Gordon A. Graham #39029
14910 125th St. NW
Gig Harbor, WA 98329
(253) 313-5377

Dept. Of Veterans Affairs
Board of Veterans Appeals
Litigation and Support Group
P.O. Box 27063
Washington DC 20038

October 5, 2021

Re:

Additional Pages to VA Form 10182
Decision Review Request

Request for Reconsideration of June 1970 rating decision Under the Authority of 38 C.F.R. §3.156(c)(1)

Request for Earlier Effective Date and Retroactive Evaluation of Disabilities Based on 2015-2018 Award of Disabilities Identified by Paragraph (c)(1) (above) Under §3.156(c)(3),(4)

Appellant, through counsel, now files his Notice of Disagreement with the January 6, 2021, denial for service connected compensation filed on June 16, 1970, based entirely on 38 C.F.R. §§3.156(c)(1)(3)(4); 3.155(d)(2) (2021). This appeal represents the same claims stream flowing from the March 30, 2015, reopening of the original June 16, 1970, claim for benefits. The Legacy claim has

since been transferred to the new AMA process. A Higher Level of Review (HLR) informal hearing was held August 12, 2021, and the claim remains denied.

The Veteran timely opted into the AMA process on November 10, 2020 and submitted a VA Form 20-0995 Supplemental Claim for an earlier effective date including the submission of new and relevant service department records never before associated with the claims file. On the same day, a Veterans Service Officer entered a comment. The VBMS document is labeled Medical Treatment Record-Government Facility. In the subject line, it states: "*Evidence is mostly duplicate with some new pages not associated previously*." See Document Title **b31974a4-3370-4e4e-8edd-c2008e8d897c_b5385f3d-5e72-40e7-8547-384ea7544c6c**. Appellant contends this is the predicate for a determination that a reconsideration of the original June 1970 claim is legitimately for application. Nowhere in the claims file prior to 11/10/2020 can any of these new service department records be found within VBMS. In any case, by operation of law, a true reconsideration must ensue under the authority of §3.156(c)(1). Appellant seeks a *de novo* review of the evidence and reconsideration afforded by the Secretary's own regulation under the authority of §§3.156(c)(1)(3)(4); 3.304(d) (2021).

Adjudicatory Facts Pertinent to the Appeal

1. 6/16/1970—Veteran files claims for, inter alia, perforated ear drums, perforated right cornea, shell fragment wounds (SFW) to right hand, arm and side, and SFW to right side of head- all of which were sustained in a mortar explosion on 1/18/1969.
2. 8/10/1970—Veteran attends c&p examination and describes symptoms of, inter alia, numbness of thumb, right arm disability, headaches, blurred vision in right eye, repeated ear infections, earaches, and ringing in right ear.
3. 8/14/1970—Special Eye, Ear, Nose and Throat (EENT) Examination records Veteran suffered concussion blast injury with bilateral tympanic perforation and SFW to right cornea with incipient lens change and intermittent tinnitus. Diagnoses: 1. Residuals of shrapnel

wound right corenea[sic]; 2. Deafness neurosensory bilateral, results of concussion blast injury.

4. 9/30/1970—Rating Decision grants DC 5308 10%, **DC 6099** 0%, DC 7805 0%, and DC 6296 0%.
5. 2/10/2015—DD 215 Certificate of Release from Active Duty with notation of Combat Infantryman Badge (CIB) showing combat is associated with Veteran's claims file. No evidence of attempt by AOJ to reopen claim under §3.156(c)(1).
6. 3/30/2015—Having heard nothing from the VA, Veteran files to reopen 1970 claim under §3.156(c)(1) with additional service department records for, inter alia, bilateral deafness, painful scars, tinnitus, peripheral neuropathy right hand, right eye and residuals of SFWs.
7. 12/21/2015-- Rating decision grants compensable entitlement to PTSD, right shoulder, right upper thigh, painful scars, tinnitus, and Chapter 35 DEA benefits (TDIU). No mention is made of a reconsideration under §3.156(c)(1) based on the introduction of relevant service department records (DD 215) which had never previously been associated with the claims file (i.e., combat presumption under 38 USC §1154(b)) §3.304(d).
8. 8/04/2016—Veteran files his VAF 21-0958 Notice of Disagreement with the 12/21/2015 rating decision for numerous contentions and clear and unmistakable error. Submission includes September 23, 1969, General Courts Martial of Veteran (new service department records).
9. 12/03/2016—Rating decision denies earlier effective date for various disabilities including informal claim for tinnitus based on clear and unmistakable error. No mention is made of entitlement to an earlier effective date based on §3.156(c)(1),(3)(4).
10. 12/27/2016—Veteran files claims for Traumatic Brain injury residuals to comprehend service connection for his headaches suffered secondary to retained shell fragment in right temple and concussion blast injuries to ears on 1/18/1969.
11. 1/02/2017—Veteran again submits new DD 215 Certificate of Release from Active Duty with award of Purple Heart Medal on 4/28/1970 to show proof of combat. No reconsideration under §3.156(c)(1) is initiated by AOJ.

