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

IN THE APPEAL OF JAMES E. BOND

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DOCKET NO. 08-36 965A) DATE February 18, 2014
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On appeal from the
Department of Veterans Affairs (VA) Regional Office (RO)
in Seattle, Washington

THE ISSUE

Entitlement to an effective date earlier than October 27, 2006, for the award of service connection for posttraumatic stress disorder (PTSD).

REPRESENTATION

Appellant is represented by: Mary Anne Royle, Attorney

WITNESS AT HEARING ON APPEAL

The Veteran

ATTORNEY FOR THE BOARD

L. Cramp, Counsel

INTRODUCTION

The Veteran had active service from February 1966 to August 1968.

This appeal comes before the Board of Veterans' Appeals (Board) from a May 2013 Order of the United States Court of Appeals for Veterans Claims (Veterans Court). The appeal originates from a May 2007 rating decision of the RO in Seattle, Washington.

The Veteran provided testimony at a hearing before a Decision Review Officer in June 2009. A transcript of that hearing has been associated with the claims file.

In a decision dated in October 2010, the Board denied the same issue listed above. The Board also denied a claim that there was clear and unmistakable error in the August 2005 denial of service connection for PTSD.

The Veteran appealed the Board's October 2010 decision to the Veterans Court. In an Order dated in May 2013, pursuant to a Joint Motion for Remand, the Veterans Court vacated that portion of the Board's October 2010 decision addressing the effective date issue and remanded the issue back to the Board for development consistent with the Joint Motion.

The Joint Motion stipulated that the Board's decision regarding clear and unmistakable evidence in the August 2005 RO decision should not be disturbed, effectively affirming the Board decision on that issue.

In reviewing this case the Board has not only reviewed the physical claims file, but has also reviewed the electronic file on the "Virtual VA" system to insure a total review of the evidence.

FINDINGS OF FACT

1. In an August 2005 rating decision, mailed to the Veteran at his then and current address of record on August 24, 2005, the RO denied a claim of entitlement to service connection for PTSD; although service connection for "anxiety" was not adjudicated as a separate claim, the August 2005 decision reasonably placed the Veteran on notice that the entire claim raised by him as "issues of anxiety and issues related to PTSD" had been denied.

2. The evidence received subsequent to the August 2005 decision and prior to the October 26, 2006, VA Form 21-3138 was not new and material regarding any unestablished fact from the August 2005 denial.

3. The October 26, 2006, VA Form 21-3138 was untimely as a notice of disagreement with the August 2005 decision and is the earliest date of claim subsequent to the August 2005 denial.

4. The earliest date of a pending claim of entitlement to service connection for PTSD is later than the date entitlement to service connection for PTSD arose, and is therefore the appropriate effective date.

CONCLUSION OF LAW

The criteria for an effective date earlier than October 27, 2006, for the award of service connection for PTSD are not met. 38 U.S.C.A. §§ 5107, 5110 (West 2002 & Supp. 2012); 38 C.F.R. §§ 3.1(p), 3.151, 3.155, 3.157, 3.400 (2013)

REASONS AND BASES FOR FINDINGS AND CONCLUSION

As noted in the Introduction, this case comes before the Board from an Order of the Veterans Court which, pursuant to a Joint Motion, vacated that portion of an

October 2010 Board decision which denied an effective date earlier than October 27, 2006, for the award of service connection for PTSD.

There were two stated bases for the Joint Motion: First, the Joint Motion stipulates that in denying an earlier effective date, the Board concentrated on whether the Veteran appealed the August 2005 RO decision, but did not address whether VA treatment records added to the claims file in November 2008, but which included records dated prior to August 2006 (within one year of the rating decision), constituted new and material evidence submitted within one year of the denial pursuant to 38 C.F.R. § 3.156(b), thus rendering the August 2005 decision nonfinal. *See Muehl v. West*, 13 Vet. App. 159, 161-62 (1999); *Buie v. Shinseki*, 24 Vet. App. 242 (2010).

