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July 23, 2020

Gregory O. Block, Clerk of the Court
U.S. Court of Appeals for Veterans Claims
Suite 900
625 Indiana Ave., N.W.
Washington, DC 20004

Re: *Bailey v. Wilkie*, No. 19-2661

Dear Sir:

In accordance with the duty to keep the Court informed of any developments which could deprive the Court of jurisdiction or “otherwise affect its decision,” *see Solze v. Shinseki*, 26 Vet.App. 299, 301 (2013) (citations omitted), counsel for Mr. Bailey wishes to notify the Court that he received a July 9, 2020 Rating Decision denying entitlement to an earlier effective date for the grant of individual unemployability and service connection of lymphedema, left and right lower extremity. *See* Attachment.

Respectfully submitted,

/s/ Dvora Louria
Counsel for Appellant

VIA CM/ECF SYSTEM



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

Herman Bailey

VA File Number
[REDACTED]

**Represented By:
DISABLED AMERICAN VETERANS
Rating Decision
07/09/2020**

INTRODUCTION

The records reflect that you are a veteran of the Korean Conflict Era, Peacetime and Vietnam Era. You served in the Army from August 17, 1954 to June 5, 1957, from August 5, 1957 to August 4, 1963, from August 5, 1963 to February 1, 1966 and from February 2, 1966 to October 31, 1974. We received a supplemental claim on June 30, 2020. Based on a review of the evidence listed below, we have made the following decision(s) on your claim.

DECISION

1. Evaluation of prostate cancer residuals, which is currently 60 percent disabling, is continued.
2. Entitlement to an earlier effective date for the grant of individual unemployability is denied.
3. Entitlement to an earlier effective date for service connection of lymphedema, left lower extremity is denied.
4. Entitlement to an earlier effective date for service connection of lymphedema, right lower extremity is denied.



EVIDENCE

- Rating Decision, dated August 6, 2013
- VA Examination, Gainesville VAMC, dated September 15, 2014
- Notification of proposal to reduce prostate cancer, October 20, 2014
- Personal Hearing requested, October 30, 2014
- Personal Hearing, dated May 11, 2015
- Disability Benefit Questionnaire and private treatment records, Dane K. Hemansen, M.D., dated May 5, 2015
- Medical opinion, inconclusive, Walter Salemron, M.D., July 24, 2015
- Rating Decision, dated December 19, 2015
- Notification of unavailability for examination, December 22, 2015
- Decision notification letter, reduction in evaluation, December 23, 2015
- Notice of disagreement, February 15, 2016
- Private Treatment Records, Southeast Regional Prostate Cancer Treatment Center, dated January 3, 2014
- VA Examination, Gainesville VAMC, dated March 1, 2016
- VA Form 21-526 EZ: Application for Disability Compensation and Related Compensation Benefits, January 30, 2019
- VA Form 21-8940, Veteran's Application For Increased Compensation Based On Unemployability, received January 30, 2019
- Disability Benefit Questionnaire, Laura Walton, dated February 4, 2018
- VA Examination, Orlando VAMC, dated April 17, 2019
- Private Treatment Records, Laura Walton, DPM, dated 2015
- Private Treatment Records, Atlantic Podiatry Associates, from May 18, 2016 through March 6, 2019
- VA contract examinations and opinions, VES, May 15, 2019
- Private Treatment Records, multiple entries, dated May 16, 2019
- Rating Decision, dated July 20, 2019
- Orlando, Gainesville and Miami VAMC (Veterans Affairs Medical Center) treatment records, from September 4, 2009 through July 8, 2020
- VA contract examination, VES, dated August 23, 2019
- VA Form 20-0995, Decision Review Request - Supplemental Claims, received June 30, 2020
- Lay Evidence from the Veteran, June 30, 2020

REASONS FOR DECISION

1. Evaluation of prostate cancer residuals currently evaluated as 60 percent disabling.

The evaluation of prostate cancer residuals is continued as 60 percent disabling.

We have assigned a 60 percent evaluation for your prostate cancer residuals based on:

- Requiring the wearing of absorbent materials which must be changed more than four times per day



Additional symptom(s) include:

- Awakening to void five or more times per night
- Daytime voiding interval less than one hour
- Decreased force of stream
- Hesitancy
- Inactive disease
- Slow stream
- Weak stream

This is the highest schedular evaluation allowed based on voiding dysfunction.

