

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

FRANKLIN A. GREEN,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 21-4193
)	
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

APPELLEE’S SOLZE NOTICE TO THE COURT

Pursuant to this Court’s holding in *Solze v. Shinseki*, 26 Vet. App. 299, 301 (2013), that, “in all cases before this Court, the parties are under a duty to notify the Court of developments that could deprive the Court of jurisdiction or otherwise affect its decision,” Appellee files this Notice in accordance with such directive.

In the Board’s February 2021 decision on appeal, it determined that entitlement to a total disability rating based on individual unemployability (TDIU) was not warranted as a matter of law because Appellant was not in receipt of service-connected compensation for any disabilities at the time of the AOJ decision on appeal. See Record Before the Agency (R.) at 19-20 (5-20). Appellant argues the Board exceeded its jurisdiction and committed clear error when it denied entitlement to TDIU in light of the Board’s grant of service connection for an acquired psychiatric disorder in the same decision. See Appellant’s Brief (App. Br.) at 5-20.

In May 2021, the agency of original jurisdiction (AOJ) issued a rating decision implementing the Board's grant of service connection for an acquired psychiatric disorder and assigned initial ratings of 30% effective August 11, 2017, 50% effective September 13, 2019, and 70% effective from April 21, 2021. See Exhibit A. In June 2021, Appellant submitted a VA Form 10182 Decision Review Request: Board Appeal (Notice of Disagreement) (NOD) electing direct review of the May 2021 rating decision and the ratings assigned therein. See Exhibit B. This appeal was placed on the Board's docket the same month. See Exhibit C.

WHEREFORE, the Secretary respectfully notifies the Court of the above, relevant development in this case.

Respectfully submitted,

RICHARD J. HIPOLIT
Deputy General Counsel
for Veterans Programs

MARY ANN FLYNN
Chief Counsel

/s/ Amanda M. Haddock
AMANDA M. HADDOCK
Deputy Chief Counsel

/s/ Dennis Pitman

DENNIS PITMAN

Appellate Attorney

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Counsel for the Secretary

EXHIBIT A



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

FRANKLIN GREEN

VA File Number



**Represented By:
MATTHEW D HILL
Rating Decision
05/04/2021**

INTRODUCTION

The records reflect that you are a Veteran of the Gulf War Era. You served in the Navy from July 27, 1998 to June 25, 1999. The Board of Veterans Appeals made their decision on your appeal on February 22, 2021. We have implemented their decision based on the evidence listed below.

DECISION

Service connection for an acquired psychiatric disorder, to include bipolar disorder, is granted with an evaluation of 30 percent disabling effective August 11, 2017. An increased evaluations of 50 percent is assigned from September 13, 2019, and an evaluation of 70 percent is assigned from April 21, 2021.

EVIDENCE

- VA Examination, Mental Disorders, dated February 25, 2013
- Statement of Case, dated August 11, 2014
- VA Form 21-0958 Notice of Disagreement, received February 27, 2014
- DD Form 214, Certificate of Release or Discharge from Active Duty, for period of July 1998



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- to June 1999, received January 6, 2015
- Service Treatment Records, for the period July 27, 1998 to June 25, 1999, received July 30, 1999 to January 6, 2015
- Service Personnel Records, for the period July 27, 1998 to June 25, 1999, received August 27, 2012 to January 6, 2015
- VA Form 21-0966, Intent To File A Claim For Compensation and/or Pension, or Survivors Pension and/or DIC, received August 11, 2017
- VA Form 21-526 EZ: Application for Disability Compensation and Related Compensation Benefits, received August 24, 2017
- Private Treatment Records, Dr. Stephen Williams, received August 25, 2017
- Private Treatment Records, Multiple Entries, Appalachian Behavioral Healthcare, dated September 27, 2012 to January 27, 2016, received September 19, 2017
- Private Treatment Records, Multiple Entries, Summit Behavioral Healthcare, dated January 27, 2016 October 3, 2017 to received September 19, 2017 to December 7, 2017
- Rating Decision, dated November 6, 2017
- VA Form 21-0958 Notice of Disagreement, received November 29, 2017
- Private Treatment Records, Forensic Diagnostic Center, dated December 1, 2017 received January 25, 2018
- Statement of Case, dated June 27, 2019
- VA Form 10182 Notice of Disagreement, received August 21, 2019
- Private Treatment Records, COPE Behavioral Consulting, Jefferey S Speiden, PhD, HSPP, dated September 13, 2019, received September 19, 2019
- Board of Veterans' Appeals Decision, dated February 22, 2021
- Rating Decision, dated February 23, 2021
- No Pertinent VA Healthcare Records from the VAMC Available, Columbus VAMC, conducted May 4, 2021
- No Pertinent Post-Service Healthcare Records from the Military Treatment Facility Available, per electronic review in Joint Longitudinal Viewer (JLV), conducted May 4, 2021

REASONS FOR DECISION

Service connection for an acquired psychiatric disorder, to include bipolar disorder.