The specific documents cited by the parties to the Joint Motion included a September or October 2005 notation that the Veteran was seen by an examiner with the impression "mild PTSD symptoms," and an October 2005 notation wherein he was asked if he was depressed or sad during most of the last year and he responded "yes," and a September 2006 entry where the examiner noted a positive responses to PTSD screening questions indicating that the PTSD symptoms occurred in the past month.

A second basis for the Joint Motion was that the Board did not address whether a separate claim of entitlement to service connection for "anxiety" was reasonably raised along with the claim for "PTSD," and if so, whether the anxiety claim remained pending, or whether it was necessarily adjudicated as part of the final August 2005 decision.

The parties cited to a VA Progress Note dated in September 2004, in which the examiner diagnosed "adjustment disorder with depressed and anxious mood." The parties noted that, reflecting the Veteran's claim, the May 2005 VA examination request was for an examination of "anxiety and issues related to PTSD."

Regarding the possibility that there might remain a pending unadjudicated claim for anxiety as an issue separate and apart from PTSD arising from the September 2004

VA Form 21-4138, the Board finds of a factual basis that a separate and distinct claim was not reasonably raised by the Veteran, that it was reasonable for the RO to interpret his assertions as raising a single claim, and that, to the extent separate and distinct claims were in fact intended by him, the August 2005 rating decision reasonably placed him on notice that the entirety of his March 11, 2005, claim, including PTSD and anxiety, was being denied.

The Veteran in this case clearly expressed his intent to seek service connection for a psychiatric disability arising from one specific cause. On the March 11, 2005, VA Form 21-4138, he specifically described the "issues of anxiety and issues related to PTSD" as being "based on experiences in Viet[n]am." It was also noted that he was a recipient of the Purple Heart. Thus, there is no assertion as to an injury or disease in service other than his PTSD stressors. Indeed, the Board finds that there is no reasonable basis that can be gleaned from the claim for the RO to have interpreted the claim as raising two separate and distinct issues. This is entirely consistent with the Veteran's Court view of the law. *See Clemons v. Shinseki*, 23 Vet. App. 1 (2009).

While the Veteran now attempts to tie his reference to "anxiety" with the September 2004 diagnosis of adjustment disorder, in fact, he never mentioned an adjustment disorder in the claim. The Board finds that it was entirely reasonable for the RO to have interpreted his assertions as raising a single claim of entitlement to service connection for any psychiatric disorder stemming from his in-service stressors.

The Board's finding is also supported by the structure of the rating schedule and VA law in general. VA law classifies PTSD as an anxiety disorder. 38 C.F.R. §§ 4.125, 4.130 (the schedular criteria incorporate the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV). Thus, noting anxiety and issues related to PTSD in the same claim would not reasonably be expected to refer to separate issues. Rather, such reference appears to acknowledge that anxiety is a component of PTSD, which in turn is related to the Veteran's experiences in Vietnam.

The Veteran now argues that the RO should have interpreted the claim as raising a separate claim regarding the diagnosis of adjustment disorder with depressed and anxious mood, which appears completely inconsistent with the current state of Veterans' law at this time.

While a September 2004 VA psychiatry note was of record at the time of the claim and contains the above diagnosis, the Board finds that it was entirely reasonable for the RO not to have taken the Veteran's claim as a reference to this diagnosis. It is clear from a reading of the September 2004 report that the psychiatric problems discussed in that evaluation were attributed to a post-service industrial accident and not to service.

Indeed, the examiner's comment with respect to service was, "[i]nitially following Vietnam, he had a severe startle reflex, which is practically gone now," and "[h]e feels he has 'dealt' with his Vietnam experience."

There appears no question from the context of that report that the diagnosis of adjustment disorder was related to post-service causes and does not raise this issue.

