BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
JACK L. STOVER
Represented by
Robert V. Chisholm, Attorney

[redacted]
Docket No. 15-42 774
Advanced on the Docket

DATE: June 10, 2020

ORDER

The claim of entitlement to service connection for a diabetes mellitus (DM) disability is denied.

REMANDED

The claim of entitlement to service connection for a bilateral leg rash disability is remanded.

FINDING OF FACT

The Veteran's DM disability did not have its onset during active service, was not caused by his active service, to include exposure to an herbicide agent, and did not manifest within one year after separation from active service.

CONCLUSION OF LAW

The criteria for service connection for a DM disability have not been met.
38 U.S.C. §§ 1101, 1110, 1112, 5107 (2012); 38 C.F.R. §§ 3.102, 3.303, 3.304, 3.307, 3.309, 4.3 (2018).

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran served in the U.S. Air Force from December 1966 to December 1970. The Veteran contends he is entitled to service connection for a diabetes mellitus (DM) disability. He also contends that he is entitled to service connection for a bilateral leg rash disability.

This case comes before the Board of Veterans' Appeals (Board) on appeal from a March 2015 rating decision by a Department of Veterans Affairs (VA) Regional Office (RO). The Veteran filed a notice of disagreement (NOD) in June 2015. A statement of the case (SOC) was issued in October 2015, and the Veteran perfected his appeal in November 2015.

The Veteran testified before the undersigned at a hearing in January 2019. A transcript of the hearing is of record.

This case was previously before the Board in April 2019. In the April 2019 Board decision, the Board denied the Veteran's claims of service connection for a DM disability and service connection for a bilateral leg rash disability.

The Veteran appealed the Board's April 2019 decision to the United States Court of Appeals for Veterans Claims (Court). In January 2020, the Court granted a Joint Motion for Remand (JMR) of the Veteran and the Secretary of Veterans Affairs (the Parties). The Parties agreed that the Board did not provide adequate statement of reasons or bases for denying the Veteran's claim of service connection for a DM disability. The Parties agreed that remand was required for the Board to reconsider the evidence.

The Parties also agreed that a March 2015 VA examination for the Veteran's claimed bilateral leg rash was inadequate. Thus, remand was also required for VA to comply with the duty to assist. The issue of the Veteran's claim of service connection for a bilateral leg rash will be discussed in the remand section.

The case has been returned to the Board at this time for further appellate review.

This appeal has been advanced on the Board's docket pursuant to 38 C.F.R. § 20.900(c) (2018). 38 U.S.C. § 7107(a)(2) (2012).

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. §§ 1110, 1131; 38 C.F.R. §§ 3.303(a), 3.304. "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) (citing *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004)).

Certain chronic diseases may be presumed to have been incurred in or aggravated by service if manifest to a compensable degree within one year of discharge from service, even though there is no evidence of such disease during service. 38 U.S.C. §§ 1101, 1112; 38 C.F.R. §§ 3.307, 3.309.

Even if the presumptive paths for establishing service connection are not available for the Veteran's disability, the claim could be granted if the three elements of direct service connection are shown by an equipoise standard of evidence. See *Combee v. Brown*, 34 F.3d 1039 (Fed. Cir. 1994).

Special consideration of exposure to herbicide agents on a factual basis should be extended to Veterans whose duties placed them on or near the perimeters of Thailand military bases. First, VA must determine if the veteran served at one of several Royal Thai Air Force Bases (RTAFBs). Second, VA must determine if the veteran served as an Air Force security policeman, security patrol dog handler, member of the security police squadron, or otherwise served near the air base perimeter as shown by evidence of daily work duties, performance reports, or other credible evidence. Herbicide agents, such as that contained in Agent Orange, are defined by VA regulation as a chemical used in an herbicide used by the United

States, specifically noted as: 2,4-D; 2,4,5-T and its contaminant TCDD; cacodylic acid; and, picloram. *See* 38 C.F.R. § 3.307(a)(6)(i).

