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On appeal from the  
Department of Veterans Affairs Regional Office in Cleveland,  
Ohio

## THE ISSUE

Entitlement to service connection for diabetes mellitus,  
claimed as secondary to herbicide exposure.

## REPRESENTATION

Veteran represented by: Disabled American Veterans

## WITNESS AT HEARING ON APPEAL

The veteran

## ATTORNEY FOR THE BOARD

K. Morgan, Associate Counsel

## INTRODUCTION

This case comes before the Board of Veterans' Appeals (the Board) on appeal from a September 2002 rating decision of the Department of Veterans Affairs (VA) Regional Office in Cleveland, Ohio (the RO).

## Procedural History

The veteran served on active duty in the United States Navy from November 1966 until March 1970. Vietnam service (which will be discussed in much greater detail below) is indicated by the evidence of record.

In February 2002, the RO received the veteran's claim of entitlement to service connection for Type II diabetes mellitus based upon herbicide exposure. The September 2002 rating decision denied the veteran's claim. The veteran disagreed with the September 2002 rating decision and initiated this appeal. The appeal was perfected by the timely submission of the veteran's substantive appeal (VA Form 9) in February 2003.

The veteran presented sworn video testimony to the undersigned Veterans Law Judge in January 2004. The transcript of that hearing has been associated with the veteran's VA claims folder.

The veteran submitted additional evidence directly to the Board in February and April 2004. Those documents were accompanied by a waiver of consideration by the agency of original jurisdiction executed by the veteran's representative. See 38 C.F.R. § 20.1304.

## FINDINGS OF FACT

1. The veteran served in the Republic of Vietnam, specifically in an inland waterway, during Vietnam era active service.
2. The veteran has a current diagnosis of diabetes mellitus.
3. The veteran's diabetes mellitus is presumed to be etiologically related to his service in Vietnam.

## CONCLUSIONS OF LAW

1. The conditions of the veteran's service meet the requirements for service or visitation in the Republic of Vietnam during the Vietnam War.

38 C.F.R. §§ 3.307(a)(6)(iii), 3.313(a) (2003).

2. The veteran's diabetes mellitus is presumed to have been incurred as a result of the veteran's exposure to Agent Orange during service. 38 U.S.C.A. §§ 1110, 1116 (West 2002); 38 C.F.R. §§ 3.303, 3.307, 3.309 (2003).

## REASONS AND BASES FOR FINDINGS AND CONCLUSION

The veteran is seeking entitlement to service connection for diabetes mellitus. In essence, he contends that he was exposed to Agent Orange in the inland waters of the Republic of Vietnam and that service connection for diabetes mellitus should therefore be granted on a presumptive basis.

In the interest of clarity, the Board will initially discuss certain preliminary matters. The Board will then address the pertinent law and regulations and their application to the facts and evidence.

### The Veterans Claims Assistance Act of 2000

The Board has given consideration to the provisions of the Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (2000) (VCAA) [codified as amended at 38 U.S.C.A. §§ 5102, 5103, 5103A, 5107) (West 2002)]. This law eliminated the former statutory requirement that claims be well grounded. Cf. 38 U.S.C.A. § 5107(a) (West 1991). The VCAA includes an enhanced duty on the part of VA to notify a claimant as to the information and evidence necessary to substantiate a claim for VA benefits. The VCAA also redefines the obligations of VA with respect to its statutory duty to assist claimants in the development of their claims. Regulations implementing the VCAA have been enacted. See 66 Fed. Reg. 45,620 (Aug. 29, 2001) [to be codified as amended at 38 C.F.R. §§ 3.102, 3.156(a), 3.159, and 3.326(a)].

Except for provisions pertaining to claims to reopen based on the submission of new and material evidence, the VCAA is applicable to all claims filed on or after the date of enactment, November 9, 2000, or filed before the date of enactment but not yet final as of that date. The provisions

of the VCAA and the implementing regulations are, accordingly, applicable to this case. See *Holliday v. Principi*, 14 Vet. App. 282-83 (2001) [the Board must make a determination as to the applicability of the various provisions of the VCAA to a particular claim].

The Board has carefully considered the provisions of the VCAA and the implementing regulations in light of the record on appeal, and for reasons expressed immediately below finds that the development of this issue has proceeded in accordance with the provisions of the law and regulations.

As stated above, the VCAA alters the legal landscape in three distinct ways: standard of review, notice and duty to assist. The Board will now address these concepts within the context of the circumstances presented in this case.

