



BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF
ROBERT L. REAVES



DOCKET NO. [REDACTED]) DATE DEC 04 2012
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On appeal from the
Department of Veterans Affairs Regional Office in Cleveland, Ohio

THE ISSUE

Entitlement to an effective date earlier than August 22, 2000, for the grant of service connection for posttraumatic stress disorder (PTSD).

(The Veteran's motion to revise a June 1990 Board decision on the basis of clear and unmistakable error (CUE) is the subject of a separate decision).

REPRESENTATION

Appellant represented by: Sean A. Ravin, Attorney at Law

ATTORNEY FOR THE BOARD

Michael Holincheck, Counsel

INTRODUCTION

The Veteran served on active duty from July 1966 to July 1969.

This case comes before the Board of Veterans' Appeals (Board) on appeal from an August 2005 rating decision issued by the Department of Veterans Affairs (VA) Appeals Management Center (AMC) in Washington, D.C. The Board previously adjudicated the Veteran's claim in November 2010. The Veteran's claim for an effective date earlier than August 22, 2000, for the grant of service connection for PTSD was denied.

The Veteran appealed the Board's decision to the United States Court of Appeals for Veterans Claims (Court). The Veteran's attorney and VA's General Counsel filed a Joint Motion requesting that the Court vacate that part of the Board's decision that denied an effective date earlier than August 22, 2000. The Joint Motion also requested that the Court remand the case to the Board for re-adjudication in accordance with the directives of the August 2011 Joint Motion.

The Court granted the Joint Motion for remand in August 2011 and returned the case to the Board.

The Veteran's attorney wrote to the Board in November 2011. He noted that the Court had granted the Joint Motion referenced above and that the issue of entitlement to an effective date earlier than August 22, 2000, for the grant of service connection for PTSD was returned to the Board. The attorney presented argument in support of the claim for an earlier effective date. He cited to a change in the Veteran's military records as supportive of an earlier effective date. The attorney also said that the Veteran waived any remaining time to submit additional evidence and/or argument.

The Board notes that the prior decision of November 2010 also remanded the issues of entitlement to an initial rating in excess of 50 percent for service-connected PTSD and entitlement to total disability rating due to individual unemployability

(TDIU rating). Those two issues remain on appeal at the agency of original jurisdiction (AOJ) and are not before the Board for appellate review at this time.

FINDINGS OF FACT

1. The Veteran was denied service connection for a nervous disorder by way of a Board decision dated in March 1983. He did not seek reconsideration of the decision. The decision is final.
2. The Veteran was denied service connection for PTSD by way of a Board decision dated in June 1990. The basis for the denial was that the Veteran did not have a diagnosis of PTSD. He did not appeal the decision and it became final.
3. The Board denied the Veteran's motion for reconsideration of the June 1990 Board decision in August 1996.
4. The Veteran was denied service connection for a psychiatric disorder, to include PTSD, in October 1998 and March 1999, respectively. He did not appeal either decision. He withdrew his claim for consideration of a neuropsychiatric disorder, to include PTSD, in February 2000.
5. The Veteran submitted evidence of a correction of his military records in February 2000.
6. The Veteran submitted a request to reopen his claim for service connection for PTSD that was received on August 22, 2000.
7. The Veteran was granted service connection for PTSD in August 2005. The grant of service connection was unrelated to the correction of his military records. The proper effective date is the date of the reopened claim for service connection for PTSD, August 22, 2000.

CONCLUSION OF LAW

The criteria for entitlement to an effective date earlier than August 22, 2000, for the grant of service connection for PTSD have not been met. 38 U.S.C.A. § 5110 (West 2002); 38 C.F.R. §§ 3.156, 3.400 (2012).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

I. Background

The Veteran's claims folder was rebuilt in 1995. Many of the rating actions and medical records prior to that time are not available. However, there is a 1982 rating decision, 1987 statement of the case, 1982 and 1988 supplemental statements of the case as well as Board decisions from 1983 and 1990 that contain discussions of the evidence of record and provide significant summaries of the evidence at those times. Further, there are a number of contemporaneous medical records from the earlier adjudications, VA and private, in the claims folder that were cited by the Board in its comprehensive decision of June 1990.

In summary, the Veteran is seeking an entitlement to an effective date earlier than August 22, 2000, for the grant of service connection for PTSD. As noted in the Introduction, his claim was previously denied by the Board in November 2010. However, the Veteran appealed to the Court and the prior Board decision was vacated. The case was returned to the Board for consideration of application of the provisions of 38 C.F.R. § 3.156(c).

In order to consider application of that particular regulation, the Board must review the history of the Veteran's claim to determine whether application of the regulation is warranted.

The Veteran served on active duty in the Army from July 1966 to July 1969. He served in Vietnam from September 1968 to June 1969. According to his personnel

records, his principal duty while in Vietnam was senior utility helicopter repairman. His DD 214 reflects that he was awarded the Army Commendation Medal, the Air Medal, the Vietnam Service Medal and the Republic of Vietnam Campaign Medal.

Of record is a VA psychiatric examination report dated in April 1981. The Veteran's history included coming from a broken home, getting into trouble, running away from home, dropping out of school and joining the Army. The Veteran reported getting married and being sent to Vietnam. His wife had their child while he was away. The examiner said the Veteran served in Vietnam as a helicopter crew chief and gunner. The Veteran felt the war was useless. He did not want to get killed and said some of his friends were killed. He said he felt boxed in at his base. He reported one episode in which incoming shells destroyed a bunker, but said he did not know if anyone was killed. [REDACTED]

[REDACTED] He reported that he showed his superiors a letter from his mother and was soon sent home. He said that after arriving home early, he found his wife was pregnant, and his appearance so shocked her that she had a miscarriage.

The examiner noted the Veteran said he had been unable to hold a job for any length of time since service. In 1971, he said he and his wife became involved in astrology and Ouija boards, and he began to hear the devil talking to him. [REDACTED]

[REDACTED] said he had been depressed since 1975. He reported multiple arrests for [REDACTED]. He also reported committing an assault.

The Veteran was said to be on probation and trying to get welfare. He was concerned about finances. He also said he had trouble sleeping and frequently had thoughts of Vietnam. [REDACTED]

[REDACTED]
[REDACTED] The Veteran reported he used to dream a great deal about Vietnam, for the first few years out of the Army, but now his dreams centered around his financial difficulties, his debts, and his knee impairment. He reportedly was fascinated by the Vietnam war, and would chase his children away from the television so he could

watch war pictures. The examiner said that, when interviewed, the Veteran looked up a passage from the Bible he was carrying, and used it to justify his having had his ear pierced a few years earlier. He felt his difficulty was due to his Army experiences, and explained, "they owe me something for what I have been through the last 10 years."

In a discussion section of the report, the examiner said that, in making a diagnosis, the question is "What is the presenting problem?" The examiner said, superficially, it could be the Veteran's personality but depression [REDACTED] could be a part of it. [REDACTED]

[REDACTED] He also said that on Axis II, one diagnosis would be anti-social personality and, at times, this was the principal diagnosis. He said the Veteran had a number of personality traits of being histrionic.

The record shows that the Veteran was denied service connection for a nervous disorder by way of a rating decision dated in January 1982. The rating decision noted that the Veteran had been previously denied service connection for the claimed disability in April 1972, September 1976 and March 1978. The rating decision listed several conditions that had been claimed by the Veteran but not service connected. Included was a diagnosis of sociopathic, anti-social personality (C&D).

Also of record is a supplemental statement of the case (SSOC), dated in February 1982. The SSOC included a continued denial of service connection for a nervous disorder. The SSOC listed several entries from the Veteran's service treatment records (STRs) that reflected review of psychiatric-related complaints. The Veteran was noted to be seen in May 1969 for complaints of feeling depressed for several weeks. The impression was a depressive reaction. A June 1969 entry was said to show an attitude of passive/aggressive personality with complaints of trouble in getting along with people [REDACTED]. A diagnosis of situational reaction was noted.

The Board denied service connection for, *inter alia*, a nervous condition in March 1983. The Board noted the several STR entries as related in the SSOC of February 1982. In addition to the two entries cited, the Board referred to a May 1968 STR entry where the Veteran was evaluated as having an anxiety reaction. The Board reviewed the evidence of record and determined that the only post-service psychiatric illness was that of a personality disorder. Accordingly, service connection could not be granted.

An April 1987 statement of the case (SOC) reflects that the Veteran sought to reopen his claim for service connection for a psychiatric disability in March 1984; the Veteran identified the disability as PTSD. The SOC notes that the claim was denied in July 1984 based on a lack of new and material evidence. The SOC reported that the Veteran submitted an 18-page statement in August 1984. His claim was again denied in September 1984. His notice of disagreement (NOD) was recorded as received in November 1985. The SOC further noted that the Veteran was informed that his NOD was not timely in January 1986. A VA medical center (VAMC) report was received in January 1986. The SOC entry related that the report showed the Veteran was admitted for depression [REDACTED]. The diagnoses listed were [REDACTED] passive-aggressive personality disorder. The Veteran's claim for PTSD was again denied in April 1986 and his "second" NOD received in March 1987.

The SOC noted that the Veteran's claim remained denied. The evidence did not show that his disability was caused by the affects of stress in service. Rather, the Veteran's difficulty was said to be [REDACTED] a personality disorder. The conclusion was that the evidence received since the March 1983 Board decision was not new and material.

An SSOC, dated in June 1988, recorded a number of procedural aspects of the case. The SSOC noted that the Veteran testified in support of his claim at a hearing in March 1988. It was also noted that he had submitted records of evaluation and treatment dated in 1986, 1987 and 1988; however, the records did not include a

diagnosis of PTSD. It was further noted that the Veteran was hospitalized at a VAMC from October to November 1987. He was given a diagnosis of PTSD at that time. It was noted that the Veteran complained of combat nightmares. The SSOC also reports that the Veteran was given an evaluation at a VA Stress Unit with the conclusion being that he did not have PTSD. The claim remained denied in the absence of a diagnosis of PTSD.

The Board denied the Veteran's claim for service connection for PTSD in June 1990. At the outset, the Board noted that the prior decision of March 1983 did not consider the issue of PTSD. Accordingly, the June 1990 adjudication was on a de novo basis.

The Board will incorporate segments of the June 1990 Board decision in its current statement of the background of the case.