A claimant may file a supplemental claim requesting to have a review completed thorough the Board of Veterans Appeals (BVA). (38 CFR 3.2500, 38 CFR 3.2501)

In support of your claim, the BVA reviewed the evidence of record and granted service connection for the following claimed conditions. (38 CFR 3.2500, 38 CFR 4.6)

Service connection may be granted for any injury or disease resulting in a disability that was incurred in or aggravated by military service. To establish direct service connection for a claimed disorder, objective evidence must show a diagnosis of a current disability that is related to a disease or injury incurred in or aggravated during "active " service. (38 CFR. 3.303, 38 CFR 3.304)



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The BVA granted service connection for an acquired psychiatric disorder, to include bipolar disorder as directly related to military service. They found the evidence is at least in equipoise on the issue whether there is a nexus between the in-service stressor and the Veteran's current acquired psychiatric disorder and service-connection is granted on a direct basis. Please refer to BVA decision dated February 22, 2021, for more detailed information as to the reasons and basis for this decision. (38 CFR 3.303, 38 CFR 3.304, 38 CFR 4.6)

Please also note the Schedule of Ratings has a general rating formula for mental health conditions which uses the same signs and symptoms to rate. You are service connected for an acquired psychiatric disorder, to include bipolar disorder and The Schedule of Ratings does not allow us to rate multiple mental health disabilities based on the same signs and symptoms. Therefore, even if you were service connected for any additional mental health condition; they would be rated together with a single percentage assigned. There would be no additional increase due to the another mental health diagnosis. (38 CFR 4.14, 38 CFR 4.130)

An evaluation of 30 percent is assigned based on a review of your VA medical examination dated February 2013; and private medical evidence from Appalachian Behavioral Health dated September 2012 to September 2013, Summit Behavioral Healthcare dated January 2016 to October 2017 and the Forensic Diagnostic Center dated December 2017. This evidence consistently approximated this level of severity until September 2019. (38 CFR 4.2, 38 CFR 4.6)

The effective date of this initial grant is August 11, 2017, as this is the earliest effective date ascertainable based on continuous pursuit through the supplemental claims process. (38 CFR 3.155, 38 CFR 3.400)

We have assigned a 30 percent evaluation for your an acquired psychiatric disorder, to include bipolar disorder based on:

- Anxiety
- Depressed mood
- Persistent hallucinations

The overall evidentiary record shows that the severity of your disability most closely approximates the criteria for a 30 percent disability evaluation. (38 CFR 4.7, 38 CFR 4.126)

A higher evaluation of 50 percent is not warranted for a mental disorder unless the evidence shows occupational and social impairment with reduced reliability and productivity due to such symptoms as:

- Flattened affect
- Circumstantial, circumlocutory, or stereotyped speech
- Panic attacks more than once a week
- Difficulty in understanding complex commands
- Impairment of short- and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks)
- Impaired judgment
- Impaired abstract thinking
- Disturbances of motivation and mood



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- Difficulty in establishing and maintaining effective work and social relationships. (38 CFR 4.125, 38 CFR 4.126, 38 CFR 4.130)

The rating schedule is primarily a guide in the evaluation of disability resulting from all types of diseases and injuries encountered as a result of or incident to military service. An increase in the evaluation assigned for a disability is warranted when the average impairment in earning capacity resulting from such diseases and injuries in civil occupations has increased and the disability picture meets the criteria required for a higher rating. (38 CFR 4.1, 38 CFR 4.7)

We granted increased evaluations for an acquired psychiatric disorder, to include bipolar disorder as the current evidence demonstrates your condition warranted a higher evaluation throughout the duration of the pursuit of this claimed condition. (38 CFR 4.1, 38 CFR 4.7)

An evaluation of 50 percent is assigned based on the symptomology reported during an examination with Jefferey S Speiden, PhD, HSPP from COPE Behavioral Consulting dated September 2019. This examination provided creditable diagnostic data and medical analysis to approximate an increased level of severity. This evidence consistently approximated this level of severity until April 2021. (38 CFR 4.2, 38 CFR 4.6)

