

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

ROLAND C. JOHNSON, SR.)	
)	
Petitioner,)	
)	
v.)	Vet. App. No. 20-2110
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Respondent.)	

**SECRETARY’S RESPONSE TO THE PETITION FOR EXTRAORDINARY
RELIEF IN THE NATURE OF A WRIT OF MANDAMUS AND COURT’S
MARCH 26, 2020, ORDER**

Pursuant to the Court’s March 26, 2020, Order, Respondent, the Secretary of Veterans Affairs (Respondent or Secretary), hereby provides a response to Petitioner’s March 23, 2020, petition for extraordinary relief in the nature of a writ of mandamus (petition). For the reasons set forth below, the Court should deny the petition.

SUMMARY OF PERTINENT FACTS

On March 23, 2020, Petitioner, Roland C. Johnson, Sr., filed a petition and requested that the Court compel VA to issue rating decisions regarding multiple pending issues that were remanded in a November 14, 2018, Board of Veterans’ Appeals’ (Board) decision. Petition at 3-4, 14. He asserted that VA unreasonably delayed a decision on his claims, and he argues that he lacks alternative means to obtain the relief sought. Petition at 3, 13.

On November 14, 2018, the Board remanded Petitioner's claims of entitlement to service connection for: 1) hypertension; 2) erectile dysfunction; 3) renal nephropathy; 4) diabetes mellitus; 5) bilateral upper extremity peripheral neuropathy; 6) bilateral lower extremity peripheral neuropathy; 7) muscle group XXI damage; and 8) a disability resulting from the retention of a metallic clip. Respondent's Exhibit (Ex.) 1. The Board also remanded Petitioner's claims for compensation under 38 U.S.C. § 1151 for 7th rib resection, an obstructive and restrictive lung disorder, a disability resulting from the retention of a metallic clip, and a chronic kidney dysfunction. *Id.* Finally, the Board remanded the issue of special monthly compensation (SMC) for loss of use of a creative organ, and an increased initial rating since June 6, 2001, for Appellant's service-connected knee disorder. *Id.*

The Board's remand directives required the VA Regional Office (RO) to conduct additional development, to include attempting to obtain Petitioner's complete service treatment records (STRs), VA medical examinations, and an informed consent form associated with his January 1985 thoracotomy with excision of a mass. Respondent's Ex. 1 at 15-18.

On April 9, 2019, the RO issued a rating decision that granted Petitioner entitlement to a 100% rating for obstructive pulmonary disease with sleep apnea effective June 15, 2005, and entitlement to SMC based on housebound criteria from June 15, 2005. Respondent's Ex. 2.

On April 17, 2020, the RO informed the undersigned counsel that on August 1, 2019, a request was submitted for a copy of Petitioner's STRs, and on August 7, 2019, 20 pages of the STRs were received and included in his file. The RO also indicated that following an initial request to the VA Medical Center (VAMC) for reports relating to Petitioner's January 1985 surgery, on October 10, 2019, the VAMC sent 876 pages of Petitioner's records. However, the RO indicated that the records received did not include documents relating to Petitioner's January 1985 surgery.

On February 13 and March 3, 2020, the RO submitted additional requests to the VAMC for Petitioner's records dated from 1985 to 1995. Respondent's Exs. 3-4. On March 10, 2020, the RO issued a Report of General Information and detailed VA's efforts to obtain Petitioner's VAMC records associated with the January 1985 surgery. Respondent's Ex. 5. One day later, on March 11, 2020, the RO sent Petitioner a letter and informed him of the multiple unsuccessful attempts made to obtain his records from the VAMC. Respondent's Ex. 6. The RO requested that Petitioner submit any available copies of his records. *Id.* at 1.

Immediately thereafter, on March 25, 2020, Petitioner submitted 41 pages of records from the VAMC dated from January 4, 1985, to February 7, 1985. Respondent's Ex. 7. On April 8, 2020, the RO submitted the necessary VA examination requests; however, the examinations have not yet been scheduled. Respondent's Ex. at 8.

On April 17, 2020, the RO informed the undersigned counsel that following the completion of the VA examinations, Petitioner's claims pending from the November 2018 Board decision would be adjudicated in a timely manner.

ARGUMENT

VA has taken appropriate action on Petitioner's claims, and, as such, Petitioner has not demonstrated a clear and indisputable right to the writ of mandamus he seeks. The Court has authority to issue extraordinary writs in aid of its jurisdiction pursuant to 28 U.S.C. § 1651(a). "The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations". *Vargas-Gonzalez v. Principi*, 15 Vet.App. 222, 224-25 (2001) (per curiam). Three conditions must be met before the Court can issue a writ: (1) The petitioner must demonstrate the lack of adequate alternative means to obtain the desired relief, thus ensuring that the writ is not used as a substitute for the appeals process; (2) the petitioner must demonstrate a clear and indisputable right to the writ; and (3) the Court must be convinced, given the circumstances, that issuance of the writ is warranted. See *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004). When the basis of a petition is an allegation of unreasonable agency delay in processing an appeal, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has provided guidance as to the criteria that the Court must consider in determining whether to issue a writ based on that alleged delay. The six factors are:

(1) the time agencies take to make decisions must be governed by a “rule of reason”; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find “any impropriety lurking behind agency lassitude” in order to hold that agency action is unreasonably delayed.

Martin v. O’Rourke, 891 F.3d 1338, 1345 (Fed. Cir. June 7, 2018) (quoting *Telecomms. Research & Action Ctr. v. FCC* (“*TRAC*”), 750 F.2d 70, 80 (D.C. Cir. 1984)). Here, those factors cumulatively militate in favor of denying the petition.

As to the first factor, “rule of reason,” VA took appropriate actions in this case. Following the Board’s November 2018 decision, in April 2019, Petitioner was granted a 100% schedular rating and entitlement to SMC at the housebound rate. Respondent’s Ex. 2. The RO has taken multiple steps to ensure that the additional development ordered in the November 2018 Board decision has been conducted. Respondent’s Exs. 3-8. Following the completion of the VA examinations requested on April 8, 2020, the RO will adjudicate Petitioner’s pending claims from the November 2018 Board decision. Respondent’s Exs. 3-8.

The VA actions are not ministerial acts. Rather, they require VA to assess the claims in response to Petitioner’s allegations and examine the evidence developed and submitted. As the Federal Circuit explained, “[i]t is reasonable that

more complex and substantive agency actions take longer than purely ministerial ones.” *Martin*, 891 F.3d at 1347.

Given the actions by VA in this case, this is not a situation of “complete inaction by [] VA,” something the Federal Circuit has indicated is important in assessing the “rule of reason.” *Id.*

The second factor, congressional timeliness, also strongly militates against the issuance of a writ. Congress has not provided a schedule for agency adjudication. In addition, Congress has created a system in which multiple steps, such as development through the duty to notify and assist, as well as preparation and issuance of a rating decision are required. See 38 U.S.C. §§ 5103, 5103A, 7105. The fact that Congress has designed an adjudicatory system with such features supports a finding under *TRAC* that VA’s actions are within the rule of reason and that the right to a writ has not been established.

Both the third and fifth *TRAC* factors focus on the interests of Petitioner and those interests are significant and weigh in his favor. While there was some delay in conducting the additional development in Petitioner’s claims, the RO has been actively and consistently taking the necessary steps to ensure that the Board’s November 2018 remand directives have been satisfied.

When considering the fourth factor, the effect of granting a writ on other agency activities, it weighs against issuing a writ. Petitioner’s writ petition should not be construed in such a way as to bypass VA procedures in favor of a direct

appeal to this Court. The All Writs Act is not a substitute for an administrative appeal. See *Bankers Life & Casualty Co.*, 346 U.S. at 384.

While the Court need not find impropriety behind agency delay in order to find any such delay unreasonable, Petitioner has failed to demonstrate that the delay here warrants the issuance of a writ. “The mere passage of time in reviewing a matter does not necessarily constitute the extraordinary circumstances requiring the Court to invoke its mandamus power. The delay, although frustrating to Petitioner, must be unreasonable before a Court will inject itself into an administrative agency’s process.” *Bullock v. Brown*, 7 Vet.App. 69 (1994); *Erspamer v. Derwinski*, 1 Vet.App. 3, 10 (1990) (noting that a reasonable delay may include delay of months or “occasionally a year or two,” and that a delay of more than a decade was unreasonable).

Given the specific facts in this case, and based on the information provided by VA officials, there is no indication that the potential jurisdiction of the Court will be frustrated. *United States v. Black*, 128 U.S. 40, 48 (1888) (The Court should refuse to invoke extraordinary powers where it is not shown that an official has refused to act at all). Therefore, the Secretary contends that Petitioner has not demonstrated a clear and indisputable right to the writ. See *Cheney, supra*. The petition should be denied.

WHEREFORE, Respondent, Secretary of Veterans Affairs, hereby notifies the Court of the actions taken by VA, and urges that Petitioner has failed to

demonstrate a compelling basis for the issuance of extraordinary relief. Therefore, the petition should be denied.

Respectfully submitted,

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Principal Deputy General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ James B. Cowden
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CERTIFICATE OF SERVICE

I hereby certify under the penalties of perjury under the laws of the United States of America, that on April 27, 2020, a copy of the foregoing was forwarded via first-class mail, postage prepaid, to:

Roland C. Johnson, Sr.

P.O. Box 204

Buffalo, NY 14201

/s/ Kristen D. King-Holland

KRISTEN D. KING-HOLLAND

Appellate Attorney

Exhibit 1

ROLAND C. JOHNSON, JR
PO Box 204
Buffalo, NY 14201

Honorable Charles E. Schumer
130 South Elmwood Avenue, #660
Buffalo, NY 14202



BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: November 14, 2018

ROLAND C. JOHNSON, JR

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,

A handwritten signature in black ink, appearing to read "K. Osborne".