The 1990 decision began with a discussion of the Veteran's STRs. The same three entries were cited with one additional entry from January 1969. In May 1968 it was noted that the Veteran complained of weakness, nervousness, nausea, and headache; physical examination was negative; and the impression was anxiety reaction. In the next few days he was treated for diarrhea. A notation dated in January 1969 was to the effect that the Veteran complained of an upset stomach and vomiting; he indicated he had a mental problem, had not been eating regularly, and had several days of diarrhea. He was thereafter treated for possible acute cholecystitis. In May 1969, he requested to see a psychiatrist because he had felt depressed for several weeks. He related that he had very little to do and had only 50 days left "in country." The impression was a chronic depressive reaction.

In June 1969, it was reported that the Veteran was having identification problems, had received Article 15 nonjudicial punishment for refusing a direct order, had trouble getting along with people [REDACTED] and had a passive-aggressive attitude. An impression of a situational reaction was entered. The Veteran was referred for a psychiatric consultation, also in June 1969, which noted that he was having situational problems with his unit, and was aware of his own attitude and of "getting short" (30

days left in country) with the related uncertainties. The diagnosis was situational reaction. The examiner reported that no psychiatric illness was present.

It was noted that the STRs did not make any reference to PTSD, or combat-related difficulties and the Veteran denied any medical history of psychiatric symptoms at the time of his separation physical examination in July 1969. No psychiatric symptoms or illness was identified on the examination.

The decision also cited to a number of items of evidence related to the Veteran's behavior as well as medical evaluations dating back into the 1970's. In that regard, it was noted that the Veteran was brought to a county medical center by police after exhibiting bizarre behavior in August 1975. He had gone to a doctor's office, complaining of knee pain [REDACTED]. The records further showed that, at the medical center, he was initially restrained for violent thrashing about. He gave a history of knee problems. He was noted to be manipulative. The Veteran was reported to be married, with three children and one on the way, and the family economic situation was poor. He was concerned that the VA receive notice of his treatment, and it was commented that it appeared the Veteran was manipulating to have his VA disability benefits raised to meet the needs of his expanding family. The diagnosis was character disorder (inadequate) with hysterical conversion.

Later in August 1975, the Veteran was again brought to the county medical facility by police after he reportedly "flipped out" when his car broke down. He was said to have been shouting, threatening others, and pretending to be unconscious. Hallucinations, delusions and other symptoms were noted. He had persistent complaints about his legs and was in a wheelchair, although he could walk when requested. The diagnosis was undifferentiated schizophrenia, and he was transferred to a VA hospital.

The decision further discussed evidence that showed the Veteran was then hospitalized at a VA facility for one day in August 1975. He related an intricate and sociopathic domestic history. He said that he had severe knee pain which

resulted in a total inability to walk, and he was said to dramatically make his point that he should be service connected for a knee disability. [REDACTED]

[REDACTED] The Veteran was given a sodium amytal interview, and it was noted that he suddenly cleared up and got up, and, after the procedure, began playing Ping-Pong. However, in a couple of hours he again complained of pains [REDACTED]

[REDACTED] The hospital notes described manipulative behavior. The discharge diagnoses included sociopathic personality [REDACTED].

[REDACTED]

It was noted that the claims folder contained a number of 1976 records from Broadlawns Polk County Hospital. The Veteran claimed to be disabled from work because of a knee disorder, but his knees were found to be essentially normal on examination. [REDACTED]

Psychological testing and examinations were provided. According to a July 1976 doctor's note, testing suggested a borderline psychotic state, but the clinical picture made matters unclear; the impression was "undiagnosed psychiatric condition." In December 1976 the Veteran reported increased tensions and noted he had been in jail for assault and battery. [REDACTED]

The Veteran was a patient in Iowa Lutheran Hospital from January to March 1977. He complained of an extreme knee disability which he dated to service; an orthopedic examination was provided and showed no significant knee problem. He also complained of depression and other nervous problems. [REDACTED]

[REDACTED] He reportedly had himself convinced that he was sick, and used his knee pain to cope with life and stress. He was described as a "welfare dependency bird" and

was encouraged to pursue vocational rehabilitation. Final hospital diagnoses included a sociopathic personality [REDACTED].

The evidence shows that the Veteran was again a patient in Iowa Lutheran Hospital in January 1978. He complained of depression, headaches, dizziness, [REDACTED]. He readily discussed his behavioral patterns of escapism via [REDACTED] illness, and the welfare system. It was commented that he knew "the ropes" on "how to beat the system." He reportedly saw himself as a victim of society; he rationalized with many excuses; and it was noted that "the only way he can subsist is in the various welfare systems." The final hospital diagnosis was antisocial personality.

During December 1978, the Veteran was seen in a private hospital [REDACTED]


[REDACTED] He was unemployed and received welfare. He continued to be preoccupied with an alleged knee disorder. The Veteran reported that when he was in service the only combat he saw was from a helicopter as a crew chief. He said he had attained the rank of E4, [REDACTED]

The findings of the April 1981 VA examination were reported. A VA mental health clinic entry from September 1981 noted that the Veteran gave a long history of unemployment [REDACTED]. It was noted that he exhibited no symptoms of a delayed stress syndrome despite his Vietnam experiences.

The prior Board denial of service connection for a nervous condition was cited. It was also noted that the Veteran filed his initial claim for service connection for delayed stress syndrome in March 1984.

A May 1984 letter from a state rehabilitation counselor was reported to show that the Veteran had failed to complete three separate vocational training programs since 1981. He had displayed a variety of mood swings which often turned out to be a manipulative tact which defeated his goals.

The decision also noted the Veteran's multi-page submission that was dated in August 1984. The decision said the submission was 35 pages as opposed to the 18 pages reported in the April 1987 SOC. The Veteran reportedly opened his submission by saying that it "was with profound regret that I shall not be able to relate to you all the 'stressor' situations in which I was involved, "since he had been involved in "classified operations and signed a statement and swore an oath of silence concerning many of those operations." The Veteran was said to describe adjustment difficulties in service related to duty assignments, alleged knee and other medical disorders, problems with superiors and disciplinary incidents, family and financial problems, etc. He also described some Vietnam experiences such as coming under rocket attack, deaths of friends and acquaintances, near-miss helicopter collisions, etc.



The decision also noted that the Veteran was evaluated at a Center for Stress Recovery (Center) in a VA hospital in October 1986. The decision related the following in regard to the evaluation:

[REDACTED]
[REDACTED]
[REDACTED] He complained of nightmares concerning a possible divorce, and also said every few months he had nightmares of Vietnam and also intrusive thoughts. His preservice history included having an alcoholic father, divorce of his parents, inability to get along with his stepfather, being raised by his grandmother for a period of time, and dropping out of school to enlist in the Army. With regard to his service, he related that he had physical problems and some difficulties with authority. He said that in Vietnam he repaired helicopters and also operated as a door gunner. He reported he received the Bronze Star, although it was noted that this was not listed on his service separation document. Concerning traumatic events, it was noted that he gave "somewhat vague accounts of situations where his life was endangered." When asked for details he claimed exhaustion. Alleged traumatic events included several attacks while he and others were protecting their helicopters, close calls including a tracer round burning out 2 feet in front of him when he was flying as door gunner, etc. When he returned from Vietnam, he reportedly found his wife pregnant by another man, but she had a miscarriage.

It was further reported that after service he never held a job for any length of time. He had been married for many years and had four children.

[REDACTED]. Episodes of family violence were described. Recently he had swung a machete at his wife and began choking her: police came and he was arrested: and a court date was pending. He tended to blame others for his problems. He had a number of financial concerns. The family was currently being supported by welfare and workers' compensation. After interview and testing, it was concluded that there was no evidence of post-traumatic stress disorder. The diagnoses were [REDACTED] a passive-aggressive personality disorder.

Center report dated in October 1986 as related in the Board decision of June 1990.

Private treatment records from the Zepf Center, from late 1986 to 1988 were discussed. On initial evaluation it was noted that, with regard to vocational plans, the Veteran was seeking disability for PTSD and an ankle injury. It was commented that he might be using treatment to confirm his sickness or as an excuse. His history, [REDACTED] family violence, was reviewed. He was reported to complain of depression, anxiety, Vietnam flashbacks and other symptoms. The initial impressions were dysthymic disorder, [REDACTED] and rule out PTSD. Additional records show the Veteran received periodic counseling [REDACTED], family violence, legal involvement, and other problems. His treatment from VA sources was noted, and it was periodically reported as the status of his efforts to obtain compensation for PTSD.

The Board decision also cited to what was described as court and probation officer records that indicated the Veteran was arrested in February 1987, after an incident of domestic violence against his teenage daughter. Charges were reduced to disorderly conduct, and in August 1987 he was placed on supervised probation for a year with a condition of psychiatric counseling. According to the August 1987

presentencing report, the Veteran's version of his offense was that he was suffering from PTSD as a result of serving in Vietnam; he had struck his daughter after she was yelling insults at him [REDACTED]; and he claimed the VA hospital was not recognizing his illness and providing benefits. It was said that his record included two prior domestic violence convictions. Probation records showed additional problems with domestic violence. According to a July 1988 letter from the probation officer, the Veteran would successfully complete his probation in August 1988, and he was attempting to get information to support a diagnosis of PTSD.

The Veteran was hospitalized at a VA facility from October 21, 1987, to November 5, 1987. The discharge summary noted the Veteran to have [REDACTED], depression, PTSD and marital conflict. He was said to have had two previous admissions and was evaluated for PTSD. However, he did not meet the criteria by testing or interview in 1986 and was not admitted to the program. He reported increasing conflicts with his wife since the summer, [REDACTED] he began to have more Vietnam nightmares, and he started to have more arguments with his wife and children. He moved in with relatives whom he described as child abusers, [REDACTED] and violent fighters. After a period, he moved back home, but had suicidal and homicidal thoughts, and sought hospitalization.

The summary also reported that the Veteran's history [REDACTED] was reviewed. [REDACTED] During his hospital stay he complained of frequent nightmares involving violent images of war, [REDACTED] The Veteran was able to stabilize his situation with his wife and she agreed that he could stay with her and the children until he could be further evaluated for PTSD. He was to return to the Center for reevaluation. On discharge the listed diagnoses were PTSD, dysthymic disorder, marital conflict, [REDACTED], and a knee disorder.

