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

IN THE APPEAL OF
BILLY E. WILSON

[redacted]

DOCKET NO. 11-31 051) DATE *April 3, 2014*
) *TDV*
)

On appeal from the
Department of Veterans Affairs Regional Office in Houston, Texas

THE ISSUES

1. Whether new and material evidence has been received to reopen a claim of entitlement to service connection for hepatitis C.

2. Entitlement to service connection for hepatitis C.

REPRESENTATION

Appellant represented by: Paralyzed Veterans of America, Inc.

WITNESS AT HEARING ON APPEAL

The Veteran

ATTORNEY FOR THE BOARD

D. Chad Johnson, Associate Counsel

INTRODUCTION

The Veteran served on active duty from November 1971 to November 1973.

This appeal comes to the Board of Veterans' Appeal (Board) from an October 2010 decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Houston, Texas.

The Veteran testified during a May 2013 videoconference hearing before the undersigned Acting Veterans Law Judge (AVLJ). A transcript of that hearing is included in the claims file.

The Board notes here that the Veteran's March 2011 notice of disagreement (NOD) references "clear and unmistakable error" (CUE) in the October 2010 RO decision; however, because the October 2010 RO decision was not final at the time of his allegation of CUE, it is not the appropriate subject of a motion for revision or reversal on the basis of CUE. Motions for CUE can only be brought against final decisions. 38 C.F.R. § 3.104(a) (2013); *see also* 38 U.S.C.A. § 7105(c) (West 2002). Accordingly, to the extent that the Veteran's NOD could also be construed as a motion for CUE, the Board finds that the Veteran's claim of CUE is moot.

The Board has not only reviewed the Veteran's physical claims file but also any electronic records maintained in the Virtual VA system and the Veterans Benefits Management System (VBMS) to ensure complete review of the evidence of record

FINDINGS OF FACT

1. The RO denied entitlement to service connection for hepatitis C in an unappealed October 2008 decision.

2. Evidence received since the October 2008 RO decision that was not previously of record and not cumulative or redundant of evidence already of record, relates to a previously unestablished fact necessary to substantiate a claim of entitlement to service connection for hepatitis C and raises a reasonable possibility of substantiating the claim.

3. The Veteran's hepatitis C has not been shown to be etiologically related to his active service.

CONCLUSIONS OF LAW

1. The October 2008 RO decision denying service connection for hepatitis C is final. 38 U.S.C.A. § 7105(c) (West 2002); 38 C.F.R. § 20.1103 (2013).

2. New and material evidence sufficient to reopen a previously denied claim of entitlement to service connection for hepatitis C has been added to the record. 38 U.S.C.A. § 5108 (West 2002); 38 C.F.R. § 3.156(a) (2013).

3. The criteria for service connection for hepatitis C have not been met. 38 U.S.C.A. §§ 1110, 5107 (West 2002); 38 C.F.R. § 3.303, 3.304 (2013).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

I. Due Process

VA has a duty to notify and assist claimants in substantiating a claim for VA benefits. *See, e.g.*, 38 U.S.C.A. §§ 5103, 5103A (West 2002 & Supp. 2013); 38

C.F.R. § 3.159 (2013). The RO provided the required notice regarding the Veteran's service connection claim in a March 2008 letter.

Following the Veteran's April 2010 claim to reopen his previously denied claim of service connection for hepatitis C, the RO sent a letter to the Veteran in May 2010 which contained proper notice concerning his claim to reopen. *See Kent v. Nicholson,* 20 Vet. App. 1 (2006). The Board notes that the May 2010 letter was apparently sent to the wrong address, and the record does not indicate that a subsequent notice letter was ever provided to the Veteran. However, the Board finds that the defective notice is harmless error as the September 2011 statement of the case (SOC) informed the Veteran of the requirement that he submit new and material evidence to reopen his claim and the basis of the prior final denial. Additionally, the Board herein reopens the Veteran's claim; thus, a remand for proper notice would serve no purpose except to further delay the Veteran's appeal. *See Sabonis v. Brown*, 6 Vet. App. 426, 430 (1994) (finding that remands which would only result in unnecessarily imposing additional burdens on VA with no benefit flowing to the Veteran are to be avoided).