12. 2/22/2017— Formal DRO Hearing. Veteran obtains and submits STRs of service department records of service treatment records (STRs) from National Personnel Records Center (NPRC) which existed, but which VA never associated with the claims file supporting reconsideration of his 1970 claims filing.
13. 5/08/2017—Rating decision grants entitlement to TBI and migraine headaches-again with no mention of recent §3.156(c)(1) submission of relevant service department records only now associated with the claims file. Entitlement is based on TBI incurred on January 18, 1969.
14. 5/21/2018—Rating decision grants earlier effective date for Tinnitus under §3.114; increase of PTSD, increase of painful scars, service connection and compensable rating for bilateral concentric field vision defect, concession of a clear and unmistakable rating error with a compensable grant of a retroactive effective date of the 1970 claim. Rating decision lastly concludes no revision of the 1970 decision is warranted under §3.156(c)(1).
15. The 5/21/2018 Statement of the Case (SOC) states Appellant's tinnitus began following "acoustic" trauma. A second opinion is the tinnitus was caused by "military noise exposure".
16. 11/10/2020—Veteran timely refiles AMA Supplemental claim for reconsideration based on §3.156(c)(1) and earlier effective date under §3.156(c)(3)(4).
17. 1/06/2021—Request for reconsideration denied based on freestanding claim for earlier effective date. No discussion of applicability of §3.156(c)(1).
18. 8/12/2021--- HLR rating decision denies earlier effective date for all contentions based on § §3.2500; 3.160; 3.105.

History

In March 2015, Appellant filed to reopen his 1970 claim and submitted relevant service department documents that existed and had never been associated with the claims file when VA first decided the initial, original claim on 9/30/1970. These included, inter alia, Appellant's belated award of the Combat

Infantryman Badge entitling him to the combat presumption enshrined in 38 U.S.C. §1154(b). The effective date of entitlement granted was the date of claim under §3.156(a). Nowhere within the four corners of the December 2015 rating decision can there be found a discussion of the applicability of reconsideration under §3.156(c)(1)-let alone a clear and unequivocal denial under the regulation's additional conjunctive subsections (3),(4).

At his February 22, 2017, Decision Review Officer (DRO) formal hearing, Mr. L--- yet again submitted 31 new pages of additional relevant service department documents in the form of service treatment records (STRs) and four period photographs that had never previously been associated with the claims file. See VBMS entry 2/22/2017; Document Title: **SMS-C21041104.pdf.** The Adjudicator was put on notice that the submission of these new and relevant service department records would legally require the need for a reconsideration based on §3.156(c)(1). See DRO hearing transcript dated February 22, 2017, page 24, 26, 47. See VBMS entry dated February 22, 2017, Document Title: **L---6503_ARC.pdf**. Again, nowhere within the four corners of any of the Appellant's 2015- 2017 decisions can there be found any evidence or mention of a formal adjudicative reconsideration of the 1970 claims and a clear and reasoned explanation of denial to aid in rebutting the finding of fact. This flies in the face of the due process promised in §3.103(a)(b)(1)(2),(c)(1).

Nowhere in the four corners of the Statement of the Case (SOC) dated 5/21/2018 can any explanation of denial of an earlier effective date for entitlement to disabilities based on §3.156(c)(3)(4) be discerned. Every reference to denial of an earlier date for entitlement to service connection of the claimed disabilities rests on §§3.155; 3.400 and entitlement under an informal claim prior to March 25th, 2015.

Mr. L--- appealed the 2018 denial of an earlier effective date under §3.156(c) to the BVA (Docket No. 18-14 816). Mr. L--- withdrew his claims of clear and unmistakable error in the original September 1970 rating decision. The Board dismissed some claims for lack of jurisdiction and failed to rule on the applicability of Court precedence to informal claims presented in the form of a

"Solze notice". As for the earlier effective date for tinnitus, The Board did not address or entertain ***Clemons*** precedence of additional inextricably intertwined conditions at the August 1970 compensation and pension examination. See ***Solze v. Shinseki***, 26 Vet. App. 118, 127(2013). The Board did rule narrowly that the service department records did not qualify as §3.156(c)(1) evidence, and if they did, it was not enough to revise the 1970 rating decision. No reasons and bases were given for the denial of the reconsideration.

In the present supplemental AMA claim, filed in November 2020, from which this Notice of Disagreement is taken, 31 new and relevant pages of official service department records that existed but had never been associated with the claims file prior to the November 10, 2020, Motion for Reconsideration of the September 1970 rating decision were submitted as new and relevant service department records for reconsideration under §3.156(c)(1)(i)(ii).

A review of the January 6, 2021, rating decision yields no mention of the application of §3.156(c)(1) and its legal significance or application to the evidence of record, both now, in the prior submissions in 2015-2017. The rating decision fails to address the request for reconsideration for earlier effective dates under §3.156(c) by averring there were no claims, formal or informal, pending. This ignores the clear and unmistakable precedence established in ***Clemons v. Shinseki***, 23 Vet. App. 1, 5 (2009) A claimant ""[does] not file a claim to receive benefits only for a particular diagnosis, but for the affliction his . . . condition, whatever that is, causes him." Consequently, VA "should construe a claim based on the reasonable expectations of the non-expert, self-represented claimant and the evidence developed in processing that claim," taking into consideration "the claimant's description of the claim; the symptoms the claimant describes; and the information the claimant submits or that the Secretary obtains in support of the claim." Id. VA commits error "when it fail[s] to weigh and assess the nature of the current condition the appellant suffer[s] when determining the breadth of the claim before it." Id. at 6. This conclusion aligns with the well-established principle that the VA is required "to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." ***Hodge v. West***, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (quoting H.R. Rep. No. 100-963, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 5782, 5795). Our cases have understood this mandate to mean that "the VA must determine all

potential claims raised by the evidence, applying all relevant laws and regulations, regardless of [the claim's label]," ***Roberson v. Principi***, 251 F.3d 1378, 1384 (Fed. Cir. 2001), and we have held that such a requirement extends to all pro se pleadings and filings submitted to the VA, see ***Szemraj v. Principi***,, 357 F.3d 1370, 1373 (2004). ***Clemons*** is but one application of the general lenity rule established by Hodge, Roberson, and their doctrinal progeny.

