



BOARD OF VETERANS' APPEALS
FOR THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON, DC 20038

Date: February 19, 2021



Dear Appellant:

A Veterans Law Judge at the Board of Veterans' Appeals made a decision on your appeal.

If you're satisfied with the decision, you don't have to do anything.

What's in the Board decision?

Your Board decision tells you which issue(s) were decided in your appeal. It explains the evidence, laws, and regulations the Veterans Law Judge considered when making their decision and identifies any findings that are favorable to you.

If your decision letter includes a "Remand" section, this means the judge is sending one or more issues in your appeal to your local VA office to correct an error the judge identified while reviewing your case. If an issue is remanded, it hasn't been decided and it can't be appealed yet. You'll receive a decision from the local VA office after they review the issue again.

What if I disagree with the decision?

If you disagree with the judge's decision, you can continue your appeal. See the letter included after your Board decision to learn more about the decision review options available to you.

What if I have questions?

If you have any questions or would like more information, please contact your representative (if you have one) or visit va.gov/decision-reviews/get-help. To track the status of your appeal, visit va.gov/claim-or-appeal-status/.

Sincerely yours,

A handwritten signature in black ink that reads "N. Tann".

N. Tann
Executive Director
Office of Appellate Support

Enclosures (2)






BOARD OF VETERANS' APPEALS
FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF 


Represented by
Disabled American Veterans


Docket No. 2 
Advanced on the Docket

DATE: February 19, 2021

ORDER

Entitlement to a compensable rating for a bilateral hearing loss disability is denied.

FINDING OF FACT

Throughout the period on appeal, the Veteran's hearing impairment was no worse than Level II in either ear.

CONCLUSION OF LAW

The criteria for an initial compensable rating for a bilateral hearing loss disability are not met. 38 U.S.C. §§ 1155, 5107 (2018); 38 C.F.R. §§ 4.7, 4.85, Diagnostic Code 6100 (2019).

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran served on active duty from January 1955 to December 1958.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a September 2020 rating decision of a Department of Veterans (VA) Regional Office (RO). In the October 2020 appeal to the Board, the Veteran elected the direct



review option. As such, the Board will consider that evidence that was before the Agency of Original Jurisdiction (AOJ) at the time of their decision.

Increased Rating – Bilateral Hearing Loss

The Veteran contends that his bilateral hearing loss disability warrants a compensable rating.

The Veteran underwent a VA examination in August 2020. He reported that he has difficulty hearing when there is background noise. Audiometric testing results at that time were as follows:

Hertz	1000	2000	3000	4000	Average
Right Ear	40	70	65	75	62.5
Left Ear	35	70	60	75	60

Speech recognition ability was measured at 94 percent in both ears. Applying those values to the rating criteria results in a numeric designation of Level II in both ears. 38 C.F.R. § 4.85, Table VI. Application of the levels of hearing impairment in each ear to Table VII produce a noncompensable (0 percent) rating. 38 C.F.R. § 4.85.

In addition to dictating objective test results, a VA audiologist must fully describe the functional effects caused by a hearing disability in the final report. *Martinak v. Nicholson*, 21 Vet. App. 447 (2007). The VA examiner clearly identified the effects that the Veteran’s bilateral hearing loss disability had on his daily activities, in the Veteran’s own words. Therefore, the Board finds that the VA examination reports of record are in compliance with the requirements of *Martinak*.

The Board finds that the Veteran is not entitled to a compensable rating for bilateral hearing loss disability. In this regard, the Veteran’s hearing impairment is no worse than Level II in either ear. Those results fall squarely within the criteria for a

IN THE APPEAL OF

[REDACTED]

Docket No. [REDACTED]

Advanced on the Docket

noncompensable rating. As such, a compensable rating is not warranted. 38 C.F.R. § 4.85, Diagnostic Code 6100.

The Board in no way discounts the difficulties that the Veteran experiences as a result of his bilateral hearing loss; however, because hearing loss is a disability requiring a “mechanical application of the rating schedule,” as described above, the Board cannot find a basis in law or regulation to support a disability rating in excess of the noncompensable rating he has been assigned. *Lendenmann v. Principi*, 3 Vet. App. 345 (1992).

