

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

DARNELL TREADWAY,)	
)	
Petitioner,)	
)	
v.)	Vet.App. No. 20-2626 WRIT
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Respondent.)	

**SECRETARY’S RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF
AND COURT ORDER DATED APRIL 17, 2020**

Pursuant to U.S. Vet. App. R. 21(d), and the Court’s April 17, 2020, order, Respondent, Secretary of Veterans Affairs (Secretary), hereby answers the petition for extraordinary relief filed on April 9, 2020.

SUMMARY OF PERTINENT FACTS

On November 22, 2019, the Board of Veteran’s Appeals (Board) issued a decision on thirteen of Petitioner’s claims that were in appellate status¹. In this decision, the Board noted that Petitioner had also perfected an appeal regarding four additional claims: service connection for a left leg condition, a bilateral hip disability, and a bilateral ankle disability, as well as an increased rating for adjustment disorder with anxious distress. (Exhibit 1 – November 22, 2019 Board Decision). However, the Board stated that those issues were not

¹ These claims are not the subject of the current petition before the Court. See Petition at 1-10.

“currently before” it, and that they would be addressed in a subsequent decision. *Id.*

On April 9, 2020, Petitioner filed a petition to compel the Regional Office (RO) to reopen his appeal as to these four claims and to certify those claims to the Board. (Petition at 1-10); (Court Order at 1-2). Petitioner asserts that he was informed that the reason no decision has been issued regarding the claims in question is because the RO improperly “closed” the claims before certifying them to the Board, thus preventing adjudication of those claims. (Petition at 5-10.) Petitioner avers that he has contacted the RO numerous times, but that the RO has failed to act on his request to reopen and certify his claims. *Id.* Petitioner argues that as a result, the RO has denied him due process and unreasonably delayed the adjudication of his claims. *Id.*

On April 28, 2020, undersigned counsel contacted the Board to inquire about the status of the four claims that are the subject of this petition. The Board determined that Petitioner’s claims for service connection were previously merged with the claims that were the subject of the November 22, 2019 decision. However, when that decision did not adjudicate those claims, they were, for an unknown reason, deactivated and not addressed in a subsequent decision. Further, Petitioner’s increased rating claim was not, at that time, certified to the Board. The Board has since activated the record concerning Petitioner’s claims for service connection a left leg condition, a bilateral hip disability, and a bilateral ankle disability. Additionally, the RO has since certified Petitioner’s claim for an

increased rating for adjustment disorder with anxious distress. These four issues are now merged and are currently before a Veteran's Law Judge (VLJ) team being actively reviewed and adjudicated. The Board has confirmed that all issues are now properly certified and there is presently no action for the RO to take in this matter.

RESPONSE TO PETITION

Pursuant to *Lane v. West*, 12 Vet.App. 220, 221 (1999) citing *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976), "the remedy of mandamus is a drastic one, to be invoked in only extraordinary situations." The Court has stressed the need for a Petitioner seeking an extraordinary writ to demonstrate a "clear and indisputable entitlement" and the lack of an adequate alternative means to obtain the requested relief. *Erspamer v. Derwinski*, 1 Vet. App. 3, 9 (1990), quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384, 74 S. Ct. 145, 148, 98 L.Ed. 106 (1953).

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 new guidance as to the criteria that the Court must consider in determining whether to issue a writ based on that alleged delay. The factors are six:

(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, 1344 (Fed. Cir. 2018) (quoting *Telecomms. Research & Action Ctr. v. FCC* (“TRAC”), 750 F.2d 70, 80 (D.C. Cir. 1984)). However, where the particular relief sought by a petitioner has been afforded, the petition is moot. See *Chandler v. Brown*, 10 Vet.App. 175, 177 (1997) (citing *Mokal v. Derwinski*, 1 Vet.App. 12 (1990) (adopting the Article III case-or-controversy requirement for exercising jurisdiction)).

The petition in this matter requested relief in the nature of compelling the RO to reopen Petitioner’s claims for service connection for a left leg condition, a bilateral hip disability, and a bilateral ankle disability, as well as an increased rating for adjustment disorder with anxious distress, and to certify such claims to the Board so that they could be adjudicated. (Petition at 10); (Court Order at 1-2). As these claims are properly certified to the Board and are now before a VLJ team and being actively reviewed and adjudicated, the petition for extraordinary relief should now be considered moot and should be dismissed by the Court. See *Chandler*, 10 Vet.App. at 177; *Mokal*, 1 Vet.App. at 15.

