BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

WASHINGTON, DC 20038

RECEIVED
MAR 04 2019
By

[redacted]

Date: March 1, 2019

[redacted]

Dear Appellant:

The Board of Veterans' Appeals (Board) has made a decision in your appeal, and a copy is enclosed.

If your decision contains a	*What happens next*
Grant	The Department of Veterans Affairs (VA) will be contacting you regarding the next steps, which may include issuing payment. Please refer to VA Form 4597, which is attached to this decision, for additional options.
Remand	Additional development is needed. VA will be contacting you regarding the next steps.
Denial or Dismissal	Please refer to VA Form 4597, which is attached to this decision, for your options.

If you have any questions, please contact your representative, if you have one, or check the status of your appeal at http://www.vets.gov.

Sincerely yours,

K. Osborne

K. Osborne
Deputy Vice Chairman

Enclosures (1)
CC: ERIC A. GANG, Attorney

BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

IN THE APPEAL OF
[redacted]

REPRESENTED BY
ERIC A. GANG, Attorney

[redacted]

DATE: March 1, 2019

ORDER

New and material evidence having been received, the claim of entitlement to service connection for an acquired psychiatric disability, to include bipolar disorder, is reopened.

Entitlement to service connection for an acquired psychiatric disability, to include bipolar disorder, is granted.

FINDINGS OF FACT

1. An October 2007 rating decision denied entitlement to service connection for an acquired psychiatric disability. The Veteran did not file a notice of disagreement or submit additional evidence or argument within 1 year of such decision.

2. Evidence received since the October 2007 rating decision is new and relates to an unestablished fact necessary to substantiate the claim for service connection.

3. The most probative evidence of record is at least in relative equipoise as to whether the Veteran's bipolar disorder had its onset during or is otherwise etiologically related to active military service.

IN THE APPEAL OF [redacted]

CONCLUSIONS OF LAW

1. The October 2007 rating decision which denied entitlement to service connection for an acquired psychiatric disability is final. 38 U.S.C. § 7105; 38 C.F.R. § 20.1103.

2. New and material evidence has been received to reopen a claim of entitlement to service connection for an acquired psychiatric disability; therefore, the claim is reopened. 38 U.S.C. § 5108; 38 C.F.R. § 3.156.

3. The criteria for entitlement to service connection for an acquired psychiatric disability, to include bipolar disorder, have been met. 38 U.S.C. §§ 1110, 5107 (b); 38 C.F.R. §§ 3.102, 3.303.

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran served on active duty in the U.S. Marine Corps from January 2006 to March 2007.

This matter comes before the Board of Veterans' Appeals (Board) on appeal of a May 2016 rating decision by the Department of Veterans Affairs (VA).

Service connection for an acquired psychiatric disability was denied in an October 2007 rating decision. The Veteran did not file a notice of disagreement or submit additional evidence or argument within 1 year of such decision. Thus, new and material evidence is required to reopen the claim. The Veteran has submitted new and material evidence. Therefore, the claim is reopened.

The Board notes that the Veteran's attorney requested an extension of 90 days in which to submit additional evidence and argument, which VA received on December 6, 2018. However, as the Board is granting the benefit sought on appeal to the maximum extent allowed by law, there is no prejudice to the Veteran in proceeding with a decision on the merits.

Service Connection – Acquired Psychiatric Disability

Service connection may be granted for a disability resulting from disease or injury incurred coincident with or aggravated by service. 38 U.S.C. §§ 1110, 1131; 38 C.F.R. § 3.303 (a). Establishing direct service connection generally requires competent evidence of: (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship, i.e., a nexus, between the claimed in-service disease or injury and the current disability. *Shedden v. Principi*, 381 F.3d 1163 (Fed. Cir. 2004).

Initially, there exists a current diagnosis of an acquired psychiatric disability. A VA examination in February 2016 reflects a diagnosis of bipolar disorder.

The Veteran's entrance examination report does not contain any indications or history of psychiatric disabilities. In November 2006, the Veteran was seen after displaying cutting behaviors, and was provisionally diagnosed with an anxiety disorder, not otherwise specified. He was referred for a psychological evaluation to determine whether he had a character disorder versus an anxiety disorder, and due to symptoms of a "possible bipolar component." The Veteran was diagnosed with alcohol abuse (Axis I), and a cluster B personality disorder (Axis II).