A higher evaluation of 80 percent is not warranted for malignant neoplasms of the genitourinary system unless the evidence shows:

- Renal dysfunction symptoms including:
 - BUN 40 to 80mg%; or,
 - Creatinine 4 to 8mg%; or,
 - Generalized poor health characterized by lethargy, weakness, anorexia, weight loss, or limitation of exertion; or,
 - Persistent edema and albuminuria. (38 CFR 4.124a)

Service connection was granted for prostate cancer evaluated at 100 percent based on active malignancy, effective April 29, 2013. A routine future examination dated September 15, 2014 noted that the cancer was in remission and that the condition should now be evaluated based on the residual voiding dysfunction. A proposed notice of reduction was sent to you on October 20, 2014. A personal hearing was held at your request on May 11, 2015. A Disability Benefit Questionnaire dated May 5, 2015, was received from Dane L. Hemansen, M.D., which included conflicting information. An additional examination was requested. You were unable to attend the requested examination. Final action was taken in the rating decision dated December 19, 2015, reducing the evaluation for prostate cancer from 100 percent to 60 percent, and the overall evaluation from 100 percent to 80 percent. This change was effective March 1, 2016.

A medical examination was subsequently completed on March 1, 2016. The examination noted diagnosis of prostate cancer by biopsy in March 2013 with radiation treatment completed in July 2013. Cancer is noted to be in remission with residuals of a voiding dysfunction. A 60 percent evaluation was confirmed and continued in the March 10, 2016 rating decision.

While a notice of disagreement was submitted, this would not prevent the reduction of benefits. Due process was served in the October 20, 2014 notice which allowed you 60 days from that date to provide additional information and request a hearing, which was completed. An appeal was received, but this does not stop the final action to reduce.

An examination dated April 17, 2019 confirmed the prior finding of prostate cancer in remission with residuals of a voiding dysfunction. This was confirmed in the July 20, 2019, rating decision.

It is noted that you dispute using PSA to monitor for prostate cancer recurrence; however the PSA test was originally approved by the FDA in 1986 to monitor the progression of prostate



cancer who had already been diagnosed with the disease.

You note that you have had trouble with diarrhea since your radiation treatment. There was no report of diarrhea at the VA examinations completed for prostate cancer. Residuals of prostate cancer are rated based on associated voiding dysfunction or urinary tract infection, but can be evaluated as renal dysfunction or obstructed voiding when applicable. (38 CFR 4.115a)

A review of the medical evidence of record does not indicate active malignancy and therefore a 100 percent evaluation for prostate cancer would not be warranted from the date that remission was determined.

2. Entitlement to an earlier effective date for the grant of individual unemployability.

Entitlement to an earlier effective date for the grant of individual unemployability is denied because the evidence of record does not indicate an earlier date would be warranted. (38 CFR 4.16, 38 CFR 3.400)

A supplemental claim was received on June 30, 2020, requesting consideration for an earlier effective date for individual unemployability. It is claimed that the VA was remiss in not providing a VA Form 21-8940, Veterans Application for Increased Compensation Based on Unemployment.

Individual unemployability would not be considered while the overall evaluation was 100 percent. Therefore March 1, 2016, would have been the earliest date individual unemployability could be raised. While the schedular requirements were met at that time there was no indication that service connected disabilities were preventing employment.

3. Entitlement to an earlier effective date for service connection of lymphedema, left lower extremity.

Entitlement to an earlier effective date for service connection for lymphedema, right lower extremity has been denied. (38 CFR 3.400)

We have assigned a 10 percent evaluation for your lymphedema, right lower extremity based on:

- Aching in leg after prolonged standing or walking
- Intermittent edema

A higher evaluation of 20 percent is not warranted for post-phlebitic syndrome unless the evidence shows:

- Persistent edema, incompletely relieved by elevation of extremity, with or without beginning stasis pigmentation or eczema. (38 CFR 4.124a)

The effective date for secondary service connection is the date of receipt of the claim or the date entitlement arose, whichever is the later. However, if the claim for secondary service connection involves a condition shown in competent medical journals or treatises to be a common



complication of the primary, service-connected condition, then the effective date for these types of secondary conditions is the date of factual entitlement if a claim is received within one year. Otherwise, the effective date is the date VA received the claim or the date of entitlement, whichever is later.

Medical evidence indicates diagnosis of lymphedema in 2015, however it was not claimed until January 30, 2019. As it was not claimed within a year of diagnosis an earlier effective cannot be granted. (38 CFR 3.400)

4. Entitlement to an earlier effective date for service connection of lymphedema, right lower extremity.

Entitlement to an earlier effective date for service connection for lymphedema, right lower extremity has been denied. (38 CFR 3.400)

We have assigned a 10 percent evaluation for your lymphedema, right lower extremity based on:

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- Persistent edema, incompletely relieved by elevation of extremity, with or without beginning stasis pigmentation or eczema. (38 CFR 4.124a)

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Medical evidence indicates diagnosis of lymphedema in 2015, however it was not claimed until January 30, 2019. As it was not claimed within a year of diagnosis an earlier effective cannot be granted. (38 CFR 3.400)

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.

