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On appeal from the  
Department of Veterans Affairs Regional Office in Atlanta, Georgia

## THE ISSUES

1. Whether new and material evidence has been received to reopen a previously denied claim of entitlement to nonservice-connected pension benefits.
2. Entitlement to nonservice-connected pension benefits.
3. Entitlement to service connection for residuals of craniocerebral trauma.

## REPRESENTATION

Veteran represented by: Chuck Pardue

## WITNESS AT HEARING ON APPEAL

Veteran

## ATTORNEY FOR THE BOARD

A. Bordewyk, Counsel

## INTRODUCTION

The Veteran has verified active service from June 1960 to February 1961, from November 1961 to August 1962, and from November 1965 to December 1965.

This case comes before the Board of Veterans' Appeals (Board) on appeal from a September 2010 rating decision issued by the Department of Veterans Affairs (VA) Regional Office (RO) in Philadelphia, Pennsylvania, which, in pertinent part, denied entitlement to nonservice-connected pension benefits. While the issue of entitlement to service connection for residuals of craniocerebral trauma was not addressed in that decision, it was considered as an ancillary issue in the March 2013 statement of the case (SOC) as a result of testimony given before a Decision Review Officer (DRO) in August 2010. The Veteran noted his continued disagreement with the SOC in his April 2013 VA Form 9, and the Board took testimony on the matter, as well as the pension claim, in October 2015. Thus, the Board has accepted jurisdiction over the issue of entitlement to service connection for residuals of craniocerebral trauma. See *Percy v. Shinseki*, 23 Vet. App. 37 (2009).

Transcripts of both the August 2010 DRO and November 2015 Board hearings have been associated with the record.

The issue of entitlement to nonservice-connected pension benefits was previously denied in an October 2005 decision. Where the claim in question has been finally adjudicated at the RO level and not appealed, the Board has a jurisdictional responsibility to first consider whether it is proper for a claim to be reopened, regardless of whether the previous action denying the claim was appealed to the Board. *Jackson v. Principi*, 265 F.3d 1366 (Fed. Cir. 2001). Thus, despite the various characterizations of the issue throughout the appeal, the Board must make an independent determination as to whether new and material evidence has been presented to reopen the claim.

The issues of entitlement to nonservice-connected pension benefits and service connection for residuals of craniocerebral trauma are addressed in the REMAND portion of the decision below and are REMANDED to the Agency of Original Jurisdiction (AOJ).

## FINDINGS OF FACT

1. In October 2005, entitlement to nonservice-connected pension was denied; the Veteran did not appeal that decision, and new and material evidence was not received within one year of its issuance.
2. Evidence received more than one year after the October 2005 decision is not cumulative or redundant of the evidence previously of record and raises a reasonable possibility of substantiating the claim.

## CONCLUSIONS OF LAW

1. The October 2005 decision that denied nonservice-connected pension benefits is final. 38 U.S.C.A. § 7105(c) (West 2014); 38 C.F.R. §§ 3.104, 20.302, 20.1103 (2015).
2. New and material has been received to reopen the previously denied claim for nonservice-connected pension benefits. 38 U.S.C.A. § 5108 (West 2014); 38 C.F.R. § 3.156 (2015).

## REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

Generally, a claim which has been finally denied in an unappealed RO decision may not thereafter be reopened and allowed. 38 U.S.C.A. § 7105(c). However, if new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim. 38 U.S.C.A. § 5108.

New evidence is defined as existing evidence not previously submitted to VA, and material evidence is defined as existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim. 38 C.F.R. § 3.156(a).

The newly presented evidence is presumed to be credible for purposes of determining whether it is new and material. *Savage v. Gober*, 10 Vet. App. 488 (1997).

Nonservice-connected pension was most recently denied in an October 2005 decision, on the basis that the Veteran did not meet the requisite length or type of service. The Veteran did not appeal that decision, and new and material evidence was not received within one year of its issuance. Therefore, the decision on the claim became final. 38 U.S.C.A. § 7105(c); 38 C.F.R. §§ 3.104, 3.156(b), 20.1103; cf. *Bond v. Shinseki*, 659 F.3d 1362 (Fed. Cir. 2011) (holding that VA has a duty to consider in every case whether evidence received within one year of an RO decision is new and material so as to prevent the decision from becoming final under 38 C.F.R. § 3.156(c)).

Evidence received more than one year since the October 2005 rating decision, particularly the Veteran's statements and testimony before the DRO and Board, is both new and material, as it is not cumulative of evidence already of record and raises a reasonable possibility of substantiating the claim. As such, the claim is reopened.

## ORDER

New and material evidence having been received, the claim for entitlement to nonservice-connected pension benefits is reopened. To that extent only, the appeal is allowed.

## REMAND

The Veteran's service from June 1960 to February 1961, from November 1961 to August 1962, and from November 1965 to December 1965 has been verified. However, service treatment records (STRs) include a March

1974 enlistment examination and report of medical history, as well as a physical profile that month for swelling of the left lower extremity secondary to thrombophlebitis. As such, the Board finds that the Veteran's complete service history must be verified on remand, and any outstanding STRs obtained.

