



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF

RICHARD J. LEY

Represented by

Disabled American Veterans

[REDACTED]
Docket No. 20-00 384

Advanced on the Docket

DATE: December 8, 2022


ORDER

Entitlement to an effective date of January 29, 2015, but no earlier for the award of service connection for chronic lymphocytic leukemia (CLL) is granted subject to the rules and regulations governing the payment of monetary awards.

FINDINGS OF FACT

1. The RO received the Veteran's claim of entitlement to service connection for chronic lymphocytic leukemia on January 29, 2016; no earlier claim is either alleged or demonstrated by the record for any disability.
2. Effective October 16, 2003, chronic lymphocytic leukemia was added to the list of diseases that are considered to be presumptively due to in-service herbicide exposure.
3. The Veteran is presumed to have been exposed to Agent Orange during service.
4. The competent evidence of record demonstrates that the Veteran met the criteria for a diagnosis of chronic lymphocytic leukemia on July 7, 2010.

IN THE APPEAL OF
RICHARD J. LEY


Docket No. 20-00 384
Advanced on the Docket

CONCLUSION OF LAW

The criteria for an effective date of January 29, 2015, but no earlier for the award of service connection for chronic lymphocytic leukemia are not met. 38 U.S.C. § 5110; 38 C.F.R. §§ 3.114 (a)(3), 3.307(a), 3.309(e), 3.400.

REASONS AND BASES FOR FINDINGS AND CONCLUSION


The Veteran served on active duty from October 1962 to December 1966 including service in the Republic of Vietnam.

This matter is before the Board of Veterans' Appeals on appeal from an August 2018 rating decision from a Department of Veterans Affairs (VA) Regional Office (RO).

This matter was previously before the Board of Veterans' Appeals (Board) in February 2021. At that time, the Board dismissed the question of clear and unmistakable error (CUE) in the August 2016 rating decision that failed to assign an earlier effective date for service – connected chronic lymphocytic leukemia (CLL) and denied entitlement to an effective date earlier than January 29, 2016 for the grant of service connection for CLL on a direct basis.

The Veteran appealed the Board's decision to the Court of Appeals for Veterans Claims (Court). In an April 2022, Memorandum Decision, the Court affirmed the Board's dismissal of CUE pertaining to the August 2016 rating decision that failed to assign an earlier effective date for service – connected chronic lymphocytic leukemia (CLL). The Court concluded that the Board's finding that the August 2016 rating decision (which initially granted service connection for CLL on a presumptive basis and assigned the effective date of the award) was not final, placed the Veteran in a more favorable position. Specifically, the standard applied on direct appellate review is less onerous than the standard applied for appellate review of a CUE claim.

IN THE APPEAL OF
RICHARD J. LEY


Docket No. 20-00 384
Advanced on the Docket


The Court remanded the claim regarding an effective date prior to January 29, 2016 for entitlement to service connection for CLL to the Board for readjudication consistent with its Memorandum Decision. In particular, the Court noted that the Veteran's disability is a presumptive condition based on herbicide exposure that was added to the list of presumptive conditions in 2010. Accordingly, remand for the Board to address in the first instance whether the Veteran is entitled to an effective date of up to one year prior to his 2016 under the terms of 38 C.F.R. §§ 3.114 was warranted.

In November 2020, the Veteran testified at a Board hearing before a now-retired Veterans Law Judge (VLJ). A transcript is of record. In October 2022 Board correspondence, the Veteran was notified and afforded the opportunity to request a new hearing with a different VLJ. In a November 2022 written response, the Veteran declined a new Board hearing and submitted arguments to be considered in conjunction with the evidence of record.

Effective Date Claims

Generally, the effective date of an award of disability compensation based on an original claim shall be the date of receipt of the claim or the date entitlement arose, whichever is later. 38 U.S.C. § 5110 (a); 38 C.F.R. § 3.400. Unless otherwise provided, the effective date of compensation will be fixed in accordance with the facts found but will not be earlier than the date of receipt of the claimant's application. 38 U.S.C. § 5110 (a). If a claim is filed within one year after separation from service, service connection will be effective as of the day after separation. 38 C.F.R. § 3.400 (b)(2).