Accordingly, the preponderance of the evidence is against the claim of entitlement to a compensable rating for a bilateral hearing loss disability. In reaching the conclusion above, the Board considered the doctrine of reasonable doubt, however, as the preponderance of the evidence is against the Veteran’s claim, the doctrine is not for application. *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

[REDACTED]

Veterans Law Judge
Board of Veterans’ Appeals


Attorney for the Board

[REDACTED]

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.

If you disagree with VA's decision

Choose one of the following review options to continue your case. If you aren't satisfied with that review, you can try another option. Submit your request before the indicated deadline in order to receive the maximum benefit if your case is granted.

<p>Review option </p> <p>Add new and relevant evidence</p>	<p>Supplemental Claim</p> <p>Higher-Level Review Not Available</p> <p>Ask for a new look from a senior reviewer</p> <p>Board Appeal Not Available</p> <p>Appeal to a Veterans Law Judge</p>	<p>Court Appeal</p> <p>Appeal to Court of Appeals for Veterans Claims</p>
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<p>Who and what</p> <p>A reviewer will determine whether the new evidence changes the decision.</p>	<p>Because your appeal was decided by a Veterans Law Judge, you cannot request a Higher-Level Review.</p> <p>You cannot request two Board Appeals in a row.</p>	<p>The U.S. Court of Appeals for Veterans Claims will review the Board's decision. You can hire an attorney to represent you, or you can represent yourself.</p>
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<p>Estimated time for decision</p> <p>1 About 4-5 months</p>	<p>Please choose a different option for your next review.</p> <p>Please choose a different option for your next review.</p>	<p>Find more information at the Court's website: uscourts.cavc.gov</p>
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<p>Evidence</p> <p> You must submit evidence that VA didn't have before that supports your case.</p>		
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<p>Discuss your case with VA</p> <p>Request this option</p> <p>Submit VA Form 20-0995 Decision Review Request: Supplemental Claim va.gov/decision-reviews</p>		<p>File a Notice of Appeal uscourts.cavc.gov</p> <p>Note: A Court Appeal must be filed with the Court, not with VA.</p>
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<p>Deadline</p> <p>You have 1 year from the date on your VA decision to submit VA Form 20-0995.</p>		<p>You have 120 days from date on your VA decision to file a Court Appeal.</p>
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<p>How can I get help?</p>	<p>A Veterans Service Organization or VA-accredited attorney or agent can represent you or provide guidance. Contact your local VA office for assistance or visit va.gov/decision-reviews/get-help. For more information, you can call the White House Hotline 1-855-948-2311.</p>	
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What is new and relevant evidence?

In order to request a Supplemental Claim, you must add evidence that is both new and relevant. New evidence is information that VA did not have before the last decision. Relevant evidence is information that could prove or disprove something about your case.

VA cannot accept your Supplemental Claim without new and relevant evidence. In addition to submitting the evidence yourself, you can identify evidence, like medical records, that VA should obtain.

What is the Duty to Assist?

The Duty to Assist means VA must assist you in obtaining evidence, such as medical records, that is needed to support your case. VA's Duty to Assist applied during your initial claim, and it also applies if you request a Supplemental Claim.

If you request a Higher-Level Review or Board Appeal, the Duty to Assist does not apply. However, the reviewer or judge will look at whether VA met its Duty to Assist when it applied, and if not, have VA correct that error by obtaining records or scheduling a new exam. Your review may take longer if this is needed.

What if I want to file a Court Appeal, but I'm on active duty?

If you are unable to file a Notice of Appeal due to active military service, like a combat deployment, the Court of Appeals for Veterans Claims may grant additional time to file. The 120-day deadline would start or resume 90 days after you leave active duty. Please seek guidance from a qualified representative if this may apply to you.

What if I miss the deadline?

Submitting your request on time will ensure that you receive the maximum benefit if your case is granted. Please check the deadline for each review option and submit your request before that date.