In spite of the Appellant being represented by a Veterans Service Organization in 1970, the Court of Appeals for the Federal Circuit (CAFC) has repeatedly held "Although aides from veterans' service organizations provide invaluable assistance to claimants seeking to find their way through the labyrinthine corridors of the veterans' adjudicatory system, they are "not generally trained or licensed in the practice of law." ***Cook v. Brown***, 68 F.3d 447, 451 (Fed.Cir.1995). See also ***Andrews v. Nicholson***, 421 F.3d (2005) 1283. See also ***Comer v. Peake***, 552 F. 3d 1362, 1367 (Fed. Cir 2009). "Although we have held that the duty to construe a veteran's filings sympathetically does not necessarily apply when a veteran is represented by an attorney, the assistance provided by the DAV aide is not the equivalent of legal representation.

Discussion

The Secretary, during the pendency of the 2015 instant appeal, finally conceded in the 2018 SOC, that Appellant had indeed submitted service department records never before associated with the claims file, but they were not probative, and, following §3.156(c)(1) reconsideration, an earlier effective date for the claimed conditions in 1970 was not for application. The Secretary has also alternately contended Appellant never filed for any of these "separate and distinct" disabilities prior to March 30, 2015, either formally or informally. Lastly, he recharacterized Appellant's concussion blast injury as "acoustic trauma" and avers it would not have been compensable because he would have to have incurred a head injury or concussion on January 18, 1969 under §§4.84a DC 6009; 4.84b DC 6260; 4.124a DC 8045, 8100; 4,132 DC 9304 (1970). Incongruously, the Secretary deigned to award an earlier effective date for tinnitus under §3.114 based on liberalizing legislation enacted on March 26,

1976-this in spite of the continuing refusal to grant an earlier effective date based on there being no evidence a claim for tinnitus was filed prior to March 15, 2015. The endless, changing rationale for the denials can only be the product of post hoc rationalizations to support prior Agency action. This is error.

On March 30, 2015, Mr. L---, acting *pro se*, filed to reopen his 1970 claim which encompassed not only the reasonably raised claims he originally filed for in 1970 but additional, residual conditions or symptoms of the original injures. The filing included §3.156(c)(1) records. See ***Grimes v. McDonough***, WL No. 18-1017 (Decided April,28, 2021) (holding that the obligation to broadly construe a claim under ***Clemons*** *supra* consistent with a lay claimant's reasonable expectations and the general rule of ***Ephraim v. Brown***, 82 F.3d 399 (Fed. Cir. 1996), and ***Boggs v. Peake***, 520 F.3d 1330 (2008), that separately diagnosed conditions with distinct factual bases should ordinarily be treated as separate claims). The Grimes Court held that "these authorities are complementary and that, pursuant to ***Clemons***, a claim for service connection may encompass a related condition that is initially referenced by the claimant but not diagnosed until later in the appeal stream, regardless of whether the claim is initially granted or denied by the RO.) *Id*. Appellant (only now a recognized combat Veteran), at his August 10, 1970, c&p examination, presented lay testimony (signed under oath) clearly and convincingly described in his own words, on the claimed disabilities thusly:

"My thumb gets numb if I get it hit just above it. If I work too much with the right arm or get too much pressure it swells. No problems from the right side. **I have been having headaches**. **My right eye is blurry**. I have been having an infection in my right ear and the left one has been clogged up. I have earaches. I have drainage in the right ear**. I have ringing in my right ear." (**Emphasis added).

On December 21, 2015, the Secretary granted all the Veteran's claims and continued the rating for bilateral deafness. No mention was made of a reconsideration of the September 30, 1970, rating decision. The effective date was March 30, 2015, for all contentions filed. Reasonable minds can only conclude that the December 17, 2015, grant of the claims could only be based, all or in part, on the relevant service department records submitted into evidence under color of §3.156(c)(1). In any event, it can be said that the

Secretary now indisputably had constructive possession of same. See ***Turner v. Shulkin***, 29 Vet. App. 207 (2018) held that for purposes of finality VA treatment records dated during the appeal period are consider in VA's possession even if these records are not physically associated with the claims file until many years after the regional office (RO) issued a rating decision if the RO had sufficient knowledge of the existence of the records within the one-year appeal period. The Court also held that these VA treatment records will thereafter only trigger VA's duty under 38 C.F.R. § 3.156(b) if they are new and material evidence.

Again, after the submission of more relevant service department records both before the February 22, 2017, DRO hearing, and during same, the Secretary shortly thereafter granted entitlement to TBI and migraine headaches conceding these injuries did indeed occur on January 18, 1969. Once again, absent from these ratings decisions was any mention of the applicability of 3.156(c)(1)(3)(4). Much like the December 2015 rating decision, the 2017 and 2018 additional awards of entitlement for injuries received in January 1969 can only be seen as the fruit of the new and relevant service department records in the absence of any disclaimer otherwise in the rating decisions. See ***McWhorter v. Derwinski***, 2 Vet. App. 133, 136 (1991). "Yet,[w]here [an] appellant has presented a legally plausible position . . . and the Secretary has failed to respond appropriately, the Court deems itself free to assume . . . the points raised by [the] appellant, and ignored by [VA], to be conceded."

Mr. L--- alleges, as he did before, that the issue of an earlier effective date under 3.156(c)(3)(4) is not moot because the RO has conceded the same entitlements over the years from 2015 to 2018 filed for in 1970 -i.e., compensable awards for tinnitus, a chronic eye condition, shell fragment wounds over seven muscle groups, PTSD, TBI with retained metal fragment to the right temporal lobe area and migraine headaches- to name just a few of the contentions in the instant appeal of the denial of the motion to reconsider the 1970 ratings decision.