With regard to the date of entitlement, the term date entitlement arose is the date when the claimant met the requirements for the benefits sought, on a fact found basis. 38 U.S.C. § 5110 (a); *McGrath v. Gober*, 14 Vet. App. 28, 35 (2000). The facts found include the date the disability first manifested and the date entitlement to benefits was authorized by law and regulation. *See generally* 38 C.F.R. § 3.400. For instance, if a claimant filed a claim for benefits for a disability before they actually had the disability, the effective date for benefits can be no earlier than the date the disability first manifested. *Ellington v. Peake*, 541 F.3d 1364, 1369-

IN THE APPEAL OF
RICHARD J. LEY
Docket No. 20-00 384
Advanced on the Docket

70 (Fed. Cir. 2008). However, the date entitlement arose is not the date that the RO receives the evidence, but the date to which that evidence refers. *McGrath*, 14 Vet. App. at 35.

Retroactive dates are allowed, to a certain extent, in cases where an award or increase of compensation is granted pursuant to a liberalizing law. 38 U.S.C. § 5110 (g); 38 C.F.R. § 3.114 (a). To be eligible for a retroactive payment under these provisions, the evidence must show that the claimant met all eligibility criteria for the liberalized benefit on the effective date of the liberalizing law or VA issue and that such eligibility existed continuously from that date to the date of claim or administrative determination of entitlement. These provisions apply to original and reopened claim, as well as claims for increase. *Id.*, see also *Mc Cay v. Brown*, 9 Vet. App. 183 (1996), *aff'd*, 106 F.3d 1577 (Fed. Cir. 1997).


In such cases, the effective date of the award or increase shall be fixed in accordance with the facts found but shall not be earlier than the effective date of the liberalizing law or VA issue. 38 C.F.R. § 3.114 (a). If a claim is reviewed on the initiative of VA within 1 year from the effective date of the law or VA issue, or at the request of a claimant received within 1 year from that date, benefits may be authorized from the effective date of the law or VA issue. 38 C.F.R. § 3.114 (a)(1).

If a claim is reviewed on the initiative of VA more than 1 year after the effective date of the law or VA issue, benefits may be authorized for a period of 1 year prior to the date of administrative determination of entitlement. 38 C.F.R. § 3.114 (a)(2). If a claim is reviewed at the request of the claimant more than 1 year after the effective date of the law or VA issue, benefits may be authorized for a period of 1 year prior to the date of receipt of such request. 38 C.F.R. § 3.114 (a)(3).

1. Entitlement to an effective date prior to January 29, 2016 for the grant of service connection for chronic lymphocytic leukemia (CLL).

The issue before the Board is whether the Veteran is entitled to an effective date prior to January 29, 2016 for the grant of service connection for chronic lymphocytic leukemia (CLL). At his November 2020 Board hearing, the Veteran contended that while his blood work indicated that he was sick with leukemia in

IN THE APPEAL OF
RICHARD J. LEY


Docket No. 20-00 384
Advanced on the Docket

August 2009, he was misdiagnosed by VA, which prevented him from filing an earlier claim.


As noted above, the effective date of an award of disability compensation based on an original claim shall generally be the date of receipt of the claim or the date entitlement arose, whichever is later. 38 U.S.C. § 5110 (a); 38 C.F.R. § 3.400.

Here, VA received the Veteran's original claim for entitlement to service connection for chronic lymphocytic leukemia (CLL) on January 29, 2016. There is no indication of a claim for any disability prior to this date.

The claim was granted on a presumptive basis based on herbicide exposure under 38 C.F.R. § 3.309 (e) in an August 2016 rating decision. As noted in the introduction, the prior February 2021 Board decision, that decision in not considered final because correspondence dated June 2017 constituted a Notice of Disagreement (NOD). The Veteran was demonstrated to have served on active duty in Vietnam during the Vietnam era (from January 9, 1962, through May 7, 1975) and he is presumed to have been exposed to Agent Orange or similar herbicide. 38 C.F.R. § 3.307 (a)(1)(6)(iii). The effective date of January 29, 2016 was assigned for the grant of service connection for chronic lymphocytic leukemia because that was the date on which VA had received the Veteran's claim.

The record does not reflect that the Veteran had submitted an earlier claim related to this disability, nor does the Veteran allege that he submitted an earlier claim. The Board acknowledges the Veteran's assertion that VA's failure to properly inform him of his CLL diagnosis prevented him from filing an earlier disability compensation claim. However, the Board notes that the applicable regulations do not contain an exception to the effective date rules based on misdiagnosis even if that misdiagnosis is due to VA's error. Because the law does not permit VA to take such factors into account when assigning an effective date, the Board need not determine on which date the Veteran's disabilities first prevented him from filing a claim that he might have otherwise filed.

