**APPENDIX A**

**United States Court of Appeals for the Federal Circuit**

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**ROBERT M. SELLERS**,
*Claimant-Appellee*

**v.**

**ROBERT L. WILKIE, SECRETARY OF VETERANS AFFAIRS,**
*Respondent-Appellant*

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2019-1769

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Appeal from the United States Court of Appeals for Veterans Claims in No. 16-2993, Judge Mary J. Schoelen, Judge Michael P. Allen, Senior Judge Robert N. Davis.

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Decided: July 15, 2020

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KENNETH M. CARPENTER, Law Offices of Carpenter Chartered, Topeka, KS, argued for claimant-appellee. Also represented by JOHN F. CAMERON, Montgomery, AL.

DAVID PEHLKE, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellant.

Also represented by ETHAN P. DAVIS, MARTIN F. HOCKEY, JR., ROBERT EDWARD KIRSCHMAN, JR.; BRIAN D. GRIFFIN, JONATHAN KRISCH, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

BENJAMIN C. BLOCK, Covington & Burling LLP, Washington, DC, for amici curiae National Organization of Veterans' Advocates, Inc., National Veterans Legal Services Program. Also represented by ISAAC CHAIM BELFER, FRANK CRAIG BROOMELL, JR., JEFFREY HUBERMAN. Amicus curiae National Veterans Legal Services Program also represented by JOHN D. NILES, BARTON F. STICHMAN, National Veterans Legal Services Program, Washington, DC.

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Before DYK, CLEVENGER, and HUGHES, *Circuit Judges*.

CLEVENGER, *Circuit Judge*.

Robert M. Sellers served honorably in the U.S. Navy from April 1964 until February 1968, and in the U.S. Army from January 1981 to February 1996. Mr. Sellers currently suffers from major depressive disorder ("MDD"). As a practical matter, this case involves Mr. Sellers' attempt to establish an earlier effective date than the one currently assigned to him for the compensation he receives due to his current MDD condition.

Mr. Sellers has an effective date of September 18, 2009. He seeks an effective date of March 11,

1996, the date he filed a formal claim[1] seeking compensation for specifically identified injuries to his leg, knee, back, finger, and ears. In a space on his formal application labeled "Remarks," Mr. Sellers wrote "Request for s/c [service connection] for disabilities occurring during active duty service." J.A. 140. Mr. Sellers contends that the law in effect in 1996 requires his remarks to be understood as a formal claim for compensation for his MDD, even though his claim in no way refers to MDD, and thus affords him the earlier effective date of his 1996 formal claim. The United States Court of Appeals for Veterans Claims ("Veterans Court") agreed that Mr. Sellers' claim based on MDD could suffice in the absence of any reference to that condition. *Sellers v. Wilkie*, 30 Vet. App. 157 (2018). The Secretary of Veterans Affairs challenges the Veterans Court's decision, arguing that a legally sufficient formal claim must identify, at least at a high level of generality, the current condition upon which the veteran's claim for benefits is based.[2] For the reasons set forth below, we agree with the Secretary.

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[1] In VA parlance, a formal claim is one made on a particular form specified by the Secretary. As early as 1962, VA regulations referred to "Original claim" as "an initial formal application on a form prescribed by the Administrator. 38 C.F.R. 3.160(b) (1962).

[2] Whether a formal claim must refer at least generally to the condition on which a veteran's claim for compensation is based is no longer questionable. Since March 24, 2015, the VA's regulations require that a formal claim must provide "a description of any symptom(s) or medical condition(s) on which the benefit is based…." 38 C.F.R. 3.160(a)(4).

Accordingly, Mr. Sellers is not entitled to the earlier effective date he requests.

I

On September 18, 2009, Mr. Sellers filed an informal claim[3] with the Department of Veterans Affairs ("VA") seeking compensation for a service-connected psychiatric disability, claimed as Post Traumatic Stress Disorder ("PTSD"). A VA regional

[3] Since as early as 1961, VA regulations allowed for informal claims, with an informal claim defined as "[a]ny communication or action, indicating an intent to apply for one or more benefits under the laws administered by the Veterans Administration, from a claimant…." 38 C.F.R. 3.155(a) (1961). The 1961 regulation specified that an informal claim "must identify the benefit sought." *Id*. If no formal claim was of record, an application form for a formal claim was sent to the informal claimant for execution, and if an executed form was received by the Administrator within 1 year from the date it was sent to the claimant, it was considered filed as of the date of receipt of the informal claim. *Id*. The purpose of informal claims was to assist in filing formal claims and to serve a placeholder role for an earlier effective date. Effective March 24, 2015, the VA abolished the concept of informal claim, and by regulation created an "intent to file" process. If a veteran demonstrates an intent to file by one of three methods delineated in the new regulations, *see* 38 C.F.R 3.155(b), the date any of the three methods is performed serves as the effective date for any formal application filed within one year from the date of the "intent to file" submission. In contrast to previous informal claims, an intent to file a claim does not require the claimant to "identify the benefit sought," *see* 79 Fed. Reg. at 57,665, but does require an identification of the general benefit sought (such as compensation versus pension). *See* 38 C.F.R. 3.155(b)(2) (2015); *Veterans Justice Group, LLC v. Sec'y of Veterans Affairs*, 818 F.3d 1336, 1342-43 (Fed. Cir. 2016).

office (RO) denied his claim in March 2011. But on May 13, 2011, following an examination for mental disorders at the VA medical center in Montgomery, Alabama, Mr. Sellers was diagnosed with "major depressive disorder, recurrent, moderate," and given a Global Assessment of Functioning (GAF) score of 50.[4]

After a number of additional medical examinations, and an appeal to the Board of Veterans Affairs ("BVA"), Mr. Sellers was granted service connection for MDD rated at 70%, with an effective date of September 18, 2009, the date he filed his informal claim for service-connected psychiatric disability. The BVA decision stated:

> The record shows that the VA received on September 18, 2009, an informal claim for service connection for psychiatric disability, claimed as PTSD… It is noted that, when a claimant makes a claim, he is seeking service connection for symptoms regardless of how those symptoms are diagnosed or labeled. *Clemons v. Shinseki*, 23 Vet. App. 1 (2009).

J.A. 37. The BVA further noted that the effective date of any claim is the date of receipt of the claim or the date entitlement arose, whichever is later, citing 38 C.F.R. 3.400. As September 18, 2009 is the later,

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[4] At this time, and later, Mr. Sellers was granted compensation for other service-connected injuries and disabilities. Since only his claim for an earlier effective date for his MDD is at stake in this case, we note but do not refer further to his other bases for compensation.

it was deemed the effective date. The BVA observed "that [the] VA received no claim (informal or otherwise) for service connection for any psychiatric disability prior to September 19, 2009." J.A. 38. With regard to Mr. Sellers' formal claim filed on March 11, 1996, the BVA noted that it "did not include any claim for psychiatric disorder or problems that could be reasonably construed as a claim for service connection for psychiatric disability." J.A. 38.

Mr. Sellers appealed the BVA's denial of an earlier effective date for his MDD to the Veterans Court. In his brief to the Veterans Court, Mr. Sellers faulted the BVA for reading his 1996 formal claim as excluding any claim for psychiatric disability. In addition to the several specific bodily injuries named in his formal application, for which he sought compensation, his formal claim also stated in block 40[5] (entitled "Remarks"): "Request s/c [service connection] for disabilities occurring during active duty service." Mr. Sellers argued to the Veterans Court that this language in the veteran's pro se filing should be sympathetically read to require the VA to "grant all possible benefits." Mr. Sellers argued that this result is mandated the more so because at the time the VA ruled on the formal

[5] In VA Form 21-526, block 40 states: "REMARKS (Identify your statements by their applicable item number. If additional space is required, attach separate sheet and identify your remarks by their item number." J.A. 140. The purpose of block 40 is to allow amplification of information contained in other numbered blocks in the Form, such as blocks 17-19, in which Mr. Sellers provided information about his specifically claimed bodily injuries.

application for benefits, it had "obtained his service medical records and was aware of his in-service medical treatment for his chronic mental disability." J.A. 70. Mr. Sellers' brief to the Veterans Court cited numerous VA medical records which referred to medical treatment for mental disorders. Because his medical records revealed in-service treatment for mental disorders before his formal claim was filed, Mr. Sellers argued that his request in essence for "all possible benefits" in block 40 was sufficient to state a claim for psychiatric disability as of the date of his formal claim.

The Secretary responded to Mr. Sellers' brief to the Veterans Court, citing as the correct statement of the law the following language in *Brokowski v. Shinseki*, 23 Vet. App. 79, 84 (2009): "The essential requirements of any claim, whether formal or informal" are: "(1) an intent to apply for benefits, (2) an indication of the benefits sought, and (3) a communication in writing."[6] In particular, the Secretary emphasized that in *Brokowski*, the Veterans Court held that a claim for anxiety and

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[6] In *Brokowski*, the veteran's 1994 claim for service-connected peripheral neuropathy was granted in 2002, with an effective date of February 15, 1994. The veteran had earlier filed a claim in January 1977 for anxiety and depression which made no reference to peripheral neuropathy, but which stated "[t]his is also a claim for service[ ] connection for all disabilities of record." *Brokowski*, 23 Vet. App. at 82. Because the veteran's medical records as of 1978 contained evidence of vascular disorder, the veteran argued that his request for all disabilities of record sufficed to state a claim for peripheral neuropathy and thus entitled him to an effective date of January 1977 for his service-connected peripheral neuropathy disability.

depression that also requested service connection for "all disabilities of record" was insufficient to support a claim for peripheral neuropathy. Because Mr. Sellers' March 1996 filing made no reference to a claim for benefits related to a psychiatric condition and only requested benefits for "disabilities occurring during active duty service," the Secretary argued that this case is like *Brokowski*: Mr. Sellers' formal claim failed to meet the required test for identifying the benefits sought for a psychiatric condition, and thus could not earn an earlier effective date for Mr. Sellers' MDD.

After oral argument, the Veterans Court issued its opinion. *See Sellers v. Wilkie*, 30 Vet. App. 157 (2018). The Veterans Court first stated the position of the parties. Mr. Sellers contended that his general statement seeking service connection for disabilities occurring during active duty service, combined with the VA's possession of his service medical treatment records, sufficed to state a formal claim for MDD. In practical terms, his March 1996 formal claim purportedly entitled him to his requested earlier effective date for his MDD rated at 70%. The Secretary's view was that Mr. Sellers failed to initiate a formal claim for MDD because the information in block 40 of the form provided no information from which an MDD claim could be deduced and the formal claim otherwise made no reference to MDD.

The Veterans Court agreed with the Secretary that "a general statement of intent to seek benefits for unspecified disabilities standing alone is insufficient to constitute a claim." *Sellers*, 30 Vet.

App. at 163. Nonetheless, the Veterans Court faulted the Secretary for missing "a crucial additional factor present here," namely that at the time the RO rejected Mr. Sellers' formal claim, his medical records in the RO's possession revealed multiple occasions on which he had received treatment for psychiatric conditions, and an undisputed in-service diagnosis of a psychiatric condition. *Id.* In the face of *Brokowski*, and with no citation to other authority, the Veterans Court held that Mr. Sellers' general statement in block 40, coupled with the VA's possession of his medical records showing previous treatment for a psychiatric condition, may have sufficed to qualify the March 1996 writing as having initiated a formal claim for MDD, subject to one condition. The condition requiring satisfaction to validate the formal claim is that Mr. Sellers' in-service psychiatric diagnosis be "reasonably identifiable" from the medical records before the RO at the time it considered his claim. In sum, the court stated: "We hold that a general statement of intent to seek benefits, coupled with reasonably identifiable in service medical diagnosis reflected in service treatment records in VA's possession prior to the RO making a decision on the claim may be sufficient to constitute a claim for benefits." *Id.* at 161.