The record demonstrates that the Veteran was in a motor vehicle accident in June 1963, during which he sustained craniocerebral trauma. The Veteran has testified that he recovered from that head injury, had returned to a physically demanding job, and did not have any residuals of the head injury prior to his enlistment in November 1965. See Board Hearing Transcript (Tr.) at 3-4. He stated that during his 1965 enlistment, he underwent additional examination and testing and was found fit for duty. See Board Hearing Tr. at 4-5. He further reported that began to experience new physical and psychological symptoms shortly after enlistment in 1965, which represented an aggravation of his 1963 head injury.

STRs document that the Veteran did report the 1963 head injury in a November 1965 report of medical history, and the examiner noted that he did not have any medical attention or difficulty in the last year. Clinical evaluation at that time was normal. There is no record of the additional testing reported by the Veteran. A December 1965 neurology consultation indicated that the Veteran was having difficulty with the reflexes and balance in his legs. The examiner diagnosed residuals of the craniocerebral trauma with spastic paraparesis and found the Veteran not fit for duty. Later that month, a Medical Board found that the Veteran's residuals of craniocerebral trauma existed prior to service and were not aggravated by service and found that the Veteran should be discharged.

Following the Board hearing, the Veteran submitted an academic article regarding a study indicating that athletes with prior brain trauma who were asymptomatic had a worsening or reoccurrence of neurologic symptomatology following exertional testing. The Veteran asserts that this supports his contention that his asymptomatic head injury was worsened during service as a result of the physical activity of boot camp.

The Board finds that based on the foregoing, a VA examination is warranted to determine the nature and etiology of the Veteran's residuals of craniocerebral trauma.

Finally, all records of ongoing VA treatment and the Veteran's Social Security Administration (SSA) records must also be obtained on remand.

Accordingly, the case is **REMANDED** for the following action:

1. Obtain all outstanding VA medical records and associate them with the claims file.
2. Verify all periods of the Veteran's service, including all periods of active duty, active duty for training (ACDUTRA), and inactive duty for training (INACDUTRA), and all service in 1974. See March 1974 enlistment examination and report of medical history.
3. Obtain all outstanding STRs for all periods of active duty, ACDUTRA, and INACDUTRA identified in item (2) above.
4. Contact the SSA and obtain a copy of that agency's decision concerning the Veteran's claim for disability benefits, including any records relied upon to make the decision.
5. Once the above development has been completed, provide the Veteran with a VA examination with a qualified physician. Access to the claims folder, including this remand and any relevant records contained in the virtual system, must be provided to the examiner for review; consideration of such should be reflected in the completed examination report. The examiner is requested to identify all residuals of craniocerebral trauma and address the following:
  - (a) Did any residuals of craniocerebral trauma clearly and unmistakably (obviously or manifestly) exist prior to the Veteran's period of active duty in November 1965? In addressing this question, please discuss: (1) the Veteran's contentions that he recovered from his 1963 head injury, had returned to a physically demanding job, did not have any residuals of the head injury prior to his enlistment in November 1965, and underwent additional examination and testing and was found fit for duty; (2) normal clinical evaluation on enlistment in November 1965; and (3) the November 1965 enlistment examiner's notation that the Veteran did not have any medical attention or difficulty in the last year.

(b) If the answer to question (a) is "Yes", were residuals of craniocerebral trauma clearly and unmistakably NOT aggravated beyond their natural progression by the Veteran's service from November 1965 to December 1965? In

addressing this question, please discuss the December 1965 neurology consultation and the Veteran's reports of new physical and psychological symptoms shortly after enlistment in 1965.

(c) If the answer to question (a) is "No," is it at least as likely as not (50 percent probability or more) that any current residuals of craniocerebral trauma had their onset in service or are otherwise related to service, to include as a result of diagnosed residuals of the craniocerebral trauma with spastic paraparesis 1965 and/or the physical rigors of boot camp?

The examiner should provide robust rationales for the opinions that take into account the Veteran's reported history and symptoms. If the examiner discounts the Veteran's reports, he or she should provide a reason for doing so.

If the examiner cannot provide an opinion without resort to speculation, the examiner must provide a reason why this is so, and must state whether there is additional evidence that would permit the opinion to be rendered.

6. Then readjudicate the claim, and issue a supplemental statement of the case, as appropriate.

The Veteran has the right to submit additional evidence and argument on the matters the Board has remanded. *Kutscherousky v. West*, 12 Vet. App. 369 (1999).

This claim must be afforded expeditious treatment. The law requires that all claims that are remanded by the Board of Veterans' Appeals or by the United States Court of Appeals for Veterans Claims for additional development or other appropriate action must be handled in an expeditious manner. See 38 U.S.C.A. §§ 5109B, 7112 (West 2014).

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S. BUSH  
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs