

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

MIGUEL A. RODRIGUEZ-ARROYO,))	
Petitioner,))	
)	
v.))	Vet. App. No. 20-1308
)	
ROBERT L. WILKIE,))	
Secretary of Veterans Affairs,))	
Respondent.))	

**SECRETARY’S RESPONSE TO PETITION
FOR EXTRAORDINARY RELIEF**

Pursuant to U.S. Vet. App. R. 21(b), and the Court’s March 25, 2020, Order, Respondent, Robert L. Wilkie, Secretary of Veterans Affairs (Secretary), hereby answers the petition for extraordinary relief filed on February 5, 2020. For the reasons set forth below, the Court should dismiss the petition as moot.

RELEVANT FACTS

On September 19, 2017, the Board of Veterans’ Appeals (Board) issued a decision in Petitioner’s case, remanding Petitioner’s claim of entitlement to service connection for hypertension and diabetes, his claim of entitlement to a greater rating for asthma, and his claim of entitlement to service connection for right ear hearing loss ¹. The Board directed the VA Regional Office (RO) to:

(1) Ask the Veteran to identify all private clinicians treating his claimed disabilities, and provide the Veteran with an authorization and waiver authorizing

¹ In the September 19, 2017, decision, the Board denied Petitioner service connection for glaucoma and denied him a rating in excess of 30 percent for sinusitis.

those clinicians to submit medical records to VA; (2) Obtain all pertinent treatment records from the VA medical center in San Juan, Puerto Rico dated earlier than March 2002 and dated from February 2016 to the present; (3) Schedule the Veteran for a VA examination to determine the nature and etiology of his right ear hearing loss; and (4) Readjudicate the claims.

Petitioner underwent examinations in January and December of 2018 and now asserts that VA has not completed the remand actions ordered in the September 19, 2017, Board decision. Petitioner asks that the Court issue an order to compel the VA to render a decision on the September 19, 2017, Board remand. See Petition.

RESPONSE TO PETITION

The Court has the authority to issue writs in aid of its jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). See *Ramsey v. Nicholson*, 20 Vet.App. 16, 21 (2006); see also *Cox v. West*, 149 F.3d 1360 (Fed. Cir. 1998). However, “[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.” *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976). The Court should not issue a writ unless: (1) the petitioner has no other adequate means to attain the relief he desires; (2) the petitioner can demonstrate a clear and indisputable right to the issuance of the writ; and (3) the court is convinced that the circumstances warrant issuance of the writ. *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004). In addition, this Court has adopted the case-or-controversy jurisdictional requirements imposed by Article III of the U.S. Constitution.

Aronson v. Brown, 7 Vet.App. 153, 155 (1994). Where the particular relief sought by a petitioner has been afforded, the petition is moot. See *Chandler v. Brown*, 10 Vet.App. 175, 177 (1997) (citing *Mokal v. Derwinski*, 1 Vet.App. 12 (1990)).

Here, the Secretary asks the Court to deny the petition because VA has issued a decision on Petitioner's claims. On January 31, 2020, VA issued and sent to Petitioner a Supplemental Statement of the Case (SSOC) and on February 5, 2020, the Petitioner's appeal was returned to the Board for review. Exhibit 1; Exhibit 2.

On April 8, 2020, the Board issued a decision in Petitioner's case. Exhibit 3. The Board denied Petitioner entitlement to service connection for right hearing loss, diabetes mellitus, and hypertension, and denied entitlement to a rating in excess of 30 percent for service-connected asthma. *Id.* The Petitioner was provided with information on how to appeal the Board's decision if he is not satisfied with the outcome. *Id.* at 17.

Because VA has issued a decision on Petitioner's claims, and because Petitioner has not provided information showing that VA is refusing to act in his case, the issuance of an extraordinary writ is not warranted, and the Court should deny the petition.

WHEREFORE, the Secretary responds to the petition for extraordinary relief and the Court's Order, and for the foregoing reasons, respectfully requests that the Court dismiss the petition as moot.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Principal Deputy General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Selket N. Cottle
SELKET N. COTTLE
Deputy Chief Counsel (027I)

/s/ Matthew Gaw
MATTHEW GAW
Paralegal Specialist
Department of Veterans Affairs
Office of General Counsel
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-5997 (office)
matthew.gaw@va.gov

For the Secretary of Veterans Affairs

CERTIFICATE OF SERVICE

I certify under possible penalty of perjury under the laws of the United States of America, that, on April 23, 2020, a copy of the foregoing was mailed, postage prepaid, to:

Miguel A. Rodriguez-Arroyo
Condominio Portales de Alheli
Apt 301
Guaynabo, PR 00966

/s/ Matthew Gaw
MATTHEW GAW
Paralegal Specialist

EXHIBIT 1



DEPARTMENT OF VETERANS AFFAIRS

January 31, 2020

MIGUEL A RODRIQUEZ
COND PORTALES DE
ALELI APT 301
2050 CARR 8177
GUAYNABO PR 00966

Dear Miguel Rodriquez:

Enclosed is a "Supplemental Statement of the Case" (SSOC). It is not a decision on any new issues, but is intended to inform you of any material changes in, or additions to, the information contained in the "Statement of the Case" (SOC) that we previously sent to you. The following information will help you decide how to respond. We encourage you to discuss this with your representative, if you have one.

Your appeal was sent back to us by the Board of Veterans' Appeals (the Board) for further development, which has been completed. Before returning your appeal to the Board, we are giving you a period of time to respond with additional comments or evidence. Please note that a response at this time is optional and is not required to continue your appeal.

- If you wish to respond, you have 30 days from the date of this letter to respond. There is no special form to use. You can simply write to us and tell us in your own words what you disagree with in this SSOC and why.
- If you do not wish to respond, and you do not want us to wait for the 30 days to expire, you can write to us and let us know that. If you do not respond, the Board will consider what you have already submitted in deciding your appeal.

We hope that the above information is helpful.