The Veterans Court noted that the determination by the RO adjudicator of whether a compensable condition is "reasonably identifiable" from medical records, with only a completely unspecified general request for benefits to go on, may be difficult. Noting that medical records can be voluminous, and may perhaps relate to several conditions, the Veterans Court specified that the

"fact finder must determine, based on the totality of the service medical record, both qualitatively and quantitatively, whether the condition at issue would be sufficiently apparent to an adjudicator." *Id.* at 163. Because the "reasonably identifiable" question in any case is one of fact, which if in dispute would be decided initially by the BVA, the Veterans Court offered extensive guidance to the BVA:

> To assist the Board in this endeavor, we provide the following thoughts on the types of factors that may be relevant to the Board's inquiry. These are not the only factors the Board may find helpful as it makes its assessment on this factual question. They are merely illustrations of factors that may be relevant to the Board's assessment. Qualitatively, for example, service medical records might contain many notes of conditions ranging from descriptions of trivial conditions (a hangnail) to full-blown diagnoses of significant illnesses (PTSD). And the record might describe certain conditions in great detail or, in contrast, in only a passing manner. Or, for example, medical records could contain vague complaints of symptoms regarding a condition but no formal diagnosis.
>
> Quantitatively, the sheer volume of medical records may potentially be a factor in determining whether a condition would have been reasonably identifiable to a VA adjudicator. For example, the Board could decide that a single diagnosis reflected in a

> single page of a 2,000 page service record is not reasonably identifiable.

*Id.* at 163-64.

As the "reasonably identifiable" issue had not been decided in this case, the Veterans Court remanded the case to the BVA for it to examine the relevant medical records and decide if Mr. Sellers' MDD claim was reasonably identifiable at the time he filed his formal claim. In *Brokowski*, the Veterans Court held that the veteran's request for "all disabilities of record" could not be used as "a pleading device to require the Secretary to conduct an unguided safari through the record to identify all conditions for which the veteran may possibly be able to assert entitlement to a claim for disability compensation." 23 Vet. App. at 89. But in this case, the Veterans Court stated that:

> [O]ur holding here is a narrow one. Only records containing diagnoses that are reasonably identifiable from a review of the record may otherwise cure an insufficient general statement of intent to seek benefits. To continue *Brokowski's* metaphor, we caution that VA at most must participate in a fully guided safari.

*Sellers*, 30 Vet. App. at 164.

To be clear, the Veterans Court did not decide that Mr. Sellers filed a sufficient formal claim for a psychiatric disability in March 1996. Instead, the Veterans Court created a new legal test for

determination of whether a general statement of intent to seek benefits for unspecified disabilities will suffice as a sufficient formal claim. The Secretary filed a motion for panel reconsideration or *en banc* review, arguing that the panel decision is barred by governing statutes and regulations. The panel denied reconsideration, *en banc* review was denied, and judgment was entered on January 30, 2019. The Secretary timely appealed to this court.

## II

We have jurisdiction over this appeal under 38 U.S.C. 7292, which generally restricts our jurisdiction to final decisions of the Veterans Court. Because the Veterans Court's decision is not final, we must determine whether this case satisfies the three-part test set forth in *Williams v. Principi*, 275 F.3d 1361 (Fed. Cir. 2002), which determines whether a non-final Veterans Court decision is nonetheless within our statutory jurisdiction. Jurisdiction will lie in such a case if all three parts of the test are met: (1) there is a clear and final decision of a legal issue, separate from the remand proceedings, that will directly govern the remand proceedings, or if reversed, would render the remand proceedings unnecessary; (2) the resolution of the legal issue adversely affects the party seeking judicial review; and (3) there is a substantial risk that the remand proceeding may moot the issue. *Id.* at 1364.

This case satisfies the *Williams* test. The Veterans Court decision created a clear rule of law that will govern the remand proceeding, and remand

proceedings would be unnecessary were we to reject that clear rule of law. The contested clear rule of law adversely affects the Secretary because it would change the law to require formal claims to proceed notwithstanding the absence of any identifiable sickness, disease, or injuries reasonably identified in the written claim. Finally, there is a substantial risk that the BVA may on remand find a reasonably identifiable timely diagnosis of a psychiatric condition in Mr. Sellers' medical record. Such a finding would moot judicial review of the contested rule of law in this case, because the Secretary cannot appeal BVA decisions favorable to the veteran to the Veterans Court. *Smith v. Nicholson*, 451 F.3d 1344, 1348 (Fed. Cir. 2006) (noting that 38 U.S.C. 7252(a) precludes the Secretary from appealing a BVA decision).

## III

The Veterans Court held that a legally sufficient formal claim can be stated despite the absence of any statement in the claim that could be sympathetically understood to identify a sickness, disease, or injury for which benefits are sought. The parties address that holding from opposite positions.

The Secretary challenges the Veterans Court's holding as legally incorrect. He argues that relevant statutes and regulations impose a duty on the veteran to identify the sickness, disease, or injury for which benefits are sought. Pointing to both its longstanding practice and the precedential holdings of this court deciding the sufficiency of informal claims, the Secretary states that the level of

specificity required to identify a sickness, disease, or injury is minimal. A veteran need not refer explicitly to the name of an illness, injury, or condition. Identifying a condition even at a high level of generality will suffice. Identifying, for example, a leg injury, memory loss, or eye problems would satisfy the specificity test. And even if the words stated do not name a condition, facts stated in the claim can be sympathetically understood to support a claim. A leading example comes from *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001). In that case, the veteran's claim included evidence of a medical disability, and of unemployability, and asked for the highest possible rating. That evidence was held sufficient to support a rating for total disability based on individual unemployability. The Secretary also cites *Shea v. Wilkie*, 926 F.3d 1362 (Fed. Cir. 2019) as another instance in which a claim lacking specific reference to PTSD was held sufficient. In that case, in contrast to the situation here, the veteran's claim pointed to specific medical records in which the veteran's psychiatric condition was noted. The Secretary emphasizes that while the VA's claim assessment process requires, consistent with our binding precedent, that veterans' claims be read sympathetically, the condition on which the claim is based must be identifiable from within the claim.

As legal support for necessary identification of the condition for which benefits are sought, the Secretary begins with 38 U.S.C. 501(a)(2), in which Congress granted the VA authority to prescribe all necessary or appropriate rules and regulations regarding "the forms of applications by claimants." *Mansfield v. Peake*, 525 F.3d. 1312, 1317 (Fed. Cir.

2008) ("Congress has provided the VA with authority to establish requirements for 'claims' for veterans benefits.") In addition, *Mansfield* held that "[a] specific claim in the form prescribed by the Secretary…must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary. 38 U.S.C. 5101(a)(2000)." *Id*.; *see also id*. at 1317 n.9 (citing 38 U.S.C. 3001(a) (1988)). The statutory command of section 5101(a) is repeated in the pertinent regulation, 38 C.F.R. 3.151(a). Further, the veteran is obligated to "present and support" his claim. 38 U.S. C. 5107(a).

As required under the statutes and regulations, the veterans' claim must be *on* the VA's prescribed form, and the claim must "contain[] specified information … as called for by the blocks on the application form." *Fleshman v. West*, 138 F.3d 1429, 1431-32 (Fed. Cir. 1988); *see also Rodriguez v. West*, 189 F.3d 1351, 1353 (Fed. Cir. 1999) (a claimant must "file a form *providing specified information* that the Secretary has adopted.") (emphasis added). Since at least 1944, the prescribed formal claim application form has been a variation of Form 526. In this case, the prescribed form was 21-526 (Apr. 1993), and that form requires claimants to identify in block 17 the "nature of sickness, disease or injuries for which this claim is made."[7]

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[7] When Mr. Sellers filed his formal claim, 38 C.F.R. 3.1(p) defined the term "claim" as "(p) "Claim" – "Application" means a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement, to a benefit." 38 C.F.R. 3.1(p) (1996). Neither

As noted at the start of this opinion, the VA in September 2014, after notice and comment rulemaking, substantially revised the claim initiation process, through regulations effective March 24, 2015. The validity of those new regulations was sustained, over challenge, in *Veterans Justice Group, LLC v. Sec'y of Veterans Affairs*, 818 F.3d 1336 (Fed. Cir. 2016) ("VJG"). The Secretary argues that *VJG* is relevant to our decision in this case.[8] We agree.

In *VJG*, the lawfulness of 38 C.F.R. 3.160 was challenged as an unreasonable interpretation of 38 U.S.C. 5107(a), which provides that "a claimant has the responsibility to present and support a claim for benefits." The interpretation question arose from two subparts of section 3.160, which were viewed by the

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party argues that this definition answers the question of the degree of specificity required of a formal claim. The current regulation defines "initial claim" as a "any complete claim" and the "first initial claim" being further defined as an "original" claim. A "complete claim" now requires "a description of any symptom(s) or medical condition(s) on which the benefit is based…."

[8] Mr. Sellers argues that *VJG* did not consider the Secretary's position on claim identification, because the opinion does not use the words "claim" and "identification" together, and hence the case is not relevant to this case. As discussed below, Mr. Sellers is wrong. The *VJG* decision is highly relevant to this case. One of the challengers in *VJG*, National Organization of Veterans' Advocates, Inc., filed an *amici curiae* brief in this case, advocating affirmance of the Veterans Court's decision. Notably, its brief does not take issue with the Secretary's interpretation of and reliance on our decision in *VJG*.

challengers as relieving the Secretary from the duty to develop claims unrelated to the actual claims presented by the veteran. Those subparts provide that a complete claim "must identify the benefit sought," 3.160(a)(3), and contain "a description of any symptom(s) or medical condition(s) on which the benefit is based…," 3.160(a)(4). The challengers argued that under those terms, the VA would not be required to "adjudicate benefits for any medical condition that is not specifically identified and that [the] VA deems 'unrelated to those particular claims'—no matter how apparent the condition is on the face of the record." *VJG*, 818 F.3d at 1355. Thus understood, the challengers argued the regulations were unreasonable as in conflict with the Secretary's duty to "consider all information and lay and medical evidence of record in a case." *Id.* at 1356 (quoting 38 U.S.C. 5107(b)). This court responded that section 5107(b) ensures consideration of all "relevant" evidence but does not answer the question of whether the Secretary is obligated to develop evidence outside the scope of a pending claim. *Id.* Treating that question as one raised under the first step in the *Chevron* analysis, the court sustained the validity of 3.160(a)(3)-(4):

> We find the challenged portions of 38 C.F.R. 3.160(a)(3)-(4) … reflect a reasonable interpretation of the statute. In fact, the regulations do not substantially alter the VA's general practice of identifying and adjudicating issues and claims that logically relate to the claim pending before the VA. *See* Final Rule, 79 Fed. Reg. at 57,672 ("Although the rule requires claimants to

> specify the symptoms or conditions on which their claims are based and the benefits they seek, it generally would not preclude the VA from identifying, addressing, and adjudicating related matters that are reasonably raised by the evidence of record which the claimant may not have anticipated or claimed.").

*Id.*

The regulations sustained in *VJG*, effective in 2015, do not apply to this case, but those regulations do not substantially differ from the regulations that do apply to this case. The statute at question in *VJG*, 38 U.S.C. 5107(a), burdens the veteran with the obligation to "present and support a claim." The version of the same statute in effect at the time Mr. Sellers submitted his formal claim imposed on the veteran the same duty to present and support his claim.[9] *See Epps v. Gober*, 126 F.3d 1464, 1468 (Fed. Cir. 1997).

