



# **BOARD OF VETERANS' APPEALS**

**FOR THE SECRETARY OF VETERANS AFFAIRS**

IN THE APPEAL OF

[REDACTED]

Represented by

Gordon A. Graham, Agent

C [REDACTED]

Docket No. 191014-38252

**Advanced on the Docket**

DATE: June 9, 2025

## **ORDER**

Entitlement to an effective date of June 18, 1990, but no earlier, for the award of service connection for psychomotor epilepsy is granted.

## **FINDING OF FACT**

The evidence persuasively weighs in favor of finding that the testimony received during an October 1991 Board hearing was received within one year from the February 1991 rating decision and is deemed to contain new and material evidence.

## **CONCLUSION OF LAW**

1. New and material evidence was received within one year of the February 1991 rating decision and therefore, such decision did not become final. 38 C.F.R. § 3.156.
2. The criteria for an effective date of June 18, 1990, but no earlier, for the award of service connection for psychomotor epilepsy have been met. 38 U.S.C. §§ 5107, 5110; 38 C.F.R. §§ 3.102, 3.400.

## REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran served on active duty from October 1967 to January 1972.

This matter comes before the Board of Veterans' Appeals (Board) on appeal of an April 2014 rating decision of a Department of Veterans Affairs (VA) Regional Office (RO).

In December 2023, the Board denied the Veteran's claim of an earlier effective date for the award of service connection for psychomotor epilepsy.

The Veteran appealed the December 2023 Board decision to the U.S. Court of Appeals for Veterans Claims (CAVC). In January 2025, the Veteran and the VA's Office of the General Counsel filed a Joint Motion for Remand (JMR). In an order dated January 15, 2025, CAVC granted the JMR and remanded the matter to the Board for action consistent with the terms of the joint motion.

### **1. Entitlement to an effective date of June 18, 1990, but no earlier, for the award of service connection for psychomotor epilepsy.**

The Veteran is seeking an earlier effective date for the award of service connection for psychomotor epilepsy. He contends that his effective date should be June 18, 1990, the date he filed an informal claim. *See* 7/17/23 Third Party Correspondence at 1.

Prior to March 24, 2015, VA recognized both formal and informal claims requesting a determination of entitlement or evidencing a belief in entitlement to a benefit. *See Brokowski v. Shinseki*, 23 Vet. App. 79, 84 (2009); 38 C.F.R. § 3.1(p) (2008).

The assignment of effective dates of awards is generally governed by 38 U.S.C. § 5110 and 38 C.F.R. § 3.400. Except as otherwise provided, the effective date for an evaluation and award of compensation based on an original claim or a claim reopened after final disallowance will 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 specifically provided, such determination is made on the basis of the facts found. 38 C.F.R. § 3.400(a).

New and material evidence received prior to the expiration of the appeal period (one year for a rating decision and 60 days for a statement of the case) will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period. 38 C.F.R. § 3.156(b).

To comply with the directive of 38 C.F.R. § 3.156(b), VA must evaluate submissions received during the relevant period and determine whether they contain new evidence relevant to a pending claim, whether or not the relevant submission might otherwise support a new claim. *See Bond v. Shinseki*, 659 F.3d 1362, 1367. If new and material evidence is received, constructively or actually, during the appellate period, VA must readjudicate the claim in a supplemental decision (either another rating decision or a supplemental statement of the case), in which the new evidence is either (1) listed in the evidence section or (2) directly mentioned and considered in the body of the decision. *Mitchell v. McDonald*, 27 Vet. App. 431, 436 (2015) (stating that a new decision must be issued that is “directly responsive” to the new evidence); *see also Bond*, 659 F.3d at 1367. An implicit finding that submission is new and material evidence satisfies § 3.156(b) so long as there is some indication that VA determined whether the submission is new and material evidence, and if so, considered such evidence in evaluating the pending claim. *Pickett v. McDonough*, 64 F. 4th 1342 (Fed. Cir. 2023)

If VA fails to readjudicate the claim in light of the new and material evidence submitted, the claim remains pending until such readjudication occurs. The claim will also remain pending if VA readjudicates the claim but does not address the new evidence in the readjudication, despite such intervening readjudication. *See Beraud v. McDonald*, 766 F.3d 1402, 1405-06 (Fed. Cir. 2014). Once VA issues a decisional document addressing the new and material evidence, the readjudication itself becomes final, and if the veteran perfects an appeal from the readjudication, then the claim is one for service connection. *Id.*

The claimant is entitled to the benefit of the doubt when there is an “approximate” (meaning nearly equal) balance of positive and negative evidence regarding any

material determination. 38 C.F.R § 3.102; *Lynch v. McDonough*, 999 F.3d 1391 (2021).