K. Osborne

Deputy Vice Chairman

Enclosures (1)

CC: Honorable Charles E. Schumer



BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

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DATE: November 14, 2018

ORDER

The Veteran's application to reopen his claim of entitlement to service connection for diabetes mellitus is, and to this extent only, the claim is granted.

An effective date prior to June 6, 2001, for the grant of service connection for left knee chondromalacia with instability is denied.

An effective date prior to June 15, 2005, for the grant of service connection for sleep apnea is denied.

An effective date prior to August 15, 2003, for the grant of a total rating for compensation purposes based on individual unemployability due to service-connected disabilities (TDIU) is denied.

A 100 percent rating is granted for obstructive and restrictive pulmonary disease with sleep apnea since June 15, 2005.

REMANDED

The issue of entitlement to service connection for hypertension is remanded.

The issue of entitlement to service connection for erectile dysfunction is remanded.

The issue of entitlement to service connection for renal nephropathy is remanded.

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The issue of entitlement to service connection for diabetes mellitus is remanded.

The issue of entitlement to service connection for bilateral upper extremity peripheral neuropathy is remanded.

The issue of entitlement to service connection for bilateral lower extremity peripheral neuropathy is remanded.

The issue of entitlement to service connection for muscle group XXI damage is remanded.

The issue of entitlement to service connection for a disability resulting from the retention of a metallic clip is remanded.

The issue of compensation under 38 U.S.C. § 1151 for 7th rib resection is remanded.

The issue of compensation under 38 U.S.C. § 1151 for an obstructive and restrictive lung disorder is remanded.

The issue of compensation under 38 U.S.C. § 1151 for disability resulting from the retention of a metallic clip is remanded.

The issue of compensation under 38 U.S.C. § 1151 for chronic kidney dysfunction is remanded.

The issue of special monthly compensation (SMC) for loss of use of a creative organ is remanded.

The issue of an increased initial rating since June 6, 2001, for the Veteran's service-connected knee disorder is remanded.



FINDINGS OF FACT

1. In August 2010, the Board denied reopening of a claim for service connection for diabetes mellitus. The Veteran was informed in writing of the adverse determination and his appellate rights at that time.
2. The August 2010 Board decision is final.
3. The additional documentation submitted since the August 2010 Board decision is new and material and raises a reasonable possibility of substantiating the Veteran's claim of service connection for diabetes mellitus.
4. Entitlement to service connection for a left knee disorder arose in service.
5. In a statement received by VA on June 6, 2001, the Veteran informed VA he wished to file a claim for service connection for a left knee disorder.
6. No formal claim, informal claim, or other communication requesting service connection for a left knee disorder was received by VA prior to June 6, 2001.
7. Entitlement to service connection for sleep apnea arose on June 6, 2001.
8. The Veteran submitted private treatment records which were received by VA on June 15, 2005, indicating sleep complaints and a statement dated July 19, 2006, indicated that the Veteran wished to establish service connection for sleep apnea.
9. No formal claim, informal claim, or other communication requesting service connection for sleep apnea was received by VA prior to June 15, 2005.
10. The Veteran's service-connected disorders did not prevent him from securing or following a substantially gainful occupation until August 15, 2003.
11. With resolution of the doubt in his favor, the Veteran's obstructive and restrictive pulmonary disease with sleep apnea caused pulmonary hypertension.



CONCLUSIONS OF LAW

1. The August 2010 Board decision denying reopening service connection for diabetes mellitus is final. 38 U.S.C. § 7104 (2012); 38 C.F.R. § 20.1100 (2017).
2. New and material evidence sufficient to reopen the Veteran's claim of entitlement to service connection for diabetes mellitus has been presented. 38 U.S.C. §§ 5103, 5103A, 5107, 5108 (2012); 38 C.F.R. §§ 3.102, 3.156, 3.159, 3.326(a) (2017).
3. The criteria for assignment of an effective date prior to June 6, 2001, for the grant of service connection for left knee chondromalacia with instability have not been met. 38 U.S.C. §§ 5103, 5103A, 5107, 5110 (2012); 38 C.F.R. §§ 3.102, 3.155, 3.157, 3.400 (2001).
4. The criteria for assignment of an effective date prior to June 15, 2005, for the grant of service connection for sleep apnea have not been met. 38 U.S.C. §§ 5103, 5103A, 5107, 5110 (2012); 38 C.F.R. §§ 3.102, 3.155, 3.157, 3.400 (2005).
5. The criteria for an effective date prior to August 15, 2003, for the grant of TDIU have not been met. 38 U.S.C. §§ 1155, 5103, 5103A, 5107 (2012); 38 C.F.R. §§ 3.102, 3.159, 3.326(a), 4.16 (2017).
6. The criteria for a rating of 100 percent, since June 15, 2005, for obstructive and restrictive pulmonary disease with sleep apnea have been met. 38 U.S.C. §§ 1155, 5103, 5103A, 5107 (2012); 38 C.F.R. §§ 3.102, 3.159, 3.321, 3.326(a), 4.7, 4.14, 4.96, 4.97, Diagnostic Codes 6604, 6847 (2017).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served in the U.S. Marine Corps from July 1975 to October 1981 and from July 1982 to October 1984. Effective August 2003, the Veteran is rated as totally disabled based on individual unemployability ("TDIU").



New and Material Evidence

Generally, absent the filing of an NOD within one year of the date of mailing of the notification of the initial review and determination of a veteran's claim and the subsequent filing of a timely substantive appeal, a rating determination is final and is not subject to revision upon the same factual basis except upon a finding of clear and unmistakable error (CUE). 38 U.S.C. §§ 5108, 7105; 38 C.F.R. §§ 20.200, 20.300, 20.1103.

A claimant may reopen a finally adjudicated claim by submitting new and material evidence. New evidence means existing evidence not previously submitted to agency decisionmakers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim. 38 C.F.R. § 3.156(a). The provisions of 38 C.F.R. § 3.156(a) create a low threshold, with the phrase "raises a reasonable possibility of substantiating the claim" enabling rather than precluding reopening and not constituting a third requirement that must be met before the claim is reopened. *Shade v. Shinseki*, 24 Vet. App. 110 (2010); *Evans v. Brown*, 9 Vet. App. 273, 283 (1996). See *Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998).

The Board is required to consider the question of whether new and material evidence has been received to reopen the Veteran's claim without regard to the RO's determination to establish the Board's jurisdiction to address the underlying claims and to adjudicate the claims on a *de novo* basis. *Jackson v. Principi*, 265 F.3d 1366, 1369 (Fed. Cir. 2001); *Barnett v. Brown*, 83 F.3d 1380 (Fed. Cir. 1996).

In August 2010, the Board denied reopening the Veteran's claim for diabetes mellitus because there was no new and material evidence that the Veteran's diabetes was caused by or originated during service. The additional documentation received since the August 2010 Board decision includes both VA and private medical opinions.

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When determining whether a claim should be reopened, the credibility of the newly submitted evidence is presumed. *Justus v. Principi*, 3 Vet. App. 510 (1992). Here, without examination of any other evidence of record, the newly-submitted evidence is of such significance that, when considered for the limited purpose of reopening the Veteran's claim, it raises a reasonable possibility of substantiating his claim for service connection when considered with the previous evidence of record. As new and material evidence has been received, the Veteran's claim is reopened.

Effective Dates

1. Entitlement to an effective date prior to June 6, 2001, for the grant of service connection for left knee chondromalacia and instability.

Unless otherwise specifically provided in Chapter 51 of Title 38 of the United States Code, the effective date of an award based on an original claim shall be fixed in accordance with the facts found, but shall not be earlier than the date of application therefor. 38 U.S.C. § 5110(a) (2012). The effective date shall be the date of receipt of the Veteran's claim or the date on which entitlement arose, whichever is later. 38 U.S.C. § 5110; 38 C.F.R. § 3.400(b)(2)(i) (2017).

During the relevant period in this case, VA regulation provided that any communication or action, indicating intent to apply for one or more benefits under the laws administered by VA, from a claimant may be considered an informal claim. Such informal claim must identify the benefit sought. Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be forwarded to the claimant for execution. If received within one year from the date it was sent to the claimant, it will be considered filed as of the date of receipt of the informal claim. 38 C.F.R. § 3.155 (2001).

In a statement received by VA on June 6, 2001, the Veteran stated that he wished to file a claim for service connection for his left knee.

In a May 2011 rating decision, VA determined that the Veteran's left knee chondromalacia was caused by service. In a November 2015 rating decision, VA

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determined that the Veteran was entitled to a separate compensable rating for left knee instability. The effective date of both ratings was established as June 6, 2001.

As the Veteran's left knee disorder was determined to have been caused by service, entitlement arose in service. However, the Veteran did not indicate that he wished to file a claim for service connection for a left knee disorder until June 6, 2001. No formal claim, informal claim, or other communication requesting service connection for a left knee disorder was received by VA prior to June 6, 2001.

The effective date of the grant of service connection is the date of receipt of the Veteran's claim or the date on which entitlement arose, whichever is later. Entitlement arose in service but the date of receipt of the claim was June 6, 2001. Therefore, that date is the correct effective date and an earlier effective date is not warranted. The appeal is denied.

2. Entitlement to an effective date prior to June 15, 2005, for the grant of service connection for sleep apnea.

The Veteran's sleep apnea is currently rated as part of his obstructive and restrictive pulmonary disease which has an effective date of June 6, 2001. An effective date prior to that for the grant of service connection for that disorder was denied by the Board in August 2010. Therefore, that date will not be reconsidered here.

A September 2015 VA examination report states that the Veteran's service-connected obstructive and restrictive pulmonary disease aggravated his sleep apnea. Service connection for obstructive and restrictive pulmonary disease has been in effect since June 6, 2001. As the Veteran's service connection for sleep apnea was granted secondary to the pulmonary disease, entitlement to service connection for sleep apnea did not arise until June 6, 2001.

