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

IN THE APPEAL OF [redacted] SS [redacted]

DOCKET NO. 16-45 563) DATE February 13, 2018
)
)

On appeal from the
Department of Veterans Affairs Regional Office in San Diego, California

THE ISSUES

1. Entitlement to an effective date earlier than April 13, 2012, for the grant of service connection for posttraumatic stress disorder (PTSD) with bipolar disorder, panic disorder with agoraphobia and alcohol abuse in sustained remission (psychiatric disability).

2. Entitlement to an effective date earlier than November 29, 2014, for the grant of service connection for left ankle fracture residuals (left ankle disability).

3. Entitlement to an effective date earlier than November 29, 2014, for the grant of service connection for lumbar disc disease, claimed as low back and mid back strain (back disability).

ORDER

Entitlement to an effective date from November 20, 2003 for the award of service connection for a psychiatric disability is granted, subject to the law and regulations governing the payment of VA monetary benefits.

Entitlement to an effective date from November 20, 2003 for the award of service connection for a left ankle disability is granted, subject to the law and regulations governing the payment of VA monetary benefits.

Entitlement to an effective date from January 23, 3004 for the award of service connection for a back disability is granted, subject to the law and regulations governing the payment of VA monetary benefits.

FINDINGS OF FACT

1. The Veteran filed his original claims for service connection for a psychiatric disability and a left ankle disability on November 20, 2003, and a back disability on January 23, 2004. The claims were denied in an October 21, 2004 rating decision.

2. The Veteran was not properly notified of the October 2004 rating decision and of his appellate rights with respect thereto, and the presumption that VA officials properly discharged their official duties by sending proper notification to the Veteran of the October 2004 rating decision has been rebutted.

3. The October 2004 rating decision was never final.

4. The application to reopen the claim for service connection for a psychiatric disability was received on April 13, 2012. The applications to reopen claims for service connection for a left ankle disability and a back disability were received on December 1, 2014.

CONCLUSIONS OF LAW

The criteria for entitlement to an effective date November 20, 2003, for the award of service connection for a psychiatric disability, have been met. 38 U.S.C. § 5110 (2012); 38 C.F.R. §§ 3.156, 3.400 (2017).

The criteria for entitlement to an effective date from November 20, 2003, for the award of service connection for a left ankle disability have been met. 38 U.S.C. § 5110 (2012); 38 C.F.R. §§ 3.156, 3.400 (2017).

The criteria for entitlement to an effective date from January 23, 2004, for the award of service connection for a back disability have been met. 38 U.S.C. § 5110 (2012); 38 C.F.R. §§ 3.156, 3.400 (2017).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran had active service from October 1989 to March 1996.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from rating decisions by the Department of Veterans Affairs (VA) Regional Offices (RO) in Huntington, West Virginia and Los Angeles, California. The jurisdiction of the case now rests with the RO in San Diego, California.

The Veteran filed his original claim for service connection a psychiatric disability, and a left ankle disability on November 20, 2003. He filed a claim for service connection for a back disability on January 23, 2004. The application to reopen the claim for service connection for a psychiatric disability was received on April 13, 2012. The application to reopen claims for service connection for a left ankle disability and a back disability was received on December 1, 2014.

In a September 2013 rating decision, the RO granted the Veteran service connection for PTSD with bipolar disorder with a 70 percent evaluation, effective April 13, 2012. In an October 2015 rating decision, the RO granted service connection for a left ankle disability with a 10 percent evaluation, effective November 29, 2014. The October 2015 rating decision also granted service connection for a back disability with a 10 percent evaluation, effective November 29, 2014. The same October 2015 rating decision also increased the rating for a psychiatric disability to 100 percent, effective November 29, 2014.

On September 3, 2016, the Veteran revoked his power of attorney, which was previously held by Disabled American Veterans (DAV). On September 8, 2016, the Veteran signed a new form VA 21-22, Appointment of Veterans Service Organization as Claimaint's Representative and named the DAV his representative. As such, the DAV is once again the Veteran's representative.

In his September 8, 2016 Form VA-9, Formal Appeal to the Board, the Veteran stated that he did not want to have a hearing on his claims. In a May 3, 2017 statement, the Veteran related that he wished to withdraw his hearing request. Since there was no hearing request pending, the Board finds that there is nothing to withdraw.