By way of background, on June 18, 1990, the Veteran filed an informal claim stating that he had a seizure disorder which he believed was due to his service-connected post-traumatic stress disorder (PTSD). *See* 6/18/90 NOD. In the same statement, he also appealed a separate issued regarding a reduction of his service-connected PTSD.

On December 17, 1990, the Veteran filed correspondence again claiming that his service-connected PTSD was causing his seizures, including the medications he took for his PTSD. *See* 12/17/90 Correspondence at 1.

On the same date, he had a hearing with the RO regarding his PTSD but at that time provided some testimony regarding his seizures. *See* 12/17/90 Hearing Testimony at 2. He also asked for his December 17, 1990 correspondence to be accepted in lieu of a VA Form I-9. *Id.*

On January 2, 1991, the RO issued a rating decision regarding the Veteran's service-connection PTSD only. In the decision, it was noted that the Veteran requested that his December 17, 1990 statement be accepted in lieu of a VA Form I-9. *See* 1/2/91 Rating Decision at 6.

On February 4, 1991, the Veteran filed a VA Form 4138 statement in support of claim requesting that his claim of service connection for seizures be reopened.

Also on February 4, 1991, the RO issued a rating decision denying the Veteran's claim of service connection for seizures. This was the first rating decision addressing the issue of seizures.

On the same date, the Veteran submitted private treatment records from three physicians regarding his seizures. *See* 2/4/91 Medical Treatment Record-Government Facility.

On February 15, 1991, the Veteran resubmitted the private treatment records from the three physicians. He also submitted a list of medications for his PTSD that he

claimed were causing his seizures and a personal statement regarding his seizures. *See* 2/15/91 Medical Treatment Record-Government Facility; VA Form 21-4138.

On February 22, 1991, the RO issued a deferred rating decision explaining that it considered the evidence submitted by the Veteran on February 15, 1991 and that it the claim of service connection remained denied. The RO notified the Veteran of this decision on February 25, 1991.

On February 28, 1991, the Veteran filed a notice of disagreement (“NOD”) as to the February 4, 1991 rating decision denying service connection for seizures.

On March 29, 1991, the Veteran filed a VA Form 21-4138 statement in support of claim again expressing disagreement of the denial of his claim.

On October 8, 1991, a Board hearing was held on a separate issue regarding the Veteran’s PTSD. Although the claim of service connection for seizures was not on appeal before the Board, the Veteran provided testimony on the issue. The Veteran presented testimony regarding the same evidence he submitted on February 15, 1991 – the medical reports from the three private physicians, the list of medications, and a statement about his seizures. *See* 10/8/91 Hearing Testimony at 11. His wife also testified regarding the continuity of his symptoms and what she experienced regarding his seizures. *Id.* at 19-21.

On October 11, 1991, the Veteran’s representative submitted an appellate brief addressing the claim of service connection for seizures. The representative reiterated what was already provided as evidence regarding the seizures and explained why additional development for the claim was needed.

On January 9, 1992, a statement of the case (“SOC”) was issued and denied service connection for seizures. Under “Summary of Evidence and Adjudication Actions,” the RO listed the private treatment records from the three physicians and the Veteran’s February 15, 1991 statement. *See* 1/9/92 SOC at 3. However, the SOC did not list or otherwise reference the October 8, 1991 Board hearing testimony. *Id.*

On June 2, 1992, the Veteran filed a VA Form 9 to the January 1992 SOC.

On June 15, 1992, the RO issued a rating decision finding that the Form 9 was untimely as it was filed over one year since the February 1991 rating decision. The RO stated that the Veteran could still file a Form 9 by March 9, 1992, but again no Form 9 was filed by such date.

On October 29, 1992, the Veteran filed an NOD to the June 1992 rating decision claiming that his appeal was perfected when he appeared for the October 1991 Board hearing.

On November 25, 1992, the RO issued an SOC and again denied the claim explaining that the Form 9 filed on June 2, 1992 was untimely.

On October 16, 1996, the Veteran filed a VA Form 21-4138 requesting to reopen his claim of service connection for seizures. However, on November 19, 1996, he withdrew the claim.