If You Have Questions or Need Assistance

If you have any questions or need assistance with this claim, you may contact us by telephone, e-mail, or letter.

If you	Here is what to do.
Telephone	Call us at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the Federal number is 711.



If you	Here is what to do.
Use the Internet	Send electronic inquiries through the Internet at https://iris.custhelp.com/ .
Write	VA now uses a centralized mail system. For all written communications, put your full name and VA file number on the letter. Please mail or fax all written correspondence to the appropriate address listed on the attached <i>Where to Send Your Written Correspondence</i> chart, below.

If you are looking for general information about benefits and eligibility, you should visit our web site at <https://www.va.gov> or search the Frequently Asked Questions (FAQs) at <https://iris.custhelp.com/>.

We sent a copy of this letter to VETERANS OF FOREIGN WARS OF THE US because you appointed them as your representative. If you have questions or need assistance, you can also contact them.

Thank you for your service,

Regional Office Director

Regional Office Director

Enclosure(s): Appeals Management Center Coversheet
Where to Send Written Correspondence
VA Form 20-0998

cc: VETERANS OF FOREIGN WARS OF THE US
200 Maryland Avenue, NE
Washington, DC 20002-5724



Supplemental Statement of the Case	Department of Veterans Affairs		Page 1 01/31/2020
NAME OF VETERAN Miguel Rodriguez			POA VETERANS OF FOREIGN WARS OF THE US

ISSUE:

1. Entitlement to service connection for diabetes mellitus (diabetes).
2. Entitlement to service connection for hypertension.
3. Entitlement to service connection for right ear hearing loss.
4. Entitlement to a rating in excess of 30 percent for asthma.

EVIDENCE:

- VA examination, VAMC San Juan, dated May 10, 2016
- Treatment reports, VAMC San Juan, dated February 2001 through December 2019
- VA contract examination dated December 20, 2017
- VA examination, VAMC San Juan, dated December 2018
- Treatment reports, VAMC Tampa, dated April 2009
- Treatment reports, VAMC Miami, dated September 2006 through November 2019

ADJUDICATIVE ACTIONS:

02/08/2016	The veteran was furnished a Statement of the Case outlining actions taken on the claim.
02/24/2016	Substantive Appeal Received.
09/19/2017	The appeal was remanded by the Board of Veterans' Appeals for additional development.
10/04/2017	You were furnished a development letter.
01/31/2020	Claim considered based on all the evidence of record.

PERTINENT LAWS; REGULATIONS; RATING SCHEDULE PROVISIONS:

Unless otherwise indicated, the symbol "\$" denotes a section from title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief. Title 38 contains the regulations of the Department of Veterans Affairs which govern entitlement of all veteran benefits.



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VA, in determining all claims for benefits that have been reasonably raised by the filings and evidence, has applied the benefit-of-the-doubt and liberally and sympathetically reviewed all submissions in writing from the Veteran as well as all evidence of record.

DECISION:

1. Entitlement to service connection for diabetes mellitus (diabetes) is denied.
2. Entitlement to service connection for hypertension is denied.
3. Entitlement to service connection for right ear hearing loss is denied.
4. Entitlement to a rating in excess of 30 percent for asthma is denied.

REASONS AND BASES:

1. Service connection can be established in several different ways. For example, service connection may be granted on a direct basis. Direct service connection involves proving that a particular injury or disease was incurred in or caused by military service. Service connection may also be established by the aggravation of a pre-service disability. Under certain circumstances, service connection may also be granted on a presumptive basis. In claims involving presumptive service connection, rather than establishing that a particular injury or disease was incurred in or caused by military service, the claimant instead only needs to establish certain facts necessary to invoke a presumption that an injury or disease was incurred in or caused by service. Also, service connection may be established on a secondary basis for disabilities, which are proximately due to or the result of a service-connected disease or injury. *Roper v. Nicholson*, 20 Vet. App. 173, 178 (2006).

Service connection for diabetes mellitus is denied, as the evidence does not show that this condition either occurred in or was caused by service. There is also no evidence that the disability manifested to a compensable degree within one year of discharge. Service connection for diabetes mellitus is denied, as the evidence does not show that this condition was aggravated by service or is otherwise related to service. The benefit-of-the-doubt rule does not apply because the preponderance of the evidence is unfavorable.

2. Service connection can be established in several different ways. For example, service connection may be granted on a direct basis. Direct service connection involves proving that a particular injury or disease was incurred in or caused by military service. Service connection may also be established by the aggravation of a pre-service disability. Under certain circumstances, service connection may also be granted on a presumptive basis. In claims



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involving presumptive service connection, rather than establishing that a particular injury or disease was incurred in or caused by military service, the claimant instead only needs to establish certain facts necessary to invoke a presumption that an injury or disease was incurred in or caused by service. Also, service connection may be established on a secondary basis for disabilities, which are proximately due to or the result of a service-connected disease or injury. *Roper v. Nicholson*, 20 Vet. App. 173, 178 (2006).

Service connection for hypertension is denied, as the evidence does not show that this condition either occurred in or was caused by service. There is also no evidence that the disability manifested to a compensable degree within one year of discharge. Service connection for hypertension is denied, as the evidence does not show that this condition was aggravated by service or is otherwise related to service. The benefit-of-the-doubt rule does not apply because the preponderance of the evidence is unfavorable.

3. Service connection for right ear hearing loss is denied because your hearing loss has not been linked to service. Service connection may not be established for disability due to impaired hearing unless the auditory threshold in any of the frequencies 500, 1000, 2000, 3000 or 4000 Hertz is 40 decibels or greater; or the auditory thresholds for at least three of the frequencies 500, 1000, 2000, 3000 or 4000 Hertz are 26 decibels or greater; or speech recognition scores using the Maryland CNC Test are less than 94 percent. (38 CFR 3.385). There are no audiometric findings in your service treatment records that meet the above requirements for your right ear.