In January 2007, the Veteran had a follow-up examination after repeated cutting behaviors. A military psychologist determined that the Veteran had a personality disorder which existed prior to service, and a long-standing character disorder interfering with his ability to function in a military environment. The Veteran's form DD-214 reflects that he was discharged under honorable conditions, with the narrative reason for separation given as a "personality disorder."

The Veteran sought VA mental health treatment from Dr. C.M. in January 2016. Dr. C.M. thoroughly reviewed the Veteran's medical history, and conducted a mental status examination. She diagnosed bipolar disorder, and stated that although the Veteran was discharged from military service with a diagnosis of personality disorder, "that is clearly not his behavior pattern, and in retrospect, his symptoms at that time were the onset of what is now clear as bipolar disorder."

The Veteran underwent a VA examination in February 2016. The examiner diagnosed bipolar disorder, and noted that although the Veteran admitted having a borderline personality disorder, that bipolar is an accurate diagnosis. The examiner

did not opine as to whether the Veteran's bipolar disorder was etiologically related to military service.

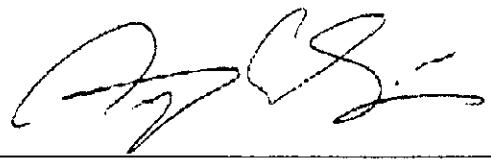
In April 2016, another VA examiner, Dr. L.S., opined that it was less likely than not that the Veteran's bipolar disorder was incurred in or caused by military service. As rationale, Dr. L.S. stated that there is no evidence in the medical record to support the presence of a condition that is related to his current bipolar disorder. He did not provide further explanation or support for his findings.

The Veteran submitted a private medical opinion from Dr. M.H. dated December 2016. She stated that the Veteran meets the criteria for bipolar disorder, and that stress associated with his circumstances within the military may very well have contributed to expression of symptoms associated with this condition.

In March 2017, the Veteran submitted a medical opinion from Dr. K.W. He stated that he had been treating the Veteran since November 2015, and that the Veteran suffers from bipolar disorder. Dr. K.W. indicated that he saw little evidence of a personality disorder, and that the mental health symptoms expressed during service, including cutting behaviors, were the early manifestations of bipolar disorder, exacerbated by the stressors of military life. He concurred with Dr. M.H., and encouraged VA to reconsider the Veteran's diagnosis. In July 2017, the Regional Office (RO) found that "VA does not have the authority to modify the evaluation or diagnosis rendered by an in-service provider," and continued the denial of service connection.

As a matter of law, VA cannot grant service connection for a personality disorder, or for aggravation of a personality disorder while in military service. *Morris v. Shinseki*, 678 F.3d 1346, 1356 (Fed. Cir. 2012); *see also* 38 C.F.R. § 4.127. However, credible and competent medical evidence has attributed the Veteran's psychiatric symptoms in military service to bipolar disorder, rather than a personality disorder. Specifically, Dr. C.M., Dr. M.H., and Dr. K.W., indicated that the Veteran's in-service symptoms were due to bipolar disorder. As these physicians reviewed the Veteran's history, and provided cogent opinions consistent with their medical knowledge and expertise, the Board affords their findings significant probative weight. *D'Aries v. Peake*, 22 Vet. App. 97, 107 (2008).

The law is clear. Pursuant to the "benefit-of-the-doubt" rule, where there is "an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter," the Veteran shall prevail upon the issue. 38 U.S.C. § 5107 (b). Although there is some evidence to the contrary, the most probative evidence of record permits a reasonable finding that the Veteran's acquired bipolar disorder manifested during military service. The Board therefore concludes that, with the benefit of the doubt resolved in the Veteran's favor, a grant of service connection for an acquired psychiatric disability, to include bipolar disorder, is warranted. *See Gilbert v. Derwinski*, 1 Vet. App. 49, 55 (1990) ("[T]he 'benefit of the doubt' standard is similar to the rule deeply embedded in sandlot baseball folklore that 'the tie goes to the runner'.... [I]f... the play is close, i.e., 'there is an approximate balance of positive and negative evidence,' the veteran prevails by operation of [statute].").



ANTHONY C. SCIRÉ, JR
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD D. Reed, Associate Counsel

Department of Veterans Affairs

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

CONTINUED ON NEXT PAGE

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).

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