Diabetes Mellitus Disability

In the Veteran's June 2015 NOD and November 2015 Form 9 and in statements from July 2014 and July 2018, the Veteran asserted that he developed his DM disability because of exposure to herbicides, such as Agent Orange, while in the Republic of Thailand during active service.

At a March 2015 VA examination, the VA examiner reported that the Veteran had a diagnosis of diabetes mellitus, type II.

However, the evidence of record does not indicate that the Veteran incurred or aggravated DM during active service. *See* 38 C.F.R. § 3.304(f). The Veteran's service treatment records (STRs) contain no complaints, diagnosis, or treatment of DM during active service.

The Veteran has reported that he was diagnosed with DM in the mid-1990s. A September 2000 private laboratory report referenced a possible diagnosis of diabetes in 1993.

However, the Veteran's own memory has been inconsistent as to the exact year of his DM diagnosis. At a January 2008 VA Ophthalmology Consult, the Veteran reported that he was diagnosed with diabetes in 1993. At a December 2008 private treatment record and a September 2011 VA Ophthalmology Consult, the Veteran reported that he was diagnosed with DM in 1995. At the March 2015 VA examination, the Veteran reported that he was diagnosed with DM in 1994. In weighing credibility, the VA may consider inconsistent statements and consistency with other evidence of record. *Caluza v. Brown*, 7 Vet. App. 498 (1995). Thus, the Veteran's statements based on his own memory regarding the date of his DM diagnosis are not entitled to significant probative weight.

In any case, there is no objective evidence of record showing any complaint, diagnosis, or treatment of DM or other related conditions in the 23 years between

the Veteran's December 1970 separation from active service and his reported 1993 diagnosis of DM. Under *Maxson v. West*, 12 Vet. App. 453 (1999), aff'd, 230 F.3d 1330 (Fed. Cir. 2000), a significant lapse in time between service and post-service medical treatment may be considered as part of the analysis of a service connection claim such that it weighs against the claim.

The Veteran reported that he served in the Republic of Thailand at the Takhli Royal Thai Air Force Base (Takhli RTAFB) from January 1969 to January 1970. He stated that he served there with the 355th Avionics Maintenance Squadron of the 355 Combat Support Group as part of the Pacific Air Forces (PACAF). He asserted that, during his time at Takhli RTAFB, he was exposed to herbicide agents, including Agent Orange.

In the November 2015 Form 9 and in statements from July 2014 and May 2020, the Veteran reported that he worked on the flight line at Takhli RTAFB as an electronic warfare repairman. He stated that the flight line where he worked was next to the runway, which was beside the base perimeter. He noted that he worked on EB-66 aircraft on the flight line, and the work was often outdoors. At the January 2019 Board hearing, the Veteran stated that the aircraft where he worked on the flight line were sometimes parked in revetments about 100 yards from the fence.

The Veteran also reported that the hooch where he lived at Takhli RTAFB was close to one side of the base, and he would travel around the perimeter to get to the hooch. The hooch had open windows and doors, so he was not protected from the elements.

In the May 2020 statement, the Veteran further reported that, once or twice a month, he would have to work on the runway when an aircraft had emergency issues while it was about to take off. These scenarios were called red balls. He stated that, during these operations, he had to travel to the end of the runway, which was a defoliated area, to take care of the issue. He stated that the runway was only a few feet away from the perimeter and the defoliated area. At the January 2019 Board hearing, the Veteran stated that this area where he drove the

vehicle to service the aircraft for red balls was maybe 20 or 30 feet from the fence on a lot of occasions.

The Veteran also stated that the aircraft were sometimes moved to the fuel cell area for extended repairs or to be stripped of electronic warfare equipment, and the ECM (electronic warfare) shop was also close to the flight line.

The Veteran reported that he remembered seeing trucks spraying a thick, fog-like substance, and there was no foliage or vegetation in this area. He stated that he would ride a shuttle bus to work; and because the bus had no air conditioning, they had the windows down. He also reported that he walked regularly to the MARS radio station to use the shortwave radios to call his wife, and he stated that this radio station was close to the perimeter. He also exited the base once or twice a week to go to the local town; and to exit and re-enter, he had to walk through the main gate, which was on the perimeter.