Also supportive of the Board's interpretation of the Veteran's claim as not intending separate psychiatric claims (two claims) is the "Claims Transmittal Memorandum" completed by his representative at the time. This document notes that a VA Form 21-4138 is attached, that a "New Issue" is being raised, and the specific issue is "PTSD." There is no other issue listed on the form.

While it can certainly be argued that this form does not express the actual intent of the Veteran, it clearly supports the Board's conclusion that it was reasonable to interpret his intent as raising a single PTSD claim. This form provides direct and probative factual evidence that his own representative at the time interpreted his correspondence in the same way as did the RO, undermining his current argument.

The Board acknowledges that the August 2005 rating decision does not specifically discuss whether separate claims were raised. As noted above, it appears that the RO interpreted, as did the Veteran at the time, that his submission raised a single claim

encompassing his symptoms of anxiety and PTSD. Nevertheless, the Board finds that he was reasonably placed on notice by the August 2005 rating decision that all issues arising from the March 11, 2005, claim were denied.

The Veterans Court and the United States Court of Appeals for the Federal Circuit (Federal Circuit) have delineated specific criteria for a claim not explicitly addressed in a rating decision to be deemed implicitly denied. In *Cogburn v. Shinseki*, 24 Vet. App. 205 (2010), the Veterans Court clarified prior holdings of the Veterans Court and Federal Circuit in *Deshotel v. Nicholson*, 457 F.3d 1258 (Fed. Cir. 2006) and *Ingram v. Nicholson*, 21 Vet. App. 232, 243 (2007).

In *Deshotel*, the Federal Circuit held that, where a veteran files more than one claim at the same time and the decision acts (favorably or unfavorably) on one of the claims but fails to specifically address the other claim, the second claim is deemed denied, and the appeal period begins to run.

In *Ingram*, the Veterans Court held that a reasonably raised claim remains pending until there is either a recognition of the substance of the claim in a rating decision from which a claimant could deduce that the claim was adjudicated or an explicit adjudication of a subsequent claim for the same disability. The Veterans Court emphasized that it rejected a "broad, sweeping reading of *Deshotel* as supplanting the pending claim doctrine," and reiterated that a claimant must be able to reasonably deduce from the decision that the claim was denied.

In *Cogburn*, the Veterans Court set forth a multifactorial analysis of whether the implicit denial doctrine was applicable. The first factor was the specificity or relatedness of the claims. The example provided was whether a claimant was seeking benefits for a generalized set of symptoms, a specifically diagnosed disorder, or two (or more) specifically diagnosed disorders that are closely related.

The Veterans Court cited *Clemons v. Shinseki*, 23 Vet. App. 1 (2009); *Boggs v. Peake*, 520 F.3d 1330 (Fed. Cir. 2008); *Adams v. Shinseki*, 568 F.3d 956, 960 (Fed. Cir. 2009) (noting that the conditions for which the veteran sought VA benefits were closely related because rheumatic heart disease and bacterial endocarditis both

affect heart valves and are frequently associated with each other); and *Deshotel*, 457 F.3d at 1261–62 (the claimant was seeking service connection for two conditions that were closely related: a head injury and a psychiatric disability resulting from that head injury); *contrasting Ingram*, 21 Vet. App. at 247 (noting that the appellant's claim for VA benefits under 38 U.S.C. § 1151 was unrelated to his claim for non-service-connected pension benefits).

The second factor to consider is the specificity of the adjudication and whether the adjudication alludes to the pending claim in such a way that it could reasonably be inferred that the prior claim was denied. The third factor to consider is the timing of the claims. The fourth factor to consider is whether the claimant is represented.

Here, the claim was for a generalized set of symptoms (anxiety) and a specifically diagnosed disorder (PTSD). As discussed above, the issues of "anxiety" and a recognized anxiety disorder such as PTSD are inherently and inextricably related. It is difficult to conceive of a situation where the symptom of anxiety would or could be medically distinguished from a diagnosed anxiety disorder such that separate claims and adjudications would be appropriate. Moreover, the Federal Circuit found even more distinct conditions to be inherently related, such a psychiatric disability and a head injury in *Deshotel*.