The Secretary, in 2018, conceded one (1) forty eight year-old clear and unmistakable error in the original September 1970 rating decision resulting in

additional compensation for SFWs. The Secretary lastly conceded compensable entitlement to an eye injury incurred in 1969 was due-but not until this representative demanded a second eye c&p examination which revealed nine (9) retained fragments and a field vision impairment. The March 24, 1970, separation examination conducted two months prior to his original claim filing in June clearly shows a *permanent* PUHLES score of 3 for right eye including a notation of traumatic cataract. See VBMS entry 7/24/1970 Document type: *STR-Medical, Subject: 56 pgs; Vietnam pg. 49; included dental;* Document Title **SMS-51710782.PDF.**

The 1970 rating board was required to address entitlement to additional compensation for tinnitus, migraine headaches and TBI under other diagnostic codes because secondary service connection for those conditions was reasonably raised by the VA compensation and pension examinations of August 10 and 14, 1970, during the pendency of his original claim before VA. See ***Robinson v. Peake***, 21 Vet. App. 545, 552 (2008) (requiring the Board to address all issues explicitly raised by the claimant or reasonably raised by the record), aff'd sub nom. ***Robinson v. Shinseki***, 557 F.3d 1355 (Fed. Cir. 2009).

The diagnoses by the August 1970 VA examiner, which document the veteran's assertions of, *inter alia*, tinnitus, bilateral deafness, otitis media and incipient lens change at his c&p examination further confirm the predicate for the reasonably raised entitlement to secondary service connection for those conditions. See ***Fountain v. McDonald***, 27 Vet. App. 258, 275-76 (2015) (concluding that entitlement to secondary service connection was reasonably raised by the record). With the benefit of hindsight, and the service department records only now associated with the claims file between 2015-2017, and yet again in the instant appeal describing his headaches immediately following the trauma, there can be no question as to the applicability of 3.156(c)(1)(3)(4).

The Secretary relies on Boggs supra for the proposition that VA's obligation to address reasonably raised issues does not extend to ***separate and distinct*** claims for benefits, including claims for secondary service connection, that were not initiated on the standardized forms prescribed by the Secretary in 1970. This

overlooks not only the version of the regulation (§3.155) in effect in 1970 as well as the obvious fact that there was one, and only one, concussion blast injury.

Appellant's case is distinguishable from ***Brokowski v. Shinseki****, 23 Vet. App. 79, 85-86 (2009.* Mr. L--- identified his "hearing" claim in 1970 as a claim for perforated ear drums. During his compensation and pension exam he further informed the examiner *in haec verba* (signed under oath) he had chronic bilateral infections, earaches and ringing in his right ear. A clinician need not go on a prolonged, guided safari to ascertain if Appellant's ear problems were related to the perforated ear drums. Indeed, they both involve the same sensory apparatus. In a known setting of a traumatic, high explosive concussion blast injury involving numerous SFWs with retained metal fragments too numerous to count (TNTC), the same clinician was easily able to discern and diagnose bilateral neurosensory deafness *which Appellant decidedly did not file for.* Appellant, only now benefiting from the combat presumption at his DRO hearing, testified under oath about what he told the VA clinicians in 1970: "I told them they [ears] ring almost all the time. See VBMS (page 39, February 22, 2017, Hearing Transcript).

Singularly, Appellant filed for a SFW to the right side of his head. This claim was made independently of the distinctly different claim for other SFWs TNTC to the right side of his body extending downward from the neck to the arm, ribs and the knee. He further elucidated that he had been suffering ongoing headaches from this head trauma. In Exhibit A, included in the latest tranche of service department records which had never been associated with the claims file, submitted with the instant November 2020 claim, on page 20 of 32, on February 28, 1969, one month and ten days following the concussion blast injury, the Army clinician noted under Symptoms or Complaints,

"c/o (complains of) H/A (headache). states has been taking Darvon all day for H/A".

Reasonable minds can only concur this constitutes new and relevant evidence evincing earlier entitlement to traumatic brain Injury claimed formally as "SFW to Rt. Side of Head" and informally as headaches, blurry vision and

tinnitus. Appellant contends that the 1970 claim for SFW to right side of head remains live and justiciable because the RO never formally granted or denied the claim in 1970. The pending claims doctrine provides that a claim remains pending in the adjudication process, even for years, if VA fails to act on it. ***Norris v. West***, 12 Vet. App. 413, 422 (1999). The Court has confirmed that raising a pending claim theory in connection with a challenge to the effective-date decision is procedurally proper. ***Ingram v. Nicholson***, 21 Vet. App. 232, 249, 255 (2007)

In evaluating a veteran's claim, the Board is required to consider all theories of entitlement to VA benefits that are either raised by the claimant or reasonably raised by the record. ***DeLisio v. Shinseki***, 25 Vet.App. 45, 53 (2011). A claim for service connection may be expanded beyond a veteran's lay description of a disability to include any disability "that may reasonably be encompassed by several factors including: the claimant's description of the claim; the symptoms the claimant describes; and the information the claimant submits or that the Secretary obtains in support of the claim." ***Clemons*** *supra.* Appellant was finally forced to submit x ray proof, at personal expense, of the large, retained metal fragment (2.9 mm) lodged in the right temporal lobe area in 2016. The ten-minute August 1970 c&p exam was peremptory and involved no x rays whatsoever.