Although hearing loss is not shown in-service, acoustic trauma or military noise exposure may constitute injury of the ear. However, in this case, acoustic trauma is not shown by the evidence of record.

VA examination findings show the left ear with 78 percent speech discrimination. Decibel (dB) loss at the puretone threshold of 500 Hertz (Hz) is 30, with a 30 dB loss at 1000 Hz, a 25 dB loss at 2000Hz, a 30 dB loss at 3000 Hz, and a 35 dB loss at 4000 Hz. The right ear shows 78 percent speech discrimination. Decibel (dB) loss at the puretone threshold of 500 Hertz (Hz) is 25, with a 30 dB loss at 1000 Hz, a 20 dB loss at 2000 Hz, a 30 dB loss at 3000 Hz, and a 45 dB loss at 4000 Hz. Your VA examiner stated that the etiology of your right ear hearing loss cannot be determined without resorting to mere speculation. The examiner was unable to link your hearing loss to your military noise exposure. Your VA examiner provided the following rationale: "The Veteran was active in military service between 1960 and 1962. VA records provided were reviewed. A pre separation test in 1962 showed normal hearing in both ears and there are no complaints of hearing loss or hearing services documented while in active service or soon after release from active duty. Although the Veteran claims that his hearing loss is due to loud noise and gunfire, the separation audiograms were within normal limits." Although you currently have a hearing loss for VA purposes, there is no medical link between your hearing loss and service. In the absence of such a link, service connection may not be granted. In addition, there is no evidence that your hearing loss manifested itself to a compensable degree within a year of your



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release from service.

4. Entitlement to a rating in excess of 30 percent for asthma is denied. We have assigned a 30 percent evaluation for your asthma based on a review of the evidence that shows:

- Daily inhalational therapy
- Daily oral bronchodilator therapy
- Inhalational anti-inflammatory medication

Additional symptom(s) include:

- Forced Expiratory Volume in One Second (FEV-1) of 71 to 80 percent of predicted value (76%)
- Forced Expiratory Volume in One Second (FEV-1) to Forced Vital Capacity (FEV-1/FVC): 110 (Not considered for compensable evaluation)

When there is a disparity between the results of different Pulmonary Function Tests (PFTs), so that the level of evaluation would differ depending on which test result is used, the test result that the examiner states most accurately reflects the level of disability shall be used. In your case, the examiner has indicated that your FEV-1 most accurately reflects your level of disability. (38 CFR 4.96)

A higher evaluation of 60 percent is not warranted for bronchial asthma unless the evidence shows:

- At least monthly visits to a physician for required care of exacerbations; or,
- FEV-1 to Forced Vital Capacity (FVC) (FEV-1/FVC) of 40 to 55 percent; or,
- Forced Expiratory Volume in One Second (FEV-1) of 40 to 55 percent predicted; or,
- Intermittent (at least three per year) courses of systemic (oral or parenteral) corticosteroids. (38 CFR 4.96, 38 CFR 4.97)

On August 23, 2017, the President signed into law the Veterans Appeals Improvement and Modernization Act of 2017 (Appeals Modernization Act), creating a modernized review system for claims and appeals. The modernized appeals system took effect on February 19, 2019, and provides streamlined choices for seeking review of your VA claim decision. You are eligible to opt-in to this new process based on your receipt of this Statement of the Case or Supplemental Statement of the Case. If you continue to disagree with our decision, please refer to the enclosed fact sheet for a more thorough explanation of your decision review options and submission deadlines should you decide to opt-in. If you wish to remain in the legacy process, please follow the instructions above regarding actions required to request further review of your appeal.

PREPARED BY AMCDPETI



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APPROVED BY null



NOTICE

Appeals Management Center

Please place this cover sheet on top of any information or documents you send in response to this letter. Failure to do so may delay review of the material you submit.

Section completed by VA personnel:

VA File Number *(or Social Security Number)*

Last Name

First Name

Access to these records is limited to: AUTHORIZED PERSONS ONLY.

Information may not be disclosed from this file unless permitted by all applicable legal authorities, which may include the Privacy Act; 38 U.S.C. §§ 5701, 5705, 7332; the Health Insurance Portability and Accountability Act; and regulations implementing those provisions, at 38 C.F.R. §§ 1.460 – 1.599 and 45 C.F.R. Parts 160 and 164.

Anyone who discloses information in violation of the above provisions may be subject to civil and criminal penalties.

Appeals Management Center/397



Where to Send Your Written Correspondence

The time it takes your response to reach VA affects how long it takes us to process your claim. We recommend responding electronically whenever possible. Only claimants or representatives can upload responses electronically currently. If you are not a claimant or representative, we recommend faxing so VA can receive your responses without wasting the time and money required to mail your documents.

The **fastest** way to respond to VA is to upload your response electronically through VA.gov.

Visit <https://www.va.gov> and under **Disability** click “Upload evidence to support your claim”

VA.gov provides one easy location to upload correspondence as well as learn about filing claims, check claim status, find out how much money you have left to pay for school or training, or refill prescriptions and communicate with your health care team among many items.

If you need to fax or mail your correspondence, identify the benefit type; then, use the corresponding fax number or mailing address below:

Faxing:

<u>Compensation Claims</u> Toll Free: 1-844-531-7818	<u>Pension & Survivors Benefit Claims</u> Toll Free: 1-844-655-1604
<u>Board of Veterans’ Appeals</u> Toll Free: 1-844-678-8979	<u>Fiduciary</u> Toll Free: 1-888-581-6826

Mailing Addresses:

<u>Compensation Claims</u> Department of Veterans Affairs Compensation Intake Center P.O. Box 4444 Janesville, WI 53547-4444	<u>Pension & Survivors Benefit Claims</u> Department of Veterans Affairs Pension Intake Center P.O. Box 5365 Janesville, WI 53547-5365
<u>Board of Veterans’ Appeals</u> Department of Veterans Affairs Board of Veterans’ Appeals P.O. Box 27063 Washington, DC 20038	<u>Fiduciary</u> Department of Veterans Affairs Fiduciary Intake Center P.O. Box 5211 Janesville, WI 53547-5211