The Veteran now argues that the diagnoses PTSD and adjustment disorder are not inherently related because PTSD has distinct criteria for establishing service connection under 38 C.F.R. § 3.304(f). However, the clearly expressed language in *Cogburn* relates to a veteran's intent, not to the specifics of the legal criteria. The Veterans Court specified that the distinction is "whether a claimant is seeking benefits for a generalized set of symptoms, a specifically diagnosed disorder, or two (or more) specifically diagnosed disorders that are closely related."

Notably, in this case, the Veteran never mentioned the diagnosed disorder of adjustment disorder, or any specific diagnosis other than PTSD. "Anxiety" itself is not a diagnosis, but a symptom, which the Board has found to be inherently related to anxiety disorders such as PTSD.

As to the second factor, while the RO did not explicitly deny service connection for anxiety or anxiety issues, the Board finds that the rating decision refers to the pending claim in such a way that it could reasonably be inferred that the entire March 11, 2005, claim was being denied. Notably, the August 2005 rating decision specifically refers to the claim being adjudicated as the "Form 21-4138, Application for Increase received March 11, 2005."

In this context, it was reasonably clear that the form was interpreted as raising a single claim, and that the entire claim was being addressed and denied in the decision.

Regarding the third *Cogburn* factor, the timing of the asserted "claims" was simultaneous. This adds support to the RO's interpretation that a claim identifying one specific psychiatric diagnosis and symptoms inherently associated with that diagnosis was, in fact, raising a single claim of entitlement to service connection for the specific diagnosis identified, PTSD, not two claims.

Regarding the fourth factor in *Cogburn*, the Veteran has been represented throughout the period of his claim. At the time of the claim and rating decision in question, he was represented by an accredited service organization, who agreed, for the reasons noted above, with the RO's interpretation of the Veteran's intent. Accordingly, based on the test elaborated in the *Cogburn*, the criteria for an implicit denial of all psychiatric matters arising from the March 11, 2005, correspondence are met.

The Board's finding that a reasonable person would have interpreted the August 2005 rating decision as a denial of all psychiatric claims raised in the March 11, 2005, correspondence is totally supported by the Veteran's subsequent actions. Following the grant of service connection for PTSD in May 2007, he made no assertion as to a separate claim for "anxiety" filed in March 2005, but asserted that the "prior denial of PTSD in 2005 should have been granted due to having a [P]urple [H]eart and a diagnosis of PTSD . . . ."

Importantly, the Veteran also made no assertion as to a separate claim at his hearing in June 2009. This omission by the Veteran and his representative at hearing weighs heavily against the current argument as this very issue (an earlier effective date for PTSD) was before the RO at this time. It is apparent to the Board that he did not consider that a second claim was pending at that time. Notwithstanding the Veteran's contention in the December 2013 Affidavit, his service representative at the time did not raise the issue indicating that the representative did not believe that a separate claim was pending. The Veteran contentions raised within the December 2013 Affidavit are completely inconsistent with both his statements, and those of his VFW representative at that time of the hearing in June 2009: In the Affidavit (point five), the Veteran contends that his VFW service office at the time said the VA denied PTSD but did not address his anxiety issue in the August 2005 rating action. He indicates he was told this when he found out the VA has denied service connection for PTSD in the August 2005 rating action, yet the VFW representative made no reference to this belief at a hearing at the RO (where action could have been taken on this alleged second unadjudicated claim) at a hearing four years later in 2009.

Indeed, the first reference to the notion of a separate claim for anxiety appears in the context of Veterans Court filings subsequent to the Board's denial of the issue. Prior to that time, the Veteran's himself never provided any evidence to the Board or RO that his true intent was to file two claims, not one, until December 2013.