### Standard of review

After the evidence has been assembled, it is the Board's responsibility to evaluate the entire record. See 38 U.S.C.A. § 7104(a) (West 2002). When there is an approximate balance of evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving each such issue shall be given to the claimant. 38 U.S.C.A. § 5107 (West 2002); 38 C.F.R. § 3.102 (2003). In *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990), the United States Court of Appeals for Veterans Claims (the Court) stated that "a veteran need only demonstrate that there is an 'approximate balance of positive and negative evidence' in order to prevail." To deny a claim on its merits, the preponderance of the evidence must be against the claim. *Aleman v. Brown*, 9 Vet. App. 518, 519 (1996), citing *Gilbert*, 1 Vet. App. at 54.

### Notice

The VCAA requires VA to notify the claimant and the claimant's representative, if any, of any information and any medical or lay evidence not previously provided to the Secretary of VA (the Secretary) that is necessary to substantiate the claim. As part of the notice, VA is to specifically inform the claimant and the claimant's

representative, if any, of which portion, if any, of the evidence is to be provided by the claimant and which part, if any, VA will attempt to obtain on behalf of the claimant. See 38 U.S.C.A. § 5103 (West 2002); see also *Quartuccio v. Principi*, 16 Vet. App. 183 (2002) [a letter from VA to an appellant describing evidence potentially helpful to the appellant but not mentioning who is responsible for obtaining such evidence did not meet the standard erected by the VCAA].

The Board observes that the veteran was notified by two separate letters from the RO in March 2002 and by the RO's January 2003 statement of the case (SOC), of the pertinent law and regulations, of the need to submit additional evidence on his claim and of the particular deficiencies in the evidence with respect to his claim.

More significantly, the January 2003 SOC and the March 2002 letters sent to the veteran, specifically referenced the VCAA. Crucially, the veteran was informed by means of this SOC and the March 2002 letters as to what evidence he was required to provide and what evidence VA would attempt to obtain on his behalf. Those documents explained that VA would obtain government records and would make reasonable efforts to help him get other relevant evidence, such as private medical records, employment records, etc., but that he was responsible for providing sufficient information to VA to identify the custodian of any records.

The Board finds that these documents properly notified the veteran and his representative of the information, and medical or lay evidence, not previously provided to VA that was necessary to substantiate the claim, and they properly indicated which portion of that information and evidence was to be provided by the veteran and which portion VA would attempt to obtain on behalf of the veteran.

The Board additionally notes that the fact that the veteran's claim was adjudicated by the RO in September 2002, prior to the expiration of the one-year period following the March 2002 notification of the veteran of the evidence necessary to substantiate his claim, does not render the RO's notice invalid or inadequate. The recently enacted Veterans Benefits Act of 2003, Pub. L. No. 108-183, § 107, 117 Stat.

2651, \_\_\_\_ (Dec. 16, 2003) (to be codified at 38 U.S.C. § \_\_\_\_), made effective from November 9, 2000, specifically addresses this issue and provides that nothing in paragraph (1) of 38 U.S.C.A. § 5103 shall be construed to prohibit the Secretary from making a decision on a claim before the expiration of the one-year period referred to in that subsection.

In this case, the RO provided the veteran a letter that expressly notified the veteran and that there was one year to submit the requested information and/or evidence, in compliance with 38 U.S.C.A. § 5103(b). In addition, the notice was sent prior to adjudication of the issue by the RO. Therefore, the Board finds that the veteran was notified properly of his statutory rights.

In short, the Board finds that the veteran received adequate notice regarding the evidence needed to substantiate his claim and which evidence the VA would obtain for him and which evidence he was expected to provide.

#### Duty to assist

In general, the VCAA provides that VA shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate a claim for VA benefits, unless no reasonable possibility exists that such assistance would aid in substantiating the claim. The law provides that the assistance provided by VA shall include providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim. An examination is deemed "necessary" if the record does not contain sufficient medical evidence for VA to make a decision on the claim. See 38 U.S.C.A. § 5103A (West 2002); 38 C.F.R. § 3.159 (2003).

The Board finds that reasonable efforts have been made to assist the veteran in obtaining evidence necessary to substantiate his claim, and that there is no reasonable possibility that further assistance would aid in substantiating it.