In June 2015 and September 2018, the Veteran submitted buddy statements from fellow service members, as well as from his wife, indicating that he served as a specialist in electronic countermeasures (ECM) and electronic intelligence (ELINT) with the 355th Avionics Maintenance Squadron of the 355 Combat Support Group as part of the PACAF. The buddy statements noted that the Veteran performed work to maintain the ECM/ELINT systems and equipment installed on EB-66E/B/C aircraft. In the buddy statement received in September 2018 from the Veteran's wife, she stated that he called her once or twice a month from the MARS shortwave station.

The Veteran's Military Personnel Records indicate that the Veteran had a period of active service as an electronic warfare systems repairman with the 355th Avionics Maintenance Squadron PACAF at Takhli RTAFB from January 1969 to January 1970. Performance Reports concerning the periods between November 1969 and April 1969 and between May 1969 and October 1969 indicate that the Veteran's duties included performing maintenance on electronic warfare equipment, and this included work on the EB-66 flight line. A Performance Report concerning the period between October 1969 and January 1970 notes that the Veteran worked on red ball actions.

Based on this evidence above and viewing the evidence above with benefit of the doubt in favor of the Veteran, the Board concedes that the Veteran served in Thailand during active service in 1969 and 1970.

The Board has considered the Veteran's statements and testimony that he performed work duties and activities near the perimeter of the Takhli RTAFB and that his assigned living quarters were near the perimeter. However, the Board concludes that the preponderance of the evidence is against finding that the Veteran's daily work activities placed him near the perimeter or that the Veteran was exposed to herbicide agents during his active service.

The Board acknowledges the Veteran's statements that he worked on the flight line near the perimeter and was exposed to herbicides as a result. However, based on this explanation, everyone who worked on the flight line would have been exposed to herbicide agents. This view would create a line of reasoning that is not supported by VA law. The herbicide agent presumption has not been extended to veterans who served on the flight line at RTAFB bases.

Similarly, the Board finds that the Veteran's explanations of being near the perimeter due to the placement of his living quarters (hooches), visiting the MARS shortwave radio station once or twice a month, or entering and exiting the base are insufficient to establish that the Veteran was exposed to herbicide agents. If these explanations were true, everyone assigned to these hooches, visiting the MARS shortwave radio station, or entering and exiting the base would have been exposed to herbicide agents, even if they only visited such areas once in a long while. Again, this view would create a slippery slope of line of reasoning that is not supported by VA law. The herbicide agent presumption of service connection has not been extended to all veterans who served at a RTAFB in Thailand. Exposure must be shown by at least an equipoise of the evidence standard. The statements provided by the Veteran do not establish, to an equipoise standard of evidence or greater, that he was exposed to Agent Orange while serving at the RTAFB in Thailand.

Additionally, although the Veteran remembers seeing people spraying a fog-like substance, the Veteran's assertion that this was an herbicide, such as Agent Orange

is mere speculation. His assertion is not supported by any objective evidence as to the contents of the fog-like substance. Even if the substance was an herbicide, there is no indication of how close the Veteran was to the substance at the time it was sprayed. Thus, this does not demonstrate that the Veteran was exposed to herbicides.

The Board notes that, in the Veteran's July 2014 statement, he stated that he worked for 10 hours a day, 6 days per week. However, in the May 2020 statement, the Veteran reported that he worked 12-hour shifts. As noted earlier, in weighing credibility, the VA may consider inconsistent statements and consistency with other evidence of record. *Caluza v. Brown*, 7 Vet. App. 498 (1995). Thus, the Veteran's statements regarding the amount of time he worked during service are not entitled to significant probative weight.

Furthermore, although the Veteran's military personnel record reflects that he worked on the flight lines, it does not demonstrate that he was exposed to herbicides, such as Agent Orange, during such work. For example, while the Veteran's in-service performance reports discuss his work on the flight lines performing maintenance on EB-66 aircraft and in red ball situations, they do not specifically mention any work at or near the perimeter of the RTAFB. The evidence in the Veteran's military personnel file does not show that his work duties placed him at or near the perimeter of Takhli RTAFB or that he was actually exposed to herbicide agents, such as Agent Orange, while working there.