CONCLUSION

Respondent, Secretary of Veterans Affairs, hereby notifies the Court of the action by VA on the matter underlying the petition for extraordinary relief, and moves the Court to dismiss as moot the petition.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Principal Deputy General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Christopher W. Wallace
CHRISTOPHER W. WALLACE
Deputy Chief Counsel

/s/ Colin M. Rettammel
COLIN M. RETTAMMEL
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Attorneys for Appellee
Secretary of Veterans Affairs

CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the United States of America that, on or before the the 4th day of May, 2020, a copy of the foregoing was mailed, postage prepaid, to:

Darnell Treadway
6325 Green Valley Drive
Garland, TX 75043

/s/ Colin M. Rettammel
COLIN M. RETTAMMEL
Counsel for Appellee

EXHIBIT 1

DARNELL TREADWAY
6325 GREEN VALLEY DR
GARLAND, TX 75043
USA



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: November 22, 2019

DARNELL TREADWAY
6325 GREEN VALLEY DR
GARLAND, TX 75043
USA

Dear Appellant:

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

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

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

Sincerely yours,

K. Osborne
Deputy Vice Chairman

Enclosures (1)
CC: JOSEPH R MOORE, Attorney

JOSEPH R MOORE, Attorney
Joseph R. Moore
7920 Norfolk Avenue, Suite 700
Bethesda, MD 20814
USA



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: November 22, 2019

DARNELL TREADWAY
6325 GREEN VALLEY DR
GARLAND, TX 75043
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Dear Appellant:

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

Sincerely yours,

K. Osborne
Deputy Vice Chairman

Enclosures (1)
CC: JOSEPH R MOORE, Attorney



BOARD OF VETERANS' APPEALS
FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
DARNELL TREADWAY
Represented by
Joseph R. Moore, Attorney

[REDACTED]
Docket No. 11-07 654
Advanced on the Docket

DATE: November 22, 2019

ORDER

Service connection for helicobacter pylori (H. pylori) is dismissed.

Service connection for gastroesophageal reflux disease (GERD) is dismissed.

Service connection for fibromyalgia is dismissed.

Service connection for chronic fatigue syndrome (CFS) is dismissed.

Entitlement to service connection for compensation purposes dental problems or teeth, claimed as secondary to GERD, is dismissed.

Entitlement to a rating in excess of 10 percent for calluses of the feet, bilaterally, is dismissed.

Service connection for a bilateral knee disability is granted.

Service connection for a lumbar spine disability is granted.

REMANDED

Service connection for diabetes mellitus, type II, is remanded.

Entitlement to a rating in excess of 20 percent for left foot disability associated with calluses is remanded.

Entitlement to a rating in excess of 20 percent for right foot disability associated with calluses is remanded.

Entitlement to special monthly compensation (SMC) based on the need for aid and attendance is remanded.

Entitlement to a total disability rating due to individual unemployability (TDIU) due to service-connected disabilities is remanded.

FINDINGS OF FACT

1. Prior to the promulgation of a decision in the appeal, the Veteran withdrew the issues of entitlement to service connection for H. pylori, GERD, fibromyalgia, CFS, and teeth and dental problems; and, entitlement to an increased rating for bilateral foot calluses.

2. The Veteran's disabilities of the lumbar spine, left knee, and right knee are proximately due to service-connected bilateral foot disability associated with calluses.

CONCLUSIONS OF LAW

1. The criteria for withdrawal of entitlement to service connection for H. pylori, GERD, fibromyalgia, CFS, and teeth and dental problems; and, entitlement to an increased rating for bilateral foot calluses by the Veteran have been met. 38 U.S.C. § 7105(b)(2), (d)(5); 38 C.F.R. § 20.204.

2. The criteria for service connection for disabilities of the lumbar spine, left knee, and right knee as secondary to service-connected bilateral foot disability are met. 38 U.S.C. §§ 1110, 1131, 5107; 38 C.F.R. §§ 3.102, 3.310.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty from October 1984 to October 1987 and October 1989 to April 1992.