We agree with the Secretary that the relevant statutes, regulations, and judicial precedent require that a veteran's legally sufficient claim provide

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[9] The version of Section 5107(a) applicable in *Epps* and in 1996, specified that a claimant "shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded." 38 U.S.C. 5107(a) (1996). The requirement of a well-grounded claim has since been abolished, but to establish a well-grounded claim at least required identification of some condition on which the claim was based. *Epps*, 126 F.3d at 1468.

information, even at "a high level of generality," 818 F.3d at 1356, to identify the sickness, disease, or injury for which benefits are sought.

Mr. Sellers' argument, in support of the Veterans Court's test, and in spite of the relevant statutes, regulations, and judicial precedent discussed above, that "[t]here is no claim identification requirement when a claimant has filed a complete claim on a prescribed VA form," Appellee's Br. at 13, is unconvincing. According to Mr. Sellers, a formal claim specifying at least one identified condition for which benefits are sought invokes the Secretary's duty to assist, not only to fully develop the specified condition but also to search the veteran's records to identify and fully develop any additional claim the record may support.[10] Thus, according to Mr. Sellers, the law requiring some degree of identification in a claim of the sickness, disease, or injury for which benefits is sought is "unavailing," Appellee Br. at 15, and "invalid," Appellee Br. at 18, because it "is completely at odds," *Id.*, with the Secretary's statutory duty to assist the veteran in developing all claims the record may support.[11]

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[10] Mr. Sellers does not argue that his 1996 form discloses his MDD.

[11] At the time Mr. Sellers filed his formal claim in 1996, the Secretary's duty to assist veterans was stated in two regulations, 38 C.F.R. 3.159(a) (1996), entitled Department of Veterans Affairs assistance in developing claims ("[The Secretary] shall assist a claimant in developing the facts pertinent to his or her claim"), and 38 C.F.R. 3.103(a) (1996), entitled Procedural due process and other rights ("[I]t is the obligation of VA to assist a claimant in developing the facts

The Secretary's duty to assist is not untethered. At the time Mr. Sellers filed his formal claim, the Secretary's duty to assist was triggered by receipt of a legally sufficient claim. *Epps*, 126 F.3d at 1469. The same is true today; the Secretary's duty to assist begins upon receipt of a formal claim that identifies the medical condition for which benefits are sought. *See* 38 C.F.R 3.159(a)(3). This triggers the Secretary's duty to obtain the veteran's medical records, *see* 38 C.F.R 3.159(c)(2)-(3), 38 U.S.C. 5103A(c)(1)(A), and then to develop fully the stated claim. Until the Secretary comprehends the current condition on which the claim is based, the Secretary does not know where to begin to develop the claim to its optimum. We reject Mr. Sellers' view that the Secretary's requirement that a formal claim must identify the condition for which benefits are sought is fatally inconsistent with the Secretary's duty to

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pertinent to the claim"). In 1996, 38 U.S.C. 5107(a) required the VA to assist a claimant "in developing the facts pertinent to the claim." *See Epps v. Gober*, 126 F.3d 1464, 1469 (Fed. Cir. 1997) (no duty to assist under section 5107 until claimant presents a proper claim). Mr. Sellers also cites the statutory duty to assist, 38 U.S.C. 5103A, enacted in 2000. Subsection (a) of the statute states that "[t]he Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant' claim for a benefit under a law administered by the Secretary." Although the language of section 5103A states the Secretary's duty to assist in different words than in previous regulations, the nature of the duty is the same: "to fully and sympathetically develop the veteran's claim to its optimum before deciding it on its merits." *Hodge v. West*, 155 F.3d. 1356, 1362 (Fed. Cir. 1998); *see also Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001) (duty to develop the veteran's *claim*, citing *Hodge*).

assist the veteran. The former is necessary to initiate the latter.

## IV

For the reasons set forth above, we hold that the Veterans Court formulated an incorrect legal test for determining if Mr. Sellers is entitled to an earlier effective date for his MDD condition. Under the correct test, a veteran's formal claim is required to identify the sickness, disease, or injuries for which compensation is sought, at least at a high level of generality. This is the same test as we have applied in evaluating the sufficiency of informal claims. *See, e.g., Shea*, 926 F.3d at 1362; *Roberson*, 251 F.3d at 1384. It is undisputed as a matter of fact that Mr. Sellers fails this test. For that reason, it is appropriate for this court to hold that Mr. Sellers is not entitled to an earlier effective date based on his 1996 formal claim. *See Robinson v. O'Rourke*, 891 F.3d 976, 979 (Fed. Cir. 2018) ("[W]here adoption of a particular legal standard dictates the outcome of a case based on undisputed facts, we may address that issue as a question of law.") (quoting *Kelly v. Nicholson*, 463 F.3d 1349, 1352-53 (Fed. Cir. 2006)); *Reeves v. Shinseki*, 682 F.3d 988, 992 (Fed. Cir. 2012); *Comer v. Peake*, 552 F.3d 1362, 1366 (Fed. Cir. 2009); *Groves v. Peake*, 524 F.3d 1306, 1309-10 (Fed. Cir. 2008) (reversing the Veterans Court and remanding for entry of judgment where application of correct law dictates outcome of a veteran's claim).

## CONCLUSION

Because Mr. Sellers cannot prevail in his request for an earlier effective date for his MDD condition based on his 1996 formal application, we reverse the decision of the Veterans Court in this case, and remand to the Veterans Court for entry of judgment against Mr. Sellers.

**REVERSED AND REMANDED**

## COSTS

The parties shall bear their own costs.

# APPENDIX B

## UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-2993

ROBERT M. SELLERS, APPELLANT,

V.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appeal from the Board of Veterans' Appeals

(Argued May 1, 2018 Decided August 23, 2018)

*Kenneth M. Carpenter* of Topeka, Kansas, with whom *John F. Cameron*, of Montgomery, Alabama, was on the brief for the appellant.

*Nathan Paul Kirschner* and *Carolyn F. Washington*, Deputy Chief Counsel, with whom *James M. Bryne*, General Counsel, and *Mary Ann Flynn*, Chief Counsel, all of Washington, D.C., were on the brief for the appellee.

Before DAVIS, *Chief Judge*, and SCHOELEN and ALLEN, *Judges*.

ALLEN, *Judge*: U.S. Navy veteran Robert M. Sellers suffers from depression. He appeals through counsel an April 29, 2016, Board of Veterans' Appeals (Board) decision denying an effective date earlier than September 18, 2009, for his service-

connected major depressive disorder (MDD) and a higher initial disability rating for MDD.[1] This matter was referred to a panel of the Court, with oral argument, to determine whether a claimant's general statement of intent to seek benefits, combined with in-service medical diagnoses documented in service treatment records, is sufficient to constitute a valid claim for benefits.

We hold that a general statement of intent to seek benefits, coupled with a reasonably identifiable in-service medical diagnosis reflected in service treatment records in VA's possession prior to the RO making a decision on the claim may be sufficient to constitute a claim for benefits. Whether service treatment records reasonably identify a claimed disability is a fact-specific inquiry. That inquiry was not made here. Accordingly, we set aside the Board's decision and remand this matter for further proceedings.

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[1] The Board remanded the issues of increased ratings for spondylolisthesis of the lumbosacral spine, right index and middle finger injuries, and a left knee disability, and service connection for a bilateral ankle disability. Accordingly, these issues are not before the Court. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order). The Board also granted service connection for PTSD and a total disability rating based on individual unemployability. These are favorable factual findings the Court may not disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). Finally, the Board also denied an earlier effective date for the appellant's 40% lumbosacral disability rating. As the appellant presents no argument as to this issue, the Court deems it abandoned. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

## I. FACTS AND PROCEDURAL HISTORY

The appellant served honorably on active duty in the U.S. Navy from April 1964 to February 1969, and in the U.S. Army from January 1981 to February 1996. In November 1993, he was examined by a military psychiatrist to determine fitness for duty. Noting that the appellant had symptoms of depression and "prominent" insomnia for the past 2 to 3 years, Record (R.) at 2930, the psychologist diagnosed dysthymia and concluded that the appellant's psychiatric symptoms were not "severe enough to make him unfit for duty." *Id.*

In April 1995, the appellant's commanding officer recommended that he undergo an involuntary acute emergency mental health evaluation because he threatened to commit suicide and had engaged in other "irrational" behavior. The commanding officer described him as "angry" and a possible threat to himself. R. at 2943. Later that month, the appellant underwent extensive psychological testing. The examiner diagnosed a personality disorder and recommended further examination to rule out dysthymia. R. at 2923. On May 1, 1995, the appellant was admitted to a psychiatric center where he was diagnosed with dysthymia and a personality disorder with obsessive-compulsive traits. R. at 2924.

In March 1996, the appellant filed a formal claim for VA disability benefits, listing various physical injuries as disabilities. He also stated that he had already received in-service treatment for several of those physical injuries. In a section entitled

"Remarks," the appellant wrote: "Request [service connection] for disabilities occurring during active duty service." R. at 2687. This statement plays a major role in this appeal. VA adjudicated the appellant's physical disability claims but did not adjudicate any mental health claims at that time.

In September 2009, the appellant filed an informal claim for service connection for PTSD, which the VA regional office (RO) denied in a March 2011 decision. In May 2011, a VA compensation and pension (C&P) examiner diagnosed the appellant with MDD and PTSD. A VA psychiatrist opined in July 2011 that the appellant's MDD began in service. In a September 2011 decision, the RO then granted service connection for MDD at a 70% rating, effective May 13, 2011. In October 2011, the appellant timely disagreed with both the March and September 2011 decisions and ultimately perfected appeals to the Board. A decision review officer then awarded an earlier effective date for the appellant's MDD, September 3, 2010.

On April 29, 2016, the Board issued a decision awarding the appellant an effective date of September 18, 2009 for MDD and a higher initial rating for MDD. Regarding its assignment of September 18, 2009, as the effective date for MDD, the Board stated:

> [A]n effective date of September 18, 2009, and no earlier, is warranted for the grant of service connection for the Veteran's psychiatric disability (major depressive disorder or MDD). The record shows that VA

received on September 18, 2009, an informal claim for service connection for psychiatric disability, claimed as PTSD. It is noted that, when a claimant makes a claim, he is seeking service connection for symptoms regardless of how those symptoms are diagnosed or labeled.

However, there is no legal basis for the assignment of an effective date earlier than September 18, 2009 for the award for service connection for MDD because the effective date of the award is the date of receipt of the claim or the date entitlement arose, whichever is later. In this case, the later date is September 18, 2009.

The Board observes that VA received no claim (informal or otherwise) for service connection for any psychiatric disability prior to September 19, 2009. Notably, prior to this date, VA had not received any correspondence from the Veteran or a representative since 1996. Also, although the Veteran had filed an original VA compensation claim in April 1971[2] and a claim for benefits in March 1996, these did not include any claim for psychiatric disorder or problems that could be reasonably construed as a claim for service connection for psychiatric disability.

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[2] In June 1971, the appellant was granted service connection for bilateral hearing loss.