On June 15, 2005, VA received several treatment records submitted by the Veteran which indicated sleep complaints. A July 2006 statement from the Veteran indicated that the Veteran wished to be considered for service connection for sleep apnea.

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In a September 2015 rating decision, VA granted service connection for sleep apnea with an effective date of June 15, 2005.

Entitlement to service connection arose on June 6, 2001. The Veteran first indicated to VA that he wished to be service-connected for sleep apnea in July 2006. However, because treatment records were received on June 15, 2005, that effective date was assigned. An earlier effective date is not warranted as the date of claim is the later of the date entitlement arose and the date of claim. The date of claim was determined to be June 15, 2005, based on the treatment records which were submitted at that time. No formal claim, informal claim, or other communication requesting service connection for sleep apnea was received by VA prior to June 15, 2005. Therefore, the effective date was correctly established as June 15, 2005. The appeal is denied.

3. Entitlement to an effective date prior to August 15, 2003, for the grant of TDIU.

VA regulations allow for the assignment of TDIU when a veteran is unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities. 38 C.F.R. § 4.16(b).

On a June 2005 TDIU application (VA Form 21-8940), the Veteran stated that he last worked full-time in his job at the U.S. Postal Service on May 14, 2003. A July 2005 Request for Employment Information in Connection with Claim for Disability Benefits (VA Form 21-4192) completed by the Veteran's employer indicated that he last worked on August 14, 2003. On a January 2007 TDIU application, the Veteran also stated that he last worked on August 14, 2003.

In a November 2015 rating decision, an effective date of August 15, 2003, was established for TDIU. The Board finds that the Veteran is not entitled to an effective date prior to August 15, 2003, as the Veteran was working. He therefore was not "unable to secure or follow a substantially gainful occupation because of service-connected disabilities" and was not entitled to TDIU.

The Board has considered the Veteran's assertion on his June 2005 TDIU application that his last date of work was May 14, 2003. However, his employer

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has stated that his last date of work was August 14, 2003, and the Veteran has also indicated that that was his last day of work. Therefore, the Board finds that the later statement from the Veteran which is consistent with the statement from his employer is more probative of the date on which he was last able to work than the date on the June 2005 TDIU application.

The Board has also considered the July 2005 Social Security Administration (SSA) decision which determined that the Veteran had “not engaged in substantial gainful activity since February 14, 2003.” However, that standard is not binding on VA and may differ from the standard for eligibility for TDIU. So, while the SSA determination is informative, it is not dispositive.

As the Veteran was working until August 14, 2003, he was not unable to secure or follow a substantially gainful occupation because of service-connected disabilities until August 15, 2003. As TDIU has been established effective August 15, 2003, an earlier effective date is not warranted. The appeal is denied.

**Increased Initial Rating for Obstructive and Restrictive Pulmonary Disease
with Sleep Apnea**

Disability evaluations are determined by comparing the Veteran’s current symptomatology with the criteria set forth in the *Schedule for Rating Disabilities*. 38 U.S.C. § 1155 (2012); 38 C.F.R. Part 4 (2017). Ratings under diagnostic codes 6600 through 6817 and 6822 through 6847 will not be combined with each other. Where there is lung or pleural involvement, ratings under diagnostic codes 6819 and 6820 will not be combined with each other or with diagnostic codes 6600 through 6817 or 6822 through 6847. A single rating will be assigned under the diagnostic code which reflects the predominant disability with elevation to the next higher evaluation where the severity of the overall disability warrants such elevation. However, in cases protected by the provisions of Pub.L. 90-493, the graduated ratings of 50 and 30 percent for inactive tuberculosis will not be elevated. 38 C.F.R. § 4.96(a).

Under 38 C.F.R. § 4.96(d), pulmonary function tests (PFT’s) are required to evaluate the conditions listed in diagnostic codes 6600, 6603, 6604, 6825-6833,

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and 6840-6845 except: (i) When the results of a maximum exercise capacity test are of record and are 20 ml/kg/min or less. If a maximum exercise capacity test is not of record, evaluate based on alternative criteria. (ii) When pulmonary hypertension (documented by an echocardiogram or cardiac catheterization), cor pulmonale, or right ventricular hypertrophy has been diagnosed. (iii) When there have been one or more episodes of acute respiratory failure. (iv) When outpatient oxygen therapy is required.

If the DLCO (SB) (Diffusion Capacity of the Lung for Carbon Monoxide by the Single Breath Method) test is not of record, evaluate based on alternative criteria as long as the examiner states why the test would not be useful or valid in a case. When the PFT's are not consistent with clinical findings, evaluate based on the PFT's unless the examiner states why they are not a valid indication of respiratory functional impairment in a particular case. Post-bronchodilator studies are required when PFT's are done for disability evaluation purposes except when the results of pre-bronchodilator pulmonary function tests are normal or when the examiner determines that post-bronchodilator studies should not be done and states why. When evaluating based on PFT's, use post-bronchodilator results in applying the evaluation criteria in the rating schedule unless the post-bronchodilator results were poorer than the pre-bronchodilator results. In those cases, use the pre-bronchodilator values for rating purposes. When there is a disparity between the results of different PFT's (FEV-1 (Forced Expiratory Volume in one second), FVC (Forced Vital Capacity), etc.), so that the level of evaluation would differ depending on which test result is used, use the test result that the examiner states most accurately reflects the level of disability. If the FEV-1 and the FVC are both greater than 100 percent, do not assign a compensable evaluation based on a decreased FEV-1/FVC ratio. 38 C.F.R. § 4.96 (2017).

Chronic obstructive pulmonary disease is rated according to diagnostic code 6604. A 60 percent rating is warranted for FEV-1 of 40- to 55-percent predicted, or; FEV-1/FVC of 40 to 55 percent, or; DLCO (SB) of 40- to 55-percent predicted, or; maximum oxygen consumption of 15 to 20 ml/kg/min (with cardiorespiratory limit). A 100 percent rating is warranted for FEV-1 less than 40 percent of predicted value, or; the ratio of FEV-1/FVC less than 40 percent, or; DLCO (SB) less than 40-percent predicted, or; maximum exercise capacity less than 15 ml/kg/min oxygen consumption (with cardiac or respiratory limitation), or; cor

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pulmonale (right heart failure), or; right ventricular hypertrophy, or; pulmonary hypertension (shown by Echo or cardiac catheterization), or; episode(s) of acute respiratory failure, or; requires outpatient oxygen therapy. 38 C.F.R. § 4.97, Diagnostic Code 6604 (2017).

Sleep apnea is rated according to diagnostic code 6847. A noncompensable rating is warranted for sleep apnea that is asymptomatic but with documented sleep disorder breathing. A 30 percent rating is warranted for persistent day-time hypersomnolence. A 50 percent rating is warranted for sleep apnea requiring use of a breathing assistance device such as a continuous airway pressure (CPAP) machine. A 100 rating is warranted for chronic respiratory failure with carbon dioxide retention or cor pulmonale or for sleep apnea requiring a tracheostomy. 38 C.F.R. § 4.97, Diagnostic Code 6847 (2017).

Where there is a question as to which of two disability evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that evaluation. Otherwise, the lower evaluation will be assigned. 38 C.F.R. § 4.7.

The evaluation of the same disability under several diagnostic codes, known as pyramiding, must be avoided. Separate ratings may be assigned for distinct disabilities resulting from the same injury so long as the symptomatology for one condition is not duplicative of or overlapping with the symptomatology of the other condition. 38 C.F.R. § 4.14; *Esteban v. Brown*, 6 Vet. App. 259, 262 (1994).

The Veteran was granted service connection for sleep apnea in a September 2015 rating decision. The disorder was rated with his obstructive and restrictive pulmonary disease because of the prohibition on combining the two ratings. *See* 38 C.F.R. § 4.96. The RO determined that the predominant disability was the obstructive and restrictive pulmonary disease and, therefore, sleep apnea was combined with that disorder for rating purposes.

The Veteran appealed his initial 60 percent rating for obstructive and restrictive pulmonary disease and the Board denied an increase in August 2010. The Veteran did not appeal and that decision is final. In this case, the Veteran is appealing his initial rating for sleep apnea, which was granted with an effective date of June 15,

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2005. Therefore, the Board will consider the Veteran's respiratory symptoms since that date to determine whether a higher rating is warranted under either diagnostic code 6604 or diagnostic code 6847.

A December 2016 echocardiogram report indicates that the Veteran had pulmonary hypertension due to obstructive pulmonary disorder. Therefore, the Veteran is entitled to a 100 percent rating under diagnostic code 6604. As he cannot be separately rated for his pulmonary disease and his sleep apnea, the 100 percent rating warranted under diagnostic code 6604 is more beneficial to the Veteran than the rating he would receive under diagnostic code 6847. The 100 percent rating is warranted only since June 15, 2005, the effective date of the grant of service connection for sleep apnea, as this is the only period on appeal. The appeal is granted.

REASONS FOR REMAND

- 1. The issue of entitlement to service connection for hypertension is remanded.**
- 2. The issue of entitlement to service connection for erectile dysfunction is remanded.**
- 3. The issue of entitlement to service connection for renal nephropathy is remanded.**
- 4. The issue of entitlement to service connection for diabetes mellitus is remanded.**
- 5. The issue of entitlement to service connection for bilateral upper extremity peripheral neuropathy is remanded.**
- 6. The issue of entitlement to service connection for bilateral lower extremity peripheral neuropathy is remanded.**
- 7. The issue of entitlement to service connection for muscle group XXI damage is remanded.**

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8. The issue of entitlement to service connection for a disability resulting from the retention of a metallic clip is remanded.

9. The issue of compensation under 38 U.S.C. § 1151 for 7th rib resection is remanded.

10. The issue of compensation under 38 U.S.C. § 1151 for an obstructive and restrictive lung disorder is remanded.

11. The issue of compensation under 38 U.S.C. § 1151 for disability resulting from the retention of a metallic clip is remanded.