The Board notes that the Veteran filed a request to reopen the previously denied claim for entitlement to service connection for PTSD. Case law provides that a claim for a mental health disability includes any mental disability that may reasonably be encompassed by the claimant's description of the claim, reported symptoms, and the other information of record. *Brokowski v. Shinseki*, 23 Vet. App. 79 (2009); *see also Clemons v. Shinseki*, 23 Vet. App. 1 (2009). The record reflects mental disorders other than PTSD, including bipolar disorder. Thus, pursuant to the holding in *Clemons*, the Board has more broadly characterized the psychiatric claims on appeal, as reflected above.

This appeal has been advanced on the Board's docket pursuant to 38 C.F.R. § 20.900(c) (2017). 38 U.S.C. § 7107(a)(2) (2012).

EARLIER EFFECTIVE DATE

The Veteran seeks an effective date earlier than April 13, 2012 for the grant of service connection for a psychiatric disability, and effective date earlier than November 29, 2014, for the grant of service connection for a left ankle disability a back disability.

In this regard, the Veteran contends that he did not receive notification of the denial of service connection in 2004. Specifically, he asserts that he was homeless at the

time the denial letter was mailed, that he notified VA of the fact that he was homeless, and that VA nonetheless sent the denial letter to an address at which he no longer lived. In the alternative, the Veteran contends that equitable tolling should pause the running of the statute of limitations, as circumstances beyond his control (homelessness and mental illness) prevented him from pursuing the claim diligently.

A claimant may initiate appellate review by the Board of Veterans' Appeals of an adverse regional office decision by filing a Notice of Disagreement (NOD) within one year after the date of the mailing of that decision. 38 U.S.C. §§ 7105(a), (b)(1). If the claimant fails to file an NOD within that time period, the regional office decision becomes final and will not thereafter be reopened or allowed, except as may otherwise be provided by regulations not inconsistent with title 38 of the U.S. Code. 38 U.S.C. § 7105(c).

Here, the RO sent out its decision denying the Veteran the claimed benefits in October 2004.

Generally, the effective date of an evaluation and award of compensation based on an original claim, a claim reopened after final disallowance, or a claim for increase will be the date of receipt of the claim or the date entitlement arose, whichever is the later. 38 U.S.C. § 5110 (a) (2012); 38 C.F.R. § 3.400 (2017). Where a prior unappealed decision becomes final, the effective date of a subsequent award of service connection is the date of receipt of the subsequently filed application to reopen, and not the date of receipt of the original claim. *Leonard v. Nicholson*, 405 F.3d 1333, 1337 (Fed. Cir. 2005).

On November 20, 2003, the Veteran filed a formal claim seeking, inter alia, service connection for a psychiatric disability and a left ankle disability. He filed a claim for service connection for a back disability on January 23, 2004.

All claims were denied in an October 21, 2004 rating decision. The RO reviewed the Veteran's service treatment records (STRs), private medical records from 2001, and VA treatment records from 2000 to 2004.

For the psychiatric disability, the RO noted that the Veteran's STRs were negative for any complaints, treatments, or diagnoses of any psychiatric disorders. The RO noted that the medical records showed three hospitalizations for suicide attempts, a Global Axis of Functioning (GAF) of 30, and a diagnosis of rapid cycling bipolar disorder. The RO noted that there was no evidence linking the Veteran's psychiatric disorder to his active service, and denied service connection for the disability.

For the left ankle disability, the RO noted that the Veteran's STRs showed complaints of left ankle pain in September 1990, followed by X-rays showing a left ankle fracture. The STRs further show that the Veteran had a cast placed for four weeks. No other references to left ankle issues were made in the STRs. The RO denied service connection for a left ankle disability, reasoning that the Veteran did not experience chronic residuals of the left ankle fracture.

For the back disability, the RO noted that his STRs show that the Veteran was seen in February 1993for complaints of back pain, as he was injured playing volleyball. Limited range of motion was observed, and an impression of acute lumbar strain was provided. In September 1994, the Veteran again injured his back when he jumped off a desk and hit his back. An assessment of severe low back pain was made. The RO denied service connection for a back disability, reasoning that the Veteran did not experience chronic back issues.

The RO stated that Veteran did not appeal the decision within the proscribed time frame.

The evidence shows that in correspondence received by VA on July 21, 2004, the Veteran informed VA that he did not have a residence, was homeless, and has been living on the streets for about two months (since about May 2004). The Veteran told VA that he did not have an address to which correspondence could be sent.

