BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: February 28, 2022

[redacted]

[redacted]

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,

N. Tann

N. Tann
Executive Director
Office of Appellate Support

Enclosures (2)
CC: JOHN ROBERT UNRUH, Attorney

JOHN ROBERT UNRUH, Attorney
Unruh Law, P.C.
100 Pine Street, Suite 1250
San Francisco, CA 94111

BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: February 28, 2022

[redacted]

[redacted]

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,

N. Tann

N. Tann
Executive Director
Office of Appellate Support

Enclosures (2)
CC: JOHN ROBERT UNRUH, Attorney

BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF [redacted]

Docket No. [redacted]

Represented by
John Robert Unruh, Attorney

Advanced on the Docket

DATE: February 28, 2022

ORDER

Entitlement to an initial rating of 70 percent for PTSD is granted.

FINDINGS OF FACT

1. For the period prior to February 6, 2020, the Veteran's PTSD resulted in occupational and social impairment with deficiencies in most areas.

2. The persuasive evidence is against a finding the Veteran's PTSD resulted in total occupational and social impairment at any time during the period on appeal.

CONCLUSION OF LAW

The criteria for entitlement to an initial rating of 70 percent for service-connected PTSD have been met. 38 U.S.C. §§ 1155, 5103A, 5104B, 5107, 5108; 38 C.F.R. §§ 3.159, 3.2500, 3.2501, 3.2601, 4.7, 4.130, Diagnostic Code 9411.

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Veteran served active duty in the United States Navy from July 1961 to July 1963. This matter comes to the Board of Veterans' Appeals (Board) on appeal of a

January 2021 Higher-Level Review decision of the Department of Veteran Affairs (VA) Regional Office (RO).

Under the legacy system of review, the Veteran filed an original claim for service connection of post-traumatic stress disorder (PTSD) on June 21, 2018. The RO granted the claim in November 2018 with an assigned evaluation of 30 percent, effective the receipt date of the claim.

In March and April 2019, the Veteran filed a Supplemental Claim under the Appeals Modernization Act for a rating in excess of 30 percent. *See* 38 C.F.R. § 3.2601. In a March 2020 rating decision, the RO denied the Veteran's claim for revision of the initial evaluation set in the November 2018 decision, and also granted a 100 percent rating for PTSD effective February 6, 2020. In January 2021, the Veteran requested a Higher-Level Review (HLR) of the Supplemental Claim decision, arguing that he should have a total rating from the initial grant of service connection. *See* 38 C.F.R. § 3.2601. A January 2021 HLR rating decision denied entitlement to an earlier date for the grant of the 100 percent rating.

The Veteran appealed the January 2021 HLR decision to the Board by filing a timely VA Form 10182 in January 2022, requesting that it be reviewed on the Board's Direct Review docket. Therefore, the Board may only consider the evidence of record at the time of the March 2020 decision supplemental claim decision. *See* 38 C.F.R. § 20.301.

Increased Ratings

Under the General Formula for Mental Disorders (General Formula), the Board must conduct a "holistic analysis" that considers all associated symptoms, regardless of whether they are listed as criteria. 38 C.F.R. § 4.130; *Bankhead v. Shulkin*, 29 Vet. App. 10, 22 (2017). The Board must determine whether unlisted symptoms are similar in severity, frequency, and duration to the listed symptoms associated with specific disability percentages. Then, the Board must determine whether the associated symptoms, both listed and unlisted, caused the level of impairment required for a higher disability rating. *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 114-118 (Fed. Cir. 2013).

A noncompensable rating is assigned when a psychiatric condition has been formally diagnosed, but symptoms are not severe enough to either require continuous medication, or to interfere with occupational and social functioning.

A 10 percent rating is assigned when mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of occasional stress, or symptoms controlled by medication cause occupational and social impairment.

A 30 percent rating is assigned when symptoms such as depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often), chronic sleep impairment, or mild memory loss (such as forgetting names, directions, or recent events), cause occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and normal conversation).