On May 23, 2005, the Veteran submitted treatment records.

On October 13, 2005, the RO denied the claim of service connection for seizures, finding that the evidence submitted was not new and material.

On October 25, 2006, the Veteran called the RO and requested to reopen his claim of service connection for seizures due to Agent Orange exposure. *See* 10/25/06 VA 119 Report of Contact.

On September 11, 2007, the RO issued a rating decision and denied the claim of service connection for seizures because the evidence submitted was not new and material.

On June 16, 2010, the Veteran filed a VA Form 21-4138 requesting to reopen his claim of service connection for seizures claiming he had a head injury in service and that his medications were still causing seizures.

On April 29, 2014, the RO issued a rating decision granting the claim of service connection for psychomotor epilepsy with an evaluation of 100 percent effective June 16, 2010.

On April 6, 2015, the Veteran filed a NOD appealing the April 2014 rating decision claiming that his effective date for service connection for seizures should be June 1990. *See* 4/6/15 VA Form 21-4138.

On September 4, 2019, the RO issued an SOC. In the SOC, the RO listed the October 8, 1991 Board hearing testimony as evidence considered in its decision, among other evidence.

On October 14, 2019, the Veteran filed his VA Form 10182 appealing the September 2019 SOC.

Based on the procedural history outlined above, the Board finds that the January 1992 SOC did not encompass all of the October 1991 Board testimony. The October 1991 Board testimony was submitted within one year of the February 4, 1991 rating decision denying the claim for seizures. While the January 1992 SOC listed the private medical treatment records from the three physicians and testimony from the Veteran regarding his seizures, it did not list or identify the Veteran's spouse's testimony during the October 1991 Board hearing. During the hearing, the spouse testified as to the continuity of the Veteran's seizure symptoms and her witnessing of the seizures. Since the SOC did not list the October 1991 Board testimony specifically or discuss its contents, it cannot be concluded that the spouse's testimony was considered in the RO's decision. The Board testimony was not addressed by the RO until the September 4, 2019 SOC, where it is specifically listed in the evidence list. Consequently, the June 1990 service connection claim for seizures remained pending until it was readjudicated in the September 2019 SOC, and therefore, the Board finds that the date of claim for seizures in this matter is June 18, 1990.

In reaching the above conclusion, the Board is cognizant of *Williams v. Peake*, 521 F.3d 1348, 1349-50 (Fed. Cir. 2008) (holding that subsequent adjudication of a claim will extinguish identical, prior "pending" claims to the same benefit). In this case, subsequent to the February 1991 rating decision that has been deemed nonfinal via application of 38 C.F.R. § 3.156(b), rating decisions were issued in October 2005 and September 2007 that were not appealed. In some cases, such failure to appeal these subsequent adjudications could vitiate the nonfinality of the

February 1991 rating decision. Here, however, the 2005 and 2007 unappealed decisions only addressed the question of new and material evidence, never reaching the merits of the claim. Given the procedural history in this case, as explained above, the claim should not have required new and material evidence and thus those adjudications do not vitiate the finality of the February 1991 adjudication. This dovetails with the above reference to *Beraud*.

Having determined that the February 1991 rating decision never became final, the Board must next determine when the disability first manifested. *See McGrath v. Gober*, 14 Vet. App. 28, 35 (2000).

Service treatment records do not show the Veteran reporting or exhibiting symptoms related to seizures. However, he contends that his blackouts began in 1968 when he was in service. *See* 7/30/12 VA Examination at 1.

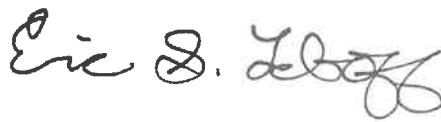
In May 1990, the Veteran reported having a seizure on May 4, 1990. *See* 5/17/90 Medical Treatment Record-Government Facility at 18. On May 17, 1990, the Veteran's private physician diagnosed him with a seizure disorder based on the event and other medical testing. *Id.* at 38.

The Board finds that the Veteran's seizures first manifested on May 4, 1990. Since the Veteran's date of claim for service connection, June 18, 1990, is the later of the two dates, such date is the effective date for service connection.

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Based on the foregoing, the Board finds that the criteria for an effective date of June 18, 1990, but no earlier, for the award of service connection for psychomotor epilepsy is granted. *See* 38 U.S.C. § 5107(b); 38 C.F.R. §§ 3.102, 4.3. The benefit of the doubt doctrine has been considered.



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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.*