In this regard, the Board has carefully reviewed the December 2013 Affidavit, particularly point five on page two.

In this regard, it is essential to note that this new evidence must be carefully reviewed by the Board. There is no manner in which the Board may address this claim without addressing the integrity, or lack thereof, of the December 2013 Affidavit.

Despite his current assertions, when the applicable law and facts are reviewed, it must be found that separate and distinct psychiatric claims were not intended or pursued by the Veteran, the RO reasonably interpreted his correspondence as

raising a single PTSD claim, a reasonable person would have interpreted the August 2005 rating decision as adjudicating and denying the entirety of the March 11, 2005, claim, and until quite recently, the Veteran himself interpreted the August 2005 decision as adjudicating and denying the entirety of the March 11, 2005, claim.

The Veteran's current recollection of events are not consistent with the contemporaneous evidence of record and are heavily outweighed by the other evidence cited above on this factual issue. The June 2009 hearing transcript undercuts the December 2013 Affidavit's reliability entirely. The Veteran's recollection of events are not accurate. The Board makes the following finding of fact: At the time in question, in light of the fact above, the Veteran himself believed he was filing only one claim, notwithstanding any current statement he has submitted in this case.

The Veteran now asserts in written argument that claims for PTSD and anxiety *should* have been treated as separate issues notwithstanding the above, *citing Boggs*, 520 F. 3d 1330. However, the holding in *Boggs* applies to the specific circumstance of a denial of reopening of a previously denied claim where there is a new and distinct diagnosis from what was adjudicated. In that instance, the Federal Circuit held that a claim for one diagnosed disease or injury cannot be prejudiced by a prior claim for a different diagnosed disease or injury.

The Board does not interpret *Boggs* for the proposition that a single claim citing general symptoms in conjunction with a specific diagnosis must be adjudicated as separate issues. If this were the case, a single mental disability claim with symptoms such as depression, anxiety, PTSD, nonorganic sleep problems, panic attacks, stress, flattened affect, mild nonorganic memory loss, delusions, and nightmares could be interpreted as a ten issue case.

In sum, the Board finds that the issues of anxiety and the anxiety disorder (PTSD) are inherently related and are reasonably interpreted as a single claim; the Board also finds that the August 2005 rating decision addressed the claim in such a way that it should reasonably have been inferred that the entire March 11, 2005, claim

was being denied. Therefore, to the extent that a separate claim of entitlement to service connection for anxiety could be inferred from the March 11, 2005, claim, such claim was implicitly denied by the August 2005 rating decision and does not remain pending.

The Board acknowledges the Veteran's assertion with a November 2006 VA Form 21-4138 that he did not receive the August 2005 notice letter and rating decision. The Board simply notes that the notice letter was stamped by the RO with the date of mailing, and it is addressed to his address of record at the time, which is also his current address of record. Moreover, a copy of the letter was sent to his representative.

The Veterans Court has ruled that there is a "presumption of regularity" under which it is presumed that Government officials have properly discharged their official duties. Clear evidence to the contrary is required to rebut the presumption of regularity. *See Ashley v. Derwinski*, 2 Vet. App. 307 (1992) (*citing United States v. Chemical Foundation, Inc*., 272 U.S. 1, 14-15 (1926). While the *Ashley* case dealt with regularity of procedures at the Board, in *Mindenhall v. Brown*, 7 Vet. App. 271 (1994), the Veterans Court applied this presumption of regularity to procedures at the RO.

In this case, the date stamp on the notice letter is a representation that the letter was mailed on that date in accordance with RO procedures. While there is an assertion from the Veteran that he did not in fact receive the letter, this assertion does not constitute *clear evidence* that the proper procedures were not followed at the RO. It is therefore presumed that timely notice of the August 2005 decision was sent to him and his representative at the appropriate addresses.