As applied to Mr. L---'s case, § 3.155(d)(2)(1970) required VA to recognize, develop, and adjudicate his entitlement to secondary service connection for tinnitus and TBI once the August 1970 VA Eye, Ear, Nose and Throat c&p examination report diagnosed a concussion blast injury including blurred vision, bilateral perforated ear drums and tinnitus. Reasonable minds can only concur that Appellant unequivocally raised those issues at his August 10, 1970, c&p examination in conjunction with the perforated tympanic membrane residuals. Because the 1970 Rating Board failed to infer these disabilities were "claims", formal or informal, it erred. To subsequently infer and rate for "deafness, bilateral" while ignoring diagnosed tinnitus in a setting of a concussion blast head trauma, conflicts with ***Roberson v. Principi,*** 251 F.3d 1378, 1384 (Fed. Cir. 2001)"the VA must determine all potential claims raised by the evidence, applying all relevant laws and regulations, regardless of [the claim's label]."

§3.156(c)(1) Legal Standard of Review

Vigil v. Peake, 22 Vet. App. 63, 66-67 (2008) states that when service records which had not been obtained previously are added to a file, and lead to a grant of service connection, the original claim is not just reopened, it is reconsidered and serves as the date of the claim and the earliest date for which benefits may be granted. ***Vigil*** is on point in the instant claim. An identical scenario exists. The Secretary, however, remains adamant that the service department records *do not* provide any new evidence that would change the rationale for the 1970 rating decision. This plainly ignores the grant of the Appellant's innumerable ratings decisions promulgated, in some cases, as quickly as sixty days following each succeeding submission of service department records which heretofore resided at the NPRC for 45 years.

Additionally, the submittal of the new DD 215s (plural) showing belated awards of the Purple Heart Medal, the Army Commendation Medal and the Combat Infantryman Badge granted Appellant entitlement to 38 U.S.C. §1154(b) status even *before* he filed to reopen the 1970 claim.

What seems less clear under existing case law is precisely what constitutes "reconsideration" under § 3.156(c)(1). ***Vigil*** supra offers the best guidance on that point, holding that "reconsideration" requires "the development of evidence regarding when Mr. Vigil first suffered PTSD." Moreover, ***George v. Wilkie***, WL 16-1221 decided 3/26/2020 held "Thus, we know without question that § 3.156(c) speaks to more than effective date; it also speaks to development of the claim in at least some respect."

Appellant believes reasonable legal minds can agree with ***George*** *supra* that a reconsideration is an "adjudicatory action" requiring a formal decision which is accorded "one decision on appeal" in its own right. In a Veteran friendly, *ex parte* form of jurisprudence, transparency is essential for due process to ensue. A reconsideration, and a subsequent finding of fact, either pro or con, must be announced in the form of an appealable rating decision based on

§§3.103(a),(b)(1),(f)(1)(2)(3)(4)(5)(7); 3.104(a). The adjudicative body, by operation of law, cannot convene *in camera* in the middle of the night, promulgate reconsideration decisions and expect a Veteran to infer an implicit denial. In point of fact, the new AMA demands there be a listing of favorable findings of fact that might aid the Veteran in obtaining benefits. See §3.103(f)(4) (2021). See also ***Jaquay v Principi***, 304 F.3d at 1280 (2002) "The VA disability compensation system is not meant to be a trap for the unwary, or a stratagem to deny compensation to a veteran who has a valid claim, but who may be unaware of the various forms of compensation available to him." To the contrary, the VA "has the affirmative duty to assist claimants by informing veterans of the benefits available to them and assisting them in developing claims they may have."

Appellant's November 10, 2020, VA Form 20-0995 Supplemental claim and accompanying legal brief were explicit as to the authority under which he sought his Motion for Reconsideration-i.e., §3.156(c)(1). See ***Emerson v. McDonald***, 28 Vet. App. 200, 206-207 (2016) holding "Generally, a claimant may reopen a finally adjudicated claim by submitting new and material evidence. 38 C.F.R. §3.156(a) (2016). The effective date for an award on a claim reopened on this basis is usually the date of receipt of the claim or request to reopen or the date entitlement arose, whichever is later. 38 U.S.C. § 5110(a); 38 C.F.R. §3.400(b)(2)(i),(r) (2016). However, subsection (c) establishes an exception to these rules, the purpose of which is "to place a veteran in the position he [or she] would have been had ... VA considered the relevant service department record before the disposition of [the] earlier claim." citing to ***Blubaugh v. McDonald***, 773 F.3d 1310, 1313 (2014); New and Material Evidence, 70 Fed. Reg. 35,388, 35,389 (June 20, 2005) (proposed rule) (stating that revised §3.156(c) will "allow VA to reconsider decisions and retroactively evaluate disability in a fair manner, on the basis that a claimant should not be harmed by an administrative deficiency of the government"); see also ***Pacheco v. Gibson***, 27 Vet. App. 21, 32–33 (2014) (en banc) (Pietsch, J., concurring)(noting that subsection (c) "is an exception to finality").

Submission of New and Relevant Evidence

Appellant sought independent medical opinions (IMOs) from subject matter experts on whether the newly associated service department records, combined with the rest of claims file during the pendency of the present claim from 2015 to 2017, and again in 2020, had they been available, would have been sufficient, in whole or in part, to support entitlement to bilateral concentric contraction with visual field loss, tinnitus, headaches and/or major depressive disorder/TBI in the 1970 claim. See ***Shedden v. Principi***, 381 F.3d 1163, 1166 -67 (Fed. Cir. 2004) "Service connection may be granted for disability resulting from disease or injury incurred in or aggravated by active service. 38 U.S.C. §§ 1110, 1131, 5107; 38 C.F.R. § 3.303. The three-element test for service connection requires evidence of: (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the current disability and the in-service disease or injury."

