

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

Peter R. Marksteiner
Office of the Clerk
United States Court of Appeals for the Federal Circuit
717 Madison Place NW
Washington, DC 20439

February 28, 2020

Re: *Monk v. Wilkie* (No. 19-1094)

Dear Colonel Marksteiner,

Pursuant to Fed. R. App. Pr. 28(j), Petitioners-Appellants file the attached decision from the Board of Veterans' Appeals ("Board").¹

On February 4, 2020, the Board issued a decision in the administrative appeal of William P. Dolphin, an Appellant herein. The Board reversed the decision of the Regional Office and found that Mr. Dolphin is entitled to an earlier effective date for his grants of service connection for six medical conditions, including post-traumatic stress disorder and traumatic brain injury. The Board also denied one of Mr. Dolphin's claims and remanded seven other claims relating to the rating and service connection for various other medical conditions. The Board decision is relevant as an update to the Statement of Facts. Appellants' Br. at 17; *see also* Appellants' Reply Br. at 25.

Mr. Dolphin, as well as Appellants Monk, Coyne, Hudson, Merrick, Obie, and Stokes, each "retain[] a personal stake in obtaining class certification" in this case. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980). Mr. Dolphin waited 1,922 days—over five years—for a decision. Each of the seven Appellants has suffered a similar, multi-year delay while waiting for the Board to decide their appeal. Appellants' Br. at 14. As the Supreme Court has recognized, "an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied." *Geraghty*, 445 U.S. at 404. Because Appellants' experiences waiting for Board decisions enable them to "adequately protect the interests of the class," this appeal is "not moot." *Id.* at 405-06.

Respectfully submitted,

/s/ Lynn Neuner
Lynn K. Neuner
Simpson Thacher & Bartlett LLP

/s/ Michael Wishnie
Jade Ford, Law Student Intern
Arjun Mody, Law Student Intern
Madison Needham, Law Student Intern
Casey Smith, Law Student Intern
Jesse Tripathi, Law Student Intern
Renée Burbank, Supervising Attorney
Michael J. Wishnie, Supervising Attorney
Veterans Legal Services Clinic
Jerome N. Frank Legal Services Organization

¹ Counsel initially filed this 28(j) letter on February 27, 2020 but inadvertently did not attach the Board decision. Counsel now re-files this letter with the Board decision attached. Counsel regrets the error and any inconvenience it may have caused the Court or other parties.



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: February 4, 2020



WILLIAM P. DOLPHIN



Dear Appellant:

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

| <i>If your decision contains a</i> | <i>What happens next</i> |
|------------------------------------|---|
| 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
Deputy Vice Chairman

Enclosures (1)
CC: MICHAEL J WISHNIE, Attorney



BOARD OF VETERANS' APPEALS
FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
WILLIAM P. DOLPHIN
Represented by
Michael J. Wishnie, Attorney

[REDACTED]
Docket No. 18-16 177
Advanced on the Docket

DATE: February 4, 2020

ORDER

An effective date of November 9, 2009, for the grant of service connection for posttraumatic stress disorder (PTSD) is granted.

An effective date of November 9, 2009, for the grant of service connection for osteoarthritis of the left shoulder is granted.

An effective date of November 9, 2009, for the grant of service connection for lumbosacral strain with arthritis is granted.

An effective date of November 9, 2009, for the grant of service connection for left lower extremity sciatica is granted.

An effective date of November 9, 2009, for the grant of service connection for tinnitus is granted.

An effective date of November 9, 2009, for the grant of service connection for a traumatic brain injury (TBI) is granted.

A rating higher than 10 percent for tinnitus is denied.

REMANDED

A rating higher than 70 percent for PTSD is remanded.

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A rating higher than 30 percent for osteoarthritis of the left shoulder is remanded.

A rating higher than 20 percent for lumbosacral strain with arthritis is remanded.

Entitlement to a rating higher than 20 percent for the period prior to April 1, 2016, and 10 percent thereafter for left lower extremity sciatica is remanded.

A rating higher than 10 percent for a TBI is remanded.

Service connection for a right hand injury is remanded.

Service connection for a right knee injury is remanded.


FINDINGS OF FACT

1. A claim for service connection for PTSD, left shoulder arthritis, lumbosacral strain, left lower extremity sciatica, tinnitus, and TBI was initially received on November 9, 2009.
2. The Veteran's tinnitus is assigned a 10 percent rating, which is the maximum schedular rating authorized under Diagnostic Code (DC) 6260.

CONCLUSIONS OF LAW

1. The criteria for an effective date of November 9, 2009, for the grant of service connection for PTSD, left shoulder arthritis, lumbosacral strain, left lower extremity sciatica, tinnitus, and TBI, have been met. 38 U.S.C. § 5101(a); 38 C.F.R. § 3.400.
2. There is no legal basis for the assignment of a schedular rating higher than 10 percent for tinnitus. 38 U.S.C. § 1155; 38 C.F.R. § 4.87, DC 6260.

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REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty from May 1967 to January 1975. He is the recipient of the Purple Heart.

Service Connection Effective Dates


As all the effective date claims involve the same facts they will be discussed together.

The effective date for an award of service connection and disability compensation is the day following separation from active service or the date entitlement arose if the claim is received within one year after separation from service; otherwise, for an award based on an original claim, a claim reopened after a final allowance, or a claim for an increase, the effective date will be the date of receipt of the claim or the date entitlement arose, whichever is later. 38 U.S.C. § 5110; 38 C.F.R. § 3.400.