The effective date of this increased evaluation is September 13, 2019. This is the earliest date as of which it is factually ascertainable this increase in this disability occurred as this is the date entitlement arose based on facts found during the continuous pursuit your mental health condition through the supplemental claims process. (38 CFR 3.155, 38 CFR 3.400)

We have assigned a 50 percent evaluation for your an acquired psychiatric disorder, to include bipolar disorder based on:

- Chronic sleep impairment
- Depressed mood
- Difficulty in establishing and maintaining effective work and social relationships
- Flattened affect
- Occupational and social impairment with reduced reliability and productivity
- Suicidal ideation

The overall evidentiary record shows that the severity of your disability most closely approximates the criteria for a 50 percent disability evaluation. (38 CFR 4.7, 38 CFR 4.126)

A higher evaluation of 70 percent is not warranted for a mental disorder unless the evidence shows occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as:

- Suicidal ideation
- Obsessional rituals which interfere with routine activities
- Speech intermittently illogical, obscure, or irrelevant
- Near-continuous panic or depression affecting the ability to function independently, appropriately and effectively
- Impaired impulse control (such as unprovoked irritability with periods of violence)
- Spatial disorientation



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- Neglect of personal appearance and hygiene
- Difficulty in adapting to stressful circumstances (including work or a worklike setting)
- Inability to establish and maintain effective relationships. (38 CFR 4.125, 38 CFR 4.126, 38 CFR 4.130)

An evaluation of 70 percent is assigned based on a review of your VA medical examination from April 2021 and there is no additional evidence which would support this evaluation prior to this examination. (38 CFR 4.1, 38 CFR 4.6, 38 CFR 4.2, 38 CFR 4.7)

The effective date of this increased evaluation is April 21, 2021. This is the earliest date as of which it is factually ascertainable this increase in this disability occurred as this is the date entitlement arose based on facts found during the continuous pursuit your mental health condition through the supplemental claims process. (38 CFR 3.155, 38 CFR 3.400)

We have assigned a 70 percent evaluation for your an acquired psychiatric disorder, to include bipolar disorder based on:

- Anxiety
- Chronic sleep impairment
- Depressed mood
- Difficulty in adapting to a worklike setting
- Difficulty in adapting to stressful circumstances
- Difficulty in adapting to work
- Difficulty in establishing and maintaining effective work and social relationships
- Disturbances of motivation and mood
- Impaired judgment
- Occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood
- Panic attacks (less than weekly)
- Panic attacks (weekly)
- Suspiciousness

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 a mental 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)



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There is no evidence of record that shows that you are unable to manage your financial affairs.
(38 CFR 3.353)

Laws and regulations applicable to this issue:

38 U.S.C. 1110 & 1131 Basic entitlement.
38 U.S.C. 5107 Claimant responsibility; benefit of the doubt.
38 C.F.R. §3.1 Definitions.
38 C.F.R. §3.6 Duty periods.
38 C.F.R. §3.102 Reasonable doubt.
38 C.F.R. §3.103 Procedural due process and appellate rights.
38 C.F.R. §3.104 Finality of decisions.
38 C.F.R. §3.155 How to file a claim
38 C.F.R. §3.156 New and material evidence.
38 C.F.R. §3.159 Department of Veterans Affairs assistance in developing claims.
38 C.F.R. §3.2500 Review of decisions.
38 C.F.R. §3.2501 Supplemental claims.
38 C.F.R. §3.2502 Return by higher-level adjudicator or remand by the Board of Veterans' Appeals.
38 C.F.R. §3.303 Principles relating to service connection.
38 C.F.R. §3.304 Direct service connection; wartime and peacetime.
38 C.F.R. §3.307 Presumptive service connection for chronic, tropical, or prisoner-of-war related disease, disease associated with exposure to certain herbicide agents, or disease associated with exposure to contaminants in the water supply at Camp Lejeune; wartime and service on or after January 1, 1947.
38 C.F.R. §3.309 Disease subject to presumptive service connection.
38 C.F.R. §3.310 Disabilities that are proximately due to, or aggravated by, service-connected disease or injury.
38 C.F.R. §3.353 Determinations of incompetency and competency
38 C.F.R. §3.400 General.
38 C.F.R. §4.1 Essentials of evaluative rating.
38 C.F.R. §4.2 Interpretation of examination reports.
38 C.F.R. §4.3 Resolution of reasonable doubt.
38 C.F.R. §4.6 Evaluation of evidence.
38 C.F.R. §4.7 Higher of two evaluations.
38 C.F.R. §4.10 Functional impairment.
38 C.F.R. §4.14 Avoidance of pyramiding.
38 C.F.R. §4.125 Diagnosis of mental disorders.
38 C.F.R. §4.126 Evaluation of disability from mental disorders.
38 C.F.R. §4.127 Intellectual disability (intellectual developmental disorder) and personality disorders.
38 C.F.R. §4.129 Mental disorders due to traumatic stress.
38 C.F.R. §4.130 Schedule of ratings – mental disorders.
Pub. L. No. 115-55 Veterans Appeals Improvement and Modernization Act of 2017.