12. The issue of compensation under 38 U.S.C. § 1151 for chronic kidney dysfunction is remanded.

13. The issue of SMC for loss of use of a creative organ is remanded.

14. The issue of an increased initial rating since June 6, 2001, for the Veteran's service-connected knee disorder is remanded.

The matters are REMANDED for the following action:

1. Reasons for the remand:
 - a. ATTEMPT TO OBTAIN STRS: The issues of service connection for hypertension, erectile dysfunction, renal nephropathy, diabetes mellitus, bilateral upper extremity peripheral neuropathy, bilateral lower extremity peripheral neuropathy, muscle group XXI damage, and for a disability resulting from retention of a metallic clip must be remanded because service treatment records (STRs) are not associated with the Veteran's file. It appears that STRs were possibly associated with the file at some point but are no longer in the file. The only records in the file were submitted by the Veteran and are incomplete. Additionally, the only VA Forms 3101 that indicate a

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request for STRs were submitted by the Veteran in September and October 2016. These documents indicate copies of the STRs were mailed in August 2002 but no STRs other than those submitted by the Veteran are currently in the file. Remand is necessary to associate all STRs with the Veteran's file.

- b. **INEXTRICABLY INTERTWINED ISSUE:** The Veteran's claim for SMC due to loss of use of a creative organ is inextricably intertwined with the Veteran's claim for service connection for erectile dysfunction. *See Harris v. Derwinski*, 1 Vet. App. 180 (1991). Therefore, remand is necessary.
- c. **UPDATED MEDICAL EXAMINATION:** Remand of the issue of an increased initial rating for the Veteran's left knee disorder is necessary because the Veteran was last afforded a VA examination in January 2011. An updated examination is necessary.
- d. **OBTAIN CONSENT FORM FOR PAST VA SURGICAL PROCEDURE:** The Veteran contends that he is entitled to compensation under 38 U.S.C. § 1151 for an obstructive and restrictive lung disorder, a disability resulting from the retention of a metallic clip, and for a 7th rib resection. These claimed disorders all stem from a January 1985 thoracotomy with excision of a mass. A consent form for the procedure has not been associated with the record. Therefore, remand is necessary. *See* 38 C.F.R. §§ 3.361(d), 17.32.
- e. **FILE REVIEW TO OBTAIN ADDITIONAL MEDICAL OPINION:** The Veteran also contends that he is entitled to compensation under 38 U.S.C. § 1151 for a chronic kidney infection due to VA medical

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treatment not complying with the standard of medical care. Remand is necessary to obtain a VA medical opinion.

2. Associate with the record complete STRs and any other documents missing from the file, including any records in a temporary folder.
3. Schedule the Veteran for a VA knee examination to obtain an opinion as to the current nature of his service-connected left knee disorder. All indicated tests and studies should be accomplished and the findings reported in detail.

All relevant medical records must be made available to the examiner for review of pertinent documents. The examination report should specifically state that such a review was conducted. The examiner must provide a comprehensive explanation for all opinions provided.

4. Obtain and associate with the Veteran's file all consent to treat forms associated with his January 1985 thoracotomy with excision of a mass.

Obtain a VA medical opinion (by file review) as to the cause of a chronic kidney disorder. IF NECESSARY, CONDUCT A CLINICAL EXAMINATION. All relevant medical records must be made available to the examiner for review of pertinent documents. The examination report should specifically state that such a review was conducted. The examiner must provide a comprehensive explanation for all opinions provided.

The examiner should address the following:

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(a.) Whether the Veteran has an additional chronic kidney disability caused by carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of VA in furnishing hospital care, medical or surgical treatment, or examination.

(b.) Whether the Veteran has an additional chronic kidney disability that was caused by an event that was not reasonably foreseeable.

The examiner's attention is drawn to the following:

*December 2011 private medical opinion indicating that the Veteran's kidney disease was caused by high creatinine levels resulting from hypertension and diabetes and stating that the Veteran should be provided a 24-hour urine test.

*July 2012 informal claim where the Veteran wrote that he believed his kidney disease was a result of VA not properly treating his complaints over a 2-year period.

*VA treatment records and laboratory test results indicating treatment for diabetes, hypertension, and kidney disease. VBMS Entries 7/27/2012, 3/29/2013, 4/23/2013, 4/24/2013, 1/6/2014, 8/25/15, 8/26/15, 9/18/2015, 12/29/2015, 5/18/2016, 4/19/2017.

*July 2012 private medical opinion indicating that the Veteran's kidney disease was caused by carelessness, negligence, and error in judgement by VA medical practitioners and that his kidney

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disease was not reasonably foreseeable. VBMS
Entry 3/27/2013.

*October 2012 VA treatment record indicating that
the Veteran underwent a renal biopsy. VBMS
Entry 3/29/2013.

*December 2016 statement from the Veteran
indicating his belief that he received inadequate
care by VA.

(Continued on the next page)

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[REDACTED]
[REDACTED]

5. Readjudicate the issues on appeal. If any benefit sought on appeal remains denied, the Veteran should be provided a supplemental statement of the case (SSOC). An appropriate period should be allowed for response before the case is returned to the Board. |



Vito A. Clementi
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD

J. E. Miller, Associate Counsel

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).

Exhibit 2



April 12, 2019

ROLAND CLEO JOHNSON
PO BOX 204
BUFFALO NY 14201-0204

The Board of Veterans' Appeals decided your appeal on November 14, 2018.

Dear Roland Johnson,

This letter will guide you through the information you should know and steps you may take now that VA has made a decision about your benefits.

Your Benefit Information:

- Entitlement to special monthly compensation based on housebound criteria being met is granted from June 15, 2005.
- Evaluation of obstructive and restrictive pulmonary disease with sleep apnea, which is currently 60 percent disabling, is increased to 100 percent effective June 15, 2005.

Your combined rating evaluation is:

Combined Rating Evaluation	Effective Date
10%	Oct 18, 1984
40%	Dec 20, 2000
80%	Jun 6, 2001
90%	Jul 16, 2002
100%	Jun 15, 2005

How VA Combines Percentages

If you have more than one condition, VA will combine percentages to determine your overall disability rating. The percentages assigned for each of your conditions may not always add up to your combined rating evaluation. The following website has additional information

We have included with this letter:

1. Explanation of Payment
2. Additional Benefits
3. Where to Send Written Correspondence
4. VA Form 20-0998
5. Rating Decision

Contact information:

Web: www.vets.gov
Phone: 1-800-827-1000
TDD: 711
To send questions online: visit <https://iris.custhelp.com/>

Social Media:

Twitter: @VAVetBenefits
Facebook: www.facebook.com/VeteransBenefits

How to obtain representation:

We have no record of you appointing an accredited representative. Accredited representatives are trained to help you understand and apply for VA benefits. For more information about how an accredited representative can help you, please visit: <https://www.vets.gov/disability-benefits/apply-for-benefits/help/>

If you or someone you know is in crisis, call the *Veterans Crisis Line* at 1-800-273-8255 and press 1.



about how VA combines percentages: <http://www.benefits.va.gov/compensation/rates-index.asp#howcalc>.

See **Rating Decision** to find out why we made this decision.

Your monthly entitlement amount is shown below:

Total VA Benefit	Amount Withheld	Amount Paid	Payment Start Date	Reason
\$2,793.00	\$108.00	\$2,685.00	Jul 1, 2005	Compensation Rating Adjustment, Special Monthly Compensation Adjustment
\$2,905.00	\$112.00	\$2,793.00	Dec 1, 2005	Cost of Living Adjustment, Other Withholding Reason
\$2,837.00	\$112.00	\$2,725.00	Feb 22, 2006	Minor Child Adjustment
\$2,930.00	\$115.00	\$2,815.00	Dec 1, 2006	Cost of Living Adjustment, Other Withholding Reason
\$2,996.00	\$117.00	\$2,879.00	Dec 1, 2007	Cost of Living Adjustment, Other Withholding Reason
\$3,152.00	\$117.00	\$3,035.00	Jun 1, 2008	Minor Child Adjustment, School Child Adjustment
\$3,334.00	\$123.00	\$3,211.00	Dec 1, 2008	Cost of Living Adjustment, Other Withholding Reason
\$3,094.00	\$123.00	\$2,971.00	Aug 24, 2009	School Child Adjustment
\$3,233.00	\$123.00	\$3,110.00	Mar 1, 2010	Minor Child Adjustment, School Child Adjustment
\$2,993.00	\$123.00	\$2,870.00	Jul 1, 2010	School Child Adjustment
\$3,100.00	\$123.00	\$2,977.00	Dec 1, 2011	Cost of Living Adjustment
\$3,152.00	\$123.00	\$3,029.00	Dec 1, 2012	Cost of Living Adjustment
\$3,199.28	\$123.00	\$3,076.28	Dec 1, 2013	Cost of Living Adjustment
\$3,199.28	\$123.00	\$3,076.28	Jan 1, 2014	Cost of Living Adjustment
\$3,253.67	\$123.00	\$3,130.67	Dec 1, 2014	Cost of Living Adjustment
\$3,253.67	\$30.83	\$3,222.84	Dec 1, 2015	Other Withholding Reason



Total VA Benefit	Amount Withheld	Amount Paid	Payment Start Date	Reason
\$3,253.67	\$0.00	\$3,253.67	Jan 1, 2016	Other Withholding Reason
\$3,263.43	\$0.00	\$3,263.43	Dec 1, 2016	Cost of Living Adjustment
\$3,328.70	\$0.00	\$3,328.70	Dec 1, 2017	Cost of Living Adjustment
\$3,421.90	\$0.00	\$3,421.90	Dec 1, 2018	Cost of Living Adjustment

We are currently paying you as a single Veteran with no dependents.

If payments are due, you should receive your first payment, if not already in receipt of payments, within 7-10 days of this notice.