In October 2017, the Board, in pertinent part, denied service connection for diabetes mellitus, type II; fatigue; fibromyalgia; back disability; bilateral knee disability; GERD; H. pylori; teeth or dental problems; denied increased ratings for bilateral foot calluses and right and left foot disabilities and, denied entitlement to SMC. Pursuant to an October 2018 Joint Motion for Partial Remand (JMPR) and Court Order, the Board's decision with regard to the above issues was vacated and remanded for action consistent with the JMPR.

The Board acknowledges that the Veteran has perfected an appeal with regard to the issues of service connection for left leg condition, bilateral hip disability, and bilateral ankle disability; and, the issue of an initial increased rating for adjustment disorder with anxious distress. Such issues are not currently before this Board, and will be addressed in a subsequent decision.

Dismissal

The Board may dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed. 38 U.S.C. § 7105. An appeal may be withdrawn as to any or all issues involved in the appeal at any time before the Board promulgates a decision. 38 C.F.R. § 20.205. Withdrawal may be made by the appellant or by his or her authorized representative. 38 C.F.R. § 20.205. In the present case, the Veteran, through his attorney, has withdrawn his appeal with regard to the issues of service connection for fatigue; fibromyalgia; GERD; H. pylori; teeth or dental problems; and, an increased rating for bilateral foot calluses(as distinguished from his rating for other disability associated with such calluses, a matter addressed in the remand portion of this decision) and, hence, there remain no allegations of errors of fact or law for appellate consideration. Accordingly, the Board does not have jurisdiction to review these issues and they are dismissed.

Service Connection

The Veteran asserts that his disabilities of the lumbar spine, left knee, and right knee are due to his service-connected bilateral foot disability. Service connection is in effect for eczema, bilateral feet (10% per 38 C.F.R. § 4118, Diagnostic Code 7806); and left and right foot disability, associated with eczema and calluses (separately rated 20% per 38 C.F.R. § 4.71a, Diagnostic Code 5284).

Diagnoses of the lumbar spine and bilateral knees have been established by the medical evidence of record. A May 2017 VA treatment record shows arthritis of the spine and knees. Similarly, the June 2016 examiner diagnosed lumbosacral strain, degenerative arthritis of the spine, knee joint osteoarthritis, and patellofemoral pain syndrome. A June 2016 private record also notes disc bulge and neural foraminal narrowing in the lumbosacral spine. A February 2009 private treatment record documents an inferior surface tear in the anterior horn of the lateral meniscus, presumed to be chronic from posttraumatic changes.

A September 2003 private record shows extensive degenerative or posttraumatic change of the left knee and mild degenerative or posttraumatic change of the right knee, which were assessed as accelerated for the Veteran's age. A January 2004 record also notes osteoarthritis of the knees. October 2003 and January 2004 private records show degenerative disc disease in the Veteran's back.

A July 2004 examiner explained that the Veteran's foot problems did not cause his knee or back problems. While his plantar calluses were painful and quite tender, they would not likely upset the body mechanics enough to cause a degenerative process in the knees or back. Instead, he noted, the feet were probably painful enough they would discourage him from being up and about to overuse his knees or back.

In January 2005, Dr. R.L. wrote that the Veteran had chronic foot pain, which contributed to some extent to his occasional arthralgias in his knee and lower back. Again, in August 2010 and December 2014, Dr. R.L. wrote that his chronic foot pain was so severe that it caused back pain and discomfort.

The examiner in June 2016 opined that the back and knee disabilities were less likely than not related to or aggravated by the service-connected foot disabilities. Regarding the knees, the examiner explained that current peer-reviewed medical literature does not support causal relationships between foot calluses and the development of knee pathology, either bony or ligamentous. While foot calluses will cause a painful/antalgic gait, this in and of itself will not lead to or significantly aggravate knee osteoarthritis or ligamentous cartilaginous knee deterioration as is manifested in this Veteran. The examiner further noted that aggravation was not substantiated at this time as the osteoarthritic changes of the knees have become manifest at an earlier than usual age because of his obesity and other medical problems.