Regarding the duty to assist, the RO has obtained the Veteran's service treatment records, VA treatment records, and private treatment records and associated them with the claims file.

The Veteran was afforded a VA examination in September 2010. The examination and resulting opinion are adequate as the examiner considered the Veteran's relevant medical history, provided a sufficiently detailed description of the disability, and provided a rationale to support the opinion.

A Veterans Law Judge who conducts a Board hearing must fully explain the issues and suggest the submission of evidence that may have been overlooked. 38 C.F.R. § 3.103(c)(2) (2013); *Bryant v. Shinseki*, 23 Vet. App. 488, 493-94 (2010). At the August 2013 Board videoconference hearing, the Veteran appeared and testified before the undersigned Acting Veterans Law Judge, who fully explained the issues and suggested the submission of evidence that may substantiate the claim. The Veteran has not asserted that VA failed to comply with these duties or identified

any prejudice in the conduct of the Board hearing. The Board therefore finds that the Acting Veterans Law Judge who conducted the hearing complied with the duties set forth in 38 C.F.R. § 3.103(c)(2), and that any error provided in notice during the Veteran's hearing constitutes harmless error.

For these reasons, the Board finds that the duties to notify and assist the Veteran have been met, so that no further notice or assistance to the Veteran is required to fulfill VA's duty to assist in the development of the claims. Therefore, appellate review may proceed without prejudice to the Veteran.

II. New and Material Evidence

The Veteran brought a prior claim of entitlement to service connection for hepatitis C which was denied in an October 2008 RO decision. The Veteran was notified of that decision and provided with notice of his procedural and appellate rights in the same month. The Veteran did not respond within one year of the notice of the adverse decision. No additional evidence was received within one year of the notice of the adverse decision. Thus, the October 2008 RO decision is final. 38 U.S.C.A. § 7105; 38 C.F.R. § 20.1103.

If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim. 38 U.S.C.A. § 5108. With claims to reopen, "new" evidence is defined as evidence not previously submitted to agency decision makers; and "material" evidence is defined as evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. 38 C.F.R. § 3.156. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last final denial of the claims sought to be reopened, and must raise a reasonable possibility of substantiating the claim. *Id*.

The determination of whether newly submitted evidence raises a reasonable possibility of substantiating the claim does not create a third element in the

reopening process, but is a component of the question of what is new and material evidence, rather than a separate determination to be made if evidence is new and material. *Shade v. Shinseki*, 24 Vet. App. 110, 117 (2010). 38 C.F.R. § 3.156 "suggests a standard that would require reopening if newly submitted evidence, combined with VA assistance and considering the other evidence of record, raises a reasonable possibility of substantiating the claim." *Id*. Further, the Board should not focus solely on whether the evidence remedies the principal reason for denial in the last prior decision, and regulations do not require new and material evidence as to each previously unproven element of a claim. *Id*. Rather the Board should focus on whether the evidence, taken together, could at least trigger the duty to assist by providing a medical examination or opinion. *Id*.

The Veteran's claim was previously denied in October 2008 because hepatitis C was not shown definitively in service and there was no evidence of a nexus between the Veteran's current diagnosis of hepatitis C and his active service. Concurrent with his April 2010 claim to reopen, the Veteran submitted an April 2010 statement from his primary care physician which included a nexus opinion linking the Veteran's current hepatitis C with vaccinations received during active service.

Presuming the credibility of this evidence, the record now indicates that the Veteran has a disability that may be related to service. This evidence is new, not cumulative, and relates directly to an unestablished fact necessary to substantiate the claim. Thus, as new and material evidence has been received, the claim of entitlement to service connection for hepatitis C is reopened. *See* 38 U.S.C.A. § 5108; 38 C.F.R. § 3.156(a).

Further, because the appellant has had the opportunity to address the merits of his claim, the Board may now proceed with a final adjudication of the merits of the claim without prejudice to the appellant. *Bernard v. Brown*, 4 Vet. App. 384, 393 (1993).

II. Service Connection

Service connection may be granted for a disability resulting from a disease or injury incurred in or aggravated by active service. *See* 38 U.S.C.A. §§ 1110, 1131 (West 2002 & Supp. 2013); 38 C.F.R. § 3.303(a) (2013). "To establish a right to compensation for a present disability, a Veteran must show: "(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service"-the so-called "nexus" requirement." *Holton v. Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2010) (quoting *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004)).

VA treatment records document in active problem lists that the Veteran was diagnosed with hepatitis C in August 2007. A January 2004 hepatology note indicates that the Veteran was referred at that time for hepatitis C treatment. The Veteran testified in May 2013 that he had been treated at the San Antonio VA Medical Center (VAMC) for hepatitis C since August 2002.

Service treatment records document a normal entrance examination in June 1971. The Veteran was admitted to the hospital in October 1973 with liver function studies that suggested mild hepatitis. He was diagnosed with acute viral hepatitis and secondary urticarial and subsequently discharged in November 1973 to active duty with normal liver function. The Veteran's separation examination in March 1973 contained normal clinical findings, including negative urology lab results. The Board acknowledges that the Veteran's military occupation specialty (MOS) was as a medical corpsman; thus in-service exposure to hepatitis C as a result of occupations duties is a possibility, although the Veteran's service treatment records contain no indication of any occupational exposure, such as accidental needle sticks.

Therefore, the remaining inquiry is whether there is a nexus between the Veteran's current hepatitis C and his active service. As discussed below, there is conflicting expert evidence in this regard.

In conjunction with his claim to reopen, the Veteran submitted an April 2010 statement from his primary care physician. The physician stated that the Veteran had been under her care since 2004 and that he had reported to her one risk factor for hepatitis C infection: exposure to blood during the administration of vaccines using an air gun. Based upon this, she opined that it is at least as likely as not that the Veteran was infected with hepatitis C during his vaccinations while on active duty.

The RO found the above physician's statement to be new and material evidence sufficient to merit reopening of the Veteran's previously denied claim; as discussed above, the Board also made this finding herein. The RO subsequently afforded the Veteran a VA examination in September 2010.

The September 2010 VA examination report documents that the Veteran's contention that his hepatitis C is due to vaccination from a jet injector vaccination gun in 1971. The examiner noted an in-service diagnosis of hepatitis in 1972 without any designation at to type; however, he noted that it was more than likely hepatitis A and not hepatitis C. The Veteran also reported a self-inflicted laceration of his left wrist and states he was given a blood transfusion at that time; however, upon review of the claims file, the examiner noted there was no mention of the reported blood transfusion. Physical examination revealed that the Veteran was well-developed with moderately low body weight. Abdominal examination revealed a smooth liver which was nontender to palpation. Ascites were not present and there was no evidence or portal hypertension. There were no other signs of liver disease (including jaundice, palmar erythema, and spider angiomata) and no evidence of malnutrition, including muscle wasting.

Diagnostic and clinical tests reviewed from August 2009 indicated a high viral count for hepatitis C, while April 2010 liver function studies were normal. Review of risk factors included the Veteran's statement above concerning a blood transfusion which the examiner could not corroborate within the claims file, and the Veteran's admission of multiple sexual partners; he denied any other risk factors.

The examiner diagnosed chronic active hepatitis C, with unknown etiology. He opined that it is not at least as likely as not that the Veteran's hepatitis C is a result of air gun injection during service as it is not documented or supported in any medical literature that the air gun causes hepatitis C. He stated that the nexus opinion of the Veteran's primary care physician discussed above was therefore unsupported. Finally, the examiner stated the Veteran's hepatitis C condition had no effect on his occupational functioning and daily activities given his normal liver function studies, but that he was disabled and confined to a wheelchair by other conditions, including a cervical spine and lumbosacral spine disorder.

The September 2010 VA examination report and the resulting opinion were based upon a review of the claims file, a history provided by the Veteran, and a physical examination. The opinion clearly addresses the Veteran's disability and provides a rationale based the examination and reference to medical literature. The conflicting opinion of the Veteran's primary care physician, while probative given her familiarity of and prior treatment of the Veteran, does not contain a fully articulated opinion supported by a reasoned analysis or rationale. *See Nieves-Rodriguez v. Peake*, 22 Vet. App. 295 (2008) (the probative value of a medical opinion comes from its reasoning).