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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.



EXHIBIT B

BRIAN D. HILL
CAROL J. PONTON
MATTHEW D. HILL¹
SARA K. HILL
LESLIE D. GAINES
SHANNON L. BREWER
SHELLY M. MARK
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ACCREDITED CLAIMS AGENT
KERRY L. BAKER
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LICENSED IN FLORIDA AND WASHINGTON, D.C.¹
LICENSED IN FLORIDA AND TEXAS²
LICENSED IN TEXAS⁴
LICENSED IN ARIZONA³

June 4, 2021

Board of Veterans' Appeals
P.O. Box 27063
Washington, D.C. 20038

In Reply To: 325/VSC
Certified, Return Receipt Requested
Direct Upload to BVA

Re: Claimant: Franklin A. Green
SSN: [REDACTED]
VA File No.: [REDACTED]

APPEAL TO THE BOARD OF VETERANS' APPEALS: DIRECT REVIEW

To Whom It May Concern:

The veteran, Mr. Franklin A. Green, hereby notifies the Regional Office of his desire to file an appeal to the Board of Veterans' Appeals. The veteran desires to appeal all of the issues listed in the Rating Decision issued on May 10, 2021 and all issues which are raised by the record including errors in failing to adjudicate issues or claims reasonably raised by the record, even though not specifically mentioned by the veteran.

Enclosed please find a completed VA Form 10182 concerning this appeal. The veteran is requesting a Direct Review.

If you have any questions regarding this matter, please call me.

Sincerely,

For

Matthew D. Hill

MDH/sa
Enclosures as stated above
cc: Mr. Franklin A. Green, Sent via Email



 Department of Veterans Affairs		DECISION REVIEW REQUEST: BOARD APPEAL (NOTICE OF DISAGREEMENT)	
PART I - PERSONAL INFORMATION			
1. VETERAN'S NAME <i>(First, middle initial, last)</i> Franklin A. Green			
2. VETERAN'S SOCIAL SECURITY NUMBER [REDACTED]	3. VETERAN'S VA FILE NUMBER <i>(if different than their SSN)</i> C/CSS - [REDACTED]		4. VETERAN'S DATE OF BIRTH 4/19/1979
5. IF I AM NOT THE VETERAN, MY NAME IS <i>(First, middle initial, last)</i>			6. MY DATE OF BIRTH <i>(If I am not the Veteran)</i>
7. MY PREFERRED MAILING ADDRESS <i>(Number and street or rural route, P.O. Box, City, State, ZIP Code and Country)</i> <input type="checkbox"/> I AM HOMELESS 2989 Fisher Rd Athens, OH 45701			
8. MY PREFERRED TELEPHONE NUMBER <i>(Include Area Code)</i> (386) 257-2100	9. MY PREFERRED E-MAIL ADDRESS alinscott@hillandponton.com		10. MY REPRESENTATIVE'S NAME Matthew D. Hill
PART II - BOARD REVIEW OPTION <i>(Check only one)</i>			
11. A Veterans Law Judge will consider your appeal in the order in which it is received, depending on which of the following review options you select. <i>(For additional explanation of your options, please see the attached information and instructions.)</i>			
<input checked="" type="checkbox"/> 11A. Direct Review by a Veterans Law Judge: I do not want a Board hearing, and will not submit any additional evidence in support of my appeal. <i>(Choosing this option often results in the Board issuing its decision most quickly.)</i>			
<input type="checkbox"/> 11B. Evidence Submission Reviewed by a Veterans Law Judge: I have additional evidence in support of my appeal that I will provide within the next 90 days, but I do not want a Board hearing. <i>(Choosing this option may add delay to issuance of a Board decision.)</i>			
<input type="checkbox"/> 11C. Hearing with a Veterans Law Judge: I want a Board hearing and the opportunity to submit additional evidence in support of my appeal that I will provide within 90 days after my hearing. <i>(Choosing this option may add delay to issuance of a Board decision.)</i>			
PART III - SPECIFIC ISSUE(S) TO BE APPEALED TO A VETERANS LAW JUDGE AT THE BOARD			
12. Please list each issue decided by VA that you would like to appeal. Please refer to your decision notice(s) for a list of adjudicated issues. For each issue, please identify the date of VA's decision and the area of disagreement.			
<input type="checkbox"/> Check here if you attached additional sheets. Include the Veteran's last name and last 4-digits of the Social Security number. Check the SOC/SSOC Opt in box if any issue listed below is being withdrawn from the legacy appeals process. <input type="checkbox"/> Opt In from SOC/SSOC			
A. Specific Issue(s)			B. Date of Decision
Acquired psychiatric disorder, to include bipolar disorder, is granted with an evaluation of 30 percent disabling effective August 11, 2017. An increased evaluations of 50 percent is assigned from September 13, 2019, and an evaluation of 70 percent is assigned from April 21, 2021			5/10/21
PART IV - CERTIFICATION AND SIGNATURE			
I CERTIFY THAT THE STATEMENTS ON THIS FORM ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.			
13. SIGNATURE <i>(Appellant or appointed representative) (Ink signature)</i> 			14. DATE SIGNED 06/03/2021