Because there are no objective indications of record that the Veteran was physically at or near a base perimeter or that he performed duties involving physical presence at or near a base perimeter, the Veteran's statements that he performed work near the RTAFB perimeter are not borne out by the other evidence of record.

The Board has considered the buddy statements submitted by the Veteran, which report that the Veteran worked on the flight line. However, as noted above, working on the flight line does not establish a presumption of exposure to herbicide agents.

In an August 2018 buddy statement, a fellow service-member, W.T., stated that anywhere you went on the base was only feet from the perimeter, but this statement does not demonstrate sufficient proximity to the perimeter or exposure to herbicides for purposes of VA service connection. W.T. also remembered seeing brown grass on the base grassy areas, and he speculated that the grass was brown because of chemical treatments. However, he never states that he witnessed the vegetation being killed or sprayed on, and he provided no objective evidence for this assertion. The question of whether the brown grass around the flight line was caused by the use of chemical agents, including Agent Orange, requires specialized knowledge, which neither the Veteran nor W.T. has. Thus, W.T.'s buddy statement is not probative for purposes of deciding this appeal.

In July 2014, September 2018, February 2019, and May 2020, the Veteran submitted photographs and maps that appears to document some buildings that were more or less near the perimeter, but the Board does not find that this demonstrates that the Veteran's regular activities or duties placed him at or near the perimeter in this case.

In June 2015, September 2018, and May 2020, the Veteran submitted various articles to support the assertions that herbicides were used at Royal Thai Air Force Bases and that herbicides, such as Agent Orange can cause DM. However, use of herbicides on the perimeters of Royal Thai Air Force Bases has already been conceded. Furthermore, while these articles show the possibility of a connection between herbicides (such as Agent Orange) and DM, they do not specifically show that such a possibility is true in the Veteran. Thus, these articles are not entitled to significant probative weight in deciding this appeal.

The Veteran has submitted no other evidence to support his assertions concerning his claimed Agent Orange exposure.

There is no objective evidence of record to demonstrate that the Veteran served any type of duty that would have brought him near the perimeter of a RTAFB. The Veteran's service records simply do not document that he ever had any guard duty or other service as a security policeman, security patrol dog handler, or was

otherwise a member of the security squadron at Takhli RTAFB or any other RTAFB during his period of service.

Considering the passage of time since his service at a RTAFB, the Board finds the Veteran's memory of activities that places him near the perimeter to be too tenuous to be persuasive. As noted earlier, the Veteran's memory concerning more recent dates and events is shown to be less than consistent. This would be all the more so for events and activities from 50 years ago.

The January 2020 JMR noted that all personal accounts of being near the perimeter at the RTAFB would necessarily have taken place more than 45 years ago. However, this fact supports rather than goes against finding that a veteran's tenuous memory alone, without corroborative objective evidence, would be insufficient to demonstrate sufficient proximity to the base perimeter or exposure to herbicides during service at a RTAFB. While it is true that personal accounts would have taken place more than 45 years ago, such fact does not convert those accounts into more probative evidence or mean that the passage of time cannot or should not be considered in weighing the value of the accounts.

In short, although the Veteran is shown to have served in Thailand in 1969 and 1970 and herbicide agent usage on the perimeters of Royal Thai Air Force Bases has been conceded, the preponderance of the evidence is against finding that the Veteran was a security policeman, a member of the security police squadron, or a security patrol dog handler during his period of service. Moreover, the preponderance of the evidence is against finding that his regular work duties placed him near to the perimeter of Takhli RTAFB or any other RTFB during his period of active service. The preponderance of the evidence is also against finding that the Veteran was exposed to herbicides during his active service at Takhli RTAFB.

Although the Veteran is not entitled to presumptive service connection based on herbicide agent exposure, the Board has also considered the claim on direct and presumptive chronic disease bases. *Combee v. Brown*, 34 F.3d 1039 (Fed. Cir. 1994).