The Veteran was evaluated at the Center again in January 1988. His recent period of hospitalization was noted. It was also noted that the inpatient physician (for the period of VAMC hospitalization) had referred the Veteran for review and that he was uncertain if a diagnosis of PTSD was present. The report noted that the records from the Zepf Center were also available for review. The report noted depression and other symptoms on examination. It was observed that the Veteran was currently on probation until July 1988 for disorderly conduct and had been permitted to live with his family as long as he got treatment. It was also noted that he was seeking compensation for PTSD. The report reflected that it was pointed out to the Veteran that a prior evaluation had not shown PTSD, which would permit him to participate in the Center's program. The Veteran allegedly related, "I have to get into the program...it will affect the attitude of the court and my family...I have all the symptoms that the other guys tell me that they have."

The Veteran underwent additional evaluation including psychological testing. The tests were listed as the Minnesota Multiphasic Personality Inventory (MMPI), the Symptom Checklist-90, The Trauma Impact/Coping Scale, and the Impact of Events Scale. The report said it was again concluded that he did not have PTSD. The stress program committee recommended the addition of another diagnosis: Malingering. The final diagnoses were [REDACTED] passive-aggressive personality disorder, dysthymic disorder, and malingering.

It was noted that the Veteran appeared at a personal hearing held at the regional office in March 1988 and that he testified in detail concerning his claim and that a transcript of the hearing was of record and had been reviewed.

The June 1990 decision also cited to a VA medical opinion provided in February 1990. The opinion was requested by the Chairman of the Board in a memorandum dated in November 1989. The memorandum provided a quick summary of the evidence. In particular, the Veteran's STR entries were noted. His service in Vietnam was also noted. The two reviews by the Center were discussed as was his period of hospitalization in 1987 with a resultant diagnosis of PTSD. The examiner was requested to provide an opinion of whether a diagnosis of PTSD was supported

by the record and, if not, was there any other acquired psychiatric disorder that could be reasonably traced to the Veteran's military service.

The Board notes that the record contains a medical opinion from January 1990 that was apparently prepared by a physician, Dr. M., at the VAMC in Columbia, South Carolina. However, the Board cited to an opinion dated in February 1990. That opinion was signed by a different physician, Dr. E., identified as Director, Mental Health & Behavioral Sciences Service. A comparison of the two opinions shows them to be identical with the exception of the omission of "He has frequent war recollections and war nightmares", listed as subparagraph 2.b., on the January 1990 report. This was not included in the report of February 1990. It does not appear that there were two separate reports; only the one report but signed by two different individuals in January and February 1990, respectively.

The Board's decision quoted the report, to include the questions presented and answers given. The report indicated that the only psychiatric diagnosis supported by the record was listed as PTSD. No other psychiatric illness was identified that had its onset in service. As to reasoning to support the opinion, Dr. E. said the Veteran had significant and life-threatening stress from combat in Vietnam as a helicopter door gunman. Several specific events were cited to that included being shot at by rocket propelled grenades (RPGs), mortar rounds landing nearby and a tracer shell exploding 2-feet from the Veteran's face. Several specific symptoms were cited to include loss of control, sleep disturbance and a startle reaction to loud noise and avoiding thinking about his combat experiences. The Veteran was said to have a restricted range of affective response. Dr. E. concluded by saying that [REDACTED]

[REDACTED] marital discord, domestic violence, and trouble verbalizing his recollections of combat did not change the diagnosis of PTSD. He said the symptoms were commonly seen accompanying PTSD.

This represented, in essence, the totality of evidence cited by the Board in the decision of June 1990. In the analysis of the claim, the Board noted the basic criteria for establish service connection for a disability. It was also noted that reasonable doubt is to be resolved in favor of the Veteran. The decision further

related the applicable criteria for establishing service connection for PTSD. It was noted that it must be established that the Veteran was subjected to significant stressful events in service (stressors) which later caused him to develop the chronic anxiety disorder known as PTSD. A current medical diagnosis or opinion that a Veteran has PTSD must be considered, but it does not, in and of itself, lead to a grant of service connection. The decision noted that the criteria to be assessed by examiners in making the diagnosis, as outlined in the American Psychiatric Association's Manual, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS III, Revised (DSM III-R), involved not only objective observations, but also subjective symptoms and historical accounts of service experiences, offered by the patient, which may or may not be accurate.

(The Board notes that Diagnostic Code 9411, used to identify and rate disabilities involving PTSD, was added to 38 C.F.R. § 4.132 in 1980. *See* 45 Fed. Reg. 26,326-26,327 (April 18, 1980). In addition, VA adopted the use of DSM-III to conform its regulations to the diagnostic terms used in DSM-III. *See* 53 Fed. Reg. 21-24 (Jan. 4, 1988.))

It was noted that the appellate record included descriptions of adjustment problems since the Veteran's early childhood. Emotional difficulties were noted in service even prior to the Veteran's Vietnam service. The decision further identified the Veteran's primary status as a helicopter repairman, and his other reported duties as a door gunner. It was said that the contemporaneous records from service time described disciplinary problems, [REDACTED], difficulty getting along with others, and other behavioral and adjustment problems; but the records did not describe symptoms resulting from combat or similar stressful experiences. It was noted that later records contained detailed accounts of family and financial problems coinciding with the Veteran's Vietnam tour.

It was further noted that post-service records documented [REDACTED], manipulative behavior, undue focusing on financial concerns and unsubstantiated disabilities, chronic reliance on welfare and other benefits systems, violence towards family members, other aberrant acts, and bizarre historical accounts offered by the Veteran. For years, on those occasions when the Veteran mentioned his

service experiences to health care providers, he did not relate typical symptoms of PTSD and did not allege combat or similar stressful events. However, the decision noted, in the 1980's, often while pursuing compensation claims or in the course of court-ordered treatment for legal infractions, the Veteran began to recite the well publicized list of PTSD symptoms and began to allege that he had life-threatening experiences in Vietnam which he believed were the source of his adjustment problems. The decision stated that the presentations appeared unspontaneous, improperly motivated, in conflict with findings and history contained in extensive earlier records, and were said to be generally unreliable.

The decision cited to the October 1986 report from the Center where no PTSD was found. The VA discharge summary from November 1987 did list PTSD as a diagnosis, although subsequent medical records suggested that the attending doctor during that admission was unsure of such diagnosis and recommended further evaluation. The Veteran was re-evaluated by the Center in 1988. Again, no PTSD was found. The Veteran was diagnosed with [REDACTED], a personality disorder, dysthymic disorder and malingering.

The Board cited the February 1990 VA opinion and noted that it was based on a review of the records and stated that the Veteran did have PTSD. The Board went on to say that the opinion appeared premised on historical accounts and symptoms recently offered by the Veteran that were found to be not credible. The Board weighed the medical evidence of record and determined that the opinions finding no PTSD, made by clinicians in the field that had personally dealt with the Veteran and had a more intimate knowledge of his background and credence, were more probative.

The Board's final conclusion was as follows:

The Board appreciates that the veteran may well have unpleasant memories of some of his wartime experiences, as do many other veterans who served their country in Vietnam. However, the great weight of the reliable and credible evidence shows the veteran did not

experience service stressors of a nature which might lead to the development of PTSD: there is no cause-and-effect relationship between his service experiences and his psychiatric problems, claimed as PTSD and there is no supportable diagnosis of PTSD, acceptable for compensation purposes. We find no reasonable doubt is presented in this case, and we must deny service connection for PTSD.

Board decision dated June 1990 (p. 15).

There was a dissent to the Board's decision. That Board member concluded that the evidence of record did show the Veteran with service in Vietnam and that he was continually in danger of being wounded or killed. The Board member noted that the Veteran had expressed several incidents that occurred that would, in the Board member's opinion, qualify as adequate stressors for the development of PTSD. The Board member felt that the February 1990 VA opinion was compelling evidence in support of the claim. The Board member did acknowledge that the opinion was made based on a review of the records. The dissenting member felt that a reasonable doubt had been raised that should be resolved in favor of the Veteran.

The Board notes that the 1986 and 1988 records from the Center, the VA discharge summary of November 1987 as well as the private records from the Zepf Center (also noted as records from Maumee Valley Counseling) are included in the claims folder. In addition, STRs are associated with the claims folder, although identified as received in September 1998. In any event, the STRs include the several entries cited by the Board in the June 1990 decision.

The Veteran's representative submitted a motion for reconsideration of the Board's decision in July 1993. It appears action on the motion was delayed due to the Veteran's claims folder being routed for processing of an unrelated education claim. The motion provided a number of arguments as to why the Board's decision should be reconsidered. It was noted that the Veteran testified about his serving as a crew chief and door gunner in Vietnam. It was argued that the Veteran engaged in

combat and that his stressors included being fired upon while on helicopter missions. The motion cited to the favorable medical opinion of February 1990 as well as the diagnosis of PTSD provided in the VA discharge summary of November 1987.

The motion also cited to the applicable VA regulation in the Veterans Benefits Administration (VBA) Adjudication Procedure Manual, M21-1, for evaluating a claim for service connection PTSD. The regulation, cited as paragraph 50.45, noted that granting service connection was the sole responsibility of the rating board at the local level. It was further noted that it was important the examining psychiatrist provide a clear diagnosis that showed a detailed history of the stressful events which were thought to have caused the condition and a full description of past and present symptoms. Service connection for PTSD was not to be established on the basis of a diagnosis of PTSD unsupported by the above history and description, or where the examination and supporting material failed to indicate a link between current symptoms and an in-service stressful event(s). Paragraph 50.45(c) noted the types of objective evidence of stressors that was acceptable. In this regard, certain medal or commendations were to be accepted as evidence of combat, as well as certain particular duty assignments.

Paragraph 50.45d addressed the issue of reasonably supportive evidence of stressors in service. It was not required that PTSD have its onset during combat. Also, a stressor did not have to be limited to just one single life-threatening episode. A group of experiences were noted that possibly affecting an individual and leading to a diagnosis of PTSD.

In addition, the motion noted that VA had promulgated a regulation to codify the requirements for establishing service connection for PTSD at 38 C.F.R. § 3.304(f). VA did publish a final rule that became codified at 38 C.F.R. § 3.304(f). *See* 58 Fed. Reg. 29,109-29,110 (May 19, 1993).

Evidence was submitted with the motion to include a copy of a General Order to show that the Veteran, along with eight other individuals from his company, was awarded a Bronze Star Medal for meritorious service in May 1969. Two STR

entries were also submitted. One, dated in November 1968, noted that the Veteran was medically qualified to perform duty as an aerial gunner. The other, dated in February 1969, noted the Veteran's restriction on flight duty since January 22, 1969, was lifted. The entry was acknowledged by the Veteran and in his position as a crew chief. The final argument was that the documents supported the Veteran's contentions of being in combat in Vietnam and supported service connection for his claimed PTSD.

