DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Regional Office

[redacted]

VA File Number
[redacted]

Rating Decision
07/05/2019

INTRODUCTION

The records reflect that you are a veteran of the Gulf War Era and Peacetime. You served in the Army from July 12, 1988 to August 31, 2008. We received a request to reopen a previous claim on May 17, 2019. Based on a review of the evidence listed below, we have made the following decision(s) on your claim.

DECISION

1. The decision to deny service connection for tinnitus was clearly and unmistakably erroneous; therefore, service connection is established with an evaluation of 10 percent effective February 22, 2019.

2. Service connection for lumbar strain (claimed as back injury) is granted with an evaluation of 20 percent effective May 14, 2019.

3. Service connection for left lower extremity radiculopathy, sciatic nerve is granted with an evaluation of 10 percent effective May 14, 2019.

4. Service connection for right lower extremity radiculopathy, sciatic nerve is granted with an evaluation of 10 percent effective May 14, 2019.

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5. The previous denial of service connection for hearing loss is confirmed and continued.

6. The previous denial of service connection for irritable bowel syndrome (stomach/intestinal problems) is confirmed and continued.

7. A decision on entitlement to compensation for traumatic brain injury (TBI) is deferred.

EVIDENCE

- Service treatment records (photocopies) for the period of service from July 1988 to August 2008, received August 19, 2009
- DD Form 214, Certificate of Release or Discharge from Active Duty, from July 12, 1988 through August 31, 2008
- VA Form 21-526, Veteran's Application for Compensation and/or Pension, received August 19, 2009
- 5103 duty to assist notification, Dated August 31, 2009
- VA memo, formal finding of unavailability of service treatment records, March 31, 2010
- VA rating decision, dated, May 12, 2010
- Notification of a return of duplicate service treatment records, dated April 26, 2012
- Notification of an intent to file, received February 22, 2019
- DBQ PSYCH review PTSD (veteran provided), received March 20, 2019
- DBQ PSYCH mental disorders (Veteran provided) received March 20, 2019
- Statement in support of claim received march 20, 2019
- Private treatment records , Chestatee Regional Hospital, received March 27, 2019
- VA Form 21-0781, Statement In Support Of Claim For Service Connection for Post-Traumatic Stress Disorder (PTSD), received March 27, 2019
- Service treatment records, for the period of service from July 1988 to August 2008, received March 27, 2019
- VA Form 21-4138, Statement in Support of Claim, (multiple) received, received March 27, 2019
- Military personnel records, for the period of service from July 1988 to August 2008, received March 27, 2019
- VA Form 21-526 EZ: Application for Disability Compensation and Related Compensation Benefits, March 27, 2019
- Military personnel records (DPRIS) for the period of service from July 1988 to August 2008, received April 25, 2019
- VA Form 21-526 EZ: Application for Disability Compensation and Related Compensation Benefits, establishing 5103 notification requirements have been met, May 4, 2019
- DBQ PSYCH Initial PTSD exam, with medical opinion, completed by VES, received May 8, 2019
- Service treatment records, retirement exam, received May 14, 2019
- VA form 20-0995, Decision Review Request: Supplemental Claim, received May 14, 2019
- VA rating Decision dated June 6, 2011
- DBQ NEURO Headaches (including Migraines), received on June 07, 2019
- DBQ AUDIO Ear (Including Vestibular and Infectious), received on June 07, 2019
- DBQ Medical Opinion, received on June 07, 2019

- TBI DBQ Medical Opinion, received on June 10, 2019
- DBQ NEURO Initial Evaluation of TBI, received on June 10, 2019
- DBQ Medical Opinion received on June 11, 2019
- DBQ NEURO Headaches (including migraines), received on June 11, 2019
- STOMACH; DBQ Medical Opinion received on June 13, 2019
- DBQ GI Stomach & Duodenum, received on June 13, 2019
- DBQ MUSC Back (Thoracolumbar Spine), received on June 13, 2019
- DBQ AUDIO hearing loss and tinnitus received June 14, 2019
- DBQ AUDIO hearing loss and tinnitus received June 27, 2019
- VA rating decision dated, July 1, 2019 with a decision notification letter dated July 2, 2019

REASONS FOR DECISION

1. Whether the decision to deny service connection for tinnitus was clearly and unmistakably erroneous.

Clear and unmistakable errors are errors that are undebatable, so that it can be said that reasonable minds could only conclude that the previous decision was fatally flawed at the time it was made. A determination that there was clear and unmistakable error must be based on the record and the law that existed at the time of the prior decision. Once a determination is made that there was a clear and unmistakable error in a prior decision that would change the outcome, then that decision must be revised to conform to what the decision should have been. As the previous decision was clearly and unmistakably erroneous, service connection is established for tinnitus with an evaluation of 10 percent effective February 22, 2019.