Dr. Hema S , Board Certified in Ophthalmology, after a careful review of the 1970 claims file and the new service department records only now associated with the file from 2015-2017 and 2020, opined that Appellant's bilateral visual field loss was a neurological residual that was at least as likely as not caused by his in-service concussion blast injury. More importantly, Dr. Sugumaran stated that Mr. L---'s visual field loss was permanent and static after healing and will never resolve.

Dr. Susan W. xxxx, a Board Certified Neurologist, was asked to review the entire claims file with a concentrated focus on the service treatment records available in 1970 and the more recent inclusion of the September 23, 1969 Military Courts Martial records six months subsequent to the Veteran's medical evacuation back to Letterman General Hospital, newer service department records associated with the claims file both during the 2015 to 2017 period and the newer service department records never before associated with the claims file submitted in November 2020. Dr. concluded that had these probative relevant service department records been available, and had Mr. Long been given a proper neurological c&p examination in 1970, that, given the irrefutable evidence of record showing each and every disability filed for was subsequently

granted, "it is as likely as not that if these new [service department] records had been associated with Mr. L---'s other records at the time he filed, it would have sufficed to support entitlement to all the present neurologically-attributable claims dating back to 1970- i.e., tinnitus, blurry vision, psychiatric diagnosis and headaches."

Appellant submits both the IMOs to the Board for consideration in the first instance and waives review below at the Agency of Original Jurisdiction (AOJ). See attached Exhibits 1 and 2 with curriculum vitae.

Conclusion

The Appellant has diligently pursued his claims for disabilities relating to a single event- to wit: concussion blast injuries with diagnosed secondaries. He was *only* granted these claims subsequent to submission of proof of receipt of combat medals and probative relevant service department records never before associated with his claims file which have existed for years at the NPRC. The duty to assist a claimant is boilerplate statute and regulation but somehow that duty never occurred upon the 2015 reopening of the 1970 claim. See 38 U.S.C. §5103(a).

Appellant has now provided four tranches of relevant service department records in addition to two revised DD 214s never associated with his claims file supporting a reconsideration of his original claim in 1970. Until the issuance of the May 2018 SOC, the record remained silent for any mention of a reconsideration of the 1970 claim-under any aegis. The Secretary would have Appellant believe a reconsideration occurred subsequent to each submission in spite of his silence on the record. For example, the December 17, 2015, rating decision granting service connection for PTSD states:

"The required stressor is conceded **based on your receipt of a combat award**." (emphasis added).

Prior to March 30, 2015, a longitudinal review of the claims file shows there was no evidence of record showing any combat awards whatsoever. Appellant submitted proof of these awards with his 2015 reopening of the 1970 claim. Above, the Secretary clearly identifies the 3.156(c)(1) evidence used to grant entitlement to PTSD. It cannot be the Appellant's fault that the Secretary ignored his own regulation (Part IV, VA Schedule of Rating Disabilities (VASRD), subsection §4.42 (1969))and the duty to assist when he failed to request a detailed neurological examination in 1970 constructively in possession of knowledge of a concussion blast injury. Prior to 2015, Appellant was unable to provide anything more than an unsubstantiated "history" of concussion blast injury with no proof of combat occurrence. Nevertheless, the Secretary was put on notice August 14, 1970, he *had been* diagnosed with a concussion blast injury. The medical evidence in 1970 did show he had shrapnel wounds-but with no supportive etiology showing combat.

The pertinent regulation then (in 1970) and now remains unchanged and is explicit in its requirements. §4.42 (1969) states:

"The importance of complete medical examination of injury cases at the time of **first medical examination** by the Veterans Administration cannot be overemphasized. When possible, this should include **complete neurological and psychiatric examination, and other special examinations indicated by the physical condition**, in addition to the required general and orthopedic or surgical examinations. When complete examinations are not conducted covering all systems of the body affected by disease or injury, it is impossible to visualize the nature and extent of the service connected disability. **Incomplete examination is a common cause of incorrect diagnosis, especially in the neurological and psychiatric fields, and frequently leaves the Veterans Administration in doubt as to the presence or absence of disabling conditions at the time of the examination." (§4.42) (1970).** (emphasis added)

Acoustic Trauma Versus Concussion Blast Injury

The Secretary, in his May 21, 2018, Statement of the Case(SOC) page 79, continues to characterize the etiology of Appellant's injury as "acoustic trauma"- this despite of the August 14,1970, confirmed diagnosis by J.W. Davis, M.D., a VA clinician, of "concussion blast injury". See ***Sickels v. Shinseki***, 643 F.3d, 1362, 1365-66 (2011) (holding that the Board is "entitled to assume" the competency of a VA examiner and the adequacy of a VA opinion without "demonstrating why the medical examiners' reports were competent and sufficiently informed"). Appellant asks the Board to take judicial note that while "acoustical trauma" can cause tinnitus, it generally does not result in shell fragment wounds to seven different muscle groups with retained metal fragments TNTC, a traumatic cataract to the right eye with bilateral concentric contraction, TBI, chronic migraine headaches or a major mental disorder.

The etiology of the Secretary's choice of "acoustical trauma" appears to have its genesis in the May 21, 2018 DRO decision where the term was first used. On page 6 of 19, The Secretary held:

"In 1970, tinnitus had to be severe and continuous, and ***a symptom of head injury or concussion*** before service connection could be granted. Tinnitus criteria changed March 10, 1976 to include ***acoustic trauma*** in addition to head injury and/or concussion as a reason for tinnitus." (emphasis added)

" At your VA examination on October 20, 2015 you reported recurrent tinnitus which began following ***acoustic trauma***. The examiner found ***your tinnitus is at least as likely as not a symptom associated with your hearing loss as tinnitus is known to be a symptom associated with hearing loss.*** (emphasis added).