In particular, the RO obtained the veteran's service medical



records, service personnel records and VA treatment records. The veteran has not indicated that there are any further records that would be probative and which have not been associated with his claims file. The Board notes that the veteran has advised that he receives Social Security Administration (SSA) disability benefits. Those records have not been associated with the veteran's VA claims folder. In general, VA is required to obtain the veteran's SSA records in order to meet its duty to assist obligations. See *Murincsak v. Derwinski*, 2 Vet. App. 363, 372 (1992) [holding that VA's duty to assist includes obtaining records from SSA and giving appropriate consideration and weight to such evidence in determining whether to award or deny VA benefits]. However, the veteran was awarded SSA disability prior to his initial diabetes diagnosis in January 2002. As such, the records are unlikely to contain information that would be relevant to this claim and further, there is no prejudice to the veteran as the service connection has been granted. Cf. *Brock v. Brown*, 10 Vet. App. 155, 162 (1997).

The Board additionally observes that general due process considerations have been satisfied. The veteran and his representative have been accorded ample opportunity to present evidence and argument in support of his appeal. The veteran was informed of his right to a hearing and elected to present testimony video testimony in January 2004. A transcript of this testimony has been associated with the claims folder. See 38 C.F.R. § 3.103 (2003).

In short, the Board has carefully considered the provisions of the VCAA in light of the record on appeal, and for the reasons expressed above finds that the development of the claim has been consistent with the provisions of the law. Under these circumstances, the Board can identify no further development that would avail the veteran or aid the Board's inquiry. See *Soyini v. Derwinski*, 1 Vet. App. 540, 546 (1991). Accordingly, the Board will proceed to a decision on the merits.

## Pertinent Law and Regulations

## Service connection - in general

In general, service connection may be granted for disability or injury incurred in or aggravated by active military service. 38 U.S.C.A. §§ 1110, 1131 (West 2002).

Where a veteran served 90 days or more during a period of war, and diabetes mellitus becomes manifest to a degree of 10 percent or more within one year from date of termination of such service, such disease shall be presumed to have been incurred in or aggravated by service, even though there is no evidence of such disease during the period of service. This presumption is rebuttable by affirmative evidence to the contrary. 38 U.S.C.A. §§ 1101, 1112, 1113, 1131, 1137 (West 2002); 38 C.F.R. §§ 3.307, 3.309(a) (2003).

Notwithstanding the above, service connection may be granted for disability shown after service, when all of the evidence, including that pertinent to service, shows that it was incurred in service. 38 C.F.R. § 3.303(d) (2003); *Cosman v. Principi*, 3 Vet. App. 303, 305 (1992).

The resolution of issues pertinent to a determination of entitlement to service connection must be considered on the basis of the places, types, and circumstances of service as shown by service records, the official history of each organization in which the veteran served, and all pertinent medical and lay evidence. Determinations relative to service connection will be based on review of the entire evidence of record. 38 U.S.C.A. § 7104(a) (West 2002); 38 C.F.R. § 3.303(a) (2003); see *Wilson v. Derwinski*, 2 Vet. App. 16, 19 (1991).

In order to establish service connection for the claimed disorder, there must be (1) medical evidence of a current disability; (2) medical, or in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and (3) medical evidence of a nexus between the claimed in-service disease or injury and the current disability. See *Hickson v. West*, 12 Vet. App. 247, 253 (1999). The determination as to whether these requirements are met is based on an analysis of all the evidence of record and the evaluation of its



credibility and probative value. *Baldwin v. West*, 13 Vet. App. 1, 8 (1999).

### Service connection - Agent Orange exposure

A veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era shall be presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service. "Service in the Republic of Vietnam" includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam. 38 C.F.R. § 3.307(a)(6)(iii); 3.313 (2003).

The diseases which are deemed associated with herbicide exposure include diabetes mellitus (Type 2). See 38 C.F.R. § 3.309(e) (2003); see also 38 U.S.C.A. § 1116(f) (West 2002), as added by § 201(c) of the Veterans Education and Benefits Expansion Act of 2001, Pub. L. No. 107-103, 115 Stat. 976 (2001) [which added diabetes mellitus (Type 2) to the list of presumptive diseases as due to herbicide exposure]. Diabetes mellitus shall be service connected if a veteran was exposed to a herbicide agent during active military, naval, or air service, if the requirements of 38 U.S.C.A. § 1116, 38 C.F.R. § 3.307(a)(6)(iii) are met, even though there is no record of such disease during service, provided further that the rebuttable presumption provisions of 38 U.S.C.A. § 1113 and 38 C.F.R. § 3.307(d) are also satisfied.

In *Combee v. Brown*, the United States Court of Appeals for the Federal Circuit held that when a veteran is found not to be entitled to a regulatory presumption of service connection for a given disability the claim must nevertheless be reviewed to determine whether service connection can be established on a direct basis. *Combee v. Brown*, 34 F.3d 1039, 1043-1044 (Fed.Cir.1994). See also 38 C.F.R. § 3.303(d) (2003).