R. at 20 (citations omitted). This appeal followed.

## II. ANALYSIS

Generally, the effective date of a claim for benefits is the date VA received the claim or the date on which entitlement arose, whichever is later. *See* 38 U.S.C. § 5110(a). The elements of any claim, formal or informal,[3] are "(1) an intent to apply for benefits, (2) an identification of the benefits sought, and (3) a communication in writing[.]" *Brokowski v. Shinseki*, 23 Vet.App. 79, 84 (2009); *see also MacPhee v. Nicholson*, 459 F.3d 1323, 1325 (Fed. Cir. 2006); *Criswell v. Nicholson*, 20 Vet.App. 501, 504 (2006); *Brannon v. West*, 12 Vet.App. 32, 35 (1998). A veteran's identification of the benefits sought does "not require any technical precision" and VA "must fully and sympathetically develop a veteran's claim to its optimum before reaching the claim on its merits." *Brokowsk*i, 23 Vet.App. at 85; *see also Ingram v. Nicholson*, 21 Vet.App. 232, 256-57 (2007). In *Brokowski*, the Court held that VA "is not required to anticipate a claim for benefits for disabilities *that have not been identified in the record by medical professions* or by competent lay evidence at the time a claimant files a claim or during the claim's development." 23 Vet.App. at 88 (emphasis added). But "the Board is not required to conjure up

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[3] As of September 25, 2015, VA no longer recognizes informal claims. *See* 79 Fed. Reg. 57,660-01 (2015). In their place, VA recognizes "an intent to file a claim," which may be submitted electronically, on a prescribed intent-to-file-a-claim form, or through an oral communication to certain VA employees that is later recorded in writing. 38 C.F.R. §§ 3.155(b)(1)(i)-(iii) (2018).

issues that were not raised by the appellant." *Brannon*, 12 Vet.App. at 35; *see also Criswell*, 20 Vet.App. at 503-04 (same).

### A. March 1996 Claim for Benefits for a Psychiatric Disability

The appellant argues his general statement of an intent to seek "[service connection] for disabilities occurring during active duty service," combined with VA's actual possession of his service treatment records, is sufficient to constitute a valid claim for a psychiatric disability. The Secretary argues in response that the Board properly determined the appellant had not submitted a claim in March 1996 for a psychiatric disability because general statements do not sufficiently "identify the benefit sought" as required under *Brokowski*, 23 Vet.App. at 89.[4]

The Secretary is correct that a general statement of intent to seek benefits for unspecified disabilities standing alone is insufficient to constitute a claim. Yet, the Secretary's argument misses a crucial additional factor present here: evidence of reasonably identifiable in-service diagnoses of psychiatric conditions that predate the appellant's claim were in the possession of the RO before it rendered its rating decision. The disability at issue here was identified in the record by military medical

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[4] There is no dispute that the appellant's statement was in writing and clearly expressed an intent to apply for some benefit. The only dispute is whether this written intent sufficiently identified the benefits he asserts now that he sought in 1996.

professionals well before the appellant filed his March 1996 claim, R. at 777, 2922-43, and the record was in VA's possession at the time of the initial decision, R. at 2667 (July 1996 rating decision listing "[s]ervice medical records for the period [April 17, 1964,] through [January 22, 1969,] and the period [February 20, 1981,] through [February 26, 1996,] as "Evidence"). Further, the appellant's mental health issues were well documented in those records. They reflect that the appellant's mental health was a subject of serious concern while he was in the military as he was twice diagnosed with dysthymia, subjected to extensive psychological testing, evaluated for retention purposes, and involuntarily hospitalized. It is undisputed on appeal to the Court that the appellant was diagnosed in service with a psychiatric condition. But what is not clear is whether that diagnosis was reasonably identifiable by VA adjudicators at the time of his putative formal claim in March 1996 or prior to the RO's deciding the claim. As we explain below, whether an in-service diagnosis in a veteran's service records is reasonably identifiable by VA adjudicators at the time a claimant seeks benefits or prior to the RO's deciding the claim is a factual determination for the Board.

As a general principle, VA may not ignore in-service diagnoses of specific disabilities, even those coupled with a general statement of intent to seek benefits, provided those diagnoses are reasonably identifiable from a review of the record.[5] But, we are

[5] Like the *Brokowski* Court, we do not reach the question whether a general statement of intent to seek benefits, standing alone, is sufficient to trigger the Secretary's statutory

cognizant of the difficulties that VA adjudicators would face when confronted with a general statement of intent to apply for benefits for conditions experienced in service. Service medical records reflecting such conditions could be voluminous and, even if they are not, the records could reflect numerous conditions. The fact finder must determine, based on the totality of the service medical record, both qualitatively and quantitatively, whether the condition at issue would be sufficiently apparent to an adjudicator.

To assist the Board in this endeavor, we provide the following thoughts on the types of factors that may be relevant to the Board's inquiry. These are not the only factors the Board may find helpful as it makes its assessment on this factual question. They are merely illustrations of factors that may be relevant to the Board's assessment. Qualitatively, for example, service medical records might contain many notes of conditions ranging from descriptions of trivial conditions (a hangnail) to full-blown diagnoses of significant illnesses (PTSD). And the record might describe certain conditions in great detail or, in contrast, in only a passing manner. Or, for example, medical records could contain vague complaints of symptoms regarding a condition but no formal diagnosis.

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obligation to notify claimants of the incomplete nature of an application, because the appellant did not argue this theory. *See* 38 U.S.C. § 5102(b) ("If a claimant's application for a benefit … is incomplete, the Secretary shall notify the claimant and the claimant's representative, if any, of the information necessary to complete the application.").

Quantitatively, the sheer volume of medical records may potentially be a factor in determining whether a condition would have been reasonably identifiable to a VA adjudicator. For example, the Board could decide that a single diagnosis reflected in a single page of a 2,000-page service record is not reasonably identifiable. Whether this is the case here is a factual question that the Board must address in the first instance, and the Board must provide support its determination with adequate reasons and bases. *See Washington v. Nicholson*, 19 Vet.App. 362, 367-68 (2005) (explaining that it is the Board's duty, as fact finder, to determine the credibility and weight to be given to the evidence).

Because the Board did not assess whether the medical record is such that the disability in question was reasonably identifiable, it did not appropriately consider this issue and, thus, remand is warranted. On remand the Board must determine whether the appellant's in-service records reflect a reasonably identifiable diagnosis of a psychiatric condition given the nature of the records at issue and, if necessary, reconsider its determination concerning the proper effective date of the appellant's MDD accordingly. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is warranted "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

In sum, we recognize the Court's warning in *Brokowski* that general statements of intent "cannot be used as a pleading device to require the Secretary

to conduct an unguided safari through the record to identify all conditions for which the veteran may possibly be able to assert entitlement to a claim for disability compensation," 23 Vet.App. at 89, and we emphasize that our holding here is a narrow one. Only records containing diagnoses that are reasonably identifiable from a review of the record may otherwise cure an insufficient general statement of intent to seek benefits. To continue *Brokowski*'s metaphor, we caution that VA at most must participate in a fully guided safari.

### B. Higher Initial MDD Rating

The appellant also appeals the Board's denial of a higher initial rating for MDD, raising arguments concerning the Board's discounting of a March 2016 vocational expert opinion and its consideration of 38 C.F.R. § 4.130, Diagnostic Code (DC) 9434. Addressing these arguments would be premature, however, and they are better left to the Board in the first instance. The weight to be accorded to the expert opinions of record might change depending on the DC at issue, and the relevant DC depends on what effective date the Board assigns. The DC in effect at the time of the appellant's March 1996 claim required that a claimant show at least one of three different factors for a 100% rating. *See* 38 C.F.R. § 4.132, DC 9411 (1996). This Court held in *Johnson v. Brown* that each of those factors provided an independent basis for the award of a 100% rating. 7 Vet.App. 95, 97 (1994). Additionally, the Court upheld the Secretary's interpretation of DC 9411 to mean that a claimant who was assigned a 70% rating for a psychiatric disability and who was

unable to work would be entitled to a 100% rating. *Id*. Here, the vocational expert opined that the appellant's "psychological disability alone precludes all competitive employment in the national economy," R. at 89, and that the accommodations his psychological disability requires "preclude competitive work of any kind," R. at 90. These findings appear to fall under at least one of DC 9411's factors as they existed in March 1996. *See* 38 C.F.R. § 4.132, DC 9411 (providing for a 100% rating where a claimant shows he or she "was demonstrably unable to obtain or retain employment"). Alternatively, the appellant might be entitled to a 70% rating under the March 1996 version of DC 9411 but be elevated to a 100% rating under *Johnson*. Either way, these determinations are best left to the Board in the first instance. *See Washington*, 19 Vet.App. at 367-68.

Finally, we caution the Board that it cannot reject a vocational expert's opinion merely because it is not a medical opinion. Vocational experts can be necessary depending on the facts of a particular case. *See Smith v. Shinseki*, 647 F.3d 1380, 1386 (Fed. Cir. 2011). While the Board is entitled to discount or reject the *medical* conclusions of a vocational examiner, it cannot discount the *vocational* conclusions of a vocational examiner simply because he or she is not a medical professional. No law, regulation, or precedent requires that an examination be conducted by an examiner with a particular expertise or specialty. Instead, an examination must be performed by someone with the "education, training, or

experience" necessary to provide an opinion. 38 C.F.R. § 3.159(a)(1).

Thus, because the legal standard the Board may use to analyze the probative value of the vocational opinion may change, the Court holds that the appellant's arguments concerning the March 2016 vocational expert opinion and the correct DC to apply are inextricably intertwined with the issue of an earlier effective date, and the Court and will not address them further. *See Harris v. Derwinski*, 1 Vet.App. 180 (1991).

In pursuing his case on remand, the appellant is free to submit additional evidence and argument, including the arguments raised in his briefs to this Court, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted, *Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the decision," *Fletcher v. Derwinski,* 1 Vet.App. 394, 397 (1991), and the Board must proceed expeditiously, in keeping with 38 U.S.C. §§ 5109B and 7112.

C. Tinnitus Claim

The appellant also argues the Board erred by failing to refer a purportedly pending claim for service connection for tinnitus to an RO for adjudication. He asserts that a May 1996 C&P examiner's note that the appellant reported tinnitus "explicitly raised" a claim for service connection for

that condition. The Secretary argues the Board did not err because no evidence of record reasonably raised such a claim. As the appellant's counsel conceded at oral argument, Oral Argument at 30:05-31:20, *Sellers v. O'Rourke*, U.S. Vet. App. No. 16-2993, (oral argument held May 1, 2018), http://www.uscourts.cavc.gov/oral_arguments_audio.php, this Court lacks jurisdiction to decide this issue because there is no final Board decision on the matter and thus the Court will not consider this issue further. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Jarrell v. Nicholson*, 20 Vet.App. 326, 331 (2006) (en banc) (holding that the Court may exercise its jurisdiction only over claims that are the subject of a final Board decision).

Where a claim is "in an unadjudicated state due to the failure of the Secretary to process" it, the claimant's remedy is "to pursue a resolution of the original claim, e.g., to seek issuance of a final RO decision with proper notification or appellate rights and initiate [a Notice of Disagreement]." *DiCarlo v. Nicholson*, 20 Vet.App. 52, 56 (2006). "If the Secretary fails to process the claim, then the claimant can file a petition with this Court challenging the Secretary's refusal to act." *Id.* at 57 (citing *Costanza v. West*, 12 Vet.App. 133, 134 (1999)).

D. Other Issues Raised at Oral Argument

At oral argument, the appellant's counsel advanced an argument that was not presented in the briefing. In the briefs, the appellant seemed to argue that his March 1996 claim included an informal

claim for MDD. *See, e.g.*, Appellant's Reply Brief at 2-4. But at oral argument, counsel made very clear that he was raising an alternative argument for the first time, Oral Argument at 4:30-4:53, 26:45-27:22, 43:46-43:55, even stating that the arguments made in the briefs concerning informal claims were incorrect, Oral Argument at 38:57-39:20, 41:00-41:16.