The Board finds that the preponderance of the evidence is against a grant of service connection for a diabetes mellitus (DM) disability on a direct and presumptive chronic basis. As the Board has determined that the evidence does not show that the Veteran was exposed to herbicide agents during service, direct service connection cannot be granted based on exposure to herbicides.

As noted earlier, the Veteran's service treatment records (STRs) are void of any evidence of complaints, diagnosis, or treatment of DM during his active service. Thus, the evidence of record does not demonstrate that the Veteran incurred or aggravated a DM disability during active service for purposes of direct service connection.

There is also no objective evidence of record concerning any complaints, diagnosis, or treatment of DM in the year immediately following the Veteran's service. Thus, service connection may not be presumed here based on manifestation within one year of discharge from active service. The one-year presumption for DM under 38 C.F.R. §§ 3.307 and 3.309 is therefore not applicable in this case. *See* 38 U.S.C. §§ 1101, 1112.

The evidence of record demonstrates that the Veteran's DM was not diagnosed during active service but rather many years after discharge therefrom. As mentioned earlier, the record reflects that the Veteran was formally diagnosed with DM some time in the mid-1990s, likely around 1993. *See Maxson v. West*, 12 Vet. App. 453 (1999), aff'd, 230 F.3d 1330 (Fed. Cir. 2000) (a significant lapse in time between service and post-service medical treatment may be considered as part of the analysis of a service connection claim, such that it weighs against the claim).

Based on the above, the Board finds the preponderance of the evidence is against a grant of service connection on a presumptive or direct basis for the Veteran's claimed DM disability. Therefore, the Veteran's claim of entitlement to service connection for a diabetes mellitus disability must be denied. See 38 U.S.C. §§ 1110, 1131; 38 C.F.R. §§ 3.303, 3.304.

In reaching the above conclusions, the Board has considered the applicability of the benefit of the doubt doctrine. However, as the preponderance of the evidence

is against the Veteran's claim, that doctrine is not applicable in the instant appeal. See 38 U.S.C. § 5107(b); 38 C.F.R. §§ 3.102, 4.3.

REASONS FOR REMAND

Service Connection for a Bilateral Leg Rash Disability

The law provides that VA shall make reasonable efforts to assist a claimant in obtaining evidence to substantiate a claim. 38 U.S.C. § 5103A (2012); 38 C.F.R. § 3.159(c) (2018). Such assistance includes providing the claimant with a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on a claim. 38 U.S.C. § 5103A; 38 C.F.R. § 3.159(c). If a medical examination report does not contain sufficient information to allow an informed Board decision, then the rating board must return the report as inadequate. See 38 C.F.R. § 4.2 (2018); *Bowling v. Principi*, 15 Vet. App. 1, 12 (2001); *Ardison v. Brown*,6 Vet. App. 405, 407 (1994). Once VA undertakes to provide a medical examination, VA must provide an adequate examination or, at a minimum, notify the claimant why one will not or cannot be provided. 38 C.F.R. § 4.2; *Barr v. Nicholson*, 21 Vet. App. 303, 311-12 (2007).

An examination "is adequate where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'" *Stefl v. Nicholson*, 21 Vet. App. 120, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet. App. 405, 407-08 (1994)); *Green v. Derwinski*, 1 Vet. App. 121, 124 (1991). It is a medical examiner's responsibility to provide a well-supported opinion so that the Board may carry out its duty to weigh the evidence of record. *Nieves–Rodriguez v. Peake*, 22 Vet. App. 295, 304 (2008) (concluding that a medical opinion is not entitled to any weight "if it contains only data and conclusions").

Here, the January 2020 JMR Parties found that the March 2015 VA examiner provided inadequate rationale for her opinion concerning the Veteran's claimed

bilateral leg rash disability. The March 2015 VA examiner found that it was less likely than not that the Veteran's skin condition was incurred in or caused by active service. In her rationale, the examiner stated that, based on the information reviewed, she was not able to provide a response without mere speculation because Veteran's skin condition could be due to a wide variety of insults (topical, internal, environmental), and it would be difficult to originate the condition to time of the Veteran's active service. The January 2020 JMR Parties noted that, under *Jones v. Shinseki*, 23 Vet. App. 382, 390 (2010), before the Board can rely on an examiner's conclusion that an etiology opinion would be speculative, the examiner must explain the basis for such an opinion.