The Veteran's representative submitted additional argument in support of the motion for reconsideration in June 1996. A DD Form 215, Correction to DD Form 214, Certificate of Release or Discharge From Active Duty, was dated stamped as received at the RO in April 1996. The DD 215 noted that the Bronze Star Medal, Good Conduct Medal, Republic of Vietnam Gallantry Cross with Palm Unit Citation Badge should be added to the Veteran's list of military awards and decorations. The DD 215 was dated in October 1993.

The Board denied the motion for reconsideration in August 1996. The denial noted that the Board decision at issue contained findings of fact that had a plausible basis in the record; were consistent with the available evidence and applicable statutory and regulatory provisions; and contained clearly stated reasons and bases for the decision. The denial also noted that the argument regarding the Veteran's involvement in combat, and the application of 38 U.S.C.A. § 1154(b), was unavailing as the determination was that there was not a diagnosis of PTSD. The denial noted the argument regarding the signature of the registered nurse on the Center report from January 1988. It was further noted that the Court considered an opinion from a nurse to constitute competent medical evidence and cited to *Goss v. Brown*, 9 Vet. App. 109, 114-115 (1996). It was also stated that the opinion was the product of consultation with other medical professionals. In summary, it was noted that a reasonable mind could have concluded, based on the record at the time of the Board's decision, that the Veteran did not PTSD.

Associated with the claims folder are VA treatment records for the period from January 1995 to August 1997. The records were developed in association with unrelated claims. [REDACTED]

[REDACTED]. At times the Veteran denied having any problems with flashbacks, nightmares or other symptoms associated with his Vietnam service. Other times he reported having some intrusive thoughts about his combat experiences.

The Veteran sought to reopen his claim for service connection for a psychiatric disorder in September 1998. He submitted a second DD 215, dated in February 1998. The form noted that the Vietnam Service Medal and Expert (Rifle M-16) awards were to be removed. The following awards were said to be added: Bronze Star Medal, Good Conduct Medal, Vietnam Service Medal with four bronze service stars, Expert Marksmanship Qualification Badge with Pistol and Automatic Rifle Bars, Sharpshooter Qualification Badge with Rifle Bar, and Republic of Vietnam Gallantry Cross with Palm Unit Citation Badge, Republic of Vietnam Civil Actions Honor Medal, First Class Unit Citation.

In a separate statement, the Veteran related that he was treated for anxiety in service (prior to going to Vietnam). He referenced a number of physical complaints. He said that his anxiety and his physical problems kept him from working. He said that PTSD was suggested as a possible explanation for his problems in 1984. [REDACTED]

[REDACTED]. The Veteran was seeking entitlement to nonservice-connected pension benefits in addition to service connection compensation.

The Veteran's claim for service connection for a neuropsychiatric condition was denied in October 1998. The determination was that no new and material evidence was submitted. Notice of the rating action was provided in October 1998.

Although the appeal period for the recent denial had not yet expired, the Veteran submitted a VA Form 21-526, Veteran's Application for Compensation or Pension, in November 1998. He again listed mental and emotional problems.

A letter from S. Killen, M.D., dated in March 1999, was received that same month. Dr. Killen noted that the Veteran had been under her care since her initial evaluation in September 1994. She said his history at that time included a diagnosis

of PTSD and that the Veteran was followed at a VA clinic for his illness. The remainder of the letter addressed various physical conditions.

The Veteran's claim for service connection for service connection for a neuropsychiatric condition was denied in March 1999. The determination was that no new and material evidence had been received. Notice of the rating action was provided that same month.

The Veteran was afforded a VA mental disorders examination in April 1999. The examiner noted that the claims folder was not available for review. The Veteran had brought a copy of the letter from Dr. Killen to the examination. The examiner reported that the Veteran said he had been "granted" service connection for PTSD in the past but that it was taken away in 1990. The examiner said the Veteran also denied that service connection was taken away. The Veteran reported having been in a VA hospital where he was diagnosed with PTSD. The examiner said the Veteran related having symptoms of nightmares of combat experiences in Vietnam and [REDACTED]

The examiner said the Veteran did not want to give any indications of a stressor and that he asked the examiner if this would count because everybody examined him for a mental disorder and not initial PTSD. The Veteran was said to not want to disclose anything about his stressors. It was reported that the Veteran said he had no mental problems, only emotional and physical problems. The Veteran admitted that he had been diagnosed over the years with bipolar disorder, malingering personality disorder. He said the Center gave him a diagnosis of PTSD in 1986 but then he had a problem with a nurse on the ward. The nurse then convinced everyone that he did not have PTSD [REDACTED]

The Veteran said his PTSD was removed by the rating board because they did not have all of the information. He noted that since then, he had "won" several medals for combat. He said that four of them were Bronze Stars and the rest the Gallantry

Cross and Air Medal. The Veteran related that, since his service in Vietnam as a crew chief and door gunner, he had not been able to re-enter life. He said he was treated for anxiety in service. He reported that he had been treated by a Dr. G. and a Dr. M. at VA and most recently a Dr. S. for the past 8-10 months.

The Veteran reported a history of hospitalizations throughout the country and that he had made several suicide attempts. He reported he was charged with domestic abuse in 1991 but this was because of an inability to get along with his wife. He said that his wife had put up with his Vietnam experiences for over 29 years. He was now living with his ex-wife since their divorce.

The examiner said that the Veteran had a pattern since service with some element of anxiety evolving into a significant pattern of depression over the years. He said the Veteran had many features of PTSD and that other examiners have diagnosed him with PTSD. The examiner noted that the Veteran declined to provide a particular stressor. Accordingly, he could not make a diagnosis of PTSD. He said it was certainly clear that the Veteran had a pattern of affective disorder that apparently started with anxiety in the service and gradually evolve into a pattern of depression. The examiner provided Axis I diagnoses of dysthymia, mild [REDACTED]

[REDACTED] He said there was no diagnosis for Axis II. Finally, the examiner recommended the Veteran have additional psychological testing to further evaluate his claim for PTSD.

The Veteran was afforded a VA psychological examination in August 1999. The examiner noted that he had reviewed the claims folder and administered the MMPI, Mississippi Scale, Impact of Events Scale and interviewed the Veteran for his report. In regard to his military service, the Veteran reported that he was shot at and witnessed helicopter crash landings and explosions. He said that, at one time, he had nightmares about both crashing and burning but said that he had not had any combat nightmares since 1993. The Veteran attributed the change to his medication. The Veteran did say that he had had a problem in controlling his anger over the years.

The Veteran told the examiner that he thought about Vietnam every day but that he missed the experience and had a lot of good times when he was there. The Veteran related to having social problems such as not wanting to be around people or being in confined spaces. [REDACTED]

[REDACTED] The Veteran also said that he was admitted to psychiatric facilities about once a year between 1974 to 1990. He said the admissions were for various reasons. He reported that he saw a Dr. S. and a social worker through VA for his therapy. The examiner noted that clinical records from other facilities were not available but other reports indicated that the Veteran had been diagnosed with bipolar condition, malingering, PTSD and dysthymia at various times.

The examiner reported on the psychological tests he administered. He said that the Veteran's scores on the MMPI appeared to be highly exaggerated and caused him to question the validity of the overall profile. He said it appeared the Veteran attempted to look worse off than what he actually was and, as a consequence, had scores on some of the scales that were higher than what would be expected in even seriously disturbed individuals. The examiner said that research showed that, individuals with extreme elevations on the MMPI were usually delusional and may be suffering from auditory hallucinations, poor judgment and were likely to have a short attention span and be disoriented for place. The examiner said the Veteran did not exhibit those symptoms. He stated that the Veteran did not exhibit any psychotic symptoms during the interview.

The examiner said that, since the MMPI was invalid it called into question the validity of both the Mississippi Scale and the Impact of Events Scale. The examiner said that neither of the two latter tests had validity indicators built into them but the results would appear to show that the Veteran suffers both from intrusions and avoidance behavior. The examiner said the results suggest that the Veteran had "waves" and strong feelings about dramatic events with pictures of them popping into his mind and other various reminders making him think of the events. In regard to avoidance, he said the Veteran attempted to stay away from the reminders and doing what he could to not think of the events. The examiner said

the Veteran's score on the Mississippi Scale was within the range expected of PTSD patients but it must be interpreted in light of his approach to the MMPI. The examiner said that the results of the Mississippi Scale suggested that the Veteran felt guilty about things he did in the military, had problems sleeping and did not remember things as well as he used to. He said it also pointed to problems controlling his temper and a lack of comfort around other people.

The examiner provided a lengthy conclusion. He said the Veteran had filed a claim alleging that he suffered from PTSD as a result of his combat experiences in Vietnam. He noted the Veteran's years in service and that the Veteran served as a crew chief and door gunner on a helicopter. He said that the events reported by the Veteran were of the magnitude that could be considered traumatic. The examiner added that records indicated that his past recollections about the events had lacked specificity and that there was not a clear cut stressor during previous examinations. He said the Veteran insisted that he had recurrent and intrusive recollections of military situations. He said that, if the Veteran's report was taken at face value, avoidance and numbing were evident because of his efforts to avoid activities and places that aroused recollections of the events. The examiner related the behavior was exhibited by the Veteran's detachment from others, a sense of foreshortened future and his increased arousal by problems falling asleep, irritability and anger outbursts.

The examiner said the Veteran's self-report was compromised by the results of the psychological assessment. He said it was clear that the Veteran approached the testing situation with a test taking attitude that suggested he was exaggerating his psychological problems. He said although it appeared the Veteran was angry and dysphoric, it was not clear that the symptoms were the result of his military experiences. The examiner said records indicated that the Veteran had been previously diagnosed, on more than one occasions, as having characterological problems.

He said the Veteran's pattern of his reported "inexperiencing" [in experiencing] is not connected in a systemic way with his reports of traumatic military events. The examiner said that, in recalling his military experiences, the Veteran noted that he actually had a lot of

good times in Vietnam and missed the military experience. He said the Veteran viewed himself as unemployable because of his physical problems and psychological difficulties and was not interested in vocational rehabilitation at this juncture.

The examiner provided an Axis I diagnosis of dysthymic disorder. He also gave a diagnosis of personality, NOS on Axis II.

The examiner from April 1999 provided an addendum in September 1999. The examiner noted that psychological testing had been done as recommended and that the testing was not supportive of PTSD. The examiner noted that his clinical impression had been that the Veteran had a history of dysthymia that was related to an early manifestation of anxiety that started in service. Over the years the Veteran had had anxiety as part and parcel of his dysthymia for the disability from service.

