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BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: October 29, 2020

C[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,

K. Osborne

K. Osborne
Deputy Vice Chairman

Enclosures (2)
CC: JOHN ROBERT UNRUH, Attorney

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

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BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

WASHINGTON, DC 20038

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K. Osborne
Deputy Vice Chairman

Enclosures (2)
CC: JOHN ROBERT UNRUH, Attorney

BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF [redacted]

C[redacted]

Represented by
John Robert Unruh, Attorney

Advanced on the Docket

DATE: October 29, 2020

ORDER

Entitlement to service connection for a lumbar spine disorder is denied.

FINDING OF FACT

The Veteran's lumbar spine disorder clearly and unmistakably preexisted his active duty service and clearly and unmistakably was not aggravated during service.

CONCLUSION OF LAW

The criteria for service connection for a lumbar spine disorder have not been met. 38 U.S.C. §§ 1101, 1110, 1111, 1153, 5107; 38 C.F.R. §§ 3.102, 3.303, 3.304, 3.306.

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran served on active duty from September 1966 to June 1968.

On August 23, 2017, the President signed into law the Veterans Appeals Improvement and Modernization Act, Pub. L. No. 115-55 (to be codified as amended in scattered sections of 38 U.S.C.), 131 Stat. 1105 (2017), also known as

the Appeals Modernization Act (AMA). That law creates a new framework for Veterans dissatisfied with VA's decision on their claim to seek review. This decision has been written consistent with the new AMA framework.

Accordingly, May 2019 AMA rating decision considered the evidence of record as of the date the VA received the claim. The May 2019 AMA rating decision readjudicated the claim for service connection for a lumbar spine disorder and denied the claim on the merits. In the May 2020 VA Form 10182, Decision Review Request: Board Appeal, the Veteran elected the Evidence Submission docket. Therefore, the Board may only consider the evidence of record at the time of the agency of original jurisdiction (AOJ) decision on appeal, as well as any evidence submitted by the Veteran or his representative with, or within 90 days from receipt of, the VA Form 10182. 38 C.F.R. § 20.303.

The Board notes that the Veteran's representative indicated that additional evidence and argument will be submitted once the requested claims file had been received in the May 2020 10182. A response to the Veteran's privacy act request was fulfilled in October 2020. However, additional argument has not been received and the 90 day period to submit additional evidence after the submission of the 10182 has expired. Therefore, the Board will proceed with this adjudication.

Service Connection

The Veteran asserts that his lumbar spine disorder is etiologically related to his active service. Specifically, he asserts that his low back pain began after a fall injury sustained during active service, and that his current low back degenerative disc disease is as a result of such fall. Moreover, the Veteran asserts that his low back pain had its onset during service and has continued since.

The May 2019 rating decision made a favorable finding that the Veteran had been diagnosed with a lumbosacral strain with intravertebral disc syndrome (IVDS) and that the claim was readjudicated based on the new evidence provided. These favorable findings are binding on the Board.

Service connection may be granted for any current disability that is the result of a disease contracted or an injury sustained while on active duty service. 38 U.S.C. § 1110; 38 C.F.R. § 3.303(a). Service connection requires competent evidence showing: (1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and, (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service. *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004).

A veteran need only demonstrate that there is an approximate balance of positive and negative evidence to prevail in a service connection claim. *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990). When the evidence for and against the claim is in equipoise, by law, the Board must resolve all reasonable doubt in favor of the appellant. 38 U.S.C. § 5107; 38 C.F.R. § 3.102. To deny a claim on its merits, the preponderance of the evidence must be against the claim. *See Alemany v. Brown*, 9 Vet. App. 518, 519 (1996).

The Board notes that the Veteran's service treatment records indicate that he had a back injury that preexisted service. Specifically, at his February 1966 entrance examination, the Veteran indicated he experienced intermittent back pain and that he had experienced a back injury at age 15. Moreover, September 1966 and October 1966 service treatment records show that the Veteran reported a history of a painful back; and at his June 1968 separation examination, the Veteran claimed a slipped disc injury from 1959.

Every veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service. 38 U.S.C. § 1111. Only such conditions as are recorded in examination reports are considered as "noted." 38 C.F.R. § 3.304(b). When determining whether a defect, infirmity, or disorder is "noted" at entrance into service, supporting medical evidence is needed. *Crowe v. Brown*, 7 Vet. App. 238 (1994).

VA's General Counsel has held that to rebut the presumption of sound condition under 38 U.S.C. § 1111, VA must show by clear and unmistakable evidence both that the disease or injury existed prior to service and that the disease or injury was not aggravated by service. The Board notes that the Court has held that the presumption of aggravation under 38 U.S.C. § 1153 only applies in cases where a preexisting disability was noted at the service entrance examination. *See Horn v. Shinseki*, 25 Vet. App. 231, 234 (2012). Otherwise, the matter goes to the analysis of the presumption of soundness. The veteran is not required to show that the disease or injury increased in severity during service before VA's duty under the second prong of this rebuttal standard attaches. VAOPGCPREC 3-2003; *see Horn*, 25 Vet. App. at 234-35 (holding that the burden of proof in presumption of soundness cases rests with VA); *see also Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004).

Generally, as a matter of law, the presumption of soundness may be rebutted by clear and unmistakable evidence consisting of a veteran's own admissions during clinical evaluations of a pre-service history of symptoms. Thus, in the absence of any contention that the appellant never made the statements attributed to him (reporting pre-existing symptoms), those statements alone may rebut the preexistence prong of the presumption of soundness. *Horn v. Shinseki*, 25 Vet. App. 231, 237-38 (2012) (*citing Doran v. Brown*, 6 Vet. App. 283, 286 (1994)). Likewise, a later medical opinion based on statements made by the veteran about the pre-service history of his condition may be sufficient to rebut the preexistence prong of the presumption of soundness, notwithstanding the lack of contemporaneous clinical evidence or recorded history. *Harris v. West*, 203 F.3d 1347, 1349 (Fed. Cir. 2000); *Horn*, 25 Vet. App. at 237-38.

The Court has held that lay statements by a veteran concerning a preexisting condition are not sufficient to rebut the presumption of soundness. *See Paulson v. Brown*, 7 Vet. App. 466, 470 (1995) (stating that a lay person's account of what a physician may or may not have diagnosed is insufficient to support a conclusion that a disability preexisted service); *Crowe*, 7 Vet. App. at 246 (1994) (finding that supporting medical evidence is needed to establish the presence of a preexisting condition).

Here, as noted above, the Veteran reported a back injury at his enlistment examination and indicated he had low back pain that began at age 15. Although the examination itself showed normal results, the Board finds that by the Veteran's lay assertions his low back pain preexisted active duty service, and was noted on his examination. Thus, there is clear and unmistakable evidence that the Veteran was not sound upon entry of service and as such, the presumption of soundness does not apply. The lumbar spine disorder therefore preexisted service and the evidence must show that there was an increase in the disability during service to trigger the presumption of aggravation. *See* 38 U.S.C. § 1153; 38 C.F.R. § 3.306.

A pre-existing injury or disease will be considered to have been aggravated by active service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease. 38 U.S.C. § 1153; 38 C.F.R. § 3.306(a).

Temporary or intermittent flare-ups during service of a preexisting injury or disease are not sufficient to be considered "aggravation in service" unless the underlying condition, as contrasted to symptoms, is worsened. *Jenson v. Brown*, 4 Vet. App. 304, 306-307 (1993) (*citing Hunt v. Derwinski*, 1 Vet. App. 292 (1991)). However, if an increase in disability is shown, clear and unmistakable evidence is required to rebut the presumption of aggravation. 38 C.F.R. § 3.306(b).

Turning to the question of whether there the Veteran's preexisting lumbar spine disorder was aggravated by service, the Board notes that the record contains several etiology opinions which must be considered and weighed. *See Hayes v. Brown*, 5 Vet. App. 60, 69-70 (1993) (*citing Wood v. Derwinski*, 1 Vet. App. 190, 192-93 (1992)). *See also Guerrieri v. Brown*, 4 Vet. App. 467, 470-471 (1993) (stating that the probative value of medical evidence is based on the physician's knowledge and skill in analyzing the data, and the medical conclusion the physician reaches; as is true of any evidence, the credibility and weight to be attached to medical opinions are within the province of the Board). When faced with conflicting medical opinions, the Board may favor one medical opinion over the other. *See Evans v. West*, 12 Vet. App. 22, 30 (1998), *citing Owens v. Brown*, 7 Vet. App. 429, 433 (1995). The Board will consider each of these opinions below.

An April 2015 opinion from Dr. M.W., a private physician, indicated that the Veteran had a fall injury in 1966 that required immediate medical attention, that he experienced intermittent back pain since that time and that he did not have back pain prior to his 1966 injury. The physician noted that the Veteran's chronic low back disorder began in 1966, and there were increased episodes of debilitating severe pain and that the condition was precipitated by a 1966 injury that occurred during service. However, this opinion is based on an inaccurate factual premise, namely that the Veteran did not have back pain prior to his 1966 injury. *See Reonal v. Brown*, 5 Vet. App. 460, 461 (1993) (an opinion based on an inaccurate factual premise has no probative value). The Board notes that the Veteran himself reported back pain on exertion in a February 1966 Report of Medical History. This opinion is therefore being afforded little, if any, probative weight.

A November 2015 VA examination report indicated that the Veteran's chronic back pain was consistent with IVDS as a result of a fall in 1966. The examiner opined that the Veteran's claimed low back disorder was at least as likely as not due to the low back pain after a fall in 1966 as the Veteran had pain that was chronic and intermittent, that had its onset during active service and has continued since. However, this opinion did not address the Veteran's reported pre-service back injury and history of back pain and was not given to the appropriate legal standard of review, namely whether a preexisting condition was aggravated by service. *Id.* This opinion is therefore being afforded little, if any, probative weight.

A February 2016 VA examiner opined that the Veteran's low back disorder clearly and unmistakably existed prior to service and was clearly and unmistakably not aggravated beyond its natural progression by an in-service injury, event, or illness. In that regard, the examiner noted that the Veteran reported a history of back pain prior to his active service, that it appeared to be a slipped disc, that the cause of his back pain was obscure, and that he received treatment. The examiner noted that the Veteran's post-service low back pain and subsequent treatment and progression. The examiner also noted that there was one note showing that the Veteran was seen for back pain less than one month after he began his military service and that there was no evidence in the record to show that his low back disorder, which began prior to his time on active duty, was aggravated by his military service. The Board that the VA examiner offered an etiological opinion as to the claimed disorder and

based his conclusion on a review of the record, to include an interview with the Veteran and a full examination. Moreover, such opinion offered clear conclusions with supporting data as well as reasoned medical explanations connecting the two. *See Nieves-Rodriguez v. Peake*, 22 Vet. App. 295 (2008); *Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007) ("[A]medical opinion ... must support its conclusion with an analysis that the Board can consider and weigh against contrary opinion"). This opinion is afforded great probative weight.

A February 2017 opinion from Dr. M.W, a private physician, indicated that he reviewed the February 2016 letter to the Veteran and would like to "refute the history, the findings, and the conclusions." The physician noted that the Veteran's history of prior back pain was normal for a male in his teens, that that the Veteran was examined at the induction physical and found to be fit for service, that the Veteran was able to complete basic training as well as advanced infantry training and that the Veteran was fully capable of performing any and all of his assigned duties and activities in the military without issue. The physician noted that the Veteran had a fall injury and that subsequent to such injury, the Veteran had ongoing back pain with a degenerative disc that progressively worsened until eventually requiring surgery. Therefore, the physician opined that the Veteran's post-service treatment and surgery required for his low back was consistent with the fall injury during active service as reported by the Veteran. However, this opinion did not address whether the Veteran's lumbar spine disorder preexisted his entrance into service despite acknowledging that the Veteran's preservice history of back pain and did not address whether it was aggravated by service. This opinion is therefore being afforded little, if any, probative weight.

An April 2018 opinion from Dr. M.W., a private physician, noted that the Veteran had a fall injury during basic training in 1966, that the Veteran experienced immediate low back pain and that the Veteran did not have a history of back pain prior to that injury. The physician noted that the Veteran recalled having some intermittent back pain as a teenager but that such childhood pain did not limit his activities of daily living whatsoever, that the Veteran was found fit for service at his induction physical and never had any problems or limitations from his back prior to the 1966 injury. The physician noted that because of the injury in 1966, the Veteran's low back never became asymptomatic, and has had ongoing back pain on

a daily basis since. The physician opined that it was "medically probable and more likely than not that this condition was started by his injury in the service," that such disorder has been chronic since that time and that the injury in 1966 was "unquestionably and more probable than not," the reason for his post-service low back surgery and cauda equina syndrome. The physician noted that it was not uncommon for teenagers during their growth spurts to have some intermittent back pain, that this was very common, and that there was no evidence based medicine to suggest that such individuals will go on to experience any chronic back pain in the future nor are they more susceptible to having back pain in the future. However, this opinion is also based on an inaccurate factual premise, namely that the Veteran did not have back pain prior to his 1966 injury. As noted above, the Veteran himself reported back pain on exertion in the February 1966 RMH. *See Reonal v. Brown, supra.* This opinion is therefore being afforded little, if any, probative weight.

A November 2018 VA examiner found the Veteran's low back disorder clearly and unmistakably existed prior to service and was clearly and unmistakably not aggravated beyond its natural progression by an in-service injury, event, or illness. In this regard, the examiner noted that the Veteran had a history of a back injury as a 15 year old prior to service, reported back pain during active service, that the Veteran denied "recurrent back pain" at his separation examination, and that the Veteran indicated a slipped disc back injury that occurred in 1959 at his separation exam. The examiner further noted that there were no medical records that pertain to an ongoing back condition in the years immediately following separation from active service. In addition, the examiner noted a review of post-service treatment records. The Board that the VA examiner offered an etiological opinion as to the claimed disorder and based his conclusion on a review of the record, to include an interview with the Veteran and a full examination. Moreover, such opinion offered clear conclusions with supporting data as well as reasoned medical explanations connecting the two. *See Nieves-Rodriguez v. Peake, supra; Stefl v. Nicholson, supra.* This opinion is afforded great probative weight.

The Board notes that the Veteran has contended that his lumbar spine disorder is the result service and that his representative alleged on his behalf that this disability was the result of his service. Lay witnesses are competent to provide testimony or statements relating to symptoms or facts of events that the lay witness observed and is within the realm of his or her personal knowledge, but not competent to establish that which would require specialized knowledge or training, such as medical expertise. *Layno v. Brown*, 6 Vet. App. 465, 469-70 (1994). Lay evidence may also be competent to establish medical etiology or nexus. D*avidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009). However, "VA must consider lay evidence but may give it whatever weight it concludes the evidence is entitled to" and a mere conclusory generalized lay statement that service event or illness caused the claimant's current condition is insufficient to require the Secretary to provide an examination. *Waters v. Shinseki*, 601 F.3d 1274, 1278 (2010).

In the instant case, the Board finds that the question regarding the potential relationship between the Veteran's lumbar spine disorder and any instance of his service to be complex in nature. *Woehlaert v. Nicholson*, 21 Vet. App. 456 (2007). Specifically, while the Veteran is competent to describe his current lumbar spine symptoms and his representative is competent to describe his observations of the Veteran's symptoms, the Board accords their statements regarding the etiology of such a disorder little probative value as they are not competent to opine on such a complex medical question. Specifically, where the determinative issue is one of medical causation, only those with specialized medical knowledge, training, or experience are competent to provide evidence on the issue. *See Jones v. Brown*, 7 Vet. App. 134, 137 (1994). In this regard, the question of causation involves a medical subject concerning an internal physical process extending beyond an immediately observable cause-and-effect relationship, and requires the administration and interpretation of diagnostic testing. In the instant case, there is no suggestion that the Veteran and/or his representative or have had any medical training. As such, the question of etiology in this case may not be competently addressed by lay evidence, and the opinions of the Veteran and/or his representative are nonprobative evidence. As discussed, to the extent that the Veteran contends that the lower intestinal disorder existed in service, the Board

finds that contemporaneous medical evidence showing no lower intestinal disorder at separation to be of greater probative value.

In sum, the weight of the competent and credible evidence demonstrates no relationship between the current lumbar spine disorder and active duty service, but rather establishes that the currently diagnosed lumbar spine disorder clearly and unmistakably existed prior to service, and was clearly and unmistakably not aggravated by service. Accordingly, for the foregoing reasons, the Board finds that a preponderance of the evidence is against the claim of service connection for a lumbar spine disorder and the claim must be denied. Because the preponderance of the evidence is against the claim, the benefit-of-the-doubt doctrine is not for application. 38 U.S.C. § 5107; 38 C.F.R. § 3.102; *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990).

[redacted]

KRISTY L. ZADORA
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board Mariah N. Sim, 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.

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**.

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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