In a rating decision dated July 1, 2019 service connection for tinnitus was denied because the evidence did not show a link between your current condition and your military service. This decision to deny service connection for tinnitus was based on a review of your service treatment records, statements you submitted in support of your claim and the results of your hearing loss exams received on June 14, 2019 and June 27, 2019.

Tinnitus is considered to be a presumptive condition listed under 38 CFR 3.309(a). Direct service connection may be established for presumptive conditions listed under 38 CFR 3.309(a) when the evidence shows that the condition had its onset during active duty and has chronically persisted from active duty to present.

A review of your STRs show inservice complaints of tinnitus, which are sufficient to establish that your condition began in service. Your audiology exams contain a current diagnosis of tinnitus. In a statement in support of claim received on March 27, 2019 you reported that your tinnitus began in service and has continued since service. Although the examiner provided a negative opinion for your tinnitus related to service, the overall evidence of record is sufficient to establish that your condition began in service and has continued to present since service.

Based on this evidence, the previous decision to deny service connection for tinnitus was clearly and unmistakably in error.

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Service connection for your tinnitus is granted with an evaluation of 10 percent effective February 22, 2019, the date we received your intent to file, since a formal claim was received within one year of that date.

We have assigned a 10 percent evaluation for your tinnitus based on:
• Recurrent tinnitus

A single evaluation for recurrent tinnitus is assigned whether the sound is perceived in one ear, both ears, or in the head.

This is the highest schedular evaluation allowed under the law for tinnitus.

References considered in this decision:
38 CFR 3.155
38 CFR 3.400
38 CFR 3.105
38 CF 3.307
38CFR 3.309
38 CFR 4.87

2. Service connection for lumbar strain (claimed as back injury).

Service connection for lumbar strain (claimed as back injury) has been established as directly related to military service. (38 CFR 3.303, 38 CFR 3.304)

The effective date of this grant is May 14, 2019. Service connection has been established from the day VA received your supplemental claim. When a claim of service connection is received more than one year after discharge from active duty, the effective date is the date VA received the claim. (38 CFR 3.400 & 38 CFR 3.155)

An evaluation of 20 percent is assigned from May 14, 2019.

We have assigned a 20 percent evaluation for your back injury based on:
• Forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees

Additional symptom(s) include:
• Combined range of motion of the thoracolumbar spine greater than 120 degrees but not greater than 235 degrees
• Guarding not resulting in abnormal gait or abnormal spinal contour
• Painful motion upon examination

The provisions of 38 CFR §4.40 and §4.45 concerning functional loss due to pain, fatigue, weakness, or lack of endurance, incoordination, and flare-ups, as cited in DeLuca v. Brown and Mitchell v. Shinseki, have been considered and applied under 38 CFR §4.59.

A higher evaluation of 40 percent is not warranted for lumbosacral strain unless the evidence shows:
• Favorable ankylosis of the entire thoracolumbar spine; or,
• Forward flexion of the thoracolumbar spine 30 degrees or less. (38 CFR 4.71a)

Entitlement to a retroactive effective date based on receipt of official service department records is not warranted in this case. The service treatment records and personnel records received on March 27, 2019 and May 14, 2019 were submitted by you with other claims material and were not provided by either the Department of Defense or the service department. They are also not declassified records that were unavailable at the time of your original decision. Therefore, they are not considered to be official service department records, unavailable at the time of the original decision, that would allow for a retroactive grant of benefits. 38 CFR 3.156(c)

3. Service connection for left lower extremity radiculopathy, sciatic nerve as secondary to the service-connected disability of lumbar strain.

Service connection for left lower extremity radiculopathy, sciatic nerve has been established as related to the service-connected disability of lumbar strain. (38 CFR 3.310)

An evaluation of 10 percent is assigned from May 14, 2019. The effective date assigned is the date we received your supplemental claim. (38 CFR 3.400)

We have assigned a 10 percent evaluation for your left lower extremity radiculopathy, sciatic nerve based on:
• Mild incomplete paralysis (38 CFR 4.124a)

A higher evaluation of 20 percent is not warranted for neuritis of the sciatic nerve unless the evidence shows nerve damage is moderate. (38 CFR 4.124a)

4. Service connection for right lower extremity radiculopathy, sciatic nerve as secondary to the service-connected disability of lumbar strain.

Service connection for right lower extremity radiculopathy, sciatic nerve has been established as related to the service-connected disability of lumbar strain. (38 CFR 3.310)

An evaluation of 10 percent is assigned from May 14, 2019. The effective date assigned is the date we received your supplemental claim. (38 CFR 3.400)

We have assigned a 10 percent evaluation for your right lower extremity radiculopathy, sciatic nerve based on:
• Mild incomplete paralysis (38 CFR 4.124a)

A higher evaluation of 20 percent is not warranted for neuritis of the sciatic nerve unless the evidence shows nerve damage is moderate. (38 CFR 4.124a)

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5. Service connection for hearing loss.