Appellant requests the Board take judicial notice of the Secretary's ongoing changing post hoc rationalizations as to the etiology of the 1970 claim for his tinnitus and the 2018 recharacterization of a 1969 concussion blast injury as acoustical trauma.

A Veteran is competent to report on that of which he or she has personal knowledge. See ***Layno v. Brown***, 6 Vet. App. 465, 470 (1994). See also ***Jandreau v. Nicholson***, 492 F.3d 1372, 1377 (Fed. Cir. 2007) (noting general competence of laypersons to testify as to symptoms but not medical diagnoses). Mr. L--- has averred under oath in 2017 that he was knocked unconscious while simultaneously blinded and deafened by the concussion blast injury. Both eardrums were ruptured. He contends, and the pepper spotting from the SFWs supports he was no more than two or three feet away from the blast. He was diagnosed while still in service with a traumatic cataract (permanent) secondary to the perforated cornea. He presented testimony, as best he could as a lay person, as to the extent of his residual injuries at his c&p examinations in 1970 under oath. See VA Form 21-2545 VA examination dated 8/10/1970.

At his discharge physical examination on March 24, 1970, fifteen months after the concussion blast injury, and a mere five months before the August 10, 1970, VA c&p examination, his PULHES eye rating was recorded as E3 permanent profile. Mr. L--- filed for "perforation Rt. Cornea", but VA didn't grant a claim for this. VA granted a claim for DC 6099—Residuals SFW RT Cornea; VOD 20/40 with best correction; VOS 20/20 Unaided. There was no mention whatsoever of a permanent profile for static traumatic cataract or blurry vision. Mr. L--- avers he did not, and never has, alleged he has refractive error nor has he ever filed a claim for same. The Secretary attempts to read more into the 1970 claim than the evidence supports.

DC 6099 is the prefix code <u>only</u> for an eye rating when using §4.27 *Use of Diagnostic Code Numbers* under §4.84a to effectuate an analogous rating for an unlisted disease. However, the VASRD provides for a rating code for perforated cornea-DC 6009 (1970). Absent a four-digit suffix code, the eye disability diagnostic code was and is too ambiguous for rating purposes. Central Visual Acuity ratings are listed from DC 6063 to 6079 (1970). A traumatic cataract is rated under DC 6027 (1970). The salient point is that the Appellant was rated for visual disabilities he *did not* file for and not rated for disabilities that he *did* file for. The Secretary fails to meet his burden contending Appellant filed only for the distinct disability of a perforated cornea to the exclusion of the nine retained metal fragments and traumatic cataract in the 1970 claim. The new service

department records clearly and convincingly reflect an injury to the left eye as well.

Similarly, the appellant filed a claim for perforated eardrums. See VBMS VA Form 21-526 filed 6/16/1970. Perforated eardrums were rated under §4.84b DC 6211. Nevertheless, Mr. L--- was rated under DC 6296 deafness, bilateral. See VBMS *Rating Decision-Code Sheet* dated September 30, 1970. VBMS document title **SMS-517107651.PDF.** Once again, strangely, the Appellant was rated for disabilities he *did not* file for and *not* rated for the disability he *did* file for. This pattern implies the above claims were studied, residuals of the actual injury were inferred and a rating promulgated on those residuals alone. In spite of the available regulation for rating service connected injuries which are asymptomatic, §4.31(1970) was not effectuated in either of the above cases.

In the January 6, 2021, rating decision denying an earlier effective date for tinnitus under §3.156(c)(3), on page 6 under the **Reasons For Decision**, the Secretary held:

" Your June 1970 application specifically listed "perforated ear drums" and made no notation of tinnitus or ringing in the ears, a **separate and distinct disability** from perforated ear drums. Although you reported ringing in your right ear and some tinnitus, along with other symptoms related to your ear, during an August 1990 VA examination, this was not sufficient to raise an informal claim for tinnitus. **There was no communication or action from you that indicated an intent to seek service connection for tinnitus or ringing in your ears at the August 1970 examination** or prior to the September 1970 rating decision. In fact, you did not indicate any intent to seek service connection for tinnitus or the ringing in your ears until more than 40 years later. Absent any claim, formal or informal, there was no denial of benefits for tinnitus prior to March 30, 2015, and thus, no prior claim to reconsider." (emphasis added)

The Secretary stated in the January 6, 2021, denial, that the November 10, 2020, supplemental claim was construed as a freestanding claim for an

earlier effective date in the preamble-something forbidden as a matter of law. He cites to 38 CFR §§3.400; 3.156(a) for his denial of entitlement to an earlier effective date. Further, the decision states that the service department records only now associated with the claims file "do not prove or disprove the matter at issue". This is the incorrect legal standard of review. The service department records merely need to be relevant and, if an award was made based all or in part on the records identified in §3.156(c)(1), then a second, ancillary decision has to be made as to the effective date entitlement arose or the date VA received the previously decided claim. ***Blubaugh*** *supra;* §3.156(c)(3)(4) (2021).

As noted above, the Secretary divorces perforated eardrums from tinnitus and ringing in the right ear as separate and distinct claims under ***Boggs*** *supra* but nevertheless contends that the Veteran's claim for perforated ear drums assuredly encompassed deafness bilaterally as an inferred claim. This is error. See ***Christopher v. Smith Kline Beecham Corp.***, 132 S.Ct. 2156, 2166 (2012)(explaining that "deference is ... unwarranted when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question," such as "when the agency's interpretation conflicts with a prior interpretation, or when it appears that the interpretation is nothing more than a convenient litigating position, or a post hoc rationalization advanced by an agency seeking to defend past agency action against attack."(internal quotations and alterations omitted)); See also ***Correia v. McDonald***, 28 Vet.App. 158, 165 (2016) at 168.

