

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

JAMES M. KERNZ,)	
Appellant,)	
)	
v.)	Vet. App. No. 20-2365
)	
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
Appellee.)	

APPELLEE’S AMENDED 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,” the Secretary of Veterans Affairs, Denis McDonough, files this Notice in accordance with such directive.

On September 11, 2023, the undersigned was notified by the Board of Veterans’ Appeals (Board) that it issued a September 7, 2023, order remanding all issues before it for additional development stemming from the January 2020 VA Form 10182, Decision Review Request: Board Appeal. See Exhibit A.

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

Respectfully submitted,

RICHARD J. HIPOLIT
Deputy General Counsel
Veterans Programs

MARY ANN FLYNN

Chief Counsel

MEGAN C. KRAL

Deputy Chief Counsel

/s/ Nicholas R. Esterman

NICHOLAS R. ESTERMAN

Senior Appellate Counsel

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U.S. Department of Veterans Affairs

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EXHIBIT A

JAMES M. KERNZ
1730 E PACIFIC LN
Inverness, FL 34453-3671



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: September 7, 2023

C XX XXX 190

JAMES M. KERNZ
1730 E PACIFIC LN
Inverness, FL 34453-3671

Dear Appellant:

A Veterans Law Judge at the Board of Veterans' Appeals made a decision on your appeal.

If you're satisfied with the decision, you don't have to do anything.

What's in the Board decision?

Your Board decision tells you which issue(s) were decided in your appeal. It explains the evidence, laws, and regulations the Veterans Law Judge considered when making their decision and identifies any findings that are favorable to you.

If your decision letter includes a "Remand" section, this means the judge is sending one or more issues in your appeal to your local VA office to correct an error the judge identified while reviewing your case. If an issue is remanded, it hasn't been decided and it can't be appealed yet. You'll receive a decision from the local VA office after they review the issue again.

What if I disagree with the decision?

If you disagree with the judge's decision, you can continue your appeal. See the letter included after your Board decision to learn more about the decision review options available to you.

What if I have questions?

If you have any questions or would like more information, please contact your representative (if you have one) or visit va.gov/decision-reviews/get-help. To track the status of your appeal, visit va.gov/claim-or-appeal-status/.

Sincerely yours,

Decision Management Branch
Office of Appellate Support

Enclosures (2)
CC: ADAM R LUCK, Attorney

ADAM R LUCK, Attorney
Adam R Luck
1700 Pacific Ave
Suite 2220
Dallas, TX 75201-4649



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Enclosures (2)
CC: ADAM R LUCK, Attorney



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
JAMES M. KERNZ

Represented by
Adam R. Luck, Attorney

C XX XXX 190
Docket No. 200117-73605

DATE: September 7, 2023

REMANDED

The claim for compensation under the provisions of 38 U.S.C. § 1151 for an aneurysm/stroke as a result of surgery for an abdominal aortic aneurysm (AAA) is remanded.

The claim for compensation under the provisions of 38 U.S.C. § 1151 for kidney failure as a result of AAA surgery is remanded.

The claim for service connection for depression, as secondary to an aneurysm/stroke and kidney failure sustained as a result of AAA surgery is remanded.

REASONS FOR REMAND

The Veteran served on active duty in the United States Army from July 1968 to April 1970.

A rating decision was issued under the legacy system in December 2016 and the Veteran submitted a timely notice of disagreement. In December 2019, the agency of original jurisdiction (AOJ) issued a Statement of the Case (SOC). The Veteran opted the claims into the modernized review system, also known as the Appeals Modernization Act (AMA), by submitting a January 2020 VA Form 10182, Decision Review Request: Board Appeal, identifying the December 2019 SOC. Therefore, the December 2019 SOC is the decision on appeal.

In the January 2020 VA Form 10182, Decision Review Request: Board Appeal, the Veteran elected the Evidence Submission docket. Therefore, the Board may only consider the evidence of record at the time of the December 2019 SOC, as well as any evidence submitted by the Veteran his representative with, or within 90 days from receipt of, the VA Form 10182. 38 C.F.R. § 20.303. Here, the 90 day period expired on April 16, 2020.

In March 2020, the Board erroneously sent the Veteran a notification letter indicating that his VA Form 10182 was untimely and therefore, his appeal was no longer eligible for review under the AMA. However, by a May 7, 2020 letter, the Board notified the Veteran that the March 2020 letter had been an administrative error. Another Board letter to the Veteran, also dated May 7, 2020, informed the Veteran that his appeals have been placed on the Evidence Submission docket and that he had 90 days from the date of the Board's receipt of the VA Form 10182 to submit new evidence.