An application for VA compensation must generally be a specific claim in the form prescribed by the Secretary, i.e., VA Form 21-526. 38 U.S.C. § 5101(a); 38 C.F.R. § 3.151(a). However, any communication received from the claimant (or specified individuals) that indicates an intent to apply for one or more VA benefits, and identifies the benefit sought, may be considered an informal claim. 38 C.F.R. § 3.155(a). The words "claim" and "application" are defined as a formal or informal communication in writing requesting a determination of entitlement, or evidencing a belief in entitlement, to a benefit. 38 C.F.R. § 3.1(p).

Based on a thorough review of the record, the Board finds that the Veteran's intent to file a claim for compensation was received by VA on November 9, 2009. On that date the Veteran submitted a letter which stated that he had receive injuries while on active duty, identified his injuries, and that he was seeking VA treatment. As such and resolving all reasonable doubt in favor of the Veteran along with considering the well-documented effects of his TBI, the Board finds that his letter meets the qualifications of an informal claim. As such, the appropriate effective date for the grant of service connection for the Veteran's claims PTSD, left

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shoulder arthritis, lumbosacral strain, left lower extremity sciatica, tinnitus, and TBI is his November 9, 2009, letter to VA.

Increased Rating for Tinnitus

In August 2014, the RO granted service connection for tinnitus with a rating of 10 percent, under the recurrent tinnitus provisions of DC 6260. The Veteran seeks an initial rating in excess of 10 percent.

DC 6260 provides for a maximum schedular rating of 10 percent for tinnitus; whether the sound is perceived in on ear, both ears, or in the head. *See* 38 C.F.R. § 4.87, DC 6260.

In this case, there is no legal basis upon which to award a higher rating for tinnitus, as the maximum rating for tinnitus has already been assigned. The Veteran's claim for such a benefit is consequently without legal merit and must be denied. *See Smith v. Nicholson*, 451 F.3d 1344 (Fed. Cir. 2006); *Sabonis v. Brown*, 6 Vet. App. 426 (1994).

REASONS FOR REMAND


Higher Ratings

The Veteran has sought higher ratings for his PTSD, left shoulder arthritis, lumbosacral strain, left lower extremity sciatica, and TBI. He has stated that the symptoms of his disabilities have increased in severity since his last VA examinations in March and April 2016. Therefore, remand is warranted for new examinations.

Service Connection for Right Hand and Right Knee Injuries

The Veteran was not afforded a VA examination concerning the etiology of his right hand and right knee injuries; after review of the record, the Board finds that there is sufficient evidence to warrant a VA examination for the Veteran's claims

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for service connection for right hand and right knee injuries. *See McClendon v. Nicholson*, 20 Vet. App. 79 (2006).

The matters are REMANDED for the following action:


1. Associate with the record any VA clinical documentation not already of record.
2. Schedule the Veteran for an appropriate VA examination to ascertain the current severity of his PTSD. The examiner should review the claims file and should note that review in the report.

The Veteran's lay assertions as to symptomatology should be recorded and considered.

After examining the Veteran and conducting any studies and/or tests deemed necessary, the examiner should fully describe all symptomatology and functional deficits associated with the Veteran's PTSD and should opine as to their severity.

3. Schedule the Veteran for an appropriate VA examination(s) to determine the severity of his service-connected left shoulder, lumbosacral, and sciatic nerve disabilities as well as **the etiology of his right hand and knee disabilities**. The claims file, to include a copy of this remand, should be made available to the examiner. The examiner must review the claims file and that review must be noted in the report. A detailed history of relevant symptoms should be obtained from the Veteran. All indicated tests and studies should be performed and all clinical findings reported in detail.

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Complete range of motion measurements must be provided. The range of motion testing must include in active motion, passive motion, weight-bearing, and non-weight-bearing. The examiner should render specific findings as to whether, during the examination, there is objective evidence of pain on motion, weakness, excess fatigability, or incoordination. If pain on motion is observed, the examiner should indicate the point at which pain begins. In addition, indicate whether, and to what extent, the Veteran experiences functional loss due to pain or any of the other symptoms during flare-ups or with repeated use. To the extent possible, the examiner should express any additional functional loss in terms of additional degrees of limited motion.

The examiner should also state whether the examination is taking place during a period of flare-up. If not, the examiner should ask the Veteran to describe the flare-ups he experiences, including: frequency, duration, characteristics, precipitating and alleviating factors, severity and/or extent of functional impairment he experiences during a flare-up after repeated use over time.

As to the Veteran's sciatic nerve, the examiner is asked to report the severity of the Veteran's sciatic nerve disability, including if he has complete paralysis or incomplete paralysis. If the Veteran's sciatic nerve paralysis is incomplete, the examiner is asked to state he degree of that paralysis (i.e., mild, moderate, moderately severe, or severe).

As to the Veteran's right hand and right knee, the examiner should state whether the Veteran's right hand and/or knee condition is at least as likely as not (50

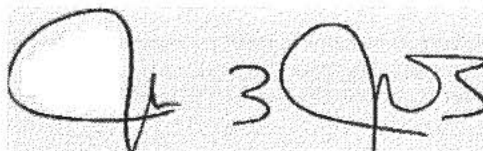
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percent or greater probability) related to an in-service injury, event, or disease. The rationale for the opinion should be provided.

4. Schedule the appropriate VA examination to assess the current level of severity of the service-connected TBI. The claims file, to include a copy of this remand, should be made available to the examiner. The examiner must note in the examination report that the evidence in the claims file has been reviewed. A detailed history of relevant symptoms should be obtained from the Veteran. All indicated tests and studies should be performed and all clinical findings reported in detail.

The appropriate Disability Benefits Questionnaire should be filled out.



JOHN Z. JONES
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board

A. Parrish, Associate Counsel

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**

member, 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).