The Secretary cannot have his cake and eat it too. See ***Mitchell v. McDonald,*** 27 Vet App. 431,440 (2015) (Cases "must be decided on the law as we find it, not on the law as we would devise it"). Either ***Clemons*** is on point and is controlling or it is not. As this involves one single event for the etiology of all the disabilities at issue here, ***Boggs*** *supra* is not for application. There are not two separate and distinct claims no matter how you slice it.

The five hundred pound gorilla on the Livingroom sofa is obviously the Appellant's March 30, 2015, submission of 38 U.S.C. §1154(b) proof of combat which provokes the combat presumption. See also §3.304(d)(2021). Once Mr.

L--- introduced the combat presumption, it called into question the propriety of adjudicating the prior 1970 claim in the absence of that presumption. This February 14, 2015 submission of a DD215 above all else, is the sine qua non to provoke a reconsideration under §3.156(c)(1). The subsequent submissions of actual service department medical records describing his surgeries, multiple debridements and bilateral eye injuries immediately after the concussion blast injuries are probative and even mention the Veteran by name. Any and all testimony provided by Mr. L---, then and now, takes on that mantle of combat presumption and the Secretary is obligated to accept his sworn testimony as sufficient proof of any disease or injury alleged to have been incurred in combat-including any and all secondary residuals of the concussion blast injury under §3.310. The Secretary is free to rebut Appellant's testimony by providing clear and convincing evidence to the contrary. This he has declined to do. As §1154(b)'s last sentence states that any reasons for granting or denying service connection in each case shall be recorded in full, it is incumbent on the Secretary to explain his reason for granting the plethora of post-1970 claims and not recording each reason in full. Certainly, if §3.156(c)3)(4) is *not* for application in the instant case, there should be a reasoned explanation as to which statute or regulation is pertinent from which to appeal.

Appellant continues to aver "the VA must determine all potential claims raised by the evidence, applying all relevant laws and regulations, regardless of [the claim's label]," ***Roberson*** *supra****. Clemons*** *supra* is on point. ***George*** *supra* controls and the Secretary has granted entitlement to nearly all Appellant's claims filed in 1970. The Secretary has not presented clear and convincing evidence why the intercurrent submission of the service department records, combined with the belated recognition of the Appellant's combat presumption, ***did not*** provoke these entitlements under §3.156(c)(1)(3)(4). Toward that end, the Board must study the evidence of record and resolve every reasonable doubt in favor of the Veteran See §3.304(d)(2021).

"Each decision of the Board shall include . . . a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented in the record." 38 U.S.C. § 7104(d)(1). This statement of reasons or bases serves not only to help a claimant understand what has been decided, but also to ensure that VA

decisionmakers do not exercise "naked and arbitrary power" in deciding entitlement to disability benefits. See ***Yick Wo v. Hopkins,*** 118 U.S. 356, 366 (1886) (Matthews, J.).

Incorrectly, on page 6 of 26 of the August 12, 2021, HLR rating decision, The Secretary contends that in the November 10, 2020, supplemental claim, the Veteran alleged there was a clear and unmistakable error in the September 30, 1970, rating decision in not granting service connection for tinnitus. Appellant is mystified. Nowhere in the four corners of the November 2020 supplemental claim can there be found any reference to §3.105 Revision of final decisions. The supplemental claim is strictly one for a reconsideration of pending claims, both formal and informal, or inferred, based on the submittal of service department records which have never before been associated with the claims file.

Appellant avers this claim is a matter of first impression. Blubaugh, Emerson and their progeny have all dealt strictly with the Joint Services Records Research Center (JSRRC) concerning available service department evidence to support stressors for a reconsideration under §3.156(c)(1) and an earlier effective date under subsections (3)(4). Appellant's claim is distinguishable from these as the new evidence is unique to only the Veteran and involves far more than a determination of a major depressive disorder alone. The utter volume of relevant service department records also mitigates in the Veteran's favor for the benefit of the doubt.

Appellant suggests the inclusion of the new and material Independent Medical Opinions, in addition to the numerous submissions of service department records which were never associated with the claims file in 1970, firmly places the appeal in equipoise. He asks for the time-honored pro-Veteran canon of statutory construction most recently espoused in ***Henderson v. Shinseki***, 562 U.S. 428,441 (2011) ("We have long applied the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.").

The pro-Veteran canon instructs that provisions providing benefits to veterans should be liberally construed in the veterans' favor, with any interpretative doubt resolved to their benefit. See, e.g., ***King v. St. Vincent's Hosp.***, 502 U.S. 215, 220 (1991).

Blubaugh *supra* instructs the purpose of subsection (c) is "to place a veteran in the position he [or she] would have been had ... VA considered the relevant service department record before the disposition of [the] earlier claim." Appellant contends that his prior alleged adjudication(s) under the authority of §3.156(c) is nothing more than a chimera and has yet to occur based on controlling statute and regulation-the Secretary's numerous post hoc rationalizations notwithstanding.

Respectfully submitted,

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Gordon A. Graham
Counsel for L---

Attachments:

Exhibit 1- Independent Medical Opinion by Hema S M.D.; Board Certified, Ophthalmology with CV

Exhibit 2 – Independent Medical Opinion by Susan W. , M.D., Board Certified Neurologist with CV.