The Court generally will not entertain arguments raised by counsel at oral argument for the first time. *See, e.g., McFarlin v. Conseco Servs., L.L.C.*, 381 F.3d 1251, 1263 (11th Cir. 2004) ("A party is not allowed to raise at oral argument a new issue for review."); *Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1332-33 (Fed. Cir. 2001) (finding that "[i]t is well settled that an appellant is not permitted to make new arguments that it did not make in its opening brief" and not addressing arguments presented for the first time at oral argument); *Tarpley v. Greene*, 684 F.3d 1, 7 n.17 (D.C. Cir. 1982) ("Clearly, oral argument on appeal is not the proper time to advance new arguments or legal theories.").

Moreover, "[t]his Court and the U.S. Court of Appeals for the Federal Circuit have repeatedly discouraged parties from raising arguments that were not presented in an initial brief to the Court." *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008); *see also Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999) ("Improper or late presentation of an issue or argument … ordinarily should not be considered."), *aff'd sub nom. Carbino v. Gober*, 10 Vet.App. 507, 511 (1997); *Fugere v. Derwinski*, 1 Vet.App. 103, 105 ("Advancing different arguments at successive

stages of the appellate process does not serve the interests of the parties or the Court. Such a practice hinders the decision-making process and raises the undesirable specter of piecemeal litigation."). "[T]he practice of presenting new issues and arguments during oral argument is even more objectionable." *Norvell*, 22 Vet.App. at 202. Though the Court is aware that the appellant's counsel who presented oral argument was not the same counsel who wrote the briefs, counsel could have alerted the Court and the Secretary's counsel to the new argument. We strongly urge counsel to avoid this approach to oral argument in the future. To be clear, the Court will not consider the arguments the appellant's counsel advanced for the first time at oral argument in his matter.

## III. CONCLUSION

After consideration of the parties' briefs, oral arguments, the record on appeal, and the governing law, the Board's April 29, 2016, decision denying an effective date earlier than September 18, 2009, for the award of service connection for MDD is SET ASIDE and the matter REMANDED for further proceedings consistent with this decision.

## APPENDIX C

**BOARD OF VETERANS' APPEALS**
**DEPARTMENT OF VETERANS AFFAIRS**
**WASHINGTON, DC 20420**

IN THE APPEAL OF ROBERT M. SELLERS — C 25 353 577

DOCKET NO. 14-10 845A ) DATE APR 29 2016
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On appeal from the
Department of Veterans Affairs Regional Office in
Montgomery, Alabama

THE ISSUES

1. Entitlement to an evaluation in excess of 40 percent for spondylolisthesis of the lumbosacral spine.

2. Entitlement to a compensable evaluation for laceration and tendon injury of the index and middle fingers, right (major) hand.

3. Entitlement to an evaluation in excess of 10 percent for left knee disability.

4. Entitlement to an initial evaluation in excess of 70 percent for major depressive disorder (MDD).

5. Entitlement to service connection for post traumatic stress disorder (PTSD).

6. Entitlement to service connection for bilateral ankle disability, to include vascular insufficiency of the lower extremities.

7. Entitlement to a total evaluation based on individual unemployability due to service connected disability (TDIU).

8. Entitlement to an effective date earlier than September 18 2009 for the award of a 40 percent evaluation for lumbosacral spine disability.

9. Entitlement to an effective date earlier than September 3, 2010 for the grant of service connection for major depressive disorder (MDD).

## REPRESENTATION

Appellant represented by: John F. Cameron, Attorney

## ATTORNEY FOR THE BOARD

C.A. Skow, Counsel

## INTRODUCTION

The Veteran served on active duty from April 1964 to February 1968 in the US Navy, and from January 1981 to February 1996 in the US Army.

This case came before the Board of Veterans' Appeals (the Board) on appeal from February 2011, August 2011, and March 2014 rating decisions of the

Department of Veterans Affairs (VA) Regional Offices (RO) in Montgomery, Alabama.

The Board notes that the Veteran's attorney submitted additional argument and evidence following the most recent Statements of the Case (SOC) in these matters without a waiver of consideration by the Agency of Original Jurisdiction (AOJ). These records are duplicative in substance or not relevant to the matters herein adjudicated by the Board, and therefore referral to the AOJ is not required. Additionally, to the extent that VA received additional evidence following the most recent SOC in regards to the earlier effective date claim for lumbosacral spine disability, the Board observes that the substantive appeal to the Board on that issue from the Veteran's attorney was received after February 2, 2013 from the Veteran's attorney and, as such, a waiver of consideration by the originating agency in the first instance is presumed to be given. *See* Third Party Correspondence (April 25, 2014).

The Board further notes that the adjudication of the claims here has been delayed by request of the Veteran's attorney for the submission of additional evidence, to include a 3 month extension requested in December 2015. *See* Third Party Correspondence (February 3, 2016). VA received additional evidence in March 2016 to include web-based occupational information, a private vocational assessment, and Veteran's statement. *See* Third Party Correspondence (March 21, 2016).

The Veteran's claims have been reviewed using the Veterans Benefits Management System (VBMS), VA's electronic system for document record keeping, and relevant documents contained therein are part of the Veteran's electronic claims file.

The following issues are addressed in the REMAND portion of the decision below and are REMANDED to the AOJ: (1) Entitlement to an evaluation in excess of 40 percent for spondylolisthesis of the lumbosacral spine; (2) Entitlement to a compensable evaluation for laceration and tendon injury of the index and middle fingers, right (major) hand; (3) Entitlement to an evaluation in excess of 10 percent for left knee disability; and (4) Entitlement to service connection for bilateral ankle disability, to include vascular insufficiency of the lower extremities.

## FINDINGS OF FACT

1. PTSD is attributable to service.

2. Total occupational and social impairment due to symptoms of major depressive disorder is not shown at any time during this appeal.

3. A formal claim for increase for low back disability was received by VA on September 18, 2009; the RO granted the claim for increase and assigned a 40 percent rating, effective September 18, 2009; VA received no claim (informal or otherwise) for increase in the year prior thereto, and it is not factually ascertainable in the year prior thereto that an increased evaluation was warranted.

4. VA received on September 18, 2009, an informal claim for service connection for psychiatric disability, claimed as PTSD; VA received no claim (informal or otherwise) for service connection for any psychiatric disability prior to this date.

5. The Veteran is unable to engage in substantially gainful employment due to the mental and physical limitations imposed by service-connected disability.

## CONCLUSIONS OF LAW

1. The criteria for service connection for PTSD are met. 38 U.S.C.A. §§1110, 1131, 1154(a), 5107 (West 2014); 38 C.F.R. § 3.304(f) (2015).

2. The criteria for an initial evaluation in excess of 70 percent for major depressive disorder are not met. 38 U.S.C.A. §§ 5107, 1155 (West 2014); 38 C.F.R. §§ 4.7, 4.130, Diagnostic Code 9434 (2015).

3. The criteria for an effective date of earlier than September 18, 2009 for the assignment of a 40 percent disability evaluation for lumbosacral spine disability are not met. 38 U.S.C.A. §§ 5107, 5110 (West 2014); 38 C.F.R. § 3.400 (2015).

4. The criteria for an effective date of September 18, 2009, and no earlier, for the award of service connection for MDD are met. 38 U.S.C.A. §§ 5107, 5110 (West 2014); 38 C.F.R. § 3.400 (2015).

5. The criteria for schedular TDIU are met. 38 U.S.C.A. §§ 1155, 5107(b) (West 2014); 38 C.F.R. §§ 3.340, 3.341, 4.15, 4.16 (2015).

## REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

### *I. PTSD*

Entitlement to service connection for PTSD requires: (1) medical evidence diagnosing the condition in accordance with 38 C.F.R. § 4.125(a); (2) a link, established by medical evidence, between current symptoms and an in-service stressor; and (3) credible supporting evidence that the claimed in-service stressor occurred. 38 C.F.R. § 3.304(f) (2015).

Service connection for PTSD is granted. The Board finds that the record establishes a confirmed diagnosis of PTSD related to military experiences. Report of VA examination dated in July 2011 notes that the Veteran began to have depression following deaths of those he knew in service in the 1960s. The examiner found that the Veteran was traumatized by survivor's guilt. The Board finds that the Veteran's report of trauma from deaths while in service are consistent with the length of his service and circumstances of his service during a period of war. 38 U.S.C.A. § 1154(a) (2015).

### *II. Veterans Claims Assistance Act of 2000*

The Veterans Claims Assistance Act (VCAA), codified in pertinent part at 38 U.S.C.A. §§ 5103, 5103A (West 2014), and the pertinent implementing

regulation, codified at 38 C.F.R. § 3.159 (2015), provide that VA will assist a claimant in obtaining evidence necessary to substantiate a claim but is not required to provide assistance to a claimant if there is no reasonable possibility that such assistance would aid in substantiating the claim. They also require 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 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. Although the regulation previously required VA to request that the claimant provide any evidence in the claimant's possession that pertains to the claim, the regulation has been amended to eliminate that requirement for claims pending before VA on or after May 30, 2008.

The Board also notes the United States Court of Appeals for Veterans Claims (Court) has held the plain language of 38 U.S.C.A. § 5103(a) requires notice to a claimant pursuant to the VCAA be provided "at the time" or "immediately after" VA receives a complete or substantially complete application for VA-administered benefits. *Pelegrini v. Principi*, 18 Vet. App. 112, 119 (2004).

The timing requirement articulated in *Pelegrini* applies equally to the initial-disability-rating and

effective-date elements of a service-connection claim. *Dingess/Hartman v. Nicholson*, 19 Vet. App. 473 (2006).

VA met its duty to notify. VA sent to the Veteran all required notice in October 2009, April 2010, and October 2010 letters, prior to the ratings decision on appeal. Notably, the claim for increase for MDD arises from the Veteran's disagreement with the initial rating assigned following the grant of service connection. *See* Rating Decision (August 2011); Notice of Disagreement (October 2011). In cases where service connection has been granted and an initial rating and effective date have been assigned, the typical service connection claim has been more than substantiated, it has been proven. As a result, no additional 38 U.S.C.A. § 5103(a) notice is required because the purpose that the notice is intended to serve has been fulfilled. *Hartman v. Nicholson*, 483 F.3d 1311 (Fed. Cir. 2007); *Dunlap v. Nicholson*, 21 Vet. App. 112 (2007).

VA also met its duty to assist. VA obtained all relevant medical treatment records identified by the Veteran. These records have been associated with the claims file. VA further afforded the Veteran appropriate VA medical examinations. Neither the Veteran nor his attorney has identified any outstanding evidence that could be obtained to substantiate the Veteran's claim for increase herein addressed; the Board is also unaware of any such evidence.

The evidence currently of record is sufficient to substantiate entitlement to the benefits sought in

regards to the claims for service connection for PTSD, an earlier effective date for the grant of service connection for MDD, and TDIU. As such, no further development is required under 38 U.S.C.A. §§ 5103, 5103A (West 2014) or 38 C.F.R. § 3.159 (2015).

### *III. Initial Evaluation of MDD*

The Veteran seeks an initial evaluation in excess of 70 percent for MOD. It is noted that, in an August 2011 rating decision, the RO granted service connection for MDD at the 70 percent disability level under Diagnostic Code 9434, effective from May 13, 2011. *See* Rating Decision (August 2011). In a March 2014 rating decision, the RO granted an earlier effective for the grant of service connection from September 3, 2010. *See* Rating Decision (March 2014). The Veteran through his attorney appeals the both the disability rating and effective date assigned for MDD. *See* VA Form 9 (April 2014) and VA Form 9 (October 2015).

