

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

LUIS NEGRON-ORTIZ,

Petitioner,

v.

ROBERT L. WILKIE,

Secretary of Veterans Affairs,

Respondent.

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Vet.App. No. 20-3907 WRIT

**SECRETARY'S RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF
AND COURT ORDER DATED JUNE 9, 2020**

Pursuant to U.S. Vet. App. R. 21(d), and the Court's June 9, 2020, order, Respondent, Secretary of Veterans Affairs (Secretary), hereby answers the petition for extraordinary relief filed on June 5, 2020.

SUMMARY OF PERTINENT FACTS

On December 6, 2019, the Board of Veteran's Appeals (Board) issued a decision which, in pertinent part, granted Petitioner's claims of entitlement to (1) an increased rating of 20 percent for right lower extremity diabetic peripheral neuropathy throughout the claim period; (2) an increased rating of 20 percent for left lower extremity diabetic peripheral neuropathy throughout the claim period; (3) an increased rating of 70 percent for posttraumatic stress disorder (PTSD) throughout the claim period; and (4) a total disability rating based on individual unemployability (TDIU) from January 1, 2009.

On June 5, 2020, Petitioner filed a petition to compel the Regional Office (RO) to issue a rating decision implementing the awards granted in the Board's December 2019 decision. (Petition at 1-7). Petitioner asserted that he has contacted the RO on four occasions since the issuance of the Board decision to request implementation of the Board's grants, but that the RO has not responded. *Id.* Petitioner further stated that upon his own review of the Veterans Benefits Management System (VBMS), his claim was marked "completed." *Id.* Petitioner argues that as a result the RO has unreasonably delayed his claim and frustrated any potential jurisdiction of this Court over that claim. *Id.*

On June 9, 2020, undersigned counsel for the Secretary contacted the San Juan Regional Office and inquired about the status of Appellant's claims that are the subject of this petition. The RO responded that it would forward these claims to a rating team to review what action still needed to be taken by the RO. On June 15, 2020, the RO issued a rating decision which implemented the Board's December 6, 2019, decision and granted Petitioner's claims of entitlement to (1) an increased rating of 20 percent for right lower extremity diabetic peripheral neuropathy throughout the claim period; (2) an increased rating of 20 percent for left lower extremity diabetic peripheral neuropathy throughout the claim period; (3) an increased rating of 70 percent for posttraumatic stress disorder (PTSD) throughout the claim period; and (4) a total disability rating based on individual unemployability (TDIU) from January 1, 2009. (Exhibit 1).

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 issue a rating decision implementing the awards granted by the Board in its December 6, 2019 decision. (Petitioner at 1-7) (Court Order at 1). As the RO has since issued this rating decision implementing the Board's grants, 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,

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EXHIBIT 1



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

LUIS NEGRON-ORTIZ

VA File Number



**Represented By:
SEAN A RAVIN
Rating Decision
06/15/2020**

INTRODUCTION

The records reflect that you are a Veteran of the Vietnam Era. You served in the Army from May 1, 1966 to April 26, 1968. The Board of Veterans Appeals made their decision on your appeal on December 6, 2019. We have implemented their decision based on the evidence listed below.

DECISION

1. Entitlement to individual unemployability is granted effective January 1, 2009.
2. Basic eligibility to Dependents' Educational Assistance is established from January 1, 2009.
3. Evaluation of POST TRAUMATIC STRESS DISORDER, which is currently 50 percent disabling, is increased to 70 percent effective October 23, 1997.
4. Evaluation of left lower extremity diabetic peripheral neuropathy (sciatic nerve), which is currently 10 percent disabling, is increased to 20 percent effective December 12, 2018.
5. Evaluation of right lower extremity diabetic peripheral neuropathy (sciatic nerve), which is





currently 10 percent disabling, is increased to 20 percent effective December 12, 2018.

EVIDENCE

- Private Treatment Records, Dr. Toro dated September 29, 1997
- Psych ptsd initial, Disability Benefits Questionnaire San Juan VAMC, dated November 23, 1997
- Service treatment records from branch component, VBMS online database file, from May 1, 1966 through April 29, 1968
- VA Form 21-4138, Statement in Support of Claim, received October 1, 1997
- VA Form 21-4138, Statement in Support of Claim, received September 9, 1997
- Rating Decision, dated November 4, 1997
- VA Form 21-4138, Statement in Support of Claim, received January 28, 1998
- Statement of the Case, dated April 4, 1998
- VA exam cancellation (PTSD) dated July 28, 2000
- Supplemental Statement of the Case dated February 23, 2009
- BVA Remand letter dated September 11, 2008
- VA Form 21-4138, Statement in Support of Claim, received December 19, 2008
- Review Post Traumatic Stress Disorder Disability Benefits Questionnaire private provider, September 29, 2016
- Statement of the Case, dated August 2, 2012
- Supplemental Statement of the Case dated May 25, 2017
- Review Post Traumatic Stress Disorder Disability Benefits Questionnaire San Juan VAMC, December 12, 2018
- Rating Decision, dated January 25, 2019
- Statement of the Case, dated January 25, 2019
- Board of Veterans Appeals Remand, dated December 6, 2019
- Board of Veterans Appeals Remand, dated November 3, 2016
- VA Form 21-526, Veterans' Application for Compensation or Pension, received on May 30, 1997
- DD Form 214, Certificate of Release or Discharge from Active Duty, from May 1, 1966 through April 26, 1968