See **Explanation of Payment** for more details about your payment.

Your payment will be directed to the financial institution and account number that you specified. To confirm when your payment was deposited, please contact your financial institution.

If this account is no longer open,

please notify us immediately.

What You Should Do If You Disagree With Our Decision

If you do not agree with our decision, you have one year from the date of this letter to select a review option in order to protect your initial filing date for effective date purposes. You must file your request on the required application form for the review option desired. The table below represents the review options and their respective required application form.

Review Option	Required Application Form
Supplemental Claim	VA Form 20-0995, <i>Decision Review Request: Supplemental Claim</i>
Higher-Level Review	VA Form 20-0996, <i>Decision Review Request: Higher-Level Review</i>
Appeal to the Board of Veterans' Appeals	VA Form 10182, <i>Decision Review Request: Board Appeal (Notice of Disagreement)</i>



[REDACTED]
JOHNSON, ROLAND CLEO

Please note: You **may not** request a higher-level review of a higher-level review decision issued by VA.

The enclosed VA Form 20-0998, *Your Rights To Seek Further Review Of Our Decision*, explains your options in greater detail and provides instructions on how to request further review. You may download a copy of any of the required application forms noted above by visiting www.va.gov/vaforms/ or you may contact us by telephone at 1-800-827-1000 and we will mail you any form you need.

You can visit www.va.gov/decision-reviews to learn more about how the disagreement process works.

If you would like to obtain or access evidence used in making this decision, please contact us by telephone, email, or letter as noted below letting us know what you would like to obtain. Some evidence may be obtained online by visiting VA.gov.

Thank you for your service,

Regional Office Director



Explanation of Payment

We are currently paying you as a single Veteran with no dependents.

Your combined evaluation is 30 percent or more disabling; therefore, you may be eligible for additional benefits based on dependency. We may be able to pay you retroactive benefits for your dependents if you submit your dependency claim within a year from the date of this letter. If you wish to notify us of your dependents, please do so through eBenefits, an electronic resource in a self-service environment. Use of these resources often helps us serve you faster! Just visit www.eBenefits.va.gov to enroll and submit your dependency information. If you would prefer to submit your request to add your dependents to your award in paper, please complete, sign, and return VA Form 21-686c, *Declaration of Status of Dependents*. You can locate the appropriate form(s), please visit the following website: www.va.gov/vaforms.

Please Take Action: What Things Affect Your Right to Payment?

Please notify VA *immediately* if there is a change in any condition affecting your right to continued payments. If you don't notify us of these changes immediately, you may have to return any overpayments. Those changes include:

Evidence received shows a change is warranted.
Military Pay or Worker's Compensation: Your payments may be affected by the following, which you must bring to our attention: <ul style="list-style-type: none">• Reentrance into active military or naval service.• Receipt of armed forces service retirement pay, unless your retirement pay has already been reduced because of award of disability compensation.• Receipt of benefits from the Office of Federal Employees Compensation.• Receipt of active duty or drill pay as a reservist or member of the National Guard.
Dependents: If you have a disability rating of 30 percent or more, you must advise VA of any change with your spouse or children.
Hospitalization: If your award includes Aid and Attendance benefits, we may reduce this additional allowance if you are admitted to a hospital, nursing home, or domiciliary care at VA expense.
Incarceration: Benefits will be reduced if you are incarcerated in a federal, state, or local penal institution for more than 60 days for conviction of a felony.
Lack of Cooperation: We may stop monthly payments if you: <ul style="list-style-type: none">• fail to submit evidence we requested,• fail to attend a VA examination when requested, or• Submit false or fraudulent evidence to VA, or cause false or fraudulent evidence to be submitted to VA.
Fraud/Lying to Government: The law provides severe penalties, which include fines,



Evidence received shows a change is warranted.

imprisonment, or both, for the fraudulent acceptance of any payment to which you are not entitled. We may verify information you submit through computer-matching programs with other agencies.

Additional Benefits

Education, Training, and Student Loans:

- Education loans: For more information, please call 1-888-GIBILL-1 (1-888-442-4551) or visit www.vets.gov/education.
- Veterans with student loans: For more information, please call 1-888-303-7818 or visit www.disabilitydischarge.com/.
- Job training and employment: For more information, please call 1-800-827-1000 or visit www.vba.va.gov/bln/vre/.

Medical Care and Treatment:

- Mental Health Counseling: For more information, please visit www.myhealth.va.gov/mhv-portal-web/.
- Blind Rehabilitation: For more information, please visit www.va.gov/blindrehab/.
- Change in Compensation Benefits: For more information, please call 1-877-222-VETS or visit www.va.gov/healtheligibility.
- Clothing Allowance: For more information, please call 1-800-827-1000 or visit www.vets.gov/disability-benefits/conditions/special-claims/clothing/.
- VA Medical Care: Present a copy of this notification letter to the Patient Registration/Eligibility Section at your nearest VA Medical Center www.vets.gov/facility-locator/.
- Dental Benefits: For more information, please contact your nearest VA Medical Center or outpatient clinic www.vets.gov/facility-locator/.

Home Adaptations/Loans, Automobile Benefits, and Life Insurance:

- Loans: For more information, please visit www.benefits.va.gov/homeloans/.
- Funding Fee Refund: If you paid a funding fee at the closing of a VA guaranteed home loan and your VA compensation award provides an effective rating date that was prior to your loan closing date, then you may be eligible for a funding fee refund. Please contact either your current mortgage servicer or a VA Regional Loan Center at (877) 827-3702 to begin



the refund process.

- Government life insurance premiums: For more information, please call 1-800-669-8477 or visit www.benefits.va.gov/insurance.

Armed Forces Commissary and Exchange:

- Armed Forces Commissary and Exchange: For more information, please visit www.ebenefits.va.gov to locate your Regional Benefit Office, please visit www.vets.gov/facility-locator/.

Payment for Travel:

- Payment for Travel: You may be eligible for reimbursement for beneficial travel mileage for previous VA medical appointments because of your newly granted service-connected conditions. You must make a request for such reimbursement **within 30 days of this letter** by contacting the Enrollment office at your Medical Center and providing a copy of this letter.

State Benefits:

- State Benefits: For more information, please visit www.va.gov/statedva.htm.



Where to Send Your Written Correspondence

<p>In order to properly determine where to send your written correspondence, please first identify your benefit type (Compensation, Veterans Pension, or Survivor Benefits); then, locate the corresponding address based on your location of residence.</p>
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For correspondence relating to all Compensation claims:
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Location of Residence	Address
<p>All United States and Foreign Locations</p> <p>*Note: For foreign Veterans Pension and Survivor Benefits please refer to the below addresses.</p>	<p>Department Of Veterans Affairs Evidence Intake Center P.O. Box 4444 Janesville, WI, 53547-4444</p> <p>Or fax your information to: Toll Free: 844-531-7818 Local: 248-524-4260</p>

For correspondence relating to all **Veterans Pension** and **Survivor Benefit** claims:

Location of Residence			Address
Alabama Arkansas Illinois Indiana	Kentucky Louisiana Michigan Mississippi	Missouri Ohio Tennessee Wisconsin	Department Of Veterans Affairs Claims Intake Center Attention: Milwaukee Pension Center P.O. Box 5192 Janesville, WI 53547-5192 Or fax your information to: Toll Free: (844) 655-1604
Alaska Arizona California Colorado Hawaii Idaho Iowa Kansas Minnesota	Montana Nebraska Nevada New Mexico North Dakota Oklahoma Oregon South Dakota	Texas Utah Washington Wyoming Mexico Central America South America Caribbean	Department Of Veterans Affairs Claims Intake Center Attention: St. Paul Pension Center P.O. Box 5365 Janesville, WI 53547-5365 Or fax your information to: Toll Free: (844) 655-1604
Connecticut Delaware Florida Georgia Maine Maryland Massachusetts	New Hampshire New Jersey New York North Carolina Pennsylvania Rhode Island	South Carolina Vermont Virginia West Virginia District of Columbia Puerto Rico Canada	Department Of Veterans Affairs Claims Intake Center Attention: Philadelphia Pension Center P.O. Box 5206 Janesville, WI 53547-5206 Or fax your information to: Toll Free: (844) 655-1604
Countries outside of North, Central or South America			

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.



**DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Regional Office**

Roland Johnson

VA File Number
[REDACTED]

**Rating Decision
04/09/2019**

INTRODUCTION

The records reflect that you are a veteran of the Peacetime. You served in the Marine Corps from July 14, 1975, to October 27, 1981 and from July 28, 1982, to October 17, 1984. The Board of Veterans Appeals made their decision on your appeal on November 14, 2018. We have implemented their decision based on the evidence listed below.

DECISION

1. Entitlement to special monthly compensation based on housebound criteria being met is granted from June 15, 2005.
2. Evaluation of obstructive and restrictive pulmonary disease with sleep apnea, which is currently 60 percent disabling, is increased to 100 percent effective June 15, 2005.

EVIDENCE

- Board of Veterans' Appeals (BVA) Decision dated November 14, 2018
- Review of VA Upstate New York Healthcare System electronic treatment records from March 27, 1995 through March 29, 2019





REASONS FOR DECISION

1. Entitlement to special monthly compensation based on housebound.

To receive the housebound benefit, the evidence must show that you are substantially confined to your house or immediate premises due to your service-connected disability OR have a single service-connected disability rated 100 percent and a separate service-connected disability or disabilities independently rated 60 percent or more.

Entitlement to special monthly compensation is warranted in this case because criteria regarding housebound have been met. (38 CFR 3.350) You meet the criteria for housebound based on your service-connected obstructive and restrictive pulmonary disease evaluated as 100 percent disabling and your additional service connected disabilities of pes planus, bilateral; residuals, low back injury; and scar and 7th rib resection, residuals of removal of bronchogenic cyst independently ratable at 60 percent or more.