Except as otherwise provided by law, a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary. The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant. 38 U.S.C.A. § 5107 (West 2014); 38 C.F.R. § 3.102 (2015); s*ee also*

*Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990). To deny a claim on its merits, the evidence must preponderate against the claim. *Alemany v. Brown*, 9 Vet. App. 518, 519 (1996), *citing Gilbert*, 1 Vet. App. at 54.

Although the Board has granted the claim for PTSD, it is noted that there is no prejudice to the Veteran from the Board's consideration of the MDD claim for the following reasons: (1) the general rating formula for mental disorders governs the rating of both PTSD under Diagnostic Code9411 and MDD under Diagnostic Code 9434; (2) the July 2011 VA examination report shows that the Veterans MDD and PTSD symptoms significantly overlap and may not be parsed from each other; (3) the Board has considered all the Veteran's psychiatric symptoms regardless of the diagnosis attached in evaluating his entitlement to an initial evaluation in excess of 70 percent for MDD—there are no manifestations of psychiatric disability left uncompensated; and (4) a veteran may not be compensated twice for the same symptomatology as this would result in pyramiding, contrary to the provisions of 38 C.F.R. § 4.14.

Legal Criteria

Disability evaluations are determined by the application of the VA Schedule for Rating Disabilities (Rating Schedule). 38 C.F.R. Part 4. The percentage ratings contained in the Rating Schedule represent, as far as can be practicably determined, the average impairment in earning capacity resulting from diseases and injuries incurred or aggravated during military service and their

residual conditions in civil occupations. 38 U.S.C.A. § 1155; 38 C.F.R. § 4.1. If two evaluations are potentially applicable, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that evaluation; otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7.

In general, all disabilities, including those arising from a single disease entity, are rated separately, and all disability ratings are then combined in accordance with 38 C.F.R. § 4.25. However, the evaluation of the same "disability" or the same "manifestations" under various diagnoses is prohibited. 38 C.F.R. § 4.14.

A disability may require re-evaluation in accordance with changes in a veteran's condition. It is thus essential, in determining the level of current impairment, that the disability be considered in the context of the entire recorded history. 38 C.F.R. § 4.1.

MDD is evaluated pursuant to 38 C.F.R. § 4.130, Diagnostic Code 9434, which provides for a 70 percent rating is warranted for occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; 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); inability to establish and maintain effective relationships. 38 C.F.R. § 4.130, Diagnostic Code 9434.

A 100 percent evaluation is indicated where there is 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 of others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name. 38 C.F.R. § 4.130, Diagnostic Code 9434.

When evaluating a mental disorder, the rating agency shall consider the frequency, severity, and duration of psychiatric symptoms, the length of remissions, and the veteran's capacity for adjustment during periods of remission. An evaluation is based on all the evidence of record that bears on occupational and social impairment, rather than solely on the examiner's assessment of the level of disability at the moment of the examination. When evaluating the level of disability from a mental disorder, the rating agency will consider the extent of social impairment, but shall not assign an evaluation solely on the basis of social impairment. 38 C.F.R. § 4.126. The rating formula is not intended to constitute an exhaustive list, but rather is

intended to provide examples of the type and degree of the symptoms, or their effects, that would justify a particular rating. *Mauerhan v. Principi*, 16 Vet. App. 436 (2002). Accordingly, the evidence considered in determining the level of impairment under § 4.130 is not restricted to the symptoms provided in the Diagnostic Code. Instead, VA must consider all symptoms of a Veteran's condition that affect the level of occupational and social impairment, and assign an evaluation based on the overall disability picture presented. However, the impairment does need to cause such impairment in most of the areas referenced at any given disability level. *Vazquez-Claudio v. Shinseki*, 713 F. 3d. 112 (Fed. Cir. 2013).

The Board is required to analyze the credibility and probative value of the evidence, account for any evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *See Daye v. Nicholson*, 20 Vet. App. 512, 516 (2006). It is noted that competency of evidence differs from weight and credibility. The former is a legal concept determining whether testimony may be heard and considered by the trier of fact, while the latter is a factual determination going to the probative value of the evidence to be made after the evidence has been admitted. *Rucker v. Brown*, 10 Vet. App. 67, 74 (1997); *Layno v. Brown*, 6 Vet. App. 465, 469 (1994); s*ee also Cartright v. Derwinski*, 2 Vet. App. 24, 25 (1991) ("although interest may affect the credibility of testimony, it does not affect competency to testify"). In determining whether statements are credible, the Board may consider internal consistency, facial plausibility, and consistency with

other evidence submitted on behalf of the claimant. *Caluza v. Brown*, 7 Vet. App. 498 (1995).

Facts and Analysis

Having carefully reviewed the evidence of record, the Board finds that the preponderance of the evidence is against an initial evaluation in excess of 70 percent for MDD. Neither the lay nor the medical evidence more nearly reflect the frequency, severity or duration of symptoms contemplated by the next higher evaluation—that is, total occupational and social impairment due to MDD symptoms. 38 C.F.R. §§ 4.7, 4.130, Diagnostic Code 9434 (2015).

VA treatment records reflect that symptoms of depression were noted in 2008. Treatment noted dated in 2009 and 2010 reflect GAF scores from 55 to 65. A January 2009 note reflects that the Veteran enjoys and spends time fishing and hunting, and he reported a good relationship with his son. In October 2009, the Veteran reported marital conflict and self-employment; mildly anxious mood was noted. A depression screen disclosed anhedonia, depression, sleep impairment, poor energy/fatigue, poor appetite or overeating, and concentration trouble. In December 2009, the Veteran denied suicidal/homicidal ideation. His spouse reported that the Veteran's outbursts "are a little better," only 2 since his last visit. The Veteran reported daytime fatigue, snoring. Objectively, mood was mildly anxious and fatigued. Affect was congruent. He was fully oriented with no impairment of attention, concentration, memory, insight, or judgment. The Veteran denied suicidal/homicidal thoughts.

Depression screening showed little interest or pleasure in doing things, nearly every day, and feeling down, depressed or hopeless nearly every day.

A 2010 VA treatment note reflects that the Veteran reported "feeling very depressed" and suicidal thoughts due to severe musculoskeletal pain. He stated "I have a plan" described as "getting in my canoe going down the river [and] putting the gun in my mouth and pulling the trigger." He further reported poor sleep, stating "I can't sleep at night but 2 hours a night" because has nightmares related to his military experiences in Special Forces. VA treatment records dated in 2011 note that the Veteran participated in anger management therapy and PTSD group therapy.

Report of VA examination dated in May 2011 reflects, by history, long standing depressive disorder. The Veteran reported using anti-depressant medication (Paroxetine, Mirtazapine, and Prazosin) since May 2011 that causes him drowsiness and dizziness. He denied group therapy. Objectively, the Veteran was clean, neatly groomed, and with unremarkable psychomotor activity. Speech was moderately forceful. Attitude was cooperative and friendly. Affect was constricted. Mood was dysphoric (mildly angry). Attention and orientation were intact. There was no impairment of thought process or thought content. There were no delusions/hallucinations. The Veteran reported an average of 2 hours sleep a night, disrupted by nightmares related to his going days without sleep during Special Forces training and operations. The

Veteran had no panic attacks. He had homicidal thoughts, but indicated he would not act unless he was terminally ill. He denied suicidal thoughts. Impulse control was fair without episodes of violence.

Memory was normal. The Veteran reported that he was retired as a laborer, grass cutter. The diagnoses were MDD, recurrent, moderate, and PTSD. A GAF score of 49 (over past 2 years) was assigned. The examiner stated that the Veteran does not have total social and occupational impairment due to mental disorder signs and symptoms. The examiner noted that the Veteran had strong opinions about right and wrong, and these opinions "seem to result in Vet having some social difficulty" and difficulty getting along with others in the workplace. The examiner found "reduced reliability and productivity due to mental disorder symptoms" and elaborated as follows:

> [The Veteran] may have difficulty in getting along with a boss who is other than supportive and kind. Vet describes himself as getting very little sleep and this seems to result in considerable irritability. Finally the cognitive effects of the significant physical pain he seems to be in right now would significantly reduce his concentration.

Report of VA examination dated in July 2011 reflects a comprehensive review of the Veteran's background and pertinent medical records. The examiner found that the Veteran did not have total occupational and social impairment due to mental disorder signs and

symptoms. The examiner found that that the Veteran had occupational and social impairment with deficiencies in most areas, such as work, judgement, thinking, family relations and mood. The Beck Depression Inventory II was administered, which showed symptoms of severe depression with symptoms of moderate agitation, marked irritability, marked anhedonia, moderate indecisiveness, moderately reduced energy level, and moderately reduced libido. The examiner further noted that there were symptoms of difficulties concentrating, impaired sleep (only sleeping 1-2 hours of sleep a day and "visions" of guys that died if goes into a deep sleep), and difficulties coping with others. The Veteran reported suicidal thoughts without intent ("I have thoughts of killing myself, but I would not carry them out."). The Veteran denied any plan to harm himself. He had no homicidal thoughts. The Veteran reported that he drives with difficulty due to physical medical problems, and that his wife usually makes his medical appointments. Speech and mood were described as "within normal limits." Affect and memory (remote, recent and immediate) were described as normal. Attention was intact. Attitude was cooperative. The Veteran reported that he had poor impulse control but denied episodes of violence, stating that "I just curse and fly off the handle." There was no impairment of orientation to person, place or time. Also, there was no impairment of thought content or process, insight, or judgement. The Veteran denied panic attacks or obsessive/compulsive behavior. There was no impairment in the Veteran's ability to perform the

activities of daily living. By history, the Veteran had quit his lawn business in 2009.

Subsequently dated VA treatment records show ongoing group therapy for the Veteran's psychiatric problems. A September 2011 note reflects that the Veteran was tired, irritable, and had homicidal thoughts to be executed only if he had terminal illness. The examiner sought to have the Veteran seen by a psychiatrist or hospitalized, but the Veteran declined both meeting with a psychiatrist and hospitalization, and he further questioned the use of therapy. The examiner commented that the Veteran demonstrated a "willingness to nurture his anger and attitude which makes change difficulty." VA treatment records also show a diagnosis for obstructive sleep apnea interfering with sleep.

The Board finds that "total occupational and social impairment" due to MDD symptoms is not more nearly approximated by the evidence of record. Although the record shows that the Veteran's symptoms would make it difficult to adapt to a work-like setting due to disturbances of mood and motivation, anger issues, as well as fatigue and decreased concentration related to poor sleep and nightmares, total occupational impairment is not shown. Although the Veteran has expressed suicidal and homicidal thoughts, the record does not establish that he is a persistent danger to himself or others, particularly since the Veteran consistently has made such execution of plans contingent on other events or factors. Additionally, neither the lay nor the medical evidence shows total social impairment. The Veteran has been married

throughout this appeal. Although marital conflict was noted, the record shows that the Veteran and his spouse have a supportive relationship as demonstrated by his report that his spouse schedules his medical appointments and records showing that she accompanied him on medical visits. The record shows that the Veteran and his spouse live together along with their son, and that the Veteran reported a good relationship with his son. There is no indication that the Veteran's relationship with his son has changed. The record shows that the Veteran attends his doctor visits, and has participated in group therapy sessions for his psychiatric symptom during this appeal. To the extent that the Veteran experiences near-continuous depression, this has not resulted in any inability to functioning independently, appropriately, and effectively. Although the record shows some impaired impulse control and anger issues, the Veteran has consistently denied episodes of violence.