[REDACTED] The examiner cited to the psychologist that did the testing and that the psychologist felt that the results cast a doubt on the Veteran's symptoms. The examiner noted that the validity of the testing was very much questionable; therefore all of the Veteran's findings were equally questionable. He said that he could not confirm the presence of "PTS" or PTSD. He noted the Veteran's several military awards, to include the Bronze Star and what he said were confirmed stressors of being a door gunner and crew chief as well as several specific events experienced by the Veteran. He said that the stressors and some of the symptoms of PTSD in his earlier report still left the door open to benefit of the doubt on PTSD.

The examiner stated that the Veteran strongly believed he had PTSD; however, based on his earlier report and his originally being skeptic and uncertain of the diagnosis because of the validity of the Veteran's experiences, the results of the psychological testing resulted in more skepticism and doubt as to the Veteran's symptomatology. He said that he felt the diagnosis was consistent with Alzheimer's and dysthymia. He said this was consistent with his examination and the longitudinal history and that PTSD was not confirmed.

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Associated with the claims folder is a Report of Contact with the Veteran dated January 26, 2000. The two prior rating decisions of October 1998 and March 1999 were discussed. The Veteran said he had filed for PTSD. The Veteran reported receiving VA outpatient treatment for his PTSD with Dr. S. and asked that the records be obtained.

The Veteran submitted a statement, with several items, that was received at the RO on February 9, 2000. In his statement the Veteran said that he was withdrawing his claim for service connection for a right ankle disability. He also asked that the RO cease all action on any service connection claim for benefits in regard to bilateral knees, right ankle and nervous disorder (PTSD).

Included in the items submitted by the Veteran was a VA outpatient entry from the Toledo, Ohio, VA mental health clinic. The note was dated in July 1999 and was signed by a Dr. S. It was noted that the Veteran was to return for another VA examination for clarification of his mental health diagnosis. Dr. S. said the Veteran had a diagnosis of PTSD since 1986 based on his Vietnam combat experiences. He listed several symptoms and said that the Veteran had received outpatient care.

The Veteran also submitted a copy of a letter in regard to an Agent Orange claim that he had made. The letter was dated in October 1989. There was no reference to PTSD.

In addition, the Veteran submitted a copy of a January 1997 decision by the U.S. Army Board for the Correction of Military Records (ABCMR). The Veteran's actual application to the ABCMR was listed as an exhibit but not proved with the report. The report noted that the Veteran sought a correction to his records to reflect the authority for his award of the Army Commendation Medal (ARCOM) and Air Medal. It was reported that the Army Reserve Personnel Center (ARPERSCEN) would not approve issuance of the two medals as the Veteran's records did not include copies of the supporting orders even though both medals were noted on his DD 214. The report also noted that supporting documentation for the ARCOM was found, dated in March 1969, and it showed the Veteran was

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awarded the ARCOM for meritorious service for the period from October 1, 1968, to February 28, 1969.

The report noted that no supporting order could be found in regard to the Air Medal, although the award was recorded on the DD 214 and the Veteran's DA Form 20. However, the records did not include citation to any specific authority. The report cited to the STR entry that cleared the Veteran to perform aerial gunner duty from November 1968 to January 1969. The report cited to an Army regulation that said the Air Medal was awarded in time of war for heroism, for meritorious achievement and for meritorious service (characterized as sustained operations). The report also cited to Army Regulation 672-5-1 as to guidelines for issuance of the Air Medal. In that regard the report said that passenger personnel who did not participate in an air assault were not eligible for the award based on sustained operations. However, the regulation did define the terms and guidelines for the award based upon the number and types of missions or hours. It was noted that 25 Category I missions (air assault and equally dangerous missions) was the standard established for which sustained operations were deemed worthy of recognition. The report noted that the guidelines were only considered as a departure point and that nothing created an entitlement to medal.

The conclusions of the report were that the Veteran was assigned to an aviation unit and was assigned helicopter aerial gunnery and crew chief duties. Also, based on previous cases of a similar nature, the ABCMR had determined that the Veteran met the requirement for sustained operations, that he would easily have qualified for an award of an Air Medal in 2 months of service as a door gunner and crew chief, and that it would be an injustice to deny issuances of the award due to a lack of orders. Thus, the report concluded that the Veteran's records should be corrected to include issuance of the ARCOM, Air Medal, and Vietnam Civil Actions Honor Medal First Class Unit Citation. (The Veteran submitted the DD 215 that reflected the change in his awards in September 1998. The DD 215, dated in February 1998, did not include the Air Medal for whatever reason).

The Veteran submitted a VA Form 21-526 that was received at the RO on August 22, 2000. In regard to the conditions claimed, the Veteran referred to attached

material. The attached material included a multi-page handwritten stressor statement from the Veteran. He listed several stressor events and provided a date with the particular events. He included a rocket attack and perimeter probe at his base in October 1968. He also related a period of 8 hours of flying and being subjected to enemy fire as a door gunner. He added that he fly in this capacity for 6 months and 390 hours and had a tracer round come up at night and extinguish very near his head level. He was in aircraft that made emergency landings where there was enemy activity. He witnessed an aircraft crash and was involved in retrieving bodies. His aircraft left on the scene to continue with the recovery and he was very concerned about the enemy in the area. He related a second incident where his aircraft was forced to make an emergency landing. He checked the aircraft over and said it was "ok" to fly. He later found that several wires were near the breaking point on the return to base. The Veteran also provided information about a time when his aircraft was diverted to recover wounded personnel and took mortar fire.

He related another incident of almost having a midair collision. The Veteran also recounted a stressor where he was working on an aircraft at the base when it received incoming rockets. He later saw crater impacts from the attack. The Veteran listed several other specific events that involved aerial flight as well as attacks at his base.

The Veteran submitted a VA Form 21-4138 to the RO in October 2000. At that time he clarified that certain medical conditions were being claimed for the purpose of qualifying for nonservice-connected disability pension. He stated that the only disability compensation issue was his claim for service connection for PTSD.

The RO wrote to the Veteran in regard to his PTSD claim in October 2001. He was informed that the claim was previously denied and that new and material evidence was required to reopen his claim. The rating decision of March 1999 was cited as the last prior denial.

VA treatment records for the period from November 1998 to October 2001 were obtained. The records included numerous entries of treatment for the Veteran in the mental health clinic. Most of the entries were made by a social worker and included

diagnoses of bipolar affective disorder. However, there were a number of entries by Dr. S. who diagnosed the Veteran with PTSD.

The Veteran's claim for service connection for PTSD was denied in December 2001. The determination was that there was no new and material evidence was received to reopen the claim.

Additional VA records for the period from February 1999 to October 2001 were received. They reflected the ongoing outpatient therapy for the Veteran.

The Veteran submitted additional evidence in support of his claim in April 2002. He included a duplicate copy of the ABCMR report of January 1997. However, the Veteran also included copies of forms that were sent to the ARPERSCEN in order for him to be issued claimed military medals. In particular, the first form, dated in January 1993, listed the Veteran as entitled to a Good Conduct Medal, National Defense Service Medal, Vietnam Service Medal with three bronze service stars, Republic of Vietnam Campaign Ribbon w/Device (1960). He was also listed as entitled to Expert Badge w/Automatic Rifle & Pistol bars and Sharpshooter Badge w/Rifle bar.

A second form, dated in October 1993, included the Bronze Star Medal (no "V" device was authorized). The form was annotated that a DD 215 was issued to reflect the addition of the medal. The form also noted that, without a copy of the General Orders or the general order number, date of the order and headquarters that cut the order, the order that authorized the Veteran his ARCOM and Air Medal could not be located. The Veteran was informed that, if he felt this was an error or injustice, he was advised to seek a correction of his records.

A third, and final form, from the ARPERSCEN, dated in February 1998, listed the Veteran's awards as the Air Medal, ARCOM, and Vietnam Service medal with four bronze service stars. The Veteran submitted a DD 215, dated in October 1993 to reflect the first change in his awards. He submitted a second DD 215, dated in February 1998, in September 1998. The latter DD 215 reflected the January 1997 action by the ABCMR.

The Veteran's claim was again denied by way of a rating decision dated in September 2002.

The Veteran's NOD with the September 2002 rating decision was received in November 2002. The Veteran related that his service records should show the stressor he served under while in Vietnam. [sic]. The Veteran perfected his appeal in March 2003.

The Board remanded the case in January 2004. The Veteran had requested a Board hearing with his substantive appeal and the case was remanded to afford him the opportunity for the hearing.

The Veteran testified at a video conference hearing in July 2004. The Veteran said he first "filed" for PTSD in 1984 or 1985. He said VA was accepting clients for PTSD at that time. He was asked if he could remember why VA originally denied his claim. The Veteran said he did not have his act together. He had been on classified missions and did not have memories. The Veteran cited to a copy of a photograph he had submitted that showed an Army jacket with a unit patch that he said was given to him by special operations forces after working with them. The Veteran had difficulty in recalling his specific military awards and decorations but felt they were given to him in recognition of his combat service. The Veteran went on to describe several stressors during his time in Vietnam. These included his base being subject to rocket and mortar attack, the time his aircraft received incoming mortar fire while recovering wounded personnel and being shot at while flying. He testified as to serving as a crew chief for his aircraft and as a door gunner.

The Veteran described having problems after service [REDACTED] He related that he was arrested several times. He was asked how many times he had been diagnosed with PTSD since 1969. The Veteran reported being diagnosed in 1986 at the Center. The Veteran said the diagnosis was removed because of a problem with some of the personnel at the Center. He said he was next diagnosed with PTSD in 1991. He said it was Dr. S. He reported his current treatment as all

outpatient through VA. The July 1999 from Dr. S. was discussed. The Veteran said Dr. S. had been treating him for 4-5 years.

The Board issued a decision in January 2005. The Board found that new and material evidence had been received and reopened the Veteran's claim for service connection for PTSD. The Board cited to the July 1999 VA outpatient entry where Dr. S. reported that the Veteran had PTSD related to combat experiences in Vietnam as evidence to reopen the claim. The Board remanded the case for an examination.

The Veteran was afforded a VA examination in April 2005. The examiner noted that she had reviewed the claims folder as part of her examination. She noted that the Veteran was followed by VA on an outpatient basis for physical complaints as well as mental health. The examiner said the Veteran was last hospitalized in July 1991 with a diagnosis of bipolar disorder and PTSD. She noted that, prior to that time; the Veteran had had a number of hospitalizations. She said that the Veteran had continuous symptoms of PTSD characterized as avoidance, social isolation, flashbacks and intrusive memories. The Veteran's ex-wife confirmed the information.