Entitlement to special monthly compensation based on housebound criteria being met is granted from June 15, 2005, which is when you first met the criteria for housebound based on your service-connected obstructive and restrictive pulmonary disease evaluated as 100 percent disabling and your additional service connected disabilities of pes planus, bilateral; residuals, low back injury; and scar and 7th rib resection, residuals of removal of bronchogenic cyst independently ratable at 60 percent or more. (38 CFR 3.400)

2. Evaluation of obstructive and restrictive pulmonary disease with sleep apnea currently evaluated as 60 percent disabling.

Evaluation of obstructive and restrictive pulmonary disease with sleep apnea, which is currently 60 percent disabling, is increased to 100 percent effective June 15, 2005, which is when we received your claim for sleep apnea. (38 CFR 4.1, 38 CFR 3.400).

Please note that per 38 U.S.C. 4.96(a), rating coexisting respiratory conditions, ratings under diagnostic codes 6600 through 6817 and 6822 through 6847 will not be combined with each other. When there is lung or pleural involvement, ratings under diagnostic codes 6819 and 6820 will not be combined with each other or with diagnostic codes 6800 through 6817 and 6822 through 6847. A single rating will be assigned under the diagnostic code which reflects the predominant disability with elevation to the next higher evaluation where the severity of the overall disability warrants such elevation. However, in cases protected by the provisions of Pub. L. 90-493, the graduated ratings of 50 and 30 percent for inactive tuberculosis will not be elevated.

We have assigned a 100 percent evaluation for your obstructive and restrictive pulmonary disease with sleep apnea based on:

- Pulmonary hypertension shown by echocardiogram

Please refer to Board of Veterans' Appeals (BVA) decision dated November 14, 2018 for further



Roland Johnson



3 of 3

information.

This is the highest schedular evaluation allowed under the law for chronic obstructive pulmonary disease. (38 CFR 4.97)

Please note that this is a full grant of benefits sought on appeal for this condition.

REFERENCES:

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our website, www.va.gov.



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COPY TO					

ACTIVE DUTY			
EOD	RAD	BRANCH	CHARACTER OF DISCHARGE
07/14/1975	10/27/1981	Marine Corps	Honorable
07/28/1982	10/17/1984	Marine Corps	Honorable

LEGACY CODES			
ADD'L SVC CODE	COMBAT CODE	SPECIAL PROV CDE	FUTURE EXAM DATE
	1		None

JURISDICTION: BVA Decision Dated 11/14/2018

ASSOCIATED CLAIM(s): 070; Remand (070); 11/14/2018

SUBJECT TO COMPENSATION (1.SC)

6604 OBSTRUCTIVE AND RESTRICTIVE PULMONARY DISEASE WITH SLEEP APNEA
Service Connected, Peacetime, Incurred
Static Disability
60% from 06/06/2001
100% from 06/15/2005

5276 PES PLANUS, BILATERAL ASSOCIATED WITH RESIDUALS, INJURY LEFT FOOT, WITH CALCANEAL SPUR AND HISTORY OF PLANTAR FASCIITIS
Service Connected, Peacetime, Secondary
Static Disability
30% from 07/16/2002
Original Date of Denial: 04/05/2004

5237 RESIDUALS, LOW BACK INJURY
Service Connected, Peacetime, Incurred
Static Disability
10% from 10/18/1984
0% from 03/01/1987
20% from 12/20/2000



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7804-7801 SCAR AND 7TH RIB RESECTION, RESIDUALS OF REMOVAL OF
BRONCHOGENIC CYST
Service Connected, Peacetime, Incurred
Static Disability
20% from 06/06/2001
Original Date of Denial: 10/31/1985

5227-5308 STATUS POST FRACTURE, RIGHT 4TH METACARPAL (DOMINANT)
Service Connected, Peacetime, Incurred
Static Disability
0% from 10/12/1990
10% from 12/20/2000

5284-5015 RESIDUALS, INJURY LEFT FOOT, WITH CALCANEAL SPUR AND HISTORY OF
PLANTAR FASCIITIS
Service Connected, Peacetime, Incurred
Static Disability (Disability Severance Condition)
0% from 10/18/1984
10% from 12/20/2000

5003-5257 LEFT KNEE CHONDROMALACIA
Service Connected, Peacetime, Incurred
Static Disability
10% from 06/06/2001
Original Date of Denial: 06/27/2002

5257 INSTABILITY OF THE LEFT KNEE
Service Connected, Peacetime, Incurred
Static Disability
10% from 06/06/2001

COMBINED EVALUATION FOR COMPENSATION :

10% from 10/18/1984
0% from 03/01/1987
40% from 12/20/2000
80% from 06/06/2001
90% from 07/16/2002 (Bilateral factor of 4.9 Percent for diagnostic codes 5015, 5257, 5276, 5257)
100% from 06/15/2005 (Bilateral factor of 4.9 Percent for diagnostic codes 5015, 5257, 5276, 5257)
Individual Unemployability Granted from August 15, 2003

SPECIAL MONTHLY COMPENSATION :

S-1 Entitled to special monthly compensation under 38 U.S.C. 1114, subsection (s) and 38 CFR 3.350(i) on



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COPY TO					

account of obstructive and restrictive pulmonary disease with sleep apnea rated 100 percent and additional service-connected disabilities of scar and 7th rib resection, residuals of removal of bronchogenic cyst, pes planus, bilateral, residuals, low back injury, independently ratable at 60 percent or more from 06/15/2005.

EFFECTIVE DATE	BASIC	HOSPITAL	LOSS OF USE	ANAT. LOSS	OTHER LOSS
06/15/2005	48	48	00	00	0

NOT SERVICE CONNECTED/NOT SUBJECT TO COMPENSATION (8.NSCPeacetime)

5299-5297 7TH RIB RESECTION
1151 Denied, No Causation
Original Date of Denial: 09/09/2015

5321 MUSCLE GROUP DAMAGE (CHEST WALL AND CHEST CAVITY), MG XXI
Not Service Connected, Not Incurred/Caused by Service
Original Date of Denial: 09/09/2015

6299-6204 VERTIGO
Not Service Connected, Not Incurred/Caused by Service
Original Date of Denial: 06/27/2002

6604 OBSTRUCTIVE AND RESTRICTIVE LUNG DISORDER
1151 Denied, No Causation
Original Date of Denial: 09/09/2015

6699-7804 DISABILITY RELATED TO RETENTION OF METALLIC CLIP
Not Service Connected, No Diagnosis
Original Date of Denial: 09/09/2015

6699-7804 DISABILITY RELATED TO RETENTION OF METALLIC CLIP
1151 Denied, No Causation
Original Date of Denial: 09/09/2015

7101 HYPERTENSION ASSOCIATED WITH OBSTRUCTIVE AND RESTRICTIVE PULMONARY DISEASE WITH SLEEP APNEA
Not Service Connected, Not Secondary



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Original Date of Denial: 04/24/2013

7522 ERECTILE DYSFUNCTION ASSOCIATED WITH OBSTRUCTIVE AND
RESTRICTIVE PULMONARY DISEASE WITH SLEEP APNEA
Not Service Connected, Not Secondary

Original Date of Denial: 04/24/2013

7541 RENAL NEPHROPATHY ASSOCIATED WITH OBSTRUCTIVE AND
RESTRICTIVE PULMONARY DISEASE WITH SLEEP APNEA
Not Service Connected, Not Secondary

Original Date of Denial: 04/24/2013

7599-7541 CHRONIC KIDNEY DYSFUNCTION
1151 Denied, No Causation

Original Date of Denial: 04/24/2013

7800-8045 RESIDUALS HEAD TRAUMA, STITCHES
Not Service Connected, Not Incurred/Caused by Service

Original Date of Denial: 06/27/2002

7913 DIABETES MELLITUS
Not Service Connected, Not Incurred/Caused by Service

Original Date of Denial: 12/02/1995

8514 DIABETIC NEUROPATHY UPPER EXTREMITIES ASSOCIATED WITH
OBSTRUCTIVE AND RESTRICTIVE PULMONARY DISEASE WITH SLEEP
APNEA
Not Service Connected, Not Secondary

Original Date of Denial: 04/24/2013

8526 DIABETIC NEUROPATHY LOWER EXTREMITIES ASSOCIATED WITH
OBSTRUCTIVE AND RESTRICTIVE PULMONARY DISEASE WITH SLEEP
APNEA
Not Service Connected, Not Secondary

Original Date of Denial: 04/24/2013

9400 ANXIETY DISORDER
Not Service Connected, Not Incurred/Caused by Service

Original Date of Denial: 08/09/2007



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COPY TO				

ANCILLARY DECISIONS

Basic Eligibility under 38 USC Ch 35 from 08/15/2003

Appeals Team VSR: Please refer to deferred re: remanded issues. Thank you.

eSign: certified by ADJNAUST, RVSR

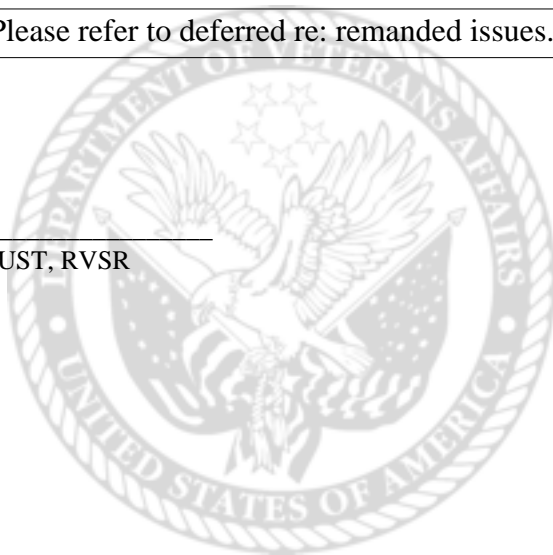


Exhibit 3

Patient Name: JOHNSON,ROLAND CLEO SR Admission Date: JAN 4,1985@08:31
SSN: [REDACTED] Claim Number: [REDACTED]