The Veteran's own testimony supports this finding, as noted at the June 2009 RO hearing transcript (page 6), in which he indicated that "I have saved every . . . every paper I just can't read it . . . I just put it away, and my pile is there I never got it." This clearly suggests he was receiving VA correspondence ("the papers") but did not read it (an issue that was addressed at this hearing).

Regarding the question of whether new and material evidence was received within the appeal period following the August 2005 decision, the Board notes that, at the time of the decision, the evidence established a diagnosis of PTSD based on a post-service industrial accident. The evidence also established in-service combat stressors based on the Veteran's receipt of the Purple Heart. Thus, the sole unestablished fact necessary for service connection was a link, established by medical evidence, between the current symptomatology and the claimed in-service stressor. *See* 38 C.F.R. § 3.304(f).

To constitute new and material evidence, any additional evidence received (or constructively of record) during the appeal period must address the unestablished fact of nexus to service under 38 C.F.R. § 3.304(f). Alternatively, evidence establishing a link between a current psychiatric disability and an injury or disease in service would be new and material evidence under 38 C.F.R. § 3.303. Such evidence must raise a reasonable possibility of substantiating the claim, and it must be neither cumulative nor redundant of evidence previously of record. 38 C.F.R. § 3.156(a).

Regarding the September or October 2005 notation that the Veteran was seen by an examiner with the impression "mild PTSD symptoms," and the October 2005 notation wherein the Veteran was asked if he was depressed or sad during most of the last year and he responded "yes," and the September 2006 entry where the examiner noted the Veteran's positive responses to PTSD screening questions indicating that the PTSD symptoms occurred in the past month, these records do not constitute new and material evidence with regard to the August 2005 denial of service connection for PTSD.

This is a very unique situation. At the time of the August 2005 decision, the evidence undebatably established a current diagnosis of PTSD. This was explicitly acknowledged in the rating decision. The RO also acknowledged that an in-service stressor was confirmed. The sole basis for the denial of service connection for PTSD in August 2005 was that the Veteran's PTSD had been related to a post-service industrial accident and had been specifically found by a June 2005 VA examiner to be unrelated to service, which fully supported this finding.

In other words, the Veteran had PTSD based on a post-service stressor. In this regard, it is important to note that even at this time it appears the Veteran receives compensation from a non-VA source for this injury.

Thus, a nexus to service was an unestablished fact either under 38 C.F.R. § 3.304(f) or 38 C.F.R. § 3.303. None of the evidence cited by the parties to the Joint Motion addresses this crucial element of the claim. As this was the only unestablished fact necessary to substantiate the claim in August 2005, the Board finds that the cited records do not constitute "new and material" evidence, but address the already-established fact that the Veteran had PTSD and was being treated for symptoms of PTSD based on post-service events.

Other records received within a year of the August 2005 rating decision or constructively of record during that period include an August 2004 VA primary care outpatient report noting that the Veteran was feeling depressed all the time (which would be expected in a Veteran who had been found to have PTSD based on a post-service stressor, as clearly found within the June 2005 VA examination). The Veteran was referred to psychiatry for evaluation. The resulting September 2004 psychiatry consultation was already of record in August 2005, as were July 2005 and October 2005 primary health reports on which it was noted that the Veteran had a positive PTSD screen.

Even under the very low standards that allow the Board to reopen previous denied claims, none of this evidence relates to the unestablished fact of a nexus between PTSD or other psychiatric diagnosis and the Veteran's service. It is therefore not new or material evidence regarding the critical issue in the case.

In sum, the Board finds that new and material evidence was not received within one year of the August 2005 rating decision and there is no bar to finality on that basis. Accordingly, the Board finds no impediment to the finality of the August 2005 rating decision. The next correspondence from the Veteran comes in the form of the October 27, 2006, VA Form 21-4138 that has been treated as an application to reopen.