The Board has considered the Veteran's GAF score, which is indicative of serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifter) or any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job). *See Richard v. Brown*, 9 Vet. App. 266, 267 (1996), *citing* the Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) (DSM-IV). However, the medical professionals examining the Veteran clearly indicated that the Veteran did not have total occupational and social impairment due to his symptoms.

The Board believes that the Veteran's symptomatology more nearly reflects the criteria for a 70 percent disability evaluation. For example, he has disturbances of mood and motivation to include feelings of depression, anxiety, and suicidal thoughts, but these symptoms have not been so frequent or severe to keep him from attending medical appointments, group therapy, and maintaining his marriage albeit with difficulty. He had no panic attacks. He had suicidal and homicidal thoughts but neither his statements nor the medical findings reflect that he is a persistent danger to himself or others. He has not tried to kill himself since 1994 during service, and he declined psychiatric help for his suicidal and homicidal thoughts. The record shows that the Veteran is able to attend to the activities of daily living to include the maintenance of minimal personal hygiene. Additionally, although he experiences chronic sleep impairment, there is no memory loss, difficulty in understanding complex commands, or impaired judgment or insight shown. The Veteran is not without friends. He reported on VA examination in 2011 that his friends were limited to his brothers, his son, and "guess my grandkids." The Veteran's constellation of symptoms is more consistent with the criteria for a 70 percent rating based on deficiencies in most areas, and does not more nearly reflect total occupational and social impairment.

The Board has considered the vocational assessment dated in March 2016, which reflects that the Veteran is precluded from work by his service-connected major depression alone. However, the vocational expert does not acknowledge any level of social

impairment, much less total social impairment, that would support a higher schedular disability rating for MDD. Also, his statement of total disability is incongruous with his acknowledgement that the symptoms cause diminished ability to function independently without any discussion thereof. The Board finds that his medical conclusions are of diminished probative value as he not a medical professional and his findings are incongruous with his discussion of the Veteran's symptoms.

As finder of fact, it is within the Board's province to determine the probative weight of evidence. *Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed.Cir.2006). The Veteran's statements along with the VA examination findings in 2011 are highly probative in this matter. Here, the evidence more nearly reflect the criteria for the currently assigned 70 percent evaluation, and do not more nearly reflect the criteria for the next higher rating, 100 percent, based on total occupational and social impairment. Notably, the Veteran's private attorney has not made any specific argument as to how the Veteran meets the criteria for increase or presented a favorable medical opinion in this matter.

Weighing the evidence of record, the Board finds that the Veteran's MDD symptomatology more closely approximates the schedular criteria for a 70 percent rating. Furthermore, the Board finds that a uniform 70 percent evaluation is warranted; the criteria for a higher evaluation are not met at any time during this appeal. *Fenderson v. West*, 12 Vet. App. 119, 126 (2001). *See also Hart v. Mansfield*, 21 Vet. App. 505 (2007) (staged ratings are appropriate

when the factual findings show distinct period where the service-connected disability exhibits symptoms that would warrant different ratings).

Accordingly, the claim for a higher initial evaluation is denied. As the evidence is not in equipoise, there is no doubt to resolve. 38 U.S.C.A. § 5107(b); *Gilbert, supra.*

### *IV. Effective Dates of Claims*

The law specifies that, unless otherwise provided, the effective date of an award of compensation based on an original application shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of the application therefor. 38 U.S.C.A. § 5110(a) (West 2014); 38 C.F.R. § 3.400 (2015). The Board notes that the effective date of an award of increased compensation may, however, be established at the earliest date as of which it is factually ascertainable that an increase in disability had occurred, if the application for an increased evaluation is received within one year after that date. 38 U.S.C.A. § 5110(b) (2); 38 C.F.R. § 3.400(o)(2).

In addition, the Court has held it is axiomatic that, in the latter circumstance above, the service-connected disability must have increased in severity to a degree warranting an increase in compensation. *See Hazan v. Gober*, 10 Vet. App. 511, 519 (1992) (noting that, under section 5110(b) (2) which provides that the effective date of an award of increased compensation shall be the earliest date of which it is ascertainable that an increase in

disability had occurred, "the only cognizable 'increase' for this purpose is one to the next disability level" provided by law for the particular disability). Thus, determining whether an effective date assigned for an increased rating is correct or proper under the law requires (1) a determination of the date of the receipt of the claim for the increased rating as well as (2) a review of all the evidence of record to determine when an increase in disability was "ascertainable." *Id*. at 521.

A claim is a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement to a benefit. 38 U.S.C.A. § 101(30); 38 C.F.R. § 3.l(p).

The date of receipt shall be the date on which a claim, information or evidence was received by VA. 38 U.S.C.A. § 101(30); 38 C.F.R. § 3.l(r). Any communication or action, indicating intent to apply for one or more benefits under the laws administered by VA, from a claimant, his or her duly authorized representative, a Member of Congress, or some person acting as next friend of a claimant who is not *sui juris* may be considered an informal claim. Such informal claims must identify the benefit sought. 38 C.F.R. § 3.155.

Under 38 C.F.R. § 3.157, a report of examination or hospitalization will be accepted as an informal claim for benefits. However the provisions of 38 C.F.R. § 3.157(b)(1) state that such reports must relate to examination or treatment of a disability for which service-connection has previously been established or that the claim specifying the benefit sought is

received within one year from the date of such examination, treatment, or hospital admission. 38 C.F.R. § 3.157(b)(1).

A. Lumbosacral Spine Disability

Having carefully reviewed the record, the Board finds that an effective date earlier than September 18 2009 for the award of a 40 percent evaluation for lumbosacral spine disability is not warranted.

On September 18, 2009, the Veteran called the RO and requested to file a claim for increase for his low back. *See* VA Form 119 (October 5, 2009). This phone call was documented on VA Form 119 and accepted as an informal claim for increase. Prior to September 18, 2009, VA had received no claim (informal or otherwise) for increase, and it is not factually ascertainable in the year period prior to September 18, 2009 that an increased evaluation was warranted. All the evidence of record has been reviewed to determine whether an increase in disability was "ascertainable." However, although the record shows complaints of severe low back pain and findings for multi-level degenerative disk disease during the year preceding the date of the formal claim, the record does not include either complaints or medical findings that make it "factually ascertainable" that the Veteran met the scheduler criteria for an increased rating at any time during the one-year period prior to September 18, 2009. To the extent that the Veteran reports or suggests that he did in fact meet the criteria for increase during the year preceding his formal claim in September 2009, the Board finds that his generic

report has diminished probative value as he had not reported nor did the medical evidence show that forward flexion limited to 30 degrees or less, or favorable ankylosis of the thoracolumbar spine. Thus, while the Veteran is competent to report his symptoms, *Layno*, *supra*, the Board finds that his statements have diminished probative value as they are vague and non-specific, and not bolstered by the medical evidence during the year prior to his September 2009 claim for increase.

The Board observes that neither the Veteran nor his attorney has pointed to any particular VA treatment record or other document as evidence showing that entitlement to an increase was factually ascertainable at an earlier date. The Board further observes that, following VA' s notification of the grant of service connection for the low back in July 1996, the RO had not received any correspondence or other contact from the Veteran prior to September 18, 2009. The Board accepts that the Veteran had worsened symptoms prior to his phone call to the RO in September 2009 requesting an increase. However, it is not factually ascertainable that he met the criteria for a higher evaluation at the time of the phone call in September 2009 or the year prior thereto.

Accordingly, the claim is denied. Because the evidence is not roughly in equipoise, the benefit-of-the-doubt does not apply. 38 U.S.C.A. § 5107; 38 C.F.R. § 3.102; and *Gilbert supra.*

B. MDD

Having carefully reviewed the record, the Board finds that an effective date of September 18, 2009, and no earlier, is warranted for the grant of service connection for the Veteran's psychiatric disability (major depressive disorder or MDD). The record shows that VA received on September 18, 2009, an informal claim for service connection for psychiatric disability, claimed as PTSD. *See* VA Form 119 (September 18, 2009). It is noted that, when a claimant makes a claim, he is seeking service connection for symptoms regardless of how those symptoms are diagnosed or labeled. *Clemons v. Shinseki*, 23 Vet. App. 1 (2009).

However, there is no legal basis for the assignment of an effective date earlier than September 18, 2009 for the award for service connection for MDD because the effective of the award is the date of receipt of the claim or the date entitlement arose, whichever is later. 38 C.F.R. § 3.400. In this case, the later date is September 18, 2009.

The Board observes that VA received no claim (informal or otherwise) for service connection for any psychiatric disability prior to September 19, 2009. Notably, prior to this date, VA had not received any correspondence from the Veteran or a representative since 1996. Also, although the Veteran had filed an original VA compensation claim in April 1971 and a claim for benefits in March 1996, these did not include any claim for psychiatric disorder or problems that could be reasonably construed as a claim for service connection for psychiatric disability.

Accordingly, the claim for an effective date of September 18, 2009, and no earlier, for the award for service connection for MDD is granted.

*V. TDIU*

The Board has considered all the evidence of record, to include the March 2015 private vocational assessment.

TDIU is granted. Where the schedular rating is less than total, a total disability rating for compensation purposes may be assigned when the disabled person is unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities, provided that, if there is only one such disability, this disability shall be ratable at 60 percent or more, or if there are two or more disabilities, there shall be at least one ratable at 40 percent or more, and sufficient additional disability to bring the combined rating to 70 percent or more. 38 C.F.R. §§ 3.340, 3.341, 4.16(a) (2015).

Here, the Veteran meets the numeric evaluation for TDIU and the record shows that he has mental and physical impairment due to service-connected disability that precludes gainful employment, resolving all doubt in favor of the Veteran. Notably, the Veteran has a 70 percent evaluation for MDD and a 40 percent evaluation for lumbosacral spine disability along with other disabilities rated at 10 percent or less; his combined disability evaluation is 80 percent.

The evidence establishes that the Veteran is unable to engage in substantially gainful employment due to the mental and physical limitations imposed by service-connected disability.

## ORDER

Service connection for PTSD is granted.

An initial evaluation in excess of 70 percent for MDD is denied.

An effective date earlier than September 18, 2009 for the award of a 40 percent evaluation for lumbosacral spine disability is denied.

An effective date of September 18, 2009, and no earlier, for the award of service connection for MDD is granted.

TDIU is granted.

## REMAND

After careful review of the record, the Board finds that further development is required. VA's duty to assist requires that VA obtain a medical examination when necessary to decide the claim. 38 C.F.R. § 3.159(c)(4).

A. Claims for Increase: Low Back, Fingers of Right Hand, and Left Knee

Where the evidence of record does not reflect the current state of the disability, a VA examination must be conducted. *Schafrath v. Derwinski*, 1 Vet. App. 589, 592 (1991). Also, reexamination will be requested whenever there is a need to verify either the continued existence or the current severity of a disability. 38 C.F.R. § 3.327(a).

In this case, the Board finds that reports of VA examination dated in June 2010 of the right hand's fingers, left knee, and spine are inadequate for rating purposes.

Report of VA examination of the "Hand, Fingers, and Thumb" does not fully address the Veteran's functional impairment, if any, due to pain, incoordination, weakness, fatigue, or lack of endurance with repetitive motion. It is noted that the Veteran reported symptoms of weakness and "stinging of the fingers," but the examiner did not address whether there was any residual muscle injury or neurological impairment related to his disability or the underlying injury.