The examiner noted that the Veteran was quite distressed that he had not been able to establish his claim in the past. She noted that the Veteran brought in a large photograph album of pictures of himself and his comrades and equipment from his service in Vietnam. The examiner reported that the Veteran had not had any arrests or spent any time in jail. She said the Veteran's wife had called the police about a domestic assault in 1996 but dropped the charges.

In her assessment, the examiner said that she believed the Veteran meet the DSM-IV stressor criteria. She felt that one of his difficulties in previous reviews was the Veteran's difficulty in communicating with examiners what actually happened to him. She said he had difficulty in focusing on the bigger picture and would get bogged down in the details. She said she was convinced that the Veteran experienced events that were outside the normal range of human experience. He founding witnessing those events traumatic and they had affected the quality of his

life since he left the service. He also said the Veteran had recurrent and intrusive distressing recollections of the events, images, thoughts, perceptions and flashbacks. She provided several examples of symptoms experienced by the Veteran, although she did not relate any of the symptoms to specific events.

The examiner noted that she had administered the Mississippi Scale for Combat-Related PTSD and the Veteran had a score of 119 and this was above the normal cut off of 107. She provided Axis I diagnoses of chronic PTSD, [REDACTED]

[REDACTED] She said there was no Axis II diagnosis. She stated that the Board remand asked her to identify all psychiatric disorders present. The examiner said there was only a diagnosis of PTSD. She added that the Veteran's status had only mildly improved since his last examination in 1991.

The RO granted service connection for PTSD by way of a rating decision dated in August 2005. The original effective date was established as of December 11, 2001. The Veteran submitted his NOD with the effective date in February 2006. He stated that he was originally diagnosed with PTSD in 1985 by Dr. Killen at the Medical College of Ohio and then at the Center in 1986. He repeated his assertion that, due to a conflict at the Center, his diagnosis was reversed.

A Decision Review Officer (DRO) issued a decision that amended the effective date for service connection to be August 22, 2000. In an August 2006 SOC, the RO determined that, since the November 2002 NOD was timely with the December 2001 rating decision, it was that rating decision that had been appealed and ultimately granted. Accordingly, the Veteran was assigned an effective date for service connection of August 22, 2000, the date of claim associated with the December 2001 rating decision.

The Veteran perfected his appeal for an earlier effective date in September 2006.

The Board denied the Veteran's claim in November 2010. The Board noted the prior final denials of the Veteran's claim for service connection for PTSD to include the June 1990 Board decision and the March 1999 rating decision. It was also noted

that the Veteran had withdrawn his claim for service connection for PTSD in February 2000 and had not submitted a new claim until August 22, 2000. Thus, no earlier effective date was possible.

As noted in the Introduction, the Veteran appealed the Board's decision to the Court. The Joint Motion asked that the Court vacate the 2010 Board decision so that the Board could consider whether the regulation regarding later added service records, 38 C.F.R. § 3.156(c), was applicable in this case. Also, as noted in the Introduction, the Joint Motion was granted by the Court and the case remanded with instructions for the Board to take actions consistent with the Joint Motion.

II. Analysis

In general, the effective date of an award of disability compensation, in conjunction with a grant of entitlement to service connection on a direct basis, shall be the day following separation from active service or the date entitlement arose if the claim is received within one year of separation from service; otherwise, the effective date shall be the date of receipt of the claim, or the date entitlement arose, whichever is later. 38 U.S.C.A. § 5110 (West 2002); 38 C.F.R. § 3.400(b)(2)(i) (2012).

The Veteran was denied service connection for a nervous disorder by way of a Board decision dated in March 1983. No appeal to the Court was available at that time. The Veteran did not seek reconsideration of the decision.

The evidence of record establishes that the Veteran was first denied service connection for PTSD by way of a Board decision dated in June 1990. He did not appeal that decision and it became final. *See* 38 U.S.C. § 4004(b) (1988); 38 C.F.R. § 19.104 (1989). Reconsideration of the decision was denied in August 1996.

The Veteran sought to reopen his claim for service connection for a psychiatric disorder, to include PTSD, in September 1998. This claim was denied by the RO in October 1998 and again in March 1999. Notice of the latter rating action was provided that same month. The Veteran failed to appeal this decision. He also withdrew his claim for service connection for a psychiatric condition, to include,

PTSD, in February 2000. Thus, the March 1999 rating decision was the last decision to deny the benefit on any basis and became final. *See* 38 U.S.C.A. § 7105(c) (West 1991); 38 C.F.R. §§ 3.104, 20.302, 20.1103 (1998).

In this case, the Veteran was denied service connection for PTSD by way of a final Board decision in June 1990 as well as a final rating decision in March 1999. The evidence of this is unequivocal. Moreover, the Veteran, through his attorney representative has conceded the procedural determinations of finality in the Joint Motion filed with the Court. *See* Joint Motion, pp. 3-4.

The effective date for a reopened claim, after a final disallowance, shall be the date of receipt of the new claim or date entitlement arose, whichever is later. 38 C.F.R. § 3.400(q)(2), (r) (2012). *See Nelson v. Principi*, 18 Vet. App. 407, 409 (2004); *Leonard v. Principi*, 17 Vet. App. 447, 451 (2004); *aff'd*, 405 F.3d 1333, 1337 (Fed. Cir. (2005)).

The Veteran sought to reopen his claim for service connection for PTSD with his submission that was received on August 22, 2000. Based on the determinations of the finality of the prior Board and rating decisions, the earliest effective date that can be established, absent application of another provision of law or regulation, can be no earlier than the date of the reopened claim.

As noted in the Introduction, the Veteran has submitted a motion to challenge the Board's decision of June 1990 on the basis of CUE. The Board has issued a separate decision in that regard that has denied the Veteran's motion. Thus, the last basis to possibly establish an earlier effective date is through consideration of whether the ABCMR action of January 1997 represented a basis for a change in effective date either through 38 C.F.R. § 3.156(c) or 38 C.F.R. § 3.400(g).

At the time the Veteran reopened his claim in August 2000, the applicable regulation for an effective date established through the receipt of later received service department records was found at 38 C.F.R. § 3.400(q)(2) (2000). The regulation provided the effective date was to agree with evaluation (as the service department records were considered lost or mislaid) or date of receipt of claim on

which prior evaluation was made, whichever is later, subject to rules on original claims filed within 1 year after separation from service.

In addition, the regulation relating to later received evidence in the form of a supplemental report from a service department as new and material evidence was found at 38 C.F.R. § 3.156(c) (2000). The regulation provided as follows:

Where the new and material evidence consists of a supplemental report from the service department, received before or after the decision has become final, the former decision will be reconsidered by the adjudicating agency of original jurisdiction. This comprehends official service department records which presumably have been misplaced and have now been located and forwarded to the Department of Veterans Affairs. Also included are corrections by the service department of former errors of commission or omission in the preparation of the prior report or reports and identified as such . . .

38 C.F.R. § 3.156(c). The remaining portion of the above cited regulation dealt with the possible retroactive evaluation to be assigned.

The regulations regarding the rules pertaining to the reconsideration of decisions on claims based on newly discovered service records received after the initial decision in a claim were amended in September 2006. *See* 52, 455-52,457 (Sept. 6, 2006) (Effective as of October 6, 2006). From October 6, 2006, 38 C.F.R. § 3.156(c)(1) provides that, notwithstanding any other section of 38 C.F.R. Part 3, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding 38 C.F.R. § 3.156(a) (concerning the requirement to reopen a previously finally denied claim with new and material evidence). This

includes (i) service records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the Veteran by name, as long as the other requirements of 38 C.F.R. § 3.156(c) are met; (ii) additional service records forwarded by the Department of Defense or the service department any time after VA's original requires for service records; and (iii) declassified records that could not have been obtained when the records were classified when VA decided the claim.

However, 38 C.F.R. § 3.156(c)(2) provides that such records do not include records that VA could not have obtained when it decided the claim because the records did not exist when VA decided the claim, or because the claimant failed to provide sufficient information for VA to identify and obtain the records from the respective service department, the Joint Services Records and Research Center (JSRRC), or from any other official source.

Finally, 38 C.F.R. § 3.156(c)(3) states that "[a]n award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later, or such other date as may be authorized by the previously decided claim." The prior effective date provision of 38 C.F.R. § 3.400(q)(2), as cited above, was incorporated into this new paragraph. *See* 70 Fed. Reg. 35,389 (June 20, 2005).

The Veteran contends that the ABCMR report of January 1997 is new and material evidence and constitutes a supplemental service department record that corroborates his claimed stressors of being in combat in service. Therefore, an earlier effective date is warranted under application of 38 C.F.R. § 3.156(c).

A thorough review of the ABCMR report of January 1997 does not show the Veteran to "receive" any new award of the Air Medal for VA purposes. Rather, as the Veteran's own submission of forms from the ARPERSCEN show, the authority for his receipt of the ARCOM and the Air Medal could not be located in available records. This was based on the response given to the Veteran in October 1993. He was urged to seek a correction of his record if he felt such action was in order.

The Veteran did petition the ABCMR. The report states that the Veteran was seeking proof of the authority for his award of the ARCOM and Air Medal. The ABCMR report found the appropriate authority for the award of the ARCOM but could not locate such authority for the Air Medal. Despite, the specific lack of authority, the ABCMR held that the Veteran's service as a helicopter crew chief and door gunner would likely have resulted in his having earned an Air Medal for sustained operations. The action by the ABCMR did not result in the "correction" of any record that was before the Board in June 1990. Rather, it served to correct an internal Army irregularity that could not find the supporting authority for the Air Medal that was listed on the Veteran's DD 214 in 1969.

The Veteran's receipt of the Air Medal was conceded at the time of the Board decision of June 1990. His DD 214 reflected the award of the medal and there was no basis to challenge the award. Moreover, there is no evidence of record that the Board, in June 1990, questioned any of the Veteran's military awards.

At the time of the June 1990 decision, service connection was in order for a disease or injury contracted in the line of duty during active military service during a period of war. 38 U.S.C. § 110. As noted by the Veteran's representative in the motion for reconsideration, the provisions for establishing service connection for PTSD were set forth at paragraph 50.45 of the M21-1, Adjudication Procedures Manual.