However, on May 27, 2020, the Veteran's representative submitted a Brief and a report from a private medical examiner in support of the claims. These were received outside the evidentiary period (beyond the 90 day window from the Veteran's January 2020 VA Form 10182).

In an August 8, 2020, letter to the Veteran, the Board took corrective action to allow the Veteran to resubmit evidence in support of his appeal. The letter stated, "Please keep in mind that any evidence submitted prior to the date of this letter cannot be considered by the Veteran's Law Judge" and the Veteran was advised to "resubmit any evidence you wish considered within 90 days of the date of this letter."

A review of the Veteran's claims file does not indicate any additional evidence was submitted or re-submitted in the 90 day period following the August 8, 2020, Board letter. Unfortunately, the Brief from the Veteran's representative and the private examiner's report is outside the evidentiary window and therefore, the Board may not consider this evidence. 38 C.F.R. § 20.300. The Veteran may file a Supplemental Claim and submit or identify this evidence. 38 C.F.R. § 3.2501. If the evidence is new and relevant, VA will issue another decision on the claim, considering the new evidence in addition to the evidence previously

considered. *Id.* Specific instructions for filing a Supplemental Claim are included with this decision.

Finally, the Veteran's contentions regarding his claim of compensation for kidney failure were not considered in the December 2016 rating decision as it was treated as one for service connection. The Veteran has consistently maintained that he was seeking entitlement to compensation under 38 U.S.C. § 1151 for his kidney failure following an AAA surgery that. As such, the Board has recharacterized the claim as one of entitlement to compensation under 38 U.S.C. § 1151 for kidney failure as a result of AAA surgery.

Entitlement to compensation under the provisions of 38 U.S.C. § 1151 for an aneurysm/stroke as a result of AAA surgery

Entitlement to compensation under the provisions of 38 U.S.C. § 1151 for kidney failure as a result of AAA surgery

Upon close review of the Veteran's VA treatment records, the fully informed consent document for the April 2016 AAA surgery is not shown in the VA CAPRI medical records. A notation in the consent document of records states that "The full consent document can be accessed through Vista Imaging." This full consent document should have been associated with the claims file, and failure to do so constitutes a pre-decisional duty to assist error. As such, the matter is remanded to the AOJ for further development pursuant to the following remand directives. Once the full informed consent is obtained, a new opinion is necessary.

Service connection for depression as secondary to an aneurysm/stroke and kidney failure sustained as a result of AAA surgery.

The Veteran sought service connection for depression as secondary to the disabilities sustained as a result of AAA surgery. Accordingly, the Board finds that the Veteran's service connection claim for depression is inextricably intertwined with the claims for compensation under 38 U.S.C. § 1151. For this reason, the claim for compensation under 38 U.S.C. § 1151 for an aneurysm/stroke and kidney failure must be resolved prior to resolution of the secondary service connection claim for depression. *Harris v. Derwinski*, 1 Vet. App. 180, 183 (1991).

The matters are REMANDED for the following action:

1. Obtain from Vista Imaging the full informed consent document recorded for the April 2016 AAA surgery and associate it with the Veteran's claims file.
2. After the above is completed, obtain a retrospective VA medical opinion concerning the questions of whether the Veteran has any additional disabilities due to the April 2016 AAA surgery, and whether the stroke and kidney failure the Veteran experienced following the surgery were events not reasonably foreseeable.

The examiner should answer the following questions:

- (a) Is it at least as likely as not (a 50 percent or greater probability) that the Veteran has any additional disability to include the aneurysm/stroke and kidney failure, that was either caused or aggravated as a result of carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on VA's part in furnishing treatment, specifically the April 2016 AAA surgery? Why or why not?
- (b) Notwithstanding any informed consent documents, was any identified additional disability, to include the aneurysm/stroke and kidney failure the Veteran sustained following surgery, an event not reasonably foreseeable from the procedure (meaning that it was not something a medical professional would obtain informed consent for)? Why or why not?

To be “not reasonably foreseeable”, the event need not be completely unforeseeable or unimaginable but must be one that a reasonable health care provider would not find to be an ordinary risk of the treatment or lack of treatment.

In addressing the Board’s questions, the VA examiner should consider and address the following: (1) the Veteran’s June 2016 and July 2016 statements indicating that he experienced a stroke and kidney failure following the AAA surgery and was not provided with an adequate notice of the risks of surgery; (2) the December 2016 VA examination opinions; and (3) any relevant VA treatment records including the April 2016 surgery records and those leading up to, and following, AAA surgery.



MATTHEW W. BLACKWELDER
Veterans Law Judge
Board of Veterans’ Appeals

Attorney for the Board

H. Yoo, 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.