In August 17, 2004 VA psychiatric treatment notes, the provider noted that the Veteran was admitted to VAMC in May 2004, June 2004, July 2004, and August 2004 for alcohol detox and withdrawal, as well as psychiatric symptoms. The

Veteran stated that he planned to go to Hotel de Riviera in Santa Barbara for an 18 month dual diagnosis residential treatment program as soon as a bed there became available.

VA treatment records dated December 20, 2004 stated that the Veteran was being discharged to Hotel de Riviera.

The Veteran filed the application to reopen the claim for service connection for a psychiatric disability on April 13, 2012. The applications to reopen claims for service connection for a left ankle disability and a back disability were received on December 1, 2014.

In a September 2013 rating decision, the RO granted the Veteran service connection for PTSD with bipolar disorder with a 70 percent evaluation, effective April 13, 2012. The grant was based on the VA examiner relating the Veteran's claimed stressor was related to his PTSD with bipolar disorder.

In an April 2015 statement, the Veteran related that VA had constructive knowledge of "possible and plausible addresses" for him, as noted in his January 19, 2005 VA Medical Center (VAMC) discharge notes. The Veteran also reported that treatment notes stated that he would be boarding at the Haven program at the West Los Angeles VA campus, and then returning to Santa Barbara to apply for the Hotel Riviera dual diagnosis treatment. In the same letter, the Veteran noted that VA "remailed" its rating decision denying him service connection to the wrong address on January 19, 2005, the same day he was discharged from the VAMC. The Veteran stated that he felt that he "did [his] best to keep VA informed of [his] whereabouts, and every chance [he] got [he] informed either a doctor of VA employee where [he] would be seeking shelter."

In a May 6, 2015 statement, the Veteran stated that the April 1, 2013 VCAA notice claimed that VA notified him of the service connection denial final decision on January 1, 2005. He related that December 19, 2004 discharge notes informed VA that he would be going to a "transitional unit," Haven II, and then returning to Hotel Riviera in Santa Barbara. He added that the August 31, 2004 discharge summary

stated that he planned to return to Santa Barbara to enter an alcohol rehabilitation program, and that social worker from the same date contained the address and contact phone number for the Hotel Riviera treatment program. He reported that a primary care February 10, 2005 progress note from Santa Barbara CBOCC stated that he was living at the Santa Barbara Rescue Mission. He related that a copy of the denial decision in his file was dated October 21, 2004, a date of October 26, 2004 was scratched out by a VA employee, and that the date of January 19, 2005 was written with the words "remailed," and then scratched out. The second mailing was returned from "1st Floor, c/o New Directions," showing mail as undeliverable. The Veteran reasoned that this returned letter showed VA that he no longer lived at the New Directions address, as he was homeless.

In a June 15, 2016 statement, the Veteran stated that he was homeless from May or June of 2004 until October 2007. He stated that he lived in a tent on the side of the freeway near the Los Angeles VAMC, and then moved to Santa Barbara and lived in various halfway houses and treatment centers, as well as public parks. The Veteran related that his VA treatment records confirm his claims. The Veteran related that from October 2007 to April 2012, he was being taken care of by friends and family members, and was not on psychiatric medication. He said that he was "incapable of assembling a document such as this" and did not care for his own well-being. The Veteran related that he told his VA mental health provider that he never heard back from VA regarding his old psychiatric disability claim. The Veteran requested that VA toll the period between October 21, 2004 to October 21, 2015, when it received his notice of disagreement (NOD), for effective dates for his psychiatric disability, back disability, and left ankle disability, and grant an effective date for those contentions back to the original claim date of October 21, 2004.

In an October 2015 rating decision, the RO granted service connection for a left ankle disability with a 10 percent evaluation, effective November 29, 2014 based on the fact that a VA examiner related the Veteran's left ankle disability to the left ankle issues he experienced in active service. The October 2015 rating decision also granted service connection for a back disability with a 10 percent evaluation, effective November 29, 2014, based on the fact that a VA examiner related the

Veteran's back disability to the back issues he experienced in active service. The same October 2015 rating decision also increased the rating for a psychiatric disability to 100 percent, effective November 29, 2014.

A September 8, 2016 statement from New Directions for Veterans, a transitional housing provider for homeless Veterans, stated that the Veteran received emergency services from the program in October 2003 (2 weeks) and April 2005 (one week).