In his March 2014 appellate brief, the Veteran's representative discusses a June 2004 VA Fast Letter 04-13, entitled "Relationship Between Immunization with Jet Injectors and Hepatitis C Infection as it Relates to Service Connection", which suggests that the "despite the lack of any scientific evidence to document transmission of HCV with airgun injectors, it is biologically possible." VBA Fast Letter 211 (04-13), June 29, 2004.

While VA has conceded that such a connection is biologically possible, VA also requires "a full discussion of all modes of transmission, and a rationale as to why the examiner believes the airgun was the source of the veteran's hepatitis C." *Id.* As stated, the Veteran's treating physician provided no such rationale, which limits the probative value of her opinion. The Board affords more probative weight to the VA examiner's opinion, which included a rationale that found no support for, or documentation of, a nexus between airgun inoculation and hepatitis C in medical

literature; this is consistent with the VA Fast Letter referenced above that points out the lack of scientific evidence in this regard. *Id*.

Further, the Board finds it significant that the Veteran's May 2013 testimony was clear when he stated that he was no longer contending that his hepatitis C was the result of air gun inoculation during service; rather, he asserted that he contracted hepatitis C from a blood transfusion given to him at Fort Sam Houston after he cut his wrist.

Service treatment records document that the Veteran was hospitalized at Brooke General Hospital at Fort Sam Houston on two occasions, first in June 1972 and again February 1973, both for psychiatric reasons. The February 1973 hospital records corroborate the Veteran's May 2013 hearing testimony that he was admitted as a suicide risk after cutting his forearm; however, just as the September 2010 VA examiner was unable to find documentation of the reported blood transfusion incident to a self-inflicted wrist laceration; the Board finds no documentation of a blood transfusion at any point during the Veteran's service. Notation as to a medical procedure as significant as a blood transfusion would be expected.

The Veteran is certainly competent to relate that he underwent a blood transfusion during service, as this requires only personal knowledge as it comes to him through his senses. *See Layno v. Brown*, 6 Vet. App. 465, 470 (1994). However, the Board finds that the Veteran's testimony in this regard is not credible. VA treatment records contain a January 2004 hepatology note wherein the Veteran states that he had a blood transfusion in *1979* related to a stab wound and that he was already hepatitis C positive at that time. Such statements are inconsistent with the Veteran's statements during the September 2010 VA examination and his May 2013 hearing testimony that he underwent a blood transfusion during service and that his treatment of hepatitis C began in August 2002.

The Veteran has been inconsistent in other statements as well. For example, he testified in May 2013 that his physicians elected not to treat him for hepatitis C because of other medical concerns. However, a May 2011 progress note in VA

treatment records documents that the Veteran *declined* treatment for hepatitis C at that time.

Given these inconsistent statements, the Board finds the Veteran's credibility to be diminished. *See Caluza v. Brown*, 7 Vet. App. 498 (1995) (in weighing credibility, VA may consider interest, bias, inconsistent statements, bad character, internal inconsistency, facial plausibility, self interest, consistency with other evidence of record, malingering, desire for monetary gain, and demeanor of the witness).

To the extent that the Veteran asserts a nexus opinion that it was more likely than not that he contracted hepatitis C through a blood transfusion during service, the Board finds that he is not competent to opine on such complicated medical etiology, even given his MOS as a medical corpsman, and in any case, his opinion is unsupported by any sort of rationale.

In summary, the preponderance of the evidence is against a finding of a nexus relationship between the Veteran's hepatitis C and his active service; hence, the appeal must be denied. As the preponderance of the evidence is against the claim of entitlement to service connection for hepatitis C, there is no reasonable doubt to be resolved in this case. *See* 38 U.S.C.A. § 5107(b); 38 C.F.R. § 3.102; *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

ORDER

Service connection for hepatitis C is denied.

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M. TENNER
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).