Receiving Div: Buffalo, NY

Requisition	Status	Status Date	Operator	Current Division
-------------	--------	-------------	----------	------------------

Notice/Discharge:				
Hospital Summary:	PENDING		1	
21-day Certificate:				
Other/Exam:	FEB 13,2020			
Special Report:				
Competency Report:				
Form 21-2680:				
Asset Information:				
Admission Report:	PENDING		1	
OPT Treatment Rpt:				
Beg Date/Care:				

REMARKS: All consent to treat forms and any other records associated with the Veterans' thoracotomy with excision of mass. If these records are not available please state so. This is the second request.
Requesting location: BUFFALO-RO Date of Request: Requested
by: BODRUK,MICHAEL

Exhibit 4

Patient Name: JOHNSON,ROLAND CLEO SR Admission Date: JAN 4,1985@08:31
SSN: [REDACTED] Claim Number: [REDACTED]

Receiving Div: Buffalo, NY

Requisition	Status	Status Date	Operator	Current Division
-------------	--------	-------------	----------	------------------

Notice/Discharge:	PENDING		Buffalo, NY	
Hospital Summary:	PENDING		1	
21-day Certificate:				
Other/Exam:	PENDING	MAR 3,2020		1
Special Report:				
Competency Report:				
Form 21-2680:				
Asset Information:				
Admission Report:	PENDING		1	
OPT Treatment Rpt:				
Beg Date/Care:				

REMARKS: This is the 3rd request. All consent to treat forms and any other records associated with the Veterans' "Thoracotomy with excision of mass". If these records do not exist please state so.

Requesting location: BUFFALO-RO Date of Request: Requested
by: BODRUK,MICHAEL

Exhibit 5



Department of Veterans Affairs

REPORT OF GENERAL INFORMATION

NOTE - This form must be filled out in ink or on a typewriter or computer, as it becomes a permanent record in the veteran's folder.

1. VA OFFICE

307

2. IDENTIFICATION NUMBERS (C, XC, SS, XSS, V, K, etc.)

3. LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN (Type or print)

Johnson Roland C

4. DATE OF CONTACT (Month, day, year)

03/10/2020

5. ADDRESS OF VETERAN (Include number and street or rural route, city or P.O., State and ZIP Code)

PO Box 204

Buffalo NY 14201

6A. TELEPHONE NUMBER OF VETERAN (Include Area Code)

DAY

EVENING

6B. E-MAIL ADDRESS (If applicable)

7. NAME OF PERSON CONTACTED

8. TYPE OF CONTACT

☐

PERSONAL

☐

TELEPHONE

9. ADDRESS OF PERSON CONTACTED

10. TELEPHONE NUMBER OF PERSON CONTACTED (Include Area Code)

☐ I certify that I properly identified my caller using the ID Protocol

11. BRIEF STATEMENT OF INFORMATION REQUESTED AND GIVEN:

Requested "all consent to treat forms associated with the January 1985 Thoracotomy with excision of mass" on 09/03/19, 02/13/20 and 03/03/20. On 10/08/19 response stated "responsive records recalled, copied and mailed to the evidence intake center" on 10/08/19. I specifically asked on the 2nd and 3rd requests that if the associated with the Thoracotomy are not available please state so. Also an email was sent 01/28/20 to VAMC asking for the same information, no reply was ever received for that request. As the VAMC is unwilling and /or unable to produce these records it is reasonable to assume no other requests will be productive.

Notification of Action

☐ I read the following statement to the caller:

"I am a VA employee who is authorized to receive or request evidentiary information or statements that may result in a change in your VA benefits. The primary purpose for gathering this information or statement is to make an eligibility determination. It is subject to verification through computer matching programs with other agencies."

cc: POA (If applicable):

DIVISION OR SECTION

307 Appeals

EXECUTED BY (Signature and title)

MICHAEL BODRUK 1578635

Digitally signed by MICHAEL BODRUK 1578635
Date: 2020.03.10 10:58:07 -04'00'

PRIVACY ACT NOTICE: The VA will not disclose information collected on this form to any source other than what has been authorized under the Privacy Act of 1974 or Title 5, Code of Federal Regulations 1.576 for routine uses (i.e., civil or criminal law enforcement, congressional communications, epidemiological or research studies, the collection of money owed to the United States, litigation in which the United States is a party or has an interest, the administration of VA programs and delivery of VA benefits, verification of identity and status, and personnel administration) as identified in the VA system of records, 58VA/21/22/28 Compensation, Pension, Education and Vocational Rehabilitation and Employment Records - VA, published in the Federal Register. Your obligation to respond is required to obtain or retain benefits. The responses you submit are considered confidential (38 U.S.C. 5701). Information submitted is subject to verification through computer matching programs with other agencies.

RESPONDENT BURDEN: We need this information to obtain evidence in support of your claim for benefits (38 U.S.C. 501(a) and (b)). Title 38, United States Code, allows us to ask for this information. We estimate that you will need an average of 5 minutes to respond to the questions on this form. VA cannot conduct or sponsor a collection of information unless a valid OMB control number is displayed. Valid OMB control numbers can be located on the OMB Internet Page at www.reginfo.gov/public/do/PRAMain. If desired, you can call 1-800-827-1000 to get information on where to send comments or suggestions about this form.

Exhibit 6



DEPARTMENT OF VETERANS AFFAIRS

March 11, 2020

ROLAND JOHNSON
PO BOX 204
BUFFALO, NY 14201

In reply, refer to:
307/MB
File Number: [REDACTED]
ROLAND JOHNSON

IMPORTANT

Dear Mr. JOHNSON:

We are continuing to work on your claim.

We requested your VA Medical Center Medical Records.

We have determined that these records cannot be located and therefore are unavailable for review. All efforts to obtain the needed information have been exhausted, and based on these facts, we have determined that further attempts to obtain the records would be futile. Your claim file contains documentation of the written and telephonic efforts we made to attempt to obtain these records.

We have taken the following actions in an effort to obtain these records:

- We contacted VA Medical Center on 09/03/2019 to obtain your VA Medical Center Medical Records, however, they responded stating 'responsive records were mailed to evidence intake center '.
- We contacted VAMC on 01/28/2020 to obtain your VA Medical Center Medical Records, however, we did not receive a response.
- We contacted VAMC on 02/13/20 to obtain your VA Medical Center Medical Records, however, they responded stating "request was processed 10/08/19
- We contacted VAMC on 03/03/20 to obtain your VA Medical Center Medical Records, however, they responded stating " records were mailed 10/01/19

What Do We Still Need From You?

Please submit any relevant documents in your possession including:

- Any available copies of your VA Medical Center Medical Records.
- Any other relevant evidence or information that you think will support your claim.

If you are unable to submit records, you may also advise us of possible locations(s) of these records.

File Number: [REDACTED]
JOHNSON, ROLAND

How Soon Should You Send What We Need?

We strongly encourage you to send any information or evidence as soon as you can. VA will decide your claim based on the evidence of record.

How Should You Submit What We Need?

Please note that the quickest, easiest, and most secure way to submit any documents to us is via the eBenefits website. Just visit www.eBenefits.va.gov to register.

You can also send what we need to the appropriate address listed in the attached *Where to Send Written Correspondence* enclosure.

What is eBenefits?

eBenefits provides electronic resources in a self-service environment to Servicemembers, Veterans, and their families. Use of these resources often helps us serve you faster! Through the eBenefits website you can:

- Submit claims for benefits and/or upload documents directly to the VA
- Request to add or change your dependents
- Update your contact and direct deposit information and view payment history
- Request a Veterans Service Officer to represent you
- Track the status of your claim or appeal
- Obtain verification of military service, civil service preference, or VA benefits
- And much more!

Enrolling in eBenefits is easy. Just visit www.eBenefits.va.gov for more information. If you submit a claim in the future, consider filing through eBenefits. Filing electronically, especially if you participate in our fully developed claim program, may result in a faster decision than if you submit your claim through the mail.

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.
Use the Internet	Send electronic inquiries through the Internet at https://iris.custhelp.va.gov .

File Number: [REDACTED]
JOHNSON, ROLAND

If you	Here is what to do.
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 Written Correspondence</i> .

In all cases, be sure to refer to your VA file number, [REDACTED].

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

We have no record of you appointing a service organization or representative to assist you with filing an intent to file and/or your claim. You can contact us for a listing of the recognized Veterans Service Organizations and/or representatives. Veterans Service Organizations, which are recognized or approved to provide services to the veteran community, can also help you with any questions.

Sincerely yours,

Regional Office Director

Enclosures: Where to Send Written Correspondence

Exhibit 7



Department of Veterans Affairs

STATEMENT IN SUPPORT OF CLAIM

PRIVACY ACT INFORMATION: The VA will not disclose information collected on this form to any source other than what has been authorized under the Privacy Act of 1974 or Title 38, Code of Federal Regulations 1.576 for routine uses (i.e., civil or criminal law enforcement, congressional communications, epidemiological or research studies, the collection of money owed to the United States, litigation in which the United States is a party or has an interest, the administration of VA Programs and delivery of VA benefits, verification of identity and status, and personnel administration) as identified in the VA system of records, 58VA21/22/28, Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records - VA, published in the Federal Register. Your obligation to respond is required to obtain or retain benefits. VA uses your SSN to identify your claim file. Providing your SSN will help ensure that your records are properly associated with your claim file. Giving us your SSN account information is voluntary. Refusal to provide your SSN by itself will not result in the denial of benefits. The VA will not deny an individual benefits for refusing to provide his or her SSN unless the disclosure of the SSN is required by Federal Statute of law in effect prior to January 1, 1975, and still in effect. The requested information is considered relevant and necessary to determine maximum benefits under the law. The responses you submit are considered confidential (38 U.S.C. 5701). Information submitted is subject to verification through computer matching programs with other agencies.