In a May 3, 2017 statement, the Veteran noted that VA remailed him the decision notice on January 19, 2005 to "Bldg 257," crossed out the words "1st Floor," and added the words "c/o New Directions," but that did not mean that New Directions delivered the notice to him. The Veteran stated that changing the address from "1st Floor" to "c/o New Directions" was not a change at all, as building 257 only housed New Directions residents, and sending it to "1st Floor" or "c/o New Directions" was the same thing. The Veteran reasoned that when the first mailing (to "1st floor") was returned as undeliverable, mailing the notice to the same address ("c/o New Directions") was a meaningless modification to the address, as both addresses were identical and wrong, as the Veteran did not live at that address. The Veteran stated that he dutifully notified VA that he was living on the streets, with no mailing address, in a July 21, 2004 statement. The Veteran added that there was VA medical treatment evidence before the RO at the time the denial decision was issued in October 2004 as to where the Veteran was located, where he was hospitalized, and that he would be returning to Santa Barbara prior to the remailing of the notice in January 2005. The Veteran asserted that VA was in constructive possession of the information, and that New Directions did not deliver the notice to him, nor was there any proof of such delivery.

The Veteran stated that his July 2004 letter informing VA that he was homeless "should have triggered a heightened duty to locate [him] when the first mailing was returned undeliverable," and that VA failed to follow 38 C.F.R. § 1.710 (d) homeless Veteran protections, and that VA should have exhausted all means to notify him. The Veteran added that a cursory review of his VA treatment records "would have revealed possible and plausible addresses to VA before the subsequent mailing was sent," and that VA could have called his family to ascertain his

whereabouts (as the family's contact information was on file). The Veteran related that his November 20, 2003 claim should have been processed within thirty days of July 21, 2004, when VA was put on notice that he was homeless. That instead, VA disregarded this duty and did not mail the notice/rating decision until October 26, 2004 and disregarded its duty to a former address at which he no longer lived. Veteran underscored that he never received any of the mailings VA sent to him notifying him that his claims were denied and, therefore, he never knew that he should file a NOD in response to the denial.

Finally, the Veteran argued that he was homeless and mentally ill for many years, and that he was not "properly medicated" until 2014. The Veteran stated that he did not realize until 2012 what had happened to him, and that he was never notified of the 2004 denial, which means that he was unable to appeal the denial. The Veteran related that VA should toll the period from January 19, 2005 to April 12, 2012, when he finally able to resume his VA claims. The Veteran stated "[i]t isn't that I abandoned the claim, it's that I was incapable of continuing it[ ]" due to mental illness. He added that being homeless "made it impossible to access the tools needed to make an appeal." The Veteran stated that he was filing a clear and unmistakable error (CUE) claim, but was not sure whether what he was actually appealing was CUE or "a procedural error in the mailing was defective." He left it to the Board to "sort it out." The Veteran also drew the Board's attention to the fact that his asthma service connection has been "dated back" to 2004, and the rest of his claims should be as well.

1. NOTIFICATION

As noted above, the Veteran has sought for service connection for a psychiatric disability and a left ankle disability since November 20, 2003, and a back disability since January 23, 2004. Where a prior unappealed decision becomes final, the effective date of a subsequent award of service connection is the date of receipt of the subsequently filed application to reopen, and not the date of receipt of the original claim. *Leonard v. Nicholson*, 405 F.3d 1333, 1337 (Fed. Cir. 2005). The Veteran, in essence, argues that the October 2004 decision never became final because he never received notice of the rating decision and, therefore, could never

disagree with the decision within the proscribed time frame to file a notice of disagreement.

The United States Court of Appeals for Veterans Claims (Court) has ruled that there is a rebuttable "presumption of administrative regularity" under which it is presumed that government officials have properly discharged their official duties, including mailing notices. *See Clark v. Principi*, 15 Vet. App. 61, 63 (2001). The presumption of regularity with regard to the regular mailing of notice attaches if VA mails notice to the last address of record. *See Mindenhall v. Brown*, 7 Vet. App. 271, 274 (1994).

Even in cases where the presumption of administrative regularity were to attach (where the written notice was mailed to the last address of record), the presumption will be rebutted by "clear evidence" that both (1) the mailing was returned as undeliverable, and (2) there were other possible and plausible addresses that could have been used to contact him. *See Davis v. Principi*, 17 Vet. App. 29 (2003). Additionally, the Court has specifically held that a statement by a claimant, standing alone, is not sufficient to rebut the presumption of regularity in RO operations. *See YT v. Brown*, 9 Vet. App. 195 (1996).