The Board notes that in the Joint Motion, the parties stipulated that, if upon remand the Board finds that a claim for service connection for anxiety was implicitly denied in August 2005, the Board will entertain any CUE claim the Veteran raises with regard to the implicit denial. The Board notes that the Board's October 2010 denial of CUE in the August 2005 rating decision has not been vacated by the Board, effectively affirming the Board's decision in the mater (or at the very least, ending the Board's jurisdiction of this issue as the Board's decision on this issue was not vacated by the Veteran's Court).

To the extent the Veteran has an additional new assertion of CUE regarding the implicit denial of entitlement to service connection for an acquired psychiatric disability other than PTSD from the August 2005 rating action; it does not appear he has raised them here. To date, no CUE motion has been raised regarding the implicit denial in the August 2005 decision. In any event, this would have to be addressed by the RO in the first instance. It is suggested that any such claim should be first submitted to the RO in order to expedite the decision as the Board would, in the facts of this case, be required to remand this issue to the RO as no claim of CUE in a RO rating action is currently before the Board.

Finally, the Board has already addressed whether VA medical records dated during the appeal period following the August 2005 rating decision constitute new and material evidence to reopen service connection for PTSD. The Board has also considered whether any such records after the appeal period, but prior to October 27, 2006, could be interpreted as a claim to reopen service connection for PTSD, thus warranting an earlier effective date.

The Board finds that, notwithstanding the distinct rules applicable to receipt of new and material evidence within the appeal period, VA treatment records cannot serve as a claim (formal or informal) for service connection. The Veterans Court in *Criswell v. Nicholson*, 20 Vet. App. 501 (2006) in pertinent part held that the mere existence of medical records generally cannot be construed as an informal claim; rather, there must be some intent by the claimant to apply for a benefit. *See also Brannon v. West*, 12 Vet. App. 32, 35 (1998); 38 C.F.R. § 3.155(a).

It is well settled that an intent to apply for benefits is an essential element of any claim, whether formal or informal, and, further, the intent must be communicated in writing. *See Criswell, citing MacPhee v. Nicholson*, 459 F.3d 1323, 1326-27 (Fed.Cir.2006) (holding that the plain language of the regulations require a claimant to have an intent to file a claim for VA benefits); *also citing Rodriguez v. West*, 189 F.3d 1351, 1353 (Fed.Cir.1999) (noting that even an informal claim for benefits must be in writing, citing *Brannon*, 12 Vet. App. at 35).

Once a formal claim for pension or compensation has been allowed or a formal claim for compensation disallowed for the reason that the service-connected disability is not compensable in degree, receipt of a report of VA examination will be accepted as an informal claim for increased benefits or an informal claim to reopen. The date of examination will be accepted as the date of receipt of the claim. *See* 38 C.F.R. § 3.157(b).

In this case, there was no prior claim for compensation that was disallowed for the reason that any of the claimed disabilities was not compensable in degree. The prior claim was disallowed on other bases. Accordingly, VA treatment records dated prior to October 27, 2006, cannot serve as a basis for an earlier effective date for the grant of service connection.

The controlling statute and regulation provide that the effective date for a grant of service connection is the date of receipt of the claim or the date entitlement arose, whichever is later. 38 U.S.C.A. § 5110(a); 38 C.F.R. § 3.400(b)(2)(i). On this point, there is no dispute. The date of claim, October 27, 2006, is the later of the two dates, and is the appropriate effective date. 38 U.S.C.A. § 5110(a); 38 C.F.R. § 3.400(b)(2)(i).

The Veteran has not asserted that there was any deficiency in the notice provided him under the Veterans Claims Assistance Act of 2000 (VCAA). The Veteran has also not identified any additional records or evidence that should be obtained to fairly adjudicate the claim. In addition, the Board finds that there is no medical

question the resolution of which requires a medical examination or opinion. As such, the Board finds that the requirements of the VCAA have been met.

ORDER

An effective date earlier than October 27, 2006, for the award of service connection for PTSD is denied.

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JOHN J. CROWLEY
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).