The previous denial for bilateral hearing loss is confirmed and continued because there is no evidence that you currently have a hearing loss for VA purposes. (38 CFR 3.303, 38 CFR 3.304, 38 CFR 3.385)

Service connection may not be established for disability due to impaired hearing unless the auditory threshold in any of the frequencies 500, 1000, 2000, 3000 or 4000 Hertz is 40 decibels or greater; or the auditory thresholds for at least three of the frequencies 500, 1000, 2000, 3000 or 4000 Hertz are 26 decibels or greater; or speech recognition scores using the Maryland CNC Test are less than 94 percent. (38 CFR 3.385)

There are no audiometric findings in your service treatment records that meet the above requirements.

Your VA examiner opined that it is less likely than not that your hearing loss is due to military noise exposure. Your examiner provided the following rationale: You do not currently have hearing loss for VA purposes. .

VA examination findings show the left ear with 98 percent discrimination. Decibel (dB) loss at the puretone threshold of 500 Hertz (Hz) is 20, at 1000 Hz is 20, at 2000 Hz is 20, at 3000 Hz is 15, and at 4000 Hz is 25. The average decibel loss is 20 in the left ear. The right ear shows a speech discrimination of 98 percent. Your right ear Decibel (dB) loss at the puretone threshold of 500 Hertz (Hz) is 20, at 1000 Hz is 20, at 2000 Hz is 25, at 3000 Hz is 20, and at 4000 Hz is 15. The average decibel loss is 20 in the right ear.

In this case, the evidence of record does not show current audiometric findings which meet the criteria for a grant of service connection for hearing loss. As you do not currently meet the criteria for hearing loss for VA purposes, service connection may not be granted. In addition, there is no evidence that disabling sensorineural hearing loss manifested itself to a compensable degree within a year of service. (38 CFR 3.303, 38 CFR 3.304, 38 CFR 3.307, 38 CFR 3.309, 38 CFR 3.385)

You were previously denied service connection for bilateral hearing loss because the evidence did not show a current diagnosis of hearing loss. In support of your claim, new and material evidence has been received and your claim is now considered reopened.

Favorable Findings identified in this decision:

Incurrence: Your service treatment records show a hearing threshold shift in service

Incurrence: Combat noise exposure has been conceded based on your Combat Infantry Badge

6. Service connection for irritable bowel syndrome (stomach/intestinal problems).

The claim for service connection for irritable bowel syndrome (stomach/intestinal problems) is considered reopened. (38 CFR 3.156) However, the evidence continues to show this condition was not incurred in or aggravated by military service. (38 CFR 3.303, 38 CFR 3.304, 38 CFR 3.306)

In a rating decision dated May 12, 2010 you were denied service connection for a stomach condition because the current evidence of record did not show a diagnosed condition.

A review of your service treatment records show evidence of in-service complaints of stomach issues.

A recent examination shows a current diagnosis of irritable bowel syndrome.

The examiner provided a negative opinion for your current condition related to your in-service complaints. The examiner provided the rational that there is no medical documentation of symptoms or treatment since your release from active duty.

Since link between your current condition and your military service was note established, service connection for irritable bowel syndrome is denied.

Favorable Findings identified in this decision:

Incurrence: Your service treatment records show complaints of or treatment for a stomach condition in-service

Diagnosis: You were diagnosed with IBS on examination

7. Compensation for traumatic brain injury (TBI).

The issue of compensation for traumatic brain injury (TBI) is deferred for the following information: A medical opinion concerning the symptoms of your TBI and PTSD

REFERENCES:

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our website, www.va.gov.

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NAME OF VETERAN	VA FILE NUMBER	SOCIAL SECURITY NR	POA
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COPY TO

ACTIVE DUTY			
EOD	RAD	BRANCH	CHARACTER OF DISCHARGE
07/12/1988	08/31/2008	Army	Honorable

LEGACY CODES			
ADD'L SVC CODE	COMBAT CODE	SPECIAL PROV CDE	FUTURE EXAM DATE
	1	4	None

CLEAR AND UNMISTAKABLE ERROR - 38 CFR 3.105(a)

I hereby certify that the claims record of this veteran has been reviewed and that the following clear and unmistakable error has been identified: In a rating decision dated July 1, 2019 service connection was denied for tinnitus on a direct basis based on a negative medical opinion. A review of the STRs show in service complaints of tinnitus. The VA exam used in the decision contains a current diagnosis of tinnitus and a creditable statement of continuity of tinnitus. Tinnitus is a condition listed under 38 CFR 3.309(a) and direct service connection was warranted under 38 CFR 3.303(a) & M21-1 IV.ii.2.B.1.c. Service connection is established 2-22-2019 The date we received the intent to file since a formal claim was received within one year of that date.