VA's use of an incorrect address for a claimant constitutes the "clear evidence" needed to rebut the presumption of regularity that the Board properly mailed notice of its decision to the claimant under section 7104(e), which requires the notice of a Board decision to be sent to the claimant at the claimant's "last known address" of record. *Crain v. Principi*, 17 Vet. App. 182, 187 (2003); see 38 U.S.C. § 5104(a) (provision as to notice of RO decisions); *Woods v. Gober*, 14 Vet. App. 214, 220 (2000) (applying the presumption of regularity and its rebuttal in the context of an RO mailing). In *Woods v. Gober*, 14 Vet. App. 214, 220-21 (2000), the Court held that where the RO sends a Veteran notice of a decision, and such notice is returned as undeliverable, the presumption of regularity is rebutted, and the burden is shifted to the RO to establish that it reviewed the claims file to ascertain whether there are other possible and plausible addresses for the Veteran. The Court has also found that "the returned notice should have triggered reexamination of the file to

determine whether another address was available." *Hyson v. Brown*, 5 Vet. App. 262, 264 (1993).

Applying the presumption of regularity to VA, there is clear evidence indicating that the notice letter of the October 2004 rating decision was returned as undeliverable. As such, the presumption of regularity is rebutted. It was up to the RO to establish that it reviewed the claims file to ascertain if there were other addresses at which the Veteran could be reached. RO has not shown that, and has not met the burden. There was at least one other another possible and plausible address available that could have been used to contact the Veteran in his claims file. Namely, an August 17, 2004 VA psychiatric treatment notes, the provider noted that the Veteran stated that he planned to go to Hotel de Riviera in Santa Barbara for an 18 month dual diagnosis residential treatment program as soon as a bed there became available. VA treatment records dated December 20, 2004 stated that the Veteran was being discharged to Hotel de Riviera for long-term treatment. Therefore, the presumption of regularity is rebutted and the Board concludes that the Veteran was not notified of the October 2004 rating decision. As such, the October 2004 rating decision is not considered to be a final decision. *See* 38 U.S.C. § 7105 (2012); 38 C.F.R. § 20.1103 (2017).

Namely, there is clear evidence that the Veteran did not receive the October 2004 rating decision, as he was homeless at the time, a fact of which he informed VA in July 2004. The rating decision mailed in October 2004 was returned to VA. In January 2005, VA re-sent the rating decision to the same mailing address, changing "1st Floor" to "c/o New Directions" – which amounted to no change in at all, as New Directions took up the entire building to which the notice was sent and then re-sent. There is also no evidence that VA paid any heed to the Veteran's July 2004 notice to VA that he was homeless – a notice which he sent three months before the rating decision was issued and mailed out, and six month before the rating decision denying his claims was re-mailed. There is no evidence in the file that VA attempted to send notice of the October 2004 rating decision to the Santa Barbara rehabilitation facility, where he clearly told his VA physicians he would be staying upon his discharge from VAMC. There is no evidence in the file that VA attempted to contact his family to find him or his new address. In fact, his initial application,

received in November 2003, noted that VA could contact his father, whose address the Veteran provided to VA, if VA needed to contact if necessary. However, the notice of the rating decision was simply resent in January 2005 to the same mailing address from which it was previously returned.

As such, the Board finds that the October 2004 rating decision denying the Veteran service connection for a psychiatric disability, a left ankle disability, and a back disability never became final.

Thus, the earlier claims of November 20, 2003 (psychiatric disability, and a left ankle disability) and January 23, 2004 (back disability) are considered as part of the same claim stream that is currently pending on appeal.

The Board will not discuss the other theories of entitlement asserted by the Veteran, as it is unnecessary to do so since his claims have been adjudicated favorably.

The Board is cognizant that the Veteran currently receives a 100 percent disability rating for his psychiatric disability, and 10 percent disability ratings for his left ankle and back disabilities. However, the issue of assigning a specific disability rating from the time of the October 2004 rating decision is not currently before the Board, only the issue of service connection.

YVETTE R. WHITE
Veterans Law Judge, Board of Veterans' Appeals

ATTORNEY FOR THE BOARD A. Lech, Counsel