These addresses serve **all United States and foreign locations.**



You can also send a text message to 838255 to receive confidential support 24 hours a day, 7 days a week, 365 days a year. For more information, visit www.veteranscrisisline.net

YOUR RIGHTS TO SEEK FURTHER REVIEW OF OUR DECISION

After careful and compassionate consideration of the matter(s) before VA, we have reached a decision. This document outlines your rights to seek further review of our decision on any issue with which you are dissatisfied or disagree. This document does not apply to decisions issued by the Board of Veterans' Appeals (Board), which have a separate rights notice. For **most VA benefits**, you must elect one of the review options discussed below within **one year** of the date on your decision notice letter to preserve your right to receive the maximum possible benefit. **Consult your decision notice letter for specific filing time limits.** If you are a party to a **contested claim**, you must file an appeal to the Board within **60 days** of the date on your decision notice letter in order to seek review. All parties to a contested claim will have received notice of the decision. See the section below regarding filing an appeal to the Board. You may select different review options for each issue decided by VA. The options are as follows:

Review Options	VA Benefit Claim	Parties to a Contested Claim	Insurance Claim	Fiduciary Decision
Supplemental Claim		Not Available		Not Available
Higher-Level Review		Not Available		
Appeal to the Board				
U.S. District Court Complaint	Not Available	Not Available		Not Available

VA benefits include Compensation, Pension/Survivors Benefits, Education, Loan Guaranty, Vocational Rehabilitation & Employment, Veterans Health Administration, or National Cemetery Administration.

You **MAY NOT** concurrently file for review of any single issue using more than one option at a time. The following is an overview of each option to help you select the most appropriate course of action. You can also find detailed information on all of the available review options and apply at www.vets.gov.

Descriptions of Review Options

Supplemental Claim	Higher-Level Review	Appeal to the Board	U. S. District Court
<p>Use this option when you have additional evidence that is NEW AND RELEVANT to support granting the benefit(s) sought or you can identify existing relevant records that you would like VA to obtain. (NEW evidence means information not previously submitted to VA, and RELEVANT evidence means information that tends to prove or disprove a matter at issue.)</p> <p>VA will assist you in gathering new and relevant evidence to support a Supplemental Claim.</p>	<p>Use this option when you have NO additional evidence to submit, or that you would like VA to obtain, in support of a previously decided issue.</p> <p>You <i>may not</i> request a Higher-Level Review of a Higher-Level Review decision or a Board decision.</p> <p>The designated reviewer will conduct a brand new review of the issue(s) based on the evidence that was before VA at the time of the prior decision(s). An informal conference is available to you and/or your representative, if you choose to exercise this option. The purpose of this telephonic contact is to point out specific errors in the case. VA will not consider any new evidence.</p>	<p>Use this option to appeal to the Board for consideration by a Veterans Law Judge. You may appeal to the Board from a Supplemental Claim decision or a Higher-Level Review decision.</p> <p>When appealing to the Board, you may request a hearing with a Veterans Law Judge and/or the opportunity to submit additional evidence. You may also choose for the Board to review your claim without any additional evidence or a hearing, which may result in a faster decision. By selecting one of these options, the Board will place your appeal onto a list for consideration in the order it was received.</p> <p>The Board does not have a duty to assist you in obtaining additional evidence, but may review whether VA properly fulfilled its duty to assist you in the original claim process and may remand your claim on that basis.</p>	<p>(INSURANCE CLAIMS ONLY)</p> <p>You may challenge VA's decision on your insurance application or claim by filing a complaint with a United States district court in the jurisdiction in which you reside within six years from when the right of action first accrues.</p> <p>To find a district court, use the map at: www.uscourts.gov/court_locator.aspx.</p>

How do I request review by VA of my decision?

To select a review option, you must submit the appropriate form to the appropriate office for review.

For a **Supplemental Claim**, consult your decision notice letter for the required forms and ways to submit the request.

For a **Higher-Level Review**, complete **VA Form 20-0996, Decision Review Request: Higher-Level Review** (available at www.va.gov/vaforms/), and consult your decision notice letter for the required ways to submit the request.

To **Appeal to the Board**, complete **VA Form 10182 - Decision Review Request: Board Appeal (Notice of Disagreement)** (available at www.va.gov/vaforms/), and send the form to:

Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038
Fax: 844-678-8979

Can someone help me with my request for review?

Yes, VA recognizes and accredits attorneys, claims agents, and Veterans Service Organizations (VSOs) representatives to assist VA claimants with their benefits claims. VSOs and their representatives are not permitted to charge fees or accept gifts for their services. Only VA-accredited attorneys and claims agents may charge you fees for assisting in a claim for VA benefits, and only after VA has issued an initial decision on the claim and the attorney or claims agent has complied with the power-of-attorney and the fee agreement requirements. For more information on the types of representatives available, see www.va.gov/ogc/accreditation.asp.

If you have not already selected a representative, or if you want to change your representative, a searchable database of VA-recognized VSOs and VA-accredited attorneys, claims agents, and VSO representatives is available at www.va.gov/ogc/apps/accreditation/index.asp. Contact your local VA office for assistance with appointing a representative or visit www.ebenefits.va.gov.

What happens if I do not submit my request for review on time?

If you do not request a review option within the required time limit, you may only seek review through the following options:

- File a request for revision of the decision based on a clear and unmistakable error in the decision;
- File a Supplemental Claim along with new and relevant evidence to support your issue(s). Where a Supplemental Claim is filed after the time limit to seek review of a decision, the effective date for any resulting award of benefits generally will be tied to the date that VA receives the Supplemental Claim.

For more information on all the available review options visit: www.va.gov, or www.vets.gov or contact us at 1-800-827-1000.