A 50 percent rating is assigned when symptoms such as flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; or difficulty in establishing and maintaining effective work and social relationships cause occupational and social impairment with reduced reliability and productivity.

A 70 percent rating is assigned when symptoms such as suicidal ideation; obsessional rituals which interfere with routine activities; intermittently illogical, obscure, or irrelevant speech; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a worklike setting); or inability to establish and maintain effective relationships cause occupational and social

impairment with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood.

A 100 percent rating is assigned for total occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; or memory loss for names of close relatives, own occupation or own name.

The "such symptoms as" language of the diagnostic codes for mental disorders in 38 C.F.R. § 4.130 means "for example" and does not represent an exhaustive list of symptoms that must be found before granting the rating of that category. *See Mauerhan v. Principi*, 16 Vet. App. 436, 442 (2002). However, as the Court also pointed out in that case, "[w]ithout those examples, differentiating a 30% evaluation from a 50% evaluation would be extremely ambiguous." *Id*. The Court went on to state that the list of examples "provides guidance as to the severity of symptoms contemplated for each rating." *Id*. Accordingly, while each of the examples needs not be proven in any one case, the particular symptoms must be analyzed in light of those given examples. Put another way, the severity represented by those examples may not be ignored.

1. Entitlement to an initial rating in excess of 30 percent for PTSD effective June 21, 2018

The Veteran contends he is entitled to a higher initial rating for his service-connected PTSD. He is currently in receipt of a staged rating for his disability: 30 percent disabling, effective June 21, 2018; and 100 percent disabling, effective February 6, 2020.

The Board first notes an on-going duty to assist error in the RO's development of the medical evidence. On his June 2018 legacy claim, the Veteran indicated he received PTSD treatment at the Santa Barbara VA Medical Center. Those records were not part of the claims file prior to his November 2018 VA examination and

rating decision. Additionally, in support of his claim, the Veteran submitted a one-page January 2018 VA psychiatric treatment note confirming his PTSD treatment. The VA treatment note was considered during his VA psychiatric examination and is noted in the RO's adjudication. As such, the RO failed to assist the Veteran in obtaining evidence necessary to substantiate the original claim. 38 C.F.R. § 3.159 (c)(2).

The subsequent 2019 Supplemental Claim for AMA review again notifies the RO of new and relevant VA treatment records. In March 2019, the Veteran again submitted the January 2018 VA treatment note and included a detailed statement regarding the severity of his psychiatric symptoms, with a statement that he has managed his symptoms for two years with the VA. At a minimum, the evidence accompanying the claim identifies potentially new evidence sufficient to trigger the duty to assist in obtaining those records and readjudicating the claim with all evidence of record. 38 C.F.R. §§ 3.159 (a)(3)(vii), 3.2501. Pertinent records from the Santa Barbara VA outpatient clinic dated 1999 to 2020, as well as West LA VA treatment records from 2007 to 2014, were of record at the time of the March 2020 Supplemental Claim decision. The rating decision indicates review of West LA VA treatment records; however as mentioned, the Veteran received psychiatric treatment at the Santa Barbara VA clinic, and therefore it is unclear whether the correct VA treatment records were reviewed. Notwithstanding, previous and current psychiatric records were not available for the VA examiner's review during the Veteran's March 4, 2020 psychiatric examination. As the Veteran reasonably identified new and relevant VA records, the RO's duty to assist was triggered upon receipt of the Veteran's substantially complete Supplemental Claim. *See* 38 U.S.C. § 5108; 38 C.F.R. §§ 3.159, 3.2501 (c).

The Veteran has continuously pursued an appeal of his initial rating by filing timely and appropriate review requests; therefore, the question for the Board is whether the evidence establishes an initial rating in excess of 30 percent is warranted. *See* 38 C.F.R. § 3.2500 (c). Upon review of all evidence of record prior to the March 2020 rating decision, the Board concludes that the Veteran is entitled to an initial rating of 70 percent for PTSD.

The relevant evidence for review of the initial rating period, June 21, 2018 to February 6, 2020, includes a November 2018 VA examination, VA psychiatric treatment records from 2016 to 2020, and Veteran lay statements.

At his November 2018 VA examination, the Veteran reported he experienced anger, agitation, depression, and anxiety. The examiner indicated symptoms of hypervigilance, suspiciousness, nightmares, panic attacks that occur weekly or more, chronic sleep impairment, mild memory loss, detachment and estrangement from others, diminished interest in significant activities, and disturbances of motivation and mood. The Veteran reported the use of psychotropic medication, on-going counseling, and a recent emergency room visit for a severe panic attack. He was noted to have a defensive physical demeanor during examination.

However, review of the Veteran's VA psychiatric treatment records during this period reveals symptoms of greater severity, frequency, and duration. A diagnosis of chronic PTSD is provided in 2016 with a confirmed DSM-5 diagnosis in January 2018. From 2018 to 2020, the Veteran endorsed symptoms of hypervigilance and exaggerated startle response, outbursts of anger and irritability, avoidance of people and voices, heightened anxiety in public, cognitive inflexibility, claustrophobia, pervasive feelings he is being watched, vivid recall of the traumatic events and unrelated intrusive thoughts, difficulty in socializing and an inability to make friends, memory and concentration problems, and a strong intolerance for others standing behind him. The Veteran reported feeling hopeless about the present or future, and he was observed as moderately tense during his treatment sessions. The record shows the Veteran lives alone, has never married and does not have romantic relationships, does not have children or siblings, his parents are deceased, and he has few friends.

Throughout his 2018 treatment, the Veteran reported a perceived conflict with a nearby neighbor that clinicians found to be, at times, illogical and based only partially in reality. He alleged the neighbor trespassed and stole items from his property, prompting him to initiate a verbal altercation. He reported feelings of rage each time she walked past his home while walking her dog and that she gave him a "nasty glare" when driving by. The Veteran believed the neighbor intentionally caused his distress such that the anxiety became overwhelming,

prompting him to consider moving. The recurring incidents of distress was noted by his primary physician and psychologist as near obsessive quality type thoughts and irritable moods associated with emotions toward the neighbor that did not appear to antagonize him. His behavior was later noted to increase in obsessive, intrusive thoughts and he continued to endorse paranoid ideation with borderline delusional thoughts and anger in 2019.

The Veteran's lay statement asserts he also experienced panic attacks two to three times a week, with an episode resulting in an emergency room visit where he received a diagnosis of hyperventilation syndrome. He reports throwing objects during emotional outbursts and experiencing distress, anger, and road rage while driving. He asserts his symptoms result in everyday challenges such as difficulty attending church due to his hypervigilance of people behind him, and difficulty leaving the safety of his home. He reports that he has trouble retaining complex orders, often resulting in an inability to complete tasks. He also asserts his PTSD results in occupational limitations as he is unable to work well with or near others due to his suspiciousness of coworkers. He reports difficulty in making sound decisions at work which also affects his workload and mood.

A Veteran is generally competent to establish the presence of observable symptomatology. *Barr v. Nicholson*, 21 Vet. App. 303 (2007). Here, the Board finds the Veteran's report of symptoms credible as they are facially plausible and internally consistent with his contemporaneous psychiatric treatment notes throughout the appeal period. *See Dalton v. Nicholson*, 21 Vet. App. 23 (2007).

With consideration of the above evidence, the Board finds the Veteran's PTSD symptoms from June 21, 2018 to February 6, 2020 warrant an increased rating of 70 percent. The record supports the Veteran experiences symptoms matching the criteria for a 70 percent rating, including: near-continuous depression or panic, difficulty in adapting to stressful situations, inability to establish and maintain effective relationships, impaired impulse control, and obsessional rituals.