As noted in the prior February 2021 Board decision, the Veteran's claim of medical malpractice by VA is distinct from the claim of entitlement to an earlier effective

IN THE APPEAL OF
RICHARD J. LEY
Docket No. 20-00 384
Advanced on the Docket

date herein and not within the scope of this appeal. (The Board further notes that consistent with the prior February Board decision the Veteran has subsequently filed a separate claim under 38 C.F.R. § 1151).

As noted by Dr. A. P. K., VA staff physician in a February 2020 Medical Opinion, the earliest evidence of a chronic lymphocytic leukemia diagnosis appears in a pathology report dated July 7, 2010. Therefore, entitlement to service connection arose on July 7, 2010, and the date of receipt of the Veteran's claim is January 29, 2016. The general regulations pertaining to the assignment of effective dates in service connection claims thus provide that the Board assign an effective date of January 29, 2016, not of July 7, 2010, in this case.

Effective October 16, 2003, chronic lymphocytic leukemia was added to the list of diseases that are considered to be presumptively due to in-service exposure to herbicides. Under 38 C.F.R. § 3.309 (e), presumptive service connection based on Agent Orange exposure is warranted, in pertinent part, for all chronic B-cell leukemias (including chronic lymphocytic leukemia).

The Board has also considered the applicability of the *Nehmer* provisions. Under 38 C.F.R. § 3.816, and as required by the U.S. District Court in the class-action case of *Nehmer v. U.S. Department of Veterans Affairs*, No. CV-86-6160 (N.D. Cal. May 17, 1991), *Nehmer* class members may benefit from special effective date rules. To qualify as a *Nehmer* class member, the claimant must be a Vietnam Veteran with a covered herbicide disease, or a surviving spouse, child, or parent of a deceased Vietnam veteran who died from a covered herbicide disease. 38 C.F.R. § 3.816 (b)(1). If a *Nehmer* class member entitled to retroactive benefits dies prior to receiving payment of any such benefits, VA shall pay such unpaid retroactive benefits to the first individual or entity in existence at the time of payment, with the class member's surviving spouse being first in order of priority. 38 C.F.R. § 3.816 (f).

The provisions of § 3.816 provide, in pertinent part, that when a compensation claim for a covered herbicide disease is denied in a decision issued between September 25, 1985 and May 3, 1989, or is pending before VA on May 3, 1989, or received by VA between that date and the effective date of the statute or regulation

IN THE APPEAL OF
RICHARD J. LEY



Docket No. 20-00 384
Advanced on the Docket

establishing a presumption of service connection for the covered disease, the effective date of the award of service connection is the later of the date the claim was received by VA (which, in the case of a decision issued between September 25, 1985 and May 3, 1989, must be the claim on which the prior denial was based) or the date the disability arose. § 3.816(c). If such a claim is submitted within one year of service separation, then the effective date of the award is the day following the date of separation from service. § 3.816(c)(3).

In this case, the Veteran did not submit any statements or evidence that may be construed as a claim for service connection for a heart condition until January 29, 2016. Accordingly, the *Nehmer* effective date rules do not afford a basis for an earlier effective date in this case.

(Continued on the next page)

IN THE APPEAL OF
RICHARD J. LEY


Docket No. 20-00 384
Advanced on the Docket

Pursuant to 38 C.F.R. § 3.114 (a)(3), described above, an effective date of one year prior to the receipt of a claim is allowed if the claim is received more than one year following the effective date of the liberalizing law, provided that the veteran met all the criteria of the liberalizing law at that time.

In the case at hand, the effective date of the liberalizing law that added chronic lymphocytic leukemia to the list of disabilities eligible for presumptive service connection based on herbicide exposure was October 16, 2003. The Veteran's claim was not received until January 29, 2016, which is more than one year following the effective date of the liberalizing law. The record reflects that the Veteran had been diagnosed with chronic lymphocytic leukemia at the time of the liberalization of the law, as reflected in the July 7, 2010 blood work. In light of the above and affording the Veteran the benefit of all reasonable doubt as required under the law, an effective date of January 29, 2015, but no earlier, for the grant of entitlement to service connection for chronic lymphocytic leukemia is warranted.



Jennifer White
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board

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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

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).