REASONS FOR DECISION

1. Entitlement to individual unemployability.

Entitlement to individual unemployability is granted because you are unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities. (38 CFR 4.16)

The effective date is the earliest date on which the facts show than an increase in disability occurred. (38 CFR 3.400(o)(2))

2. Eligibility to Dependents' Educational Assistance under 38 U.S.C. Chapter 35.





Eligibility to Dependents' Educational Assistance is derived from a veteran who was discharged under other than dishonorable conditions; and, has a permanent and total service-connected disability; or a permanent and total disability was in existence at the time of death; or the veteran died as a result of a service-connected disability. Also, eligibility exists for a serviceperson who died in service. Finally, eligibility can be derived from a service member who, as a member of the armed forces on active duty, has been listed for more than 90 days as: missing in action; captured in line of duty by a hostile force; or forcibly detained or interned in line of duty by a foreign government or power. (38 USC Ch. 35, 38 CFR 3.807)

Basic eligibility to Dependents' Education Assistance is granted as the evidence shows you currently have a total service-connected disability, permanent in nature. (38 USC Chapter 35, 38 CFR 3.807)

The effective date assigned for this grant is January 1, 2009 which to the extent feasible, correspond to effective dates relating to awards of disability compensation.(38 USC 5113(a)

3. Evaluation of POST TRAUMATIC STRESS DISORDER currently evaluated as 50 percent disabling.

The evaluation of POST TRAUMATIC STRESS DISORDER is increased to 70 percent disabling effective October 23, 1997. (38 CFR 4.1, 38 CFR 3.400)

The effective date of this grant is November 3, 1997. Entitlement to an increased evaluation has been established from the date of the VA medical evidence showing an increase in disability. When an increased evaluation is granted based on VA medical evidence showing an increase in disability prior to the date the claim was received, the effective date of the increase is the date of the VA medical evidence. (38 CFR 3.400)

We have assigned a 70 percent evaluation for your POST TRAUMATIC STRESS DISORDER based on:

- Occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood
- Depressed mood
- Suicidal ideation
- Near-continuous depression affecting the ability to function independently, appropriately and effectively
- Disturbances of motivation and mood
- Impaired judgment
- Impaired impulse control
- Chronic sleep impairment
- Near-continuous panic affecting the ability to function independently, appropriately and effectively
- Panic attacks more than once a week
- Difficulty in adapting to stressful circumstances
- Difficulty in adapting to work
- Inability to establish and maintain effective relationships





- Flattened affect
- Intermittent inability to perform maintenance of minimal personal hygiene
- Difficulty in adapting to a worklike setting
- Anxiety
- Difficulty in establishing and maintaining effective work and social relationships

The overall evidentiary record shows that the severity of your disability most closely approximates the criteria for a 70 percent disability evaluation. (38 CFR 4.7, 38 CFR 4.126)

A higher evaluation of 100 percent is not warranted for posttraumatic stress disorder unless the evidence shows total occupational and social impairment, due to such symptoms as:

- gross impairment in thought processes or communication
- persistent delusions or hallucinations
- grossly inappropriate behavior
- persistent danger of hurting self or others
- intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene)
- disorientation to time or place
- memory loss for names of close relatives, own occupation, or own name. (38 CFR 4.125, 38 CFR 4.126, 38 CFR 4.130)

4. Evaluation of left lower extremity diabetic peripheral neuropathy (sciatic nerve) currently evaluated as 10 percent disabling.

The evaluation of left lower extremity diabetic peripheral neuropathy (sciatic nerve) is increased to 20 percent disabling effective December 12, 2018. (38 CFR 4.1, 38 CFR 3.400)

The effective date of this grant is December 12, 2018. Entitlement to an increased evaluation has been established from the date of the VA medical evidence showing an increase in disability. When an increased evaluation is granted based on VA medical evidence showing an increase in disability prior to the date the claim was received, the effective date of the increase is the date of the VA medical evidence. (38 CFR 3.400)

We have assigned a 20 percent evaluation for your left lower extremity diabetic peripheral neuropathy (sciatic nerve) based on:

- Moderate incomplete paralysis (38 CFR 4.124a)

A higher evaluation of 40 percent is not warranted for paralysis of the sciatic nerve unless the evidence shows nerve damage is moderately severe. (38 CFR 4.120, 38 CFR 4.124a)

5. Evaluation of right lower extremity diabetic peripheral neuropathy (sciatic nerve) currently evaluated as 10 percent disabling.

The evaluation of right lower extremity diabetic peripheral neuropathy (sciatic nerve) is increased to 20 percent disabling effective December 12, 2018. (38 CFR 4.1, 38 CFR 3.400)





The effective date of this grant is December 12, 2018. Entitlement to an increased evaluation has been established from the date of the VA medical evidence showing an increase in disability. When an increased evaluation is granted based on VA medical evidence showing an increase in disability prior to the date the claim was received, the effective date of the increase is the date of the VA medical evidence. (38 CFR 3.400)

We have assigned a 20 percent evaluation for your right lower extremity diabetic peripheral neuropathy (sciatic nerve) based on:

- Moderate incomplete paralysis (38 CFR 4.124a)

A higher evaluation of 40 percent is not warranted for paralysis of the sciatic nerve unless the evidence shows nerve damage is moderately severe. (38 CFR 4.120, 38 CFR 4.124a)

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.