The evidence also establishes that the Veteran experiences symptoms of such severity, frequency, and duration as to approximate symptoms contemplated by a 70 percent rating. Despite several prescriptions since 2016, he has had varying

success in managing his PTSD with psychiatric medication. Consistent with his reports of memory problems and difficulty understanding complex commands, in December 2018 the Veteran was noted to have discarded his psychiatric medicine when he misunderstood his physician's medication directions. The incident resulted in reassessment of the Veteran's medication needs to include addressing perceptional distortions.

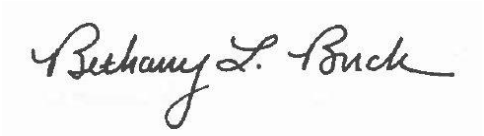
The Veteran's impaired judgment and impulse control is demonstrated by his history of verbal outbursts of anger and sporadic physical reactions to such distress. He is noted to present with inappropriate affect at times. The Veteran recounted several events during treatment that exhibited ideas of reference and perceptional distortion, particularly with regard to the perceived conflict with his neighbor. The borderline delusional thoughts regarding his neighbor resulted in adapted daily behavior and further isolation.

His disturbances in motivation and mood are evidenced by pervasive distress and near constant irritability and is confirmed by notations of anxious and irritable mood during counseling sessions. He is also noted to experience frequent episodes of depression accompanied by excessive sleeping. And alternatively, he exhibited frequent to daily excessive anxiety that does not diminish, accompanied by broken, limited sleep. The record supports the Veteran's reports of avoidance of people as he is shown to be hypersensitive to ambient noises and becomes easily overwhelmed by voices, prompting more irritability. As the Veteran has no close relationships, is isolated, and reports an inability to connect with people, he is unable to establish new relationships.

Resolving any reasonable doubt in favor of the Veteran, the Board finds the Veteran's PTSD symptoms resulted in occupational and social impairment with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood from June 21, 2018 to February 6, 2020.

However, the evidence of record does not reflect symptoms of such severity to approximate the level of total occupational and social impairment to warrant a 100 percent disability rating prior to February 6, 2020. Although the presence or absence of certain symptoms is not dispositive in determining the proper disability

rating, the presence or absence of symptoms is useful in assessing the severity of the condition. Here, there is no evidence of suicidal ideation at any time, disorientation to time or place, gross impairment of thought or behavior, neglect of personal appearance and hygiene, an inability to perform activities of daily living, or other symptoms on par with the level of severity contemplated by these manifestations. While the Veteran asserts that he is entitled to an initial rating of 100 percent, he is not competent to provide an assessment of his PTSD symptoms against the rating criteria. The benefit of the doubt doctrine is not applicable on the issue as the persuasive evidence is against a rating of 100 percent for the entire appeal period. *See Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990). Rather, the evidence supports a 70 percent initial rating for PTSD prior to February 6, 2020, and the maximum schedular rating thereafter. As such, the appeal for an initial rating in excess of 30 percent is granted.



Bethany L. Buck
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board T.N. Chapman

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.

Review option	**Supplemental Claim** **Add new and relevant evidence**	**Higher-Level Review** Not Available **Ask for a new look from a senior reviewer**	**Board Appeal** Not Available **Appeal to a Veterans Law Judge**	**Court Appeal** **Appeal to Court of Appeals for Veterans Claims**
Who and what	A reviewer will determine whether the new evidence changes the decision.	Because your appeal was decided by a Veterans Law Judge, you cannot request a Higher-Level Review. Please choose a different option for your next review.	You cannot request two Board Appeals in a row. Please choose a different option for your next review.	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. Find more information at the Court's website: uscourts.cavc.gov
Estimated time for decision	**About 4-5 months**			
Evidence	You must submit evidence that VA didn't have before that supports your case.			
Discuss your case with VA				
Request this option	Submit VA Form 20-0995 Decision Review Request: Supplemental Claim VA.gov/decision-reviews			File a Notice of Appeal uscourts.cavc.gov Note: A Court Appeal must be filed with the Court, not with VA.
Deadline	You have **1 year** from the date on your VA decision to submit VA Form 20-0995.			You have **120 days** from date on your VA decision to file a Court Appeal.
How can I get help?	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**.			

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