If the deadline has passed, you can either:

- Add new and relevant evidence and request a Supplemental Claim. Because the deadline has passed, the effective date for benefits will generally be tied to the date VA receives the new request, not the date VA received your initial claim. Or,
- File a motion to the Board of Veterans' Appeals.

What if I want to get a copy of the evidence used in making this decision?

Call 1-800-827-1000 or write a letter stating what you would like to obtain to the address listed on this page.

Motions to the Board

Please consider the review options available to you if you disagree with the decision. In addition to those options, there are three types of motions that you can file with the Board to address errors in the decision. Please seek guidance from a qualified representative to assist you in understanding these motions.

Motion to Vacate

You can file a motion asking the Board to vacate, or set aside, all or part of the decision because of a procedural error. Examples include if you requested a hearing but did not receive one or if your decision incorrectly identified your representative. You will need to write a letter stating how you were denied due process of law. If you file this motion within 120 days of the date on your decision letter, you will have another 120 days from the date the Board decides the motion to appeal to the Court of Appeals for Veterans Claims.

Motion to Reconsider

You can file a motion asking the Board to reconsider all or part of the decision because of an obvious error of effect or law. An example is if the Board failed to recognize a recently established presumptive condition. You will need to write a letter stating specific errors the Board made. If the decision contained more than one issue, please identify the issue or issues you want reconsidered. If you file this motion within 120 days of the date on your decision letter, you will have another 120 days from the date the Board decides the motion to appeal to the Court of Appeals for Veterans Claims.

Motion for Revision of Decision based on Clear and Unmistakable Error

Your decision becomes final after 120 days. Under certain limited conditions, VA can revise a decision that has become final. You will need to send a letter to VA requesting that they revise the decision based on a Clear and Unmistakable Error (CUE). CUE is a specific and rare kind of error. To prove CUE, you must show that facts, known at the time, were not before the judge or that the judge incorrectly applied the law as it existed at the time. It must be undebatable that an error occurred and that this error changed the outcome of your case. Misinterpretation of the facts or a failure by VA to meet its Duty to Assist are not sufficient reasons to revise a decision. Please seek guidance from a qualified representative, as you can only request CUE once per decision.

Mail to:

Board of Veterans' Appeals
PO Box 27063
Washington, DC 20038

Or, fax:

1-844-678-8979



Department Of Veterans Affairs
Evidence Intake Center
P.O. Box 4444
Janesville, WI, 53547-4444



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Disabled American Veterans
Chisholm, Chisholm and Kilpatrick LTD
321 South Main Street 0
Providence RI 02903



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We realize you may be dealing with difficulties during the COVID-19 pandemic. The Department of Veterans Affairs (VA) may be able to help.

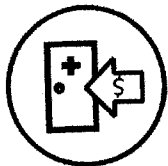
WHAT WE'RE DOING

If you have...



New VBA debt (established after April 3, 2020)

Collection actions have stopped until January 2021. You do not have to act until you receive the Debt Management Center's (DMC) notification letter after January 1, 2021.



New and existing Veterans Health Administration (VHA) medical care debt

Statements and collection have stopped until January 2021. For current VHA medical and prescription debt balances and debt relief options, contact the Health Resource Center at 1-866-400-1238.

DMC will resume debt collection activities beginning January 1, 2021.

OTHER VA DEBT-RELATED EFFORTS

- VA will **not** refer delinquent debts to credit reporting agencies or the Department of the Treasury through December 31, 2020
- VA Home Loan applications will continue for Veterans with unresolved debt payment issues

For help or to confirm whether this information applies to your VA benefit debt, contact the Debt Management Center by submitting an online inquiry at: <https://iris.custhelp.va.gov/app/ask> or call **1-800-827-0648**.

IF YOU NEED ASSISTANCE

For assistance with benefit-related claim support, please visit our website at: <https://benefits.va.gov> or call **1-800-827-1000**.

The fastest, safest way to send information is electronically. Visit access.va.gov to submit your information using **Direct Upload**.

We're working to find additional ways to serve you during this crisis. Please follow national and local guidelines to stay healthy and safe.