NOTE: This form supersedes VA Forms 4107, 4107C, 4107VHA, 4107VRE, 4107INS for VA decisions after the publication in the Federal Register of the applicability date on which the *Veterans Appeals Improvement and Modernization Act of 2017* goes into effect.

EXHIBIT 2



DEPARTMENT OF VETERANS AFFAIRS
Board of Veterans' Appeals
Washington DC 20038

Date: 02/05/20

MIGUEL A RODRIGUEZ
COND PORTALES DE ALHELI
2050 CARR 8177 APT 301
GUAYNABO, PR 00966

Dear Appellant:

Your appeal has been returned to the Board of Veterans' Appeals (Board) and has resumed its place on the docket.

The Board's database reflects that you have appointed a Veterans Service Organization to represent you. As such, your representative has requested to review your file and prepare written argument on your behalf prior to the Board making a determination. The Board cannot consider your appeal until this review is completed.

Since your appeal was previously remanded for additional development, please be assured that it will be handled expeditiously. Although we will make every effort to decide your appeal as quickly as possible, the time needed to render a decision can vary depending on a number of factors, including the amount of time spent by your representative in review of your appeal, as well as the complexity of your appeal.

Please note that you have **90 days from the date of this letter or until the Board issues a decision in your appeal (whichever comes first)** to request a change in representation or to submit additional argument or evidence, if you elect to do so. Any such request or submission must be sent directly to the Board. *See generally* 38 C.F.R. § 20.1304. Please mail any request or submission to the following address: Board of Veterans' Appeals, P.O. Box 27063, Washington, DC 20038.

You may check the status of your appeal via eBenefits, www.eBenefits.va.gov. If you do not already have an eBenefits account, please visit the eBenefits website for more information on how to register. You may also contact the Board at (800) 923-8387, from 8:00 a.m. to 4:30 p.m., Eastern time, Monday through Friday, or via fax at 1-(844) 678-8979. Any questions about factual or legal matters involved in your appeal should be directed to your representative.

Sincerely yours,

A handwritten signature in black ink, appearing to read "K. Arnold", is positioned above the typed name.

Kenneth A. Arnold
Deputy Vice Chairman

EXHIBIT 3

MIGUEL A. RODRIGUEZ
COND PORTALES DE ALELI
APT 301
2050 CARR 8177
GUAYNABO, PR 00966



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: April 8, 2020

MIGUEL A. RODRIGUEZ
COND PORTALES DE
ALELI APT 301
2050 CARR 8177
GUAYNABO, PR 00966

Dear Appellant:

The Board of Veterans' Appeals (Board) has made a decision in your appeal, and a copy is enclosed.

<i>If your decision contains a</i>	<i>What happens next</i>
Grant	The Department of Veterans Affairs (VA) will be contacting you regarding the next steps, which may include issuing payment. Please refer to VA Form 4597, which is attached to this decision, for additional options.
Remand	Additional development is needed. VA will be contacting you regarding the next steps.
Denial or Dismissal	Please refer to VA Form 4597, which is attached to this decision, for your options.

If you have any questions, please contact your representative, if you have one, or check the status of your appeal at <http://www.vets.gov>.

Sincerely yours,

K. Osborne
Deputy Vice Chairman

Enclosures (1)

CC: Veterans of Foreign Wars of the United States

Veterans of Foreign Wars of the United States
(101/014)
810 Vermont Avenue NW
Washington, DC 20420



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: April 8, 2020

MIGUEL A. RODRIGUEZ
COND PORTALES DE
ALELI APT 301
2050 CARR 8177
GUAYNABO, PR 00966

Dear Appellant:

The Board of Veterans' Appeals (Board) has made a decision in your appeal, and a copy is enclosed.

<i>If your decision contains a</i>	<i>What happens next</i>
Grant	The Department of Veterans Affairs (VA) will be contacting you regarding the next steps, which may include issuing payment. Please refer to VA Form 4597, which is attached to this decision, for additional options.
Remand	Additional development is needed. VA will be contacting you regarding the next steps.
Denial or Dismissal	Please refer to VA Form 4597, which is attached to this decision, for your options.

If you have any questions, please contact your representative, if you have one, or check the status of your appeal at <http://www.vets.gov>.

Sincerely yours,

K. Osborne
Deputy Vice Chairman

Enclosures (1)

CC: Veterans of Foreign Wars of the United States



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF

MIGUEL A. RODRIGUEZ

Represented by

Veterans of Foreign Wars of the United States

DATE: April 8, 2020

ORDER

Entitlement to service connection for right ear hearing loss is denied.

Entitlement to service connection for diabetes mellitus is denied.

Entitlement to service connection for hypertension is denied.

Entitlement to a rating in excess of 30 percent for service-connected asthma is denied.

FINDINGS OF FACT

1. The Veteran's right ear hearing loss was neither incurred in nor caused by active military service.
2. Diabetes mellitus did not have its clinical onset in service, was not incurred or aggravated in service, did not manifest to a compensable within one year of separation, and is not otherwise related to active duty.
3. Hypertension did not have its clinical onset in service and is not otherwise related to active duty.
4. The Veteran's service-connected asthma has not resulted in a Forced Expiratory Volume in one second (FEV-1) of 55 percent of the predicted value or worse, or a FEV-1/Forced Vital Capacity (FVC) of 55 percent or worse; asthma did not require

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monthly visits to a physician for required care of exacerbations, at least intermittent courses of systemic corticosteroids or immunosuppressive medications, nor did it result in more than one attack per week with episodes of respiratory failure.

CONCLUSIONS OF LAW

1. The criteria for entitlement to service connection for right ear hearing loss have not been met. 38 U.S.C. §§ 1110, 1116, 5107; 38 C.F.R. § 3.102, 3.303, 3.307, 3.309.
2. The criteria for entitlement to service connection for diabetes mellitus have not been met. 38 U.S.C. §§ 1110, 1112, 1113, 1137, 5107; 38 C.F.R. §§ 3.102, 3.303, 3.307, 3.309.
3. The criteria for entitlement to service connection for hypertension have not been met. 38 U.S.C. §§ 1110, 1112, 1113, 1137, 5107; 38 C.F.R. §§ 3.102, 3.303, 3.307, 3.309.
4. The criteria for entitlement to a rating in excess of 30 percent for service-connected asthma have not been met. 38 U.S.C. §§ 1155, 5107(b); 38 C.F.R. §§ 3.159, 4.97, Diagnostic Code 6602.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran had active service from June 1960 to June 1962. As the development directed in a September 2017 remand has been accomplished, the appeal has now been returned to the Board for further action. *Stegall v. West*, 11 Vet. App. 268 (1998).

Service Connection

Service connection will be granted for disability resulting from a disease or injury incurred in or aggravated by military service. 38 U.S.C. §§ 1110, 1131; 38 C.F.R. § 3.303. Service connection requires competent evidence showing, (1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service. *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004).

Service connection may be awarded on a presumptive basis for certain chronic diseases listed in 38 C.F.R. § 3.309 (a) that manifest to a degree of 10 percent within 1 year of service separation. 38 C.F.R. § 3.303 (b); *see Walker v. Shinseki*, 708 F.3d 1331, 1337 (Fed.Cir.2013). Evidence of continuity of symptomatology may be sufficient to invoke this presumption if a claimant demonstrates (1) that a condition was “noted” during service; (2) evidence of post-service continuity of the same symptomatology; and (3) medical or, in certain circumstances, lay evidence of a nexus between the present disability and the post-service symptomatology. *Barr v. Nicholson*, 21 Vet. App. 303, 307 (2007).

1. Entitlement to service connection for right ear hearing loss.

Service connection for impaired hearing shall only be established when hearing status as determined by audiometric testing meets specified pure tone and speech recognition criteria. Audiometric testing measures pure tone threshold hearing levels (in decibels) over a range of frequencies (in hertz). *Hensley v. Brown*, 5 Vet. App. 155, 158 (1993). The determination of whether a veteran has a disability based on hearing loss is governed by 38 C.F.R. § 3.385.

For the purposes of applying the laws administered by VA, impaired hearing will be considered to be a disability when the auditory threshold in any of the frequencies 500, 1000, 2000, 3000, or 4000 hertz (Hz) is 40 decibels (dB) or greater; when the auditory thresholds for at least three of the frequencies 500, 1000, 2000, 3000, or 4000 Hz are 26 dB or greater; or when speech recognition scores using the Maryland CNC Test are less than 94 percent. 38 C.F.R. § 3.385.

The Veteran contends that his right ear hearing loss was caused by active service, and he specifically contends that he has right ear hearing loss as a result of firing multiple weapons without hearing protection in active service. Service treatment records are silent as to any complaint, treatment, or diagnosis of hearing loss.

A January 2018 VA audiologic examination report recorded pure tone thresholds for the Veteran's right ear, in decibels, at 500, 1000, 2000, 3000, and 4000 hertz (Hz) were as follows: 25, 30, 20, 30, and 45. The speech recognition score using the Maryland CNC Test for the right ear was 78 percent. The examiner provided a negative etiologic opinion and stated that it was less likely than not that the Veteran's right ear hearing loss was related to his active service. As rationale he stated that the Veteran had normal hearing documented during active service and on his service separation examination.

A May 2004 VA audiologic examination report recorded pure tone thresholds for the Veteran's right ear, in decibels, at 500, 1000, 2000, 3000, and 4000 hertz (Hz) were as follows: 15, 15, 15, 25, and 40. The speech recognition score using the Maryland CNC Test for the right ear was 100 percent. The examiner diagnosed normal hearing for the right ear.

After thorough review of the lay and medical evidence of record, the Board finds that the Veteran has a current, right ear hearing loss disability for VA purposes. 38 C.F.R. § 3.385. The January 2018 VA audiological report reflects his auditory thresholds are at 40 or greater for at least one the frequencies at 500, 1000, 2000, 3000 and 4000 Hertz, bilaterally, or are at 26 or greater for at least three of the applicable frequencies bilaterally.

Less clear is whether the Veteran was exposed to acoustic trauma while in active service. Although his DD-214 notes that he was awarded a sharpshooter badge while in service, the Board points out that every soldier undergoes firearm training, and there is no indication that he failed to use hearing protection during firearms training. The Board finds that his account of not using hearing protection is not credible, both given that the military had been using hearing protection since before the 1960s, and as the Veteran's recollection was made decades after service and in connection with a claim seeking compensation. He otherwise served as a

medical corpsman stateside. The Veteran's contention concerning acoustic trauma is not consistent with the circumstances of his service, and the Board finds that he was not exposed to acoustic trauma in service.

As to the third element of service connection, the Board notes the January 2018 opinion states the right ear hearing loss was less likely than not caused by or the result of an event in service, and provided the rationale that the Veteran's service treatment records showed hearing within normal limits and without significant threshold shifts after the Veteran's claimed exposure to noise during his period of service. This evidence shows that at the Veteran's separation examination no defect or abnormality of the ears, hearing, or auditory acuity was found upon examination. Finally, no positive nexus opinion or any opinion which links the Veteran's period of service to his current right ear hearing loss is of record.

Considering the lay and medical evidence contained in the service treatment records which speak to the state of the Veteran's hearing acuity before and after he was exposed to noise in service, the Board finds that the January 2018 opinion is fully supported by a well-reasoned medical explanation. *See Nieves-Rodriguez v. Peake*, 22 Vet. App. 295 (2008); *Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007). For this reason, the Board affords the opinion probative value.

The Board notes Veteran's lay statements that he believes there is a nexus between his right ear hearing loss disability and his military service. *Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009). However, in this case, the facts are complex enough, involving multiple periods of service as well as post-service noise exposure, that the Veteran's assertion about the cause of his hearing loss is not sufficient. *See Kahana v. Shinseki*, 24 Vet. App. 428, 438 (2011) (Lance, J., concurring) ("The question of whether a particular medical issue is beyond the competence of a layperson-including both claimants and Board members-must be determined on a case-by-case basis"). Accordingly, the Board finds the lay statements to be of minimal probative value.

In summary, the Board finds that the criteria for service connection for right ear hearing loss are not met. While the Board is sympathetic to the Veteran's subjective belief that his hearing loss developed as result of his active service and exposure to

acoustic trauma therein, the medical evidence does not support any such conclusion. Further, the record does not reveal a nexus between the Veteran's current right ear hearing loss and his active service, and no competent medical evidence showing that the Veteran's current symptoms of right ear hearing loss had an onset in service, within one year of separation, or is otherwise related to service is of record.

Since the preponderance of the evidence is against the claim, the provisions of 38 U.S.C. § 5107 (b) regarding reasonable doubt are not applicable. The preponderance of the evidence is against the Veteran's claim of entitlement to service connection for right ear hearing loss is denied.

2. Entitlement to service connection for diabetes mellitus.

3. Entitlement to service connection for hypertension.

The Veteran also asserts that his diabetes and hypertension are related to his active service. Initially, service treatment records are silent for any treatment or diagnosis of hypertension or diabetes mellitus. Post-service medical treatment notes of record reflect diagnoses and treatment of hypertension and diabetes mellitus beginning in April 2002. Medical treatment records do not contain any etiologic opinions concerning either hypertension or diabetes mellitus.

Clearly, the above summarized evidence does not reflect a diagnosis of diabetes mellitus or a diagnosis of hypertension for several decades following separation from service. *See Maxson v. Gober*, 230 F.3d 1330, 1333 (Fed. Cir. 200) (ruling that a prolonged period without medical complaint can be considered, along with other factors, as evidence of whether an injury or a disease was incurred in service which resulted in any chronic or persistent disability). *See also Kahana v. Shinseki*, 24 Vet. App. 428, 440 (2011) (the silence in a medical record can be weighed against lay testimony if the alleged injury, disease, or related symptoms would ordinarily have been recorded in the medical record being evaluated by the fact finder). In this case, the Board finds that the evidence of record reflects the Veteran did not experience any symptoms of diabetes or hypertension for at many years after service. In this regard, the weight of the competent evidence does not attribute

the Veteran's diabetes or hypertension to active duty, despite his contentions to the contrary. Further, no medical professional has established a relationship between these disorders and active duty.

The Veteran is not competent to provide testimony regarding the etiology of his diabetes or hypertension, as these disorders are not diagnosed by unique and readily identifiable features and does not involve a simple identification that a layperson is competent to make. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1377 n.4 (Fed. Cir. 2007).

The Board acknowledges that the Veteran was not afforded a VA examination for his claim for service connection for hypertension or diabetes. *McLendon v. Nicholson*, 20 Vet. App. 79, 81 (2006). In this regard, the Board finds that the Veteran has submitted insufficient evidence to indicate that his hypertension or diabetes is related to an event, injury, or disease that occurred in service. Accordingly, the Board finds that no further development of the Veteran's claims for service connection for hypertension or diabetes is required.

As the preponderance of the evidence is against the claims, the benefit-of-the-doubt doctrine does not apply, and the claims for entitlement to service connection for hypertension and diabetes must be denied. *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

Increased Rating

A disability rating is determined by the application of VA's Schedule for Rating Disabilities (Rating Schedule), 38 C.F.R. § Part 4. The percentage ratings contained in the Rating Schedule represent, as far as can be practicably determined, the average impairment in earning capacity resulting from diseases and injuries incurred or aggravated during military service and their residual conditions in civil occupations. Separate diagnostic codes identify the various disabilities. 38 U.S.C. § 1155; 38 C.F.R. §§ 4.1.

VA has a duty to acknowledge and consider all regulations that are potentially applicable through the assertions and issues raised in the record, and to explain the

reasons and bases for its conclusions. *Schafrath v. Derwinski*, 1 Vet. App. 589 (1991). Where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria for that rating. Otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7.

The Board will consider whether separate ratings may be assigned for separate periods of time based on facts found, a practice known as “staged ratings”. *Fenderson v. West*, 12 Vet. App. 119, 126-27 (1999); *Hart v. Mansfield*, 21 Vet. App. 505 (2007).

4. Entitlement to a rating in excess of 30 percent for service-connected asthma.

Finally, the Veteran asserted in his June 2012 claim that his service-connected asthma was more severe than his current rating reflected. He is currently rated as 30 percent under Diagnostic Code 6602 for bronchial asthma.

Under the Diagnostic Code 6602, in pertinent part, a 30 percent rating is warranted with a FEV-1 of 56 to 70 percent predicted, or; a FEV-1/FVC of 56 to 70 percent, or; daily inhalational or oral bronchodilator therapy, or; inhalational anti-inflammatory medication. A 60 percent rating requires a FEV-1 of 40 to 55 percent predicted, or; a FEV-1/FVC of 40 to 55 percent, or; at least monthly visits to a physician for required care of exacerbations, or; intermittent (at least three per year) courses of systemic (oral or parenteral) corticosteroids. A 100 percent rating requires a FEV-1 less than 40 percent predicted, or; a FEV-1/FVC less than 40 percent, or; more than one attack per week with episodes of respiratory failure, or; requires daily use of systemic (oral or parenteral) high dose corticosteroids or immuno-suppressive medications. 38 C.F.R. § 4.97, Diagnostic Code 6602. The Board notes that “parenteral” means not through the alimentary canal, but rather by injection through some other route, such as subcutaneous, intramuscular, intraorbital, intracapsular, intraspinal, intrasternal, or intravenous. *Dorland’s Illustrated Medical Dictionary* 1403 (31st ed. 2007).