The provisions noted that it was important that the examining physician present a clear diagnosis showing a detailed history of the stressful events which were thought to have caused the condition and a full description of the past and present symptoms. It was noted that, because of the complexity of PTSD, the application of careful clinical judgment was necessary to identify and describe the relationship between past events and current symptoms. Service connection for PTSD was not to be established on the basis of a diagnosis that was unsupported by the above history and description or where the examination and supporting material failed to indicate a link between current symptoms and an in-service stressful event. In addition, certain awards that were indicative of combat would be considered supportive evidence as participation in a stressful episode. Paragraph 50.45.

The Veteran was denied service connection for PTSD in June 1990 because the Board found that the evidence of record did not establish a diagnosis of PTSD. The Board listed a great deal of evidence, medical and otherwise, that noted a long and difficult past for the Veteran. He had received medical treatment with diagnoses of a personality disorder for a number of years. Not having a psychiatric disability was the basis of denial for his claim by the Board in March 1983.

The Board cited to the Center's assessment of the Veteran in October 1986 where he was found to not have PTSD. The Center records in the claims folder list multiple stressors claimed by the Veteran, to include flying multiple missions in helicopters and serving as a door gunner. They also included reference to being attacked while protecting his helicopter, and close calls including a tracer round burning close to his face. These stressors and duty as a door gunner were acknowledged by the Board. The purpose of the Center was to treat veterans with PTSD and this Veteran was screened and found to not have PTSD despite his claimed stressors and combat duty.

The Board also considered the diagnosis provided at the time of the Veteran's VA hospitalization in October and November 1987. However, the Veteran was again evaluated at the Center for admission to the program, subsequent to his diagnosis of PTSD in November 1987. Psychological testing and evaluation determined that the Veteran was not suffering from PTSD in January 1988.

The Board considered the February 1990 medical opinion provided at the request of the Chairman of the Board. The opinion provided a diagnosis of PTSD and related it specifically to the Veteran's claimed duties in his helicopter, to include serving as a door gunner on multiple missions. The Board weighed the probative value of the opinion but determined that the complete assessments done by the Center in 1986 and 1988 were more probative as the medical personnel evaluated and tested the Veteran in reaching their determination that the Veteran did not have PTSD. The February 1990 opinion was based on a review of the record.

In summary, the Board considered the Veteran's claimed combat service and his diagnoses of PTSD as a result of VA hospitalization and the VA opinion of

February 1990 in June 1990. The Board was critical of the Veteran's current claiming of symptoms of PTSD in light of his extensive psychiatric history but did not dispute his claimed stressors or his combat service. The Board determined that the weight of the evidence was against a finding of a clear diagnosis of PTSD, a requirement for the grant of service connection.

The grant of service connection for PTSD in August 2005 was based on the opinion from the VA examination of April 2005. The examiner did not provide much detail as to the specifics of the Veteran's claimed stressors. She noted how the events of the Veteran's service in Vietnam affected him and that she felt he met the criteria for a diagnosis of PTSD. In fact, the Veteran's duties as a crew chief and door gunner are not mentioned in the report.

The rating decision that granted service connection cited to the results of the examiner's report of psychological testing that established a score indicative of PTSD. No specific stressor was identified in the rating decision. The rating decision noted that the examinations of 1999 had not diagnosed the Veteran with PTSD.

The Board finds that the grant of service connection for PTSD in August 2005 was not related, in any way, to the correction of the Veteran's military records as indicated in the ABCMR report of January 1997. The Veteran was noted to have an Air Medal on his DD 214 at the time of the prior decisions in this case. His claimed stressors of being a crew chief and door gunner were of record in 1986. The ABCMR report did not make any difference in the evaluation of the Veteran's claim. The ABCMR provided legal authority for the award of the ARCOM and made a determination that the Veteran's records supported his being awarded the Air Medal such that the ARPERSCEN could issue the medal as he had requested.

The Board is aware of the Court's application of 38 C.F.R. § 3.156(c) in cases involving later received reports detailing action for units of veterans that were considered to have been available but not requested earlier in the development of the record. *See Vigil v. Peake*, 22 Vet. App. 63 (2008), *Mayhue v. Shinseki*, 24 Vet. App. 273 (2011), *Shipley v. Shinseki*, 24 Vet. App. 458 (2011), and *Cline v.*

Shinseki, 26 Vet. App. 18 (2012). Those cases are distinguishable from the case at hand. This Veteran's Air Medal was of record and not challenged by VA at any time. The stressors associated with his service that resulted in his receiving the Air Medal were of record. He sought a correction to his own personnel records because he was informed that the Air Medal could not be issued to him absent supporting authority for the award. The action by the ABCMR was not used to establish a confirmation of a stressful event or combat service. It clearly could not be used to provide a diagnosis of PTSD related to military service.

As a final review, the Board notes that 38 U.S.C.A. § 5110(i) and 38 C.F.R. § 3.400(g) address the possibility of an earlier effective date when a disallowed claim is reopened and thereafter allowed on the basis of new and material evidence that resulted from correction of military records under 10 U.S.C. § 1552. As the above analysis reflects, the Veteran's grant of service connection for PTSD was not predicated, in any way, on the ABCMR actions of January 1997. The Veteran's claim was reopened on the basis of a VA outpatient entry that related the Veteran has having PTSD related to his combat experiences in Vietnam. Although the ABCMR acted under the authority of 10 U.S.C. § 1552, their determination did not alter the records before the Board at the time of the June 1990 decision or VA's consideration of the Veteran's service in Vietnam in subsequent adjudications.

Upon review of the evidence of record, and the applicable laws and regulations, the Veteran's claim for an effective date earlier than August 22, 2000, for the grant of service connection for PTSD is denied.

Veterans Claims Assistance Act of 2000 (VCAA)

The VCAA describes VA's duty to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2002 & Supp. 2012); 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326(a) (2012).

The Veteran's claim for service connection for PTSD has been granted. He is seeking an earlier effective date as a downstream element. The Board notes that once service connection is granted the claim is substantiated, additional notice is not

required and any defect in the notice is not prejudicial. *See Hartman v. Nicholson*, 483 F.3d 1311 (Fed. Cir. 2007); *Dunlap v. Nicholson*, 21 Vet. App. 112 (2007); *Dingess*, 19 Vet. App. at 490. Accordingly, no discussion of VCAA notice is required. *See* VAOPGCPREC 8-2003.

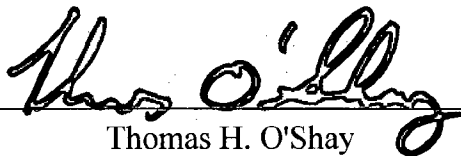
The Board also finds that VA has adequately fulfilled its obligation to assist the Veteran. His STRs were of record. VA and private records were developed. The Veteran submitted numerous items of evidence in support of his claim to include military personnel records as well as medical evidence and lay statements. He was afforded a VA examination in April 2005 that resulted in the grant of his claim for service connection.

The Veteran appealed the original denial of an earlier effective date to the Court. A Joint Motion was granted to vacate the Board's prior decision and return the case for further consideration by the Board. The Veteran, through his attorney representative, has submitted additional argument in support of his claim for an earlier effective date.

The Board finds that VA has satisfied its duty to notify and assist. The Veteran has not identified any other pertinent evidence, not already of record. The Board is unaware of any such evidence.

ORDER

The claim for an effective date earlier than August 22, 2000, for the grant of service connection for PTSD is denied.



Thomas H. O'Shay
Acting Veterans Law Judge, Board of Veterans' Appeals



YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or 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. We will return your file to your local VA office to implement the BVA'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. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court *before* you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

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 then have another 120 days from the date the BVA 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.*

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.cavc.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 BVA to reconsider any part of this decision by writing a letter to the BVA clearly explaining why you believe that the BVA 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 such letter be as specific as possible. A general statement of dissatisfaction with the BVA decision or some other aspect of the VA claims adjudication process will not suffice. If the BVA 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:

Director, Management, Planning and Analysis (014)
Board of Veterans' Appeals
810 Vermont Avenue, NW
Washington, DC 20420

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 BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. 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 above for the Director, Management, Planning and Analysis, 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 above for the Director, Management, Planning and Analysis, 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 BVA, 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 VA, then you can get information on how to do so by writing directly to the Court. Upon request, the Court will provide you with a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to represent appellants. This information, as well as information about free representation through the Veterans Consortium Pro Bono Program (toll free telephone at: (888) 838-7727), is also provided on the Court's website at: <http://www.uscourts.cavc.gov>.

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: In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to the Secretary at the following address:

Office of the General Counsel (022D)
810 Vermont Avenue, NW
Washington, DC 20420

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).



BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE MATTER OF THE MOTION OF [REDACTED]
ROBERT L. REAVES

DOCKET NO. [REDACTED]

) DATE DEC 04 2012
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THE ISSUE

Whether a June 15, 1990 Board of Veterans' Appeals (Board) decision contains clear and unmistakable error (CUE) in denying entitlement to service connection for posttraumatic stress disorder (PTSD).

(The issue of entitlement to an effective date earlier than August 22, 2000 for the award of service connection for PTSD is addressed in a separate decision.)

REPRESENTATION

Moving party represented by: Sean A. Ravin, Attorney

ATTORNEY FOR THE BOARD

M. Riley, Counsel

IN THE MATTER OF THE MOTION OF
ROBERT L. REAVES

INTRODUCTION

The moving party (Veteran) served on active duty from July 1966 to July 1969. This matter comes before the Board from a November 2011 motion by the Veteran's representative requesting revision of the June 1990 Board decision on the basis of CUE.

FINDINGS OF FACT

1. In a June 15, 1990 decision, the Board determined that service connection was not warranted for PTSD. The Veteran did not appeal the denial of the claim.
2. There was no outcome determinative error of fact or law in the Board's June 1990 decision finding that entitlement to service connection for PTSD was not warranted.

CONCLUSION OF LAW

The June 1990 Board decision denying entitlement to service connection for PTSD is not clearly and unmistakably erroneous. 38 U.S.C.A. § 7111 (West 2002); 38 C.F.R. §§ 20.1400-20.1411 (2012).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Veteran contends that a June 15, 1990 decision of the Board contains CUE in its conclusion that service connection is not warranted for PTSD. In the November 2011 motion for CUE, the Veteran's representative argued that January 1997 corrections to the Veteran's service records established that the Veteran engaged in combat with the enemy and was entitled to the combat presumption contained in 38 U.S.C.A. § 1154(b). The representative also contends that if the June 1990 Board

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had correctly applied the law, the outcome of the decision would have been different and service connection for PTSD would have been granted.