With respect to the back, the examiner explained that while the Veteran's moderately-severe foot calluses cause significant discomfort when standing and walking and may lead to an antalgic gait, it is less likely that such conditions would ultimately lead to the lumbar facet arthritis shown on recent imaging studies. This lumbar arthritis is due to normal aging of the spine, coupled with the Veteran's current obesity. With regard to aggravation of the back, the examiner noted that the antalgic gait may lead to some lower back pain, but it would not worsen the degree of lumbar facet arthritis.

In September 2019 Dr. P.C. reviewed the claims folder and provided a positive etiological opinion with regard to the Veteran's low back and bilateral knees and his service-connected bilateral feet disabilities. Dr. P.C. noted that multiple bilateral foot disabilities had been diagnosed, to include hallux valgus, pes planus, and resultant callus formation. The examiner cited to studies in noting disagreement with the opinions that his lumbar spine and knee problems were due to normal aging, finding that his severe knee osteoarthritis is not related to the normal aging process and explaining that it is well established in medical literature that the prevalence of lumbar degenerative disease displays a linear progression from early in life until peaking in the later decades, and by no means is the presence of significant disease in the 4th decade of life considered normal. Dr. P.C. explained that there is a growing body of medical evidence to support just that relationship as it has been demonstrated that military recruits with moderate pes planus have twice the rate of knee pain and low back pain as those with normal

feet. Multiple studies have demonstrated a correlation between the presence of pes planus and the development of chondromalacia patellae as well as medical cartilage damage in the knee just as the Veteran experienced. Multiple studies have also found increased rates of low back pain in patients with documented pes planus and hallux valgus. Dr. P.C. stated that VA examiners have ignored the literature which demonstrates the association between pes planus and hallux valgus and the eventual development of chondromalacia, meniscal cartilage injury and low back pain. Dr. P.C. opined that his service-connected foot disabilities are as likely as not the proximate cause of his severe knee and lumbar spine degeneration.

Upon consideration of the conflicting opinions of record with regard to a secondary relationship, the Board finds the evidence to at least be in equipoise as to whether the Veteran's current disabilities of the lumbar spine, left knee, and right knee are proximately due to his service-connected bilateral feet disability. Accordingly, after resolving all doubt in favor of the Veteran, the Board finds that service connection for a lumbar spine disability, a right knee disability, and a left knee disability are warranted. 38 U.S.C. § 5107; 38 C.F.R. § 3.102.

REASONS FOR REMAND

Diabetes mellitus

In the prior Board decision, service connection was denied for diabetes mellitus on a direct basis. Per the JMPR, the issue was remanded to consider whether his diabetes mellitus was due to or aggravated by his claimed GERD. The issue of service connection for GERD, however, has been withdrawn for appellate consideration by the Veteran. Dr. P.C. opined that the Veteran's disabilities of the feet led to his physical inactivity, weight gain, and insulin resistance, which resulted in the development of his diabetes mellitus.

Dr. P.C. indicated that the Veteran has a family history of diabetes mellitus but did not provide a discussion of this risk factor in formulating an opinion. Moreover, it is noted that Dr. P.C. is an orthopedic surgeon, thus it would be helpful to obtain a

further opinion from a clinician with appropriate expertise to discuss and opine on an etiological relationship.

Bilateral disabilities of the feet, with calluses

Per the JMPR, outstanding VA treatment records must be requested and associated with the claims folder for the period from April 4, 2000 to February 18, 2014. The Board acknowledges that there is an October 23, 2003, record which references an Advanced Directive but the next record is dated on February 18, 2014. 10/26/2019 CAPRI at 1. Also, updated records must be obtained for the period from October 4, 2019.

Also, it is noted that in November 2018 the Veteran underwent a VA examination wherein reference was made to pes planus and calluses of the feet. The medical evidence of record also reflects diagnoses of hammer toe and hallux valgus, and the examination does not contain any reference to these conditions. As such, the Veteran should be afforded a VA examination to assess the severity of his disabilities of the feet.

SMC

In light of the grant of service connection for disabilities of the lumbar spine, left knee, and right knee, this issue should be readjudicated.