Each assigned effective date of this corrected rating corresponds to the date from which benefits would have been payable if it had been made on the date of the reversed decisions (38 CFR 3.400(k)).

JURISDICTION: Reopened Claim Received 05/14/2019

ASSOCIATED CLAIM(s): 040; Supplemental Claim Rating; 05/17/2019

SUBJECT TO COMPENSATION (1.SC)

6204 VERTIGO
Service Connected, Gulf War, Incurred
Static Disability

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30% from 02/22/2019

8100 MIGRAINES
Service Connected, Gulf War, Incurred
Static Disability
30% from 02/22/2019

9411 POST TRAUMATIC STRESS DISORDER [PTSD - Combat/Combat Medal]
Service Connected, Gulf War, Incurred
Static Disability
30% from 02/22/2019

5237 LUMBAR STRAIN
Service Connected, Gulf War, Incurred
Static Disability
20% from 05/14/2019

5260 LEFT KNEE STRAIN
Service Connected, Gulf War, Incurred
Static Disability
10% from 02/22/2019

5260 RIGHT KNEE STRAIN
Service Connected, Gulf War, Incurred
Static Disability
10% from 02/22/2019

6260 TINNITUS
Service Connected, Gulf War, Incurred
Static Disability
10% from 02/22/2019

8620 RIGHT LOWER EXTREMITY RADICULOPATHY, SCIATIC NERVE ASSOCIATED WITH LUMBAR STRAIN
Service Connected, Gulf War, Secondary
Static Disability
10% from 05/14/2019

8620 LEFT LOWER EXTREMITY RADICULOPATHY, SCIATIC NERVE ASSOCIATED WITH LUMBAR STRAIN
Service Connected, Gulf War, Secondary
Static Disability
10% from 05/14/2019

5276 BILATERAL FLAT FOOT WITH PLANTAR FASCIITIS
Service Connected, Gulf War, Aggravated
Static Disability
0% from 02/22/2019

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COMBINED EVALUATION FOR COMPENSATION :

80% from 02/22/2019 (Bilateral factor of 1.9 Percent for diagnostic codes 5260, 5260)
80% from 05/14/2019 (Bilateral factor of 3.4 Percent for diagnostic codes 8620, 8620, 5260, 5260)

NOT SERVICE CONNECTED/NOT SUBJECT TO COMPENSATION (8.NSCPeacetime, Gulf War)

5025	FIBROMYALGIA Not Service Connected, No Diagnosis Original Date of Denial: 06/11/2019
5099-5025	JOINT PAIN Not Service Connected, No Diagnosis Original Date of Denial: 06/11/2019
6100	HEARING LOSS Not Service Connected, Hearing Normal for VA Purposes Static Disability 0% Original Date of Denial: 05/12/2010
6847	SLEEP APNEA Not Service Connected, Not Incurred/Caused by Service Static Disability Original Date of Denial: 06/11/2019
7199-7110	HEAT INJURY Not Service Connected, Not Incurred/Caused by Service Original Date of Denial: 05/12/2010
7319	IRRITABLE BOWEL SYNDROME Not Service Connected, Not Incurred/Caused by Service Static Disability Original Date of Denial: 05/12/2010

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7522 ERECTILE DYSFUNCTION
Not Service Connected, No Diagnosis

Original Date of Denial: 06/11/2019

7542 URINARY INCONTINENCE
Not Service Connected, Not Incurred/Caused by Service

Original Date of Denial: 06/11/2019

7819 LESIONS ON THE FACE
Not Service Connected, Not Incurred/Caused by Service

Original Date of Denial: 05/12/2010

DEFERRED ISSUES - VETERAN

8045 TRAUMATIC BRAIN INJURY (TBI)
Deferred
Static Disability

Original Date of Denial: 05/12/2010

Reviewer: The Veteran requested a retroactive effective date for service connection for the previously denied conditions based on new STRs. It is noted that the Veteran provided STRs on March 26, 2019 and May 14, 2019 with other claims materials. These records were not considered to be official service department records. While there are some original STRs mixed in with the STRs provided, these did not come from the DoD, the service department nor were they declassified records that we could not previously obtain. Additionally, at the time of the original decision we requested STRs from the Veteran. If the Veteran was in possession of these records and did not provide or identify them then then it is unreasonable to expect the VA to have been able to obtain them. Entitlement to a retroactive effective date is not warranted based on 38 CFR 3.156(c).

Reviewer: The Veterans personnel records show service in Afghanistan, not Southwest

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Asia

VSR: Additional signatures are not required for the CUE based on III.iv.6.D.7.d.

eSign: certified by VSCJSTOU313 DRO (RQRS)

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