The post-bronchodilator findings for these pulmonary function tests (PFTs) are the standard in pulmonary assessment. *See* 61 Fed. Reg. 46720, 46723 (Sept. 5, 1996)

(VA assesses pulmonary function after bronchodilation). However, if the post-bronchodilator results are poorer than the pre-bronchodilator results, then the pre-bronchodilator results are used for rating purposes. *See* 38 C.F.R. § 4.96 (d)(5).

A September 2015 VA examination report noted the Veteran used inhalation bronchodilator therapy and anti-inflammatory inhalation medication daily. His asthma did not require oral bronchodilators, antibiotics, or oxygen therapy. The examiner also did not note any asthma attacks with episodes of respiratory failure within the past twelve months or physician visits for care of exacerbation. Pre bronchodilator FVC predicted was 66% and FEV-1 predicted was 73%. Post bronchodilator FVC predicted was 78% and FEV-1 predicted was 79%.

A May 2016 VA examination report noted the Veteran's reports of asthma exacerbations sometimes up to three times per week and use of inhalation bronchodilator therapy and anti-inflammatory inhalation medication daily. His asthma did not require oral bronchodilators, antibiotics, or oxygen therapy. The examiner also did not note any asthma attacks with episodes of respiratory failure within the past twelve months though the Veteran reported at least monthly visits to a private physician for his asthma attacks. Pre bronchodilator FVC predicted was 66% and FEV-1 predicted was 76%. Post bronchodilator FVC predicted was 78% and FEV-1 predicted was 79%.

A December 2018 VA examination report noted the Veteran used inhalation bronchodilator therapy and anti-inflammatory inhalation medication daily. His asthma did not require oral bronchodilators, antibiotics, or oxygen therapy. The examiner also did not note any asthma attacks with episodes of respiratory failure within the past twelve months, and physician visits for care of exacerbation were noted as less frequently than monthly. Pre bronchodilator FVC predicted was 65% and FEV-1 predicted was 64%. Post bronchodilator FVC was not recorded.

Medical treatment notes of record reflect treatment for asthma care less frequently than monthly, no episodes of respiratory failure within the past twelve months, no use of courses of systemic (oral or parenteral) corticosteroids or immuno-suppressive medications.

The evidence does not more nearly approximate the criteria for a rating higher than 30 percent for asthma as the evidence does not show that the Veteran had FEV-1 of 55 percent predicted or worse, or a FEV-1/FVC of 55 percent or worse. Further the medical evidence of record does not support that the Veteran had monthly visits to a physician for required care of exacerbations nor did he require treatment with systemic (oral or parenteral) corticosteroids or immuno-suppressive medications. His asthma also has not resulted in more than one attack per week with episodes of respiratory failure.

The Veteran is competent to report the symptoms of his asthma. His complaints are credible. The Veteran's complaints have been considered in the above noted evidence; however, evaluations for VA purposes have not shown the severity required for a higher schedular rating, as discussed above. VA must only consider the factors as enumerated in the rating criteria discussed above, which in part involves the examination of clinical data gathered by competent medical professionals. *See Massey v. Brown*, 7 Vet. App. at 208.

(Continued on the next page)

In sum, the evidence does not more nearly approximate the criteria for a rating higher than 30 percent for asthma under Diagnostic Code 6602. There are no other codes that may be considered. As in the instant case, when there is a diagnostic code that addresses the particular service-connected disability, to evaluate that disability under another code would constitute impermissible rating by analogy. *See Copeland v. McDonald*, 27 Vet. App. 333, 338 (2015). The preponderance of the evidence is against the assignment of a rating higher than 30 percent. 38 U.S.C. § 5107 (b); *Gilbert*, 1 Vet. App. 49.

A handwritten signature in blue ink that reads "Thomas O'Shay". The signature is written in a cursive style with a horizontal line extending from the end of the name.

Thomas H. O'Shay
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board

N. Peden

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. Your local VA office will implement the Board's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. Please note that if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your appeal at the Court because of jurisdictional conflicts. If you file a Notice of Appeal with the Court *before* you file a motion with the Board, the Board will not be able to consider your motion without the Court's permission or until your appeal at the Court is resolved.

How long do I have to start my appeal to the court? You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you*, you will have another 120 days from the date the Board decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time*. Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

**Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950**

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: <http://www.uscourts.cavc.gov>, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

How do I file a motion for reconsideration? You can file a motion asking the Board to reconsider any part of this decision by writing a letter to the Board clearly explaining why you believe that the Board committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that your letter be as specific as possible. A general statement of dissatisfaction with the Board decision or some other aspect of the VA claims adjudication process will not suffice. If the Board has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

**Litigation Support Branch
Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038**

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the Board to vacate any part of this decision by writing a letter to the Board stating why you believe you were denied due process of law during your appeal. See 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address on the previous page for the Litigation Support Branch, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address on the previous page for the Litigation Support Branch, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400-20.1411, and *seek help from a qualified representative before filing such a motion*. See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

How do I reopen my claim? You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. See 38 C.F.R. 3.156(a).

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the Board, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: <http://www.va.gov/vso/>. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: <http://www.uscourts.cavc.gov>. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: <http://www.vetsprobono.org>, mail@vetsprobono.org, or (855) 446-9678.

Do I have to pay an attorney or agent to represent me? An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. See 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. See 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. See 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

Filing of Fee Agreements: If you hire an attorney or agent to represent you, a copy of any fee agreement must be sent to VA. The fee agreement must clearly specify if VA is to pay the attorney or agent directly out of past-due benefits. See 38 C.F.R. 14.636(g)(2). If the fee agreement provides for the direct payment of fees out of past-due benefits, a copy of the direct-pay fee agreement must be filed with the agency of original jurisdiction within 30 days of its execution. A copy of any fee agreement that is not a direct-pay fee agreement must be filed with the Office of the General Counsel within 30 days of its execution by mailing the copy to the following address: Office of the General Counsel (022D), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. See 38 C.F.R. 14.636(g)(3).

The Office of the General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of the General Counsel. See 38 C.F.R. 14.636(i); 14.637(d).