TDIU

Per the JMPR, it was determined that entitlement to a TDIU had been raised per *Rice v. Shinseki*, 22 Vet. App. 447, 452 (2009). A TDIU was most recently denied in an August 2018 rating decision. In light of the grant of service connection for disabilities of the lumbar spine, left knee, and right knee, the Veteran's claim should be readjudicated.

The matters are REMANDED for the following actions:

1. Request and associate with the claims folder VA treatment records for the period from April 4, 2000 to February 18, 2014; and, from October 4, 2019.

If records are unavailable, documentation to that effect should be added to the claims folder.

2. Request that a VA clinician with appropriate expertise review the claims folder to determine the nature and etiology of his diabetes mellitus, type II. The examiner should opine as to the following:

- a) Is diabetes mellitus, type II, *at least as likely as not* (a 50 percent or more probability) caused by disabilities of the feet, knees, and lumbar spine, to include consideration of any physical inactivity, weight gain, and insulin resistance resulting from such disabilities;
- b) If not, has diabetes mellitus, type II, *at least as likely as not* (a 50 percent or more probability) been aggravated beyond its natural progression by disabilities of the feet, knees, and lumbar spine, to include consideration of any physical inactivity, weight gain, and insulin resistance resulting from such disabilities? If aggravation is found, the examiner should identify baseline level of disability prior to such aggravation.

Please provide a comprehensive rationale for every opinion offered. All pertinent evidence, including both lay and medical, to include the September 2019 opinion of Dr. P.C., should be considered.

The clinician is advised that the Veteran is competent to report his symptoms and history, and such reports must

be specifically acknowledged and considered in formulating any opinions.

An examination should be scheduled if deemed necessary by the Veteran.

3. The Veteran should be scheduled for a VA podiatry examination in order to ascertain the nature and severity of his disabilities of the bilateral feet. It is imperative that the claims folder be reviewed in conjunction with the examination. Any medically indicated special tests should be accomplished, and all special test and clinical findings should be clearly reported.

The examination report should comply with all AMIE protocols for rating foot disabilities.

The examiner should specify whether the Veteran's calluses of the feet is manifested by: (i) moderate; weight-bearing line over or medial to great toe, inward bowing of the tendo achillis, pain on manipulation and use of the feet, bilateral or unilateral; (ii) severe; objective evidence of marked deformity (pronation, abduction, etc.), pain on manipulation and use accentuated, indication of swelling on use, characteristic callosities, and whether bilateral or unilateral; or (iii) pronounced; marked pronation, extreme tenderness of plantar surfaces of the feet, marked inward displacement and severe spasm of the tendo achillis on manipulation, not improved by orthopedic shoes or appliances, and whether bilateral or unilateral.

The examiner should indicate whether the calluses of the feet manifests in any further disability affecting the feet.

The examiner should comment on whether the Veteran's hallux valgus is equivalent to amputation of the great toe or if he has undergone an operation which resulted in resection of the metatarsal head.

The examiner should comment on whether the Veteran has a foot disability that is moderate, moderately severe, or severe.

The examiner should identify any objective evidence of pain or painful motion and attempt to assess the extent of any pain. The examiner should comment on any edema, disturbed circulation, weakness, atrophy, heat, redness, or instability. The extent of any incoordination, weakened movement and excess fatigability on use should be described.

The examiner should further indicate whether, and to what extent, the Veteran experiences functional loss during flare-ups of pain and/or weakness (to include with use or upon activity) as a result of the service-connected disabilities of the feet. To the extent possible, the examiner should express such functional loss in terms of additional degrees of limited motion on both flexion and extension.

The examiner should comment on the symptoms associated with the Veteran's feet. The examiner should opine whether the Veteran's bilateral foot disability precludes gainful employment for which his education and occupational experience would otherwise qualify him.

4. In light of the grant of service connection for disabilities of the lumbar spine, left knee, and right knee,

entitlement to SMC due to Aid and Attendance and entitlement to a TDIU should be readjudicated, and any necessary further development should be completed.



Eric S. Leboff
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board

M.W. Kreindler, Counsel

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

YOUR RIGHTS TO APPEAL OUR DECISION

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

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

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

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

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

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

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

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

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

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: <http://www.uscourts.cave.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).