### Factual Background

The veteran served on active duty from November 1966 until

August 1970, during the Vietnam era. The veteran's DD 214 indicates service on the USS RICHMOND K. TURNER. His decorations include the Vietnam Service Medal with two Bronze Stars. The veteran's service personnel records confirm that the USS RICHMOND K TURNER was located within the Vietnamese combat zone from July 1968 to November 1968.

The veteran's service medical records are absent any reference to diabetes.

VA treatment records from January 2002 indicate that the veteran has been diagnosed with diabetes mellitus.

In the veteran's sworn hearing testimony, he asserted that he had spent 4 months stationed in the Danang Harbor. He denied that he ever left his ship while it was berthed in Da Nang Harbor. The veteran described the harbor as being surrounded on three sides by land and further described that he could clearly observe movements onshore from the deck of his ship.

The veteran and his representative have submitted a map of Danang Harbor. The map indicates that the harbor is surrounded on three sides by land and that the entire harbor lies within the physical boundaries of the Republic of Vietnam.

## Analysis

The veteran is seeking service connection for diabetes mellitus. His essential contention is that this condition is related to herbicide exposure he experienced in connection with his Vietnam service.

In the interest of clarity, the Board will apply the Hickson analysis to this issue. As discussed above, in general, in order for service connection to be granted three elements must be satisfied: (1) a current disability; (2) in-service incurrence of disease or injury; and (3) medical nexus. See Hickson, 12 Vet. App. at 253.

With respect to element (1), current disability, it is undisputed that the veteran has been diagnosed with diabetes mellitus. Hickson element (1) is therefore satisfied.

Turning to element (2), in-service incurrence of disease or injury, there is no medical or other evidence of diabetes mellitus in service or within the one year presumptive period after service found in 38 C.F.R. § 3.309(a). The veteran's service medical records are entirely silent as to complaints, treatment or diagnosis of diabetes mellitus, and reports of periodic medical examinations show that urinalysis with respect to sugar was negative when tested, to include upon separation from service in August 1970. Post-service medical reports all indicate that diabetes mellitus was not shown until at least thirty years following service separation. The veteran does not appear to contend otherwise. Accordingly, that part of Hickson element (2) relating to in-service disease is not satisfied.

With respect to in-service injury, the injury contended here is exposure to Agent Orange. If the veteran can be considered to have served in Vietnam, exposure to herbicides can be presumed. See 38 U.S.C.A. § 1116(f) (West 2002); 38 C.F.R. §§ 3.307(a)(6)(iii), 3.313(a) (2003). See also 38 C.F.R. § 3.313.

The veteran does not allege that he set foot onto the land of the Republic of Vietnam, but rather that he was stationed aboard a ship located in the territorial, and therefore inland, waterways of the Republic of Vietnam. In particular, he states that he was stationed aboard the aircraft carrier USS RICHMOND K. TUNER which was anchored in Danang Harbor between July and November 1968. The veteran appears to base his argument on the fact that he was stationed approximately 75 yards offshore the Vietnamese mainland, within the territorial waterways of Danang Harbor.

In a precedent opinion, VA General Counsel determined that for purposes of 38 U.S.C.A. § 101(29)(A), which defines the Vietnam era, service on a deep-water naval vessel in waters off the shore of the Republic of Vietnam does not constitute service in the Republic of Vietnam. See VAOPGCPREC 27-97. The Board is not free to reject VA General Counsel opinions. Rather, the statute expressly requires that the Board "shall be bound in its decisions by...the precedent opinions of the chief legal officer of the Department." See 38 U.S.C.A. §

7104(c) (West 2002);  
see also *Splane v. West*, 216 F.3d 1058 (Fed. Cir. 2000).

More recently, the VA reiterated its position that service in deep-water naval vessels offshore of Vietnam is not included as "service in the Republic of Vietnam" for purposes of presumptive service connection for Agent Orange diseases including diabetes. However, service aboard vessels in inland waterways of Vietnam irrespective of vessel size is considered service in the Republic of Vietnam. See the "comments" section in the Federal Register announcement of the final rule adding diabetes to the list of Agent Orange presumptive diseases, 66 Fed.Reg. 23166 (May 8, 2001). Specifically, the interpretative guidance provided in 66 Fed.Reg. 23166 states "Title 38 U.S.C. 1116 requires that veteran have served 'in the Republic of Vietnam' to be eligible for the presumption of exposure to herbicides. We believe that it is commonly recognized that this term includes the inland waterways". Further, a review of the plain text of the applicable regulations notably 38 C.F.R. § 3.307 (a)(6)(iii); 38 C.F.R. § 3.313(a) and 38 U.S.C. § 1116 provides no statement that physical contact with the land of Vietnam is required for a show of service in Vietnam. Therefore, service in the inland waterways of Vietnam appears to qualify as applicable "service in the Republic of Vietnam" for the purposes of the application of the Agent Orange presumptions.