Thus, based on the January 2020 JMR, remand is warranted in order to afford the Veteran a new VA examination and medical opinion regarding his claimed bilateral leg rash disability. The examiner must determine the nature, status, and etiology of the Veteran's claimed bilateral leg rash disability. The examiner must consider all the evidence of record, including all relevant VA and private medical treatment of record from both during and after the Veteran's active service, as well as the Veteran's lay statements. The examiner must address whether any bilateral leg rash condition in the Veteran is at least as likely as not to have been incurred in, aggravated by, caused by, or otherwise related to the Veteran's active service. The examiner must support his or her conclusion with complete and adequate analysis and rationale.

Accordingly, the matter is REMANDED for the following actions:

> 1. The Agency of Original Jurisdiction (AOJ) must assist the Veteran in procuring any outstanding VA medical treatment records not yet associated with the claims file.
>
> 2. Ensure that the Veteran is scheduled for an appropriate VA examination to determine the nature, status, and etiology of his claimed bilateral leg rash disability. The examiner must address whether the Veteran's claimed bilateral leg rash disability was incurred in, caused by, aggravated by, or otherwise related to his active service.

The examination should be conducted by a VA examiner who has not previously examined the Veteran. The claims file must be made available to and reviewed by the examiner in conjunction with the examination. The examiner must consider the Veteran's entire medical history, both during and after his periods of active service. The examiner should consider the Veteran's lay statements regarding onset of symptomatology and any continuity of symptomatology since onset and/or since discharge from service. The examiner should consider any other pertinent evidence of record, as appropriate. All findings by the examiner should be reported in detail, and all opinions must be accompanied by a clear and complete rationale.

The examiner must provide the following:

(a) Identify any diagnosable skin condition in the Veteran.

(b) Provide a medical opinion as to whether it is as least as likely as not (a 50 percent probability or greater) that any skin condition suffered by the Veteran was incurred in, aggravated by, caused by, or otherwise related to his active service.

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The examiner must support his or her conclusion with complete and adequate analysis and rationale. The Board notes that if the examiner simply states that he or she is not able to provide a response without mere speculation, that would be insufficient to answer this question. The examiner must explain the basis for his or her opinion.

James G. Reinhart

JAMES G. REINHART
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board Department of Veterans Affairs

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (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. Your local VA office will implement the Board'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. Please note that if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your appeal at the Court because of jurisdictional conflicts. If you file a Notice of Appeal with the Court ***before*** you file a motion with the Board, the Board will not be able to consider your motion without the Court's permission or until your appeal at the Court is resolved.

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 have another 120 days from the date the Board 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.* Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

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

Litigation Support Branch
Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038

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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 Board to vacate any part of this decision by writing a letter to the Board stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address on the previous page for the Litigation Support Branch, 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 on the previous page for the Litigation Support Branch, 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 Board, 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 the VA, you can get information on how to do so at the Court's website at: http://www.uscourts.cavc.gov. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: http://www.vetsprobono.org, mail@vetsprobono.org, or (855) 446-9678.

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: If you hire an attorney or agent to represent you, a copy of any fee agreement must be sent to VA. The fee agreement must clearly specify if VA is to pay the attorney or agent directly out of past-due benefits. See 38 C.F.R. 14.636(g)(2). If the fee agreement provides for the direct payment of fees out of past-due benefits, a copy of the direct-pay fee agreement must be filed with the agency of original jurisdiction within 30 days of its execution. A copy of any fee agreement that is not a direct-pay fee agreement must be filed with the Office of the General Counsel within 30 days of its execution by mailing the copy to the following address: Office of the General Counsel (022D), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. See 38 C.F.R. 14.636(g)(3).

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).