RESPONDENT BURDEN: We need this information to obtain evidence in support of your claim for benefits (38 U.S.C. 501(a) and (b)). Title 38, United States Code, allows us to ask for this information. We estimate that you will need an average of 15 minutes to review the instructions, find the information, and complete this form. VA cannot conduct or sponsor a collection of information unless a valid OMB control number is displayed. You are not required to respond to a collection of information if this number is not displayed. Valid OMB control numbers can be located on the OMB Internet Page at www.reginfo.gov/public/do/PRAMain. If desired, you can call 1-800-827-1000 to get information on where to send comments or suggestions about this form.

FIRST NAME - MIDDLE NAME - LAST NAME OF VETERAN (Type or print)

ROLAND C. JOHNSON SR.

SOCIAL SECURITY NO.

VA FILE NO.

The following statement is made in connection with a claim for benefits in the case of the above-named veteran:

This Statement in Support of Claim is in response to your letter dated March 11, 2020 (copy attached), and received by me on March 18, 2020 regarding your request for "VA Medical Center Records", and your determination that the records are unavailable and cannot be located.

Please find enclosed, forty one (41) pages of my VA Medical Records dated 1/4/1985 through 2/7/1985 (Admission to Discharge) for the removal of a pleural tumor found one month after my discharge from service. Thank you. [REDACTED]
Copies enclosed, including your, 3 page March 11, 2020 letter (44)
THERE IS NOTHING BELOW THIS LINE _____

I CERTIFY THAT the statements on this form are true and correct to the best of my knowledge and belief.

SIGNATURE

Roland C Johnson Sr.

DATE SIGNED

03/23/2020

ADDRESS

*PO BOX 204
BUFFALO, NEW YORK 14201*

TELEPHONE NUMBERS (Include Area Code)

DAYTIME

716 352-[REDACTED]

EVENING

716 953-5[REDACTED]

PENALTY: The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.

Exhibit 8

Exam Scheduling Request

ROLAND CLEO JOHNSON

PO BOX 204
BUFFALO, NY 14201
USA

File Number: [REDACTED]
DOB: February 20, [REDACTED]
Gender: M
Exam Jurisdiction RO: 307

Phone: 1-716-853 [REDACTED]

Alternate Phone: 1-716-352 [REDACTED]

Email: N/A

<u>Branch(es) of Service</u>	<u>Entry on Duty</u>	<u>Release Active Duty</u>	<u>Era(s) of Service</u>
Marine Corps	Jul 28, 1982	Oct 17, 1984	Peacetime
Marine Corps	Jul 14, 1975	Oct 27, 1981	Peacetime

070 Remand with BVA Grant (070)	Date of Claim: 11/14/2018
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Post-Discharge Claim

Payee Number: 00

Remand: YES

Veteran Priority Issues:

- Remand

1151 FOR CHRONIC KIDNEY DYSFUNCTION

Classification: Genitourinary

Type: REP

Contention Priority Issues:

- 1151 Claim and Tort Claim

Standard Language Output Text:

The Veteran is claiming service connection for 1151 FOR CHRONIC KIDNEY DYSFUNCTION. Please examine the Veteran for a chronic disability related to his or her claimed condition and indicate the current level of severity.

TYPE OF MEDICAL OPINION REQUESTED: Compensation under 38 U.S.C. 1151.

Please provide an opinion whether it is at least as likely as not that:

- The claimed disability of 1151 FOR CHRONIC KIDNEY DYSFUNCTION was caused by or became worse as a result of the VA treatment at issue
- The additional disability resulted from carelessness, negligence, lack of skill, or similar incidence of fault on the part of the attending VA personnel
- The additional disability resulted from an event that could not have reasonably been foreseen by a reasonable healthcare provider, and/or
- Failure on the part of VA to timely diagnose and/or properly treat the claimed disease or disability allowed the disease or disability to continue to progress.

Please review the Veteran's electronic folder(s) and state that it was reviewed in your report.

Rationale must be provided in the appropriate section.

The Veteran contends that he is entitled to compensation under 38 U.S.C. § 1151 for a chronic kidney infection due to VA medical treatment not complying with the standard of medical care. Remand is necessary to obtain a VA medical opinion. Obtain a VA medical opinion (by file review) as to the cause of a chronic kidney disorder. IF NECESSARY, CONDUCT A CLINICAL EXAMINATION. All relevant medical records must be made available to the examiner for review of pertinent documents. The examination report should specifically state that such a review was conducted. The examiner must provide a comprehensive explanation for all opinions provided. The examiner should address the following:

a.) Whether the Veteran has an additional chronic kidney disability caused by carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of VA in furnishing hospital care, medical or surgical treatment, or examination.

b.) Whether the Veteran has an additional chronic kidney disability that was caused by an event that was not reasonably foreseeable. The examiner's attention is drawn to the following (all tabbed in e-folder):

*December 2011 private medical opinion indicating that the Veteran's kidney disease was caused by high creatinine levels resulting from hypertension and diabetes and stating that the Veteran should be provided a 24-hour urine test.

*July 2012 informal claim where the Veteran wrote that he believed his kidney disease was a result of VA not properly treating his complaints over a 2-year period.

*VA treatment records and laboratory test results indicating treatment for diabetes, hypertension, and kidney disease. VBMS Entries 7/27/2012, 3/29/2013, 4/23/2013, 4/24/2013, 1/6/2014, 8/25/15, 8/26/15, 9/18/2015, 12/29/2015, 5/18/2016, 4/19/2017

*July 2012 private medical opinion indicating that the Veteran's kidney disease was caused by carelessness, negligence, and error in judgement by VA medical practitioners and that his kidney disease was not reasonably foreseeable. VBMS Entry 3/27/2013.

*October 2012 VA treatment record indicating that the Veteran underwent a renal biopsy. VBMS Entry 3/29/2013.

*December 2016 statement from the Veteran indicating his belief that he received inadequate care by VA.

Clinician: If using the ACE process to complete the Medical Examination, please explain the basis for the decision not to examine the Veteran, and identify the specific materials reviewed to complete the Medical Examination.

The Veteran does not need to report for all examinations for the following Contention:

- 1151 FOR CHRONIC KIDNEY DYSFUNCTION

Please review the Veteran's electronic folder(s) and state that it was reviewed in your report.

For this Contention, VBMS expects a results package to at minimum include data pertaining to the following DBQ(s):

- DBQ Medical Opinion
- DBQ GU Kidney

L KNEE

Classification: Musculoskeletal - Knee

Type: INC

Rated Name of SC Disability	Diagnostic Code	Current Evaluation Percent	Bilateral Code
left knee chondromalacia	5257	10%	Left Lower

Standard Language Output Text:

The Veteran is service connected for: L KNEE rated as:

- left knee chondromalacia currently evaluated at 10%

Please evaluate for the current level of severity of the Veteran's service connected disability. If the diagnosis rendered is different from the disability for which the Veteran is service connected, please indicate whether the Veteran's current diagnosis is a progression of the service connected disability or the original diagnosis was in error. If the diagnosis was in error, please provide a rationale supported by the clinical evidence of record that refutes the previous exam(s) which diagnosed the condition.

When completing any musculoskeletal DBQ, additional information is required to comply with a recent US Court of Appeals for Veterans Claims (CAVC) decision in the case of Mitchell v. Shinseki, relating to functional limitations. In the section of the DBQ titled "Functional loss and additional limitation in ROM" additional questions must be addressed. For each joint examined, please provide an opinion.

- (1) Whether pain, weakness, fatigability, or incoordination could significantly limit functional ability during flare-ups, or when the joint is used repeatedly over a period of time, and
- (2) Describe any such additional limitation due to pain, weakness, fatigability or incoordination, and if feasible, this opinion should be expressed in terms of the degrees of additional ROM loss due to "pain on use or during flare-ups".
- (3) If such opinion is not feasible, please state and provide an explanation as to why the opinion cannot be rendered.
- (4) For any joint condition, please test the contralateral joint, unless medically contraindicated. Address pain on both passive and active motion, and on both weightbearing and non-weightbearing motion. If unable to test, please provide rationale.

When pain is associated with movement, the examiner must give a statement on whether pain could significantly limit functional ability during flare-ups and repeated use over time in terms of additional loss of range of motion. Pursuant to the Court's holding in Sharp v. Shulkin, 29 Vet.App. 26 (2017), if a flare-up event is not directly observed during the examination, the examiner is requested to provide an estimate on the frequency, duration, and severity of decreased range of motion in degrees during flare-ups in the exam report.

If the examiner is unable to provide a statement regarding additional loss of range of motion during flare-ups or repeated use over time without resorting to speculation, he or she must provide a rationale for this statement based on all procurable information to include the veteran's testimony on examination, case specific evidence to include medical treatment records when applicable, and the examiner's medical expertise. The statement should not be based on an examiner's shortcomings or a general aversion to offering this statement on issues not directly observed.

The Veteran needs to report for all examinations for the following Contention:

- L KNEE

ACE process must not be used to complete the DBQ(s).

Special Instructions:

Remand of the issue of an increased initial rating for the Veteran's left knee disorder is necessary because the Veteran was last afforded a VA examination in January 2011. An updated examination is necessary. Schedule the Veteran for a VA knee examination to obtain an opinion as to the current nature of his service-connected left knee disorder. All indicated tests and studies should be accomplished and the findings reported in detail. All relevant medical records must be made available to the examiner for review of pertinent documents. The examination report should specifically state that such a review was conducted. The examiner must provide a

comprehensive explanation for all opinions provided. See VAMC records tabbed in claims file dated 4/19/17; 4/8/19 and 4/9/19.

For this Contention, VBMS expects a results package to at minimum include data pertaining to the following DBQ(s):

- DBQ MUSC Knee and Lower Leg

Created By: adjjmill307
Exam Request Destination: QTC