There appears to be no guidance currently available concerning the definition of "inland waterways". Further, although the regulation states that service in the Republic of Vietnam is required for the presumption to apply, setting foot on land is not expressly mentioned in the regulations.

It is undisputed that given the guidance in VAOPGCPREC 27-97, if the veteran's service had been limited to service on the USS RICHMOND K TURNER in the South China Sea outside the territorial boundaries of the Republic of Vietnam, the presumptions contained in the regulations would be inapplicable to his case as he would not have met the criteria for service in the Republic of Vietnam. However, in the instant case, the veteran's service was conducted on a ship located in a harbor. The evidence of record clearly



shows that Danang Harbor is well sheltered and surrounded on three sides by the shoreline of Vietnam. A map submitted by the veteran and his representative indicates that the harbor is nearly totally surrounded by land and that the entire harbor is located within the territorial boundaries of Vietnam. Further, the veteran's description of his ability to observe the activities on the shoreline is consistent with the map's indication of the proximity of the land and the water in the area at issue. As such, given the location of the harbor as being surrounded by the land on three sides and the evidence that the harbor is within the territory of Vietnam, and resolving all doubt in the veteran's favor, the Board finds that Da Nang Harbor is an inland waterway for the purposes of the regulation.

Based on the Board's finding that veteran's sojourn in Da Nang Harbor was service in an "inland waterway, have occurred. , and resolving all doubt in the veteran's favor, Agent Orange exposure is presumed, satisfying element (2). See 38 C.F.R. § 3.307(a)(6)(iii) (2003).

The first two Hickson elements have thus been satisfied. With respect to element (3), medical nexus, diabetes mellitus is presumed to be service connected when the veteran has had Agent Orange exposure. See 38 C.F.R. § 3.309(e) (2003). Element (3), medical nexus, has accordingly been satisfied on a presumptive basis.

All three Hickson elements are therefore met. The Board has determined that the evidence supports the grant of service connection for diabetes mellitus.

## ORDER

Service connection for diabetes mellitus is granted.

Barry F. Bohan

Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

## YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or 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. We will return your file to your local VA office to implement the BVA'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. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court before you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

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 United States Court of Appeals for Veterans Claims. 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 then have another 120 days from the date the BVA 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 Court is filed on time.

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 web site on the Internet at [www.vetapp.uscourts.gov](http://www.vetapp.uscourts.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 BVA to reconsider any part of this decision by writing a letter to the BVA stating why you believe that the BVA committed an obvious error of fact or law in this decision, or stating that new and material military service records have been discovered that apply to your appeal. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Send your letter to:

Director, Management and Administration (014)  
Board of Veterans' Appeals  
810 Vermont Avenue, NW  
Washington, DC 20420

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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 BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. 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 above for the Director, Management and Administration, 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 above for the Director, Management and Administration, 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 BVA, 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: [www.va.gov/vso](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 VA, then you can get information on how to do so by writing directly to the Court. Upon request, the Court will provide you with a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to represent appellants. This information is also provided on the Court's website at [www.vetapp.uscourts.gov](http://www.vetapp.uscourts.gov).

Do I have to pay an attorney or agent to represent me? Except for a claim involving a home or small business VA loan under Chapter 37 of title 38, United States Code, attorneys or agents cannot charge you a fee or accept payment for services they provide before the date BVA makes a final decision on your appeal. If you hire an attorney or accredited agent within 1 year of a final BVA decision, then the attorney or agent is allowed to charge you a fee for representing you before VA in most situations. An attorney can also charge you for representing you before the Court. VA cannot pay fees of attorneys or agents.

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. For more information, read section 5904, title 38, United States Code.

In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to:

Office of the Senior Deputy Vice Chairman (012)

Board of Veterans' Appeals

810 Vermont Avenue, NW

Washington, DC 20420

The Board may decide, on its own, to review a fee agreement for reasonableness, or you or your attorney or agent can file a motion asking the Board to do so. Send such a motion to the address above for the Office of the Senior Deputy Vice Chairman at the Board.

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