EXHIBIT C

FRANKLIN A. GREEN
2989 FISHER RD
ATHENS, OH 45701

MATTHEW D HILL, Attorney
Matthew D Hill
Hill & Ponton, P.A.
P.O. Box 449
Deland, FL 32721



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

Date: June 4, 2021

In Reply Refer To: 014CREB
[REDACTED]

FRANKLIN A. GREEN
2989 FISHER RD
ATHENS, OH 45701

Dear: FRANKLIN A. GREEN

The Board of Veterans' Appeals received your Board Appeal request (VA Form 10182). Based on the Board appeal option you selected on the form, your appeal has been placed on the Direct Review docket.

What happens next?

Please keep in mind that while selecting the Direct Review option often results in the Board issuing a decision more quickly, you cannot submit any evidence to the Board under this review option. On average, appeals on the Direct Review docket are decided within 365 days of being docketed.

What if I want to change my Board appeal request by switching AMA dockets?

You may request to change from one Board AMA docket to another by submitting a new VA Form 10182 with the new docket choice and a list of issues you want considered under the new docket. You can only switch from one AMA docket to another if you have not had a hearing or submitted evidence following the Board's receipt of your original VA Form 10182.

Typically, requests to change AMA dockets must be filed at the Board within 60 days of the date the Board received the VA Form 10182 that you have already submitted, or within one year of the VA decision being appealed, whichever date is later. However, **you may submit a good cause extension request.** To request an extension of time to submit a VA Form 10182 docket switch request, please note the reasons why you believe there is good cause on or with your VA Form 10182 docket switch request.

What if I would like my case advanced on the Board's docket?

If you are suffering from a serious illness, or you are under severe financial hardship, or have other sufficient cause, you can request to have your appeal "Advanced on the Docket," or moved to the front of the line. If you are age 75 or older, your appeal will automatically be prioritized, and you do not have to submit anything further.

If applicable, you may submit a brief explanation of the reasons why the Board should prioritize your case. You must include documentation that supports your explanation. For example, if you have:

- **Severe financial hardship:** Examples of evidence you may submit to demonstrate severe financial hardship include, but are not limited to, evidence of homelessness, a bankruptcy petition, or a home foreclosure or eviction notice.
- **Serious illness:** Examples of evidence you may submit to demonstrate serious illness include, but are not limited to, a physician's statement documenting terminal or serious illness, preferably with clinical findings.

What if I want to change my representation?

You have 90 days from the date the Board receives your Board Appeal request (VA Form 10182) or until the Board issues a decision (whichever comes first) to change your representative. To change your representative, please submit a VA Form 21-22 if you would like to appoint a Veterans Service Organization (VSO), or a VA Form 21-22a if you would like to appoint an individual (to include an accredited claims agent or attorney) as your representative. For a comprehensive list of attorneys and VSOs please visit <http://www.va.gov/ogc/apps/accreditation/index.asp>.

How do I send documents to the Board?

All correspondence, requests, and evidence you send to the Board should include your name, the Veteran's name (if you are not the Veteran), and your VA file number. Mail or fax documents to:

Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038
Fax: 1-844-678-8979

What if I have questions?

If you have any questions about your appeal, contact your representative (if you have one) or visit <http://www.va.gov/decision-reviews>. You may also contact VA at **1-800-827-1000** from 8:00 a.m. to 9:00 p.m. (ET), Monday through Friday. To check the status of your appeal, visit <http://www.va.gov/claim-or-appeal-status/>.

Sincerely,

**Case Review and Intake & Mail Management
Branch**

Board of Veterans' Appeals

CC: MATTHEW D HILL, Attorney