Motions for review of prior Board decisions on the grounds of CUE are adjudicated pursuant to the Board's Rules of Practice at 38 C.F.R. §§ 20.1400-1411 (2012). Such a motion must set forth clearly and specifically the alleged clear and unmistakable error, or errors, of fact or law in the Board decision, the legal or factual basis for such allegations, and why the result would have been manifestly different but for the alleged error. Non-specific allegations of failure to follow regulations or failure to give due process, or any other general, non-specific allegations of error, are insufficient to satisfy that requirement. Motions which fail to comply with the regulatory requirements shall be dismissed, without prejudice to refiling. 38 C.F.R. § 20.1404(b). The Board finds that the Veteran's motion for CUE was made with the requisite specificity.

The Board notes that it has original jurisdiction to determine whether CUE exists in a prior final Board decision. 38 C.F.R. § 20.1400. The Board decision that is the subject of this decision was issued on June 15, 1990 and was not appealed by the Veteran. It is therefore final. 38 C.F.R. § 20.1100.

Section § 20.1403(a) provides that CUE is a very specific and rare kind of error. It is the kind of error of fact or law which, when called to the attention of later reviewers, compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. Generally, either the correct facts, as they were known at the time, were not before the Board, or the statutory and regulatory provisions extant at the time were incorrectly applied. *See* 38 C.F.R. § 20.1403(a).

The review for CUE in a prior Board decision must be based on the record and the law which existed when that decision was made. To warrant revision of a Board decision on the grounds of CUE, there must have an error in the Board's adjudication of the appeal that, had it not been made, would have manifestly changed the outcome when it was made. If it is not absolutely clear that a different

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result would have ensued, the error complained of cannot be CUE. *See* 38 C.F.R. § 20.1403(b), (c).

The following situations do not constitute CUE: (1) a new medical diagnosis that "corrects" an earlier diagnosis considered in a Board decision; (2) VA failure to fulfill the duty to assist; (3) a disagreement as to how the facts were weighed or evaluated; and (e) the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a change in the interpretation of the pertinent statute or regulation. 38 C.F.R. § 20.1403(d)-(e). *See also* 38 U.S.C.A. §§ 501(a), 7111 (West 2002).

As a preliminary matter, the Board observes that the Veteran's file was rebuilt in August 1995; thus, there are some early documents referenced by the Board in its June 1990 decision that are no longer of record.

At the time of the June 1990 Board decision, the law provided that service connection was granted for a disability resulting from a disease or injury incurred or aggravated by wartime service. 38 U.S.C. § 310. There was no specific statutory or regulatory provision governing claims for entitlement to service connection for PTSD. Instead, procedural guidelines were in place in the VA Adjudication Procedure Manual, M21-1 (M21-1). These guidelines established that service connection for PTSD required a clinical diagnosis of the disability and the existence of a recognizable stressor which led to the development of the disorder. M21-1, 50.45 (1986).

In its June 1990 decision, the Board found that none of the three elements necessary for a grant of PTSD were present. Although the Veteran had behavioral and adjustment problems during service, there was no indication that these difficulties resulted from combat or similar stressful experiences incurred as a helicopter repairman and gunner. After service, treatment records documented [REDACTED] manipulative behavior, a focus on financial concerns and unsubstantiated disabilities, and bizarre historical accounts reported by the Veteran. The Board noted that the Veteran did not allege any symptoms associated with PTSD until the 1980s and the VA Center for Stress Recovery found in 1986 and 1988 that the

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Veteran did not meet the criteria for a diagnosis of PTSD. The Board found the evidence weighing against a diagnosis of PTSD was more probative and concluded that the record did not establish a supportable diagnosis of the disorder.

The Veteran contends that a January 1997 correction to his service records establishes that he served in combat as a helicopter aerial gunner and crew chief and therefore demonstrates the presence of a combat stressor. The claims file does in fact contain a January 1997 report from the Board of Corrections for Military Records holding that the Veteran's service records should be corrected to show that he was awarded the Army Commendation Medal (ARCOM), the Air Medal based on meritorious service (sustained operations), and the Vietnam Civil Actions Medal First Class Unit Citation.

While the claims file includes the January 1997 report referenced by the Veteran, the Board finds that the Veteran's argument in this case fails for two reasons. First, the January 1997 report from the Board of Corrections does *not* establish that the Veteran served in combat. None of the medals awarded to the Veteran establish combat service—although the Air Medal can be awarded on the basis of heroism (thereby indicating combat), the Board of Correction's report clearly notes that the Veteran's Air Medal was awarded based on sustained operations service of two months as a gunner. That is, it was awarded for a non-combat category. Furthermore, the record at the time of the June 1990 Board decision already included evidence that established the Veteran's service as an aerial gunner. A November 1968 memorandum from the 101st Assault Helicopter Battalion stated that the Veteran was medically qualified to perform duty as an aerial gunner and the Board's June 1990 decision specifically noted the Veteran's service as a helicopter repairman and gunner. Therefore, the January 1997 correction of the Veteran's service records does not establish that the correct facts were not before the Board at the time of the June 1990 decision.

Second, the Board correctly applied the law in effect in June 1990. Service connection in June 1990 first required the presence of a current disability and VA procedures specified that a clinical diagnosis of PTSD was necessary to substantiate the claim. After review of the complete record, the Board in 1990 determined that

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the weight of the evidence was against the finding of a supportable diagnosis of PTSD. The Board considered the Veteran's lay statements in its decision, but found that the Veteran's reports regarding the onset of PTSD symptoms were not credible in light of the absence of reported symptoms for years after service, the Veteran's inconsistent history of the disability, and various findings of malingering by VA health care professionals. The January 1997 correction to the Veteran's service records does not pertain to the question of whether the evidence established the presence of a current disability in June 1990. The Veteran may disagree with how the facts and evidence were weighed by the Board, but such disagreement can never constitute CUE. *See* 38 C.F.R. § 20.1403.

Finally, the Board has considered the Veteran's contention that the 1990 Board should have applied the combat presumptions contained in 38 U.S.C.A. § 1154(b) to the claim for service connection for PTSD. The statute in effect in 1990, U.S.C. § 354(b) (substantially similar to the current 38 U.S.C.A. § 1154(b)) provided that if a Veteran engaged in combat with the enemy, lay or other similar evidence could be used to establish service incurrence of a disease or injury if consistent with the circumstances, conditions, or hardships of such service. Service connection of the injury or disease could be rebutted by clear and convincing evidence to the contrary. Although the Board in 1990 acknowledged the Veteran's service as a helicopter gunner, they did not explicitly apply the provisions of U.S.C. § 354(b). The Board points out that while service as a door gunner certainly presents the opportunity to engage in combat, it does not necessarily establish that a Veteran did in fact engage in combat.

Although the Board does not appear to have applied U.S.C. § 354(b) in its June 1990 analysis, in order to constitute CUE, the Board's error must manifestly change the outcome of the decision. In light of the June 1990 Board's conclusion that the Veteran's statements regarding the history and onset of his PTSD symptoms were not credible, the current Board cannot conclude that the application of U.S.C. § 354(b) would have clearly resulted in another outcome. In any event, as discussed above, the Board's June 1990 denial of service connection for PTSD was predicated on the lack of a supportable diagnosis of PTSD. Section 354(b) relates only to the second element of service connection—the presence of an in-service injury—and

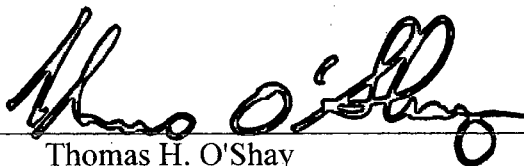
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therefore its application would not have manifestly changed the Board's decision. The Veteran has not identified an error of fact or legal conclusion in the Board's June 1990 decision that would have altered the final outcome of the appeal for entitlement to service connection for PTSD. The Board concludes that the June 15, 1990 Board decision denying the claim for service connection for PTSD was consistent with and supported by the evidence then of record, as well as the law that was in effect at that time and VA's interpretation of those laws. Therefore, the motion for revision or reversal based on CUE must be denied.

The Veterans Claims Assistance Act of 2000 (VCAA) enhanced VA's duty to notify and assist claimants in substantiating their claims for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2002); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) (2012). The Court has held that the statutory and regulatory provisions pertaining to VA's duty to notify and to assist under the VCAA do not apply to allegations of clear and unmistakable error in prior decisions of the Board, because a CUE motion is not a claim or an appeal, but is a collateral attack upon a previous final decision. *Livesay v. Principi*, 15 Vet. App. 165, 178 (2001) (*en banc*); *Simmons v. Principi*, 17 Vet. App. 104, 109 (2003).

ORDER

The motion to revise or reverse the June 15, 1990 Board decision that denied entitlement to service connection for PTSD is denied.



Thomas H. O'Shay
Acting Veterans Law Judge, Board of Veterans' Appeals

YOUR RIGHTS TO APPEAL OUR DECISION ON YOUR MOTION FOR REVIEW FOR CLEAR AND UNMISTAKABLE ERROR

The attached decision by the Board of Veterans' Appeals (BVA or Board) is the final decision on your motion for the Board to review one or more of its final decisions for clear and unmistakable error (CUE). If you are satisfied with the outcome of this decision, you do not need to do anything. However, if you are not satisfied with this decision, 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.

None of these things is mutually exclusive - you can do all three at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court *before* you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

There is *no* time limit for filing a motion for reconsideration or a motion to vacate with the Board.

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 then have another 120 days from the date the BVA 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.*

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.cavc.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 BVA to reconsider any part of this decision by writing a letter to the BVA clearly explaining why you believe that the BVA 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 such letter be as specific as possible. A general statement of dissatisfaction with the BVA decision or some other aspect of the VA claims adjudication process will not suffice. If the BVA 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:

**Director, Management, Planning and Analysis (014)
Board of Veterans' Appeals
810 Vermont Avenue, NW
Washington, DC 20420**

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 BVA to vacate any part of this decision by writing a letter to the BVA 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 submitted by or on behalf of the appellant. Send this motion to the address above for the Director, Management, Planning and Analysis, 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.

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the BVA, 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 VA, then you can get information on how to do so by writing directly to the Court. Upon request, the Court will provide you with a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to represent appellants. This information, as well as information about free representation through the Veterans Consortium Pro Bono Program (toll free telephone at: (888) 838-7727), is also provided on the Court's website at: <http://www.uscourts.cavc.gov>.

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: In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to the Secretary at the following address:

Office of the General Counsel (022D)
810 Vermont Avenue, NW
Washington, DC 20420

The Office of the General Counsel may decide, on its own motion, 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).