Report of VA examination of the knee dated in June 2010 reflects that the Veteran had arthroscopic surgery on the left knee in the early 1990's. The Veteran complained of left knee giving way, instability, pain, stiffness, decreased speed of joint motion, locking episodes (1-3 times a month), and impaired range of motion. The Veteran reported that he was unable to walk more than a few yards, and

he intermittent but frequently used a walker. Objective examination of the Veteran failed to address whether there was joint laxity with recurrent subluxation or lateral instability of the left knee joint; and whether the Veteran had "frequent episodes of 'locking,' pain and effusion into the joint." Also, the examiner failed to address whether there was functional impairment due to pain, incoordination, weakness, fatigue, or lack of endurance with repetitive motion.

Report of VA examination of the spine dated in June 2010 reflects that the Veteran complained of numbness and paresthesias, and symptoms of pain radiating down both legs—described as stinging and burning. It was noted that an April 2009 MRI showed severe back pain with radiculopathy due to degenerative disk disease with virtually every lumbar segment affected to some degree. It was further noted that an EMG/NCS, no date given, was negative for radiculopathy and peripheral neuropathy of the left or right lower extremities. The examiner did not address the Veteran's functional impairment, if any, due to pain, incoordination, weakness, fatigue, or lack of endurance with repetitive motion. Also, the examiner did not address the etiology of the Veteran's lower extremity complaints. Notably, a private neurology treatment record dated in February 2010 shows an assessment for lumbar radiculopathy—noting diffuse weakness of lower extremities, hypoesthesia to pinprick, and absent knee/ankle jerks bilaterally.

Additionally, in April 2015, the Veteran's attorney submitted additional pertinent private medical

records concerning the spine and left knee without waiving consideration by the AOJ.

Therefore, in regard to the low back, right hand fingers, and left knee, remand for new VA examinations is necessary to fully address all symptoms and provide detailed clinical findings for consideration in the context of the schedular criteria.

B. Service Connection for Bilateral Ankle Disability

The Veteran seeks service-connected for right and left ankle disabilities. He reported symptoms of swelling. He suggested that this is attributable to service, specifically his parachuting activities. Also, in April 2015, the Veteran's attorney submitted a November 2011 letter indicating that the Veteran had moderate venous insufficiency of the lower extremities. Therefore, because the VA examination dated in June 2011 did not take into account the Veteran's venous insufficiency and recognizing that claimants are actually seeking consideration of all symptoms reasonably encompassed by the claim, remand is necessary for a new VA examination addressing the etiology of the Veteran's ankle swelling and lower extremity vascular insufficiency, to include an opinion on whether it is etiology related to service or secondary to service-connected disability.

Accordingly, the case is REMANDED for the following action:

1. All updated pertinent treatment records should be requested and associated with the claims file.

2. The Veteran should be scheduled for a VA examination of the "Hand, Fingers, and Thumb" to ascertain the severity of service-connected residuals of laceration and tendon injury to the index and middle fingers of the right (major) hand. All symptoms and clinical findings should be reported in detail, to include complaints or findings pertaining to muscle and neurological involvement, if any. The examiner should address whether the Veteran has functional impairment due to pain, incoordination, weakness, fatigue, or lack of endurance with repetitive motion. It is noted that the Veteran reported symptoms of weakness and "stinging of the fingers" on VA examination in June 2010. The examiner should address whether there is muscle impairment or neurological abnormality that is as likely as not (50 percent or greater probability) related to the Veteran's service-connected right index and middle fingers disability or the underlying injury. It is noted that "cardinal signs and symptoms" of muscle disability are loss of power, weakness, lowered threshold of fatigue, fatigue-pain, impairment of coordination and uncertainty of movement. All pertinent evidence in the Veteran's claims file should be reviewed. A complete rational for all opinions is required.

3. The Veteran should be scheduled for a VA examination to ascertain the severity of service-connected left knee disability. All appropriate tests deemed necessary should be conducted and all clinical findings should be reported in detail. Range of motion testing should be recorded to include the point at which pain begins and ends. Three repetitions of use should be conducted, if possible, to determine whether there is additional loss of motion, or increased pain, fatigue, weakness, lack of endurance, or incoordination. The examiner should indicate the severity of any subluxation or lateral instability found to include whether the Veteran uses any appliances or devices. The examiner should further indicate whether the Veteran has "frequent episodes of 'locking,' pain and effusion into the joint." All pertinent evidence in the Veteran's claims file should be reviewed. A complete rationale for all opinions is required.

4. The Veteran should be scheduled for a VA examination to ascertain the severity of service-connected lumbosacral spine disability to include whether there is any associated neurological abnormality of the lower extremities. All appropriate tests deemed necessary should be conducted and all clinical findings should be reported in detail. Range of motion testing should be recorded to include the point at which pain begins and ends. Three repetitions of use should be conducted, if possible, to determine

whether there is additional loss of motion, or increased pain, fatigue, weakness, lack of endurance, or incoordination. The examiner should indicate whether the Veteran has "unfavorable ankylosis of the entire thoracolumbar spine" and, if so, the date of this is objectively shown. The examiner should indicate whether the Veteran has any neurological abnormality of the lower extremities associated with his service-connected spondylolisthesis of the lumbosacral spine—and if so, type nerve group(s) involved and severity. All pertinent evidence in the Veteran's claims file should be reviewed. A complete rationale for all opinions is required.

5. The Veteran should be scheduled for a VA examination of the ankles by an appropriately skilled physician to address the etiology of his complaints of swelling and the documented findings for vascular insufficiency. Also, for each ankle/lower extremity, the physician should indicate:

(a) Whether it is as likely as not (50 percent probability or more) that any currently shown disorder is etiologically related to service, to include the Veteran's history of parachute jumps; and

(b) Whether it is as likely as not (50 percent probability or more) that any currently shown disorder is proximately due to or aggravated by service-connected disability.

Aggravation is defined as a permanent worsening of the nonservice-connected disability beyond that due to the natural disease process as contrasted to temporary or intermittent flare-ups of symptomatology which resolve with return to the baseline level of disability.

All pertinent evidence in the claims file must be reviewed by the physician. A complete rationale for all opinions is required. The physician should identify and explain the relevance or significance, as appropriate, of any history, clinical findings, medical knowledge or literature, etc., relied upon in reaching the conclusions. If an opinion cannot be expressed without resort to speculation, the examiner should so indicate and discuss why an opinion is not possible, to include whether there is additional evidence that could enable an opinion to be provided, or whether the inability to provide the opinion is based on the limits of medical knowledge.

6. Then, the AOJ should ensure that the requested examinations contained all information sought and that all opinions include complete rationales. The AOJ should undertake any other development it determines to be warranted.

7. After the development requested above has been completed to the extent possible, the AOJ should readjudicate the issues on

> appeal. If the benefits sought on appeal are not granted to the Veteran's satisfaction, he and his attorney should be furnished a Supplemental Statement of the Case and given the requisite opportunity to respond before the claims files are returned to the Board for further appellate action.

The Veteran has the right to submit additional evidence and argument on the matter or 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).

/s/ Michael Lane

MICHAEL LANE

Veterans Law Judge, Board of Veterans' Appeals

## APPENDIX D

NOTE: This order is nonprecedential.

**United States Court of Appeals for the Federal Circuit**

---

**ROBERT M. SELLERS**,
*Claimant-Appellee*

**v.**

**ROBERT L. WILKIE, SECRETARY OF VETERANS AFFAIRS,**
*Respondent-Appellant*

---

2019-1769

---

Appeal from the United States Court of Appeals for Veterans Claims in No. 16-2993, Judge Mary J. Schoelen, Judge Michael P. Allen, Senior Judge Robert N. Davis.

---

**ON PETITION FOR REHEARING EN BANC**

---

Before PROST, *Chief Judge*, NEWMAN, LOURIE, CLEVENGER[*], DYK, MOORE, O'MALLEY, REYNA,

---

[*] Circuit Judge Clevenger participated only in the decision on the petition for panel rehearing.

WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

PER CURIAM.

**ORDER**

Appellee Robert M. Sellers filed a petition for rehearing en banc. The petition was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on October 8, 2020.

FOR THE COURT

October 1, 2020
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

## APPENDIX E

*Designated for electronic publication only*

## UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-2993

ROBERT M. SELLERS, APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before DAVIS, *Chief Judge*, and SCHOELEN, PIETSCH, BARTLEY, GREENBERG, ALLEN, MEREDITH, TOTH, and FALVEY, *Judges*.

## ORDER

*Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.*

On November 20, 2018, the Court denied the Secretary's motion for panel reconsideration. The Court noted that the motion for full-Court review was held in abeyance pending further order of the Court.

"Motions for full-Court review are not favored. Ordinarily they will not be granted unless such action is necessary to secure or maintain uniformity of the Court's decisions or to resolve a question of exceptional importance." U.S. VET. APP. R. 35(c). In

this matter, the Secretary has not shown that either basis exists to warrant full-Court review.

Upon consideration of the foregoing, it is

ORDERED that the motion for full-Court review is denied.

DATED: January 30, 2019 PER CURIAM.

Copies to:

John F. Cameron, Esq.

VA General Counsel (027)

## APPENDIX F

*Not published*
*NON-PRECEDENTIAL*

**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

NO. 16-2993

ROBERT M. SELLERS, APPELLANT,

V.

ROBERT L. WILKIE,
SECRETARY OF VETERANS
AFFAIRS, APPELLEE.

Before DAVIS, *Chief Judge*, and SCHOELEN and ALLEN, *Judges*.

**ORDER**

*Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.*

On August 23, 2018, in a panel decision, the Court set aside the April 29, 2016, Board of Veterans' Appeals (Board) decision that, among other things, denied an effective date earlier than September 18, 2009, for the service-connected major depressive disorder. On September 13, 2018, the Secretary filed a timely motion for reconsideration and/or for full-Court review. "[A] motion for … panel [reconsideration] … shall state the points of law or

fact that the party believes the Court has overlooked or misunderstood." U.S. VET. APP. R. 35(e)(1). The Court did not overlook or misunderstand any points of law or fact that was properly before it. The Secretary has not presented any argument that warrants reconsideration by the panel.

Upon consideration of the foregoing, it is

ORDERED that the motion for reconsideration by the panel is denied. It is further

ORDERED that the motion for full-Court consideration is held in abeyance pending further order of the Court.

DATED: November 20, 2018 PER CURIAM.

Copies to:

John F. Cameron, Esq.

VA General Counsel (027)

## APPENDIX G

*Not Published*

## UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO: 16-2993

ROBERT M. SELLERS, APPELLANT,

V.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

## JUDGMENT

The Court has issued a decision in this case, and has acted on a motion under Rule 35 of the Court's Rules of Practice and Procedure.

Under Rule 36, judgment is entered and effective this date.

Dated: January 30, 2019

FOR THE COURT:

GREGORY O. BLOCK
Clerk of the Court

By: /s/ Abie M. Ngala
Deputy Clerk

Copies to:

John F. Cameron, Esq.

VA General Counsel (027)

## APPENDIX H

United States Code
Title 38. Veterans' Benefits

38 U.S.C. § 1110 (1996)

### § 1110. Basic entitlement

For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

# APPENDIX I

United States Code
Title 38. Veterans' Benefits

38 U.S.C. § 5101 (1996)

## § 5101. Claims and forms

(a) A specific claim in the form prescribed by the Secretary (or jointly with the Secretary of Health and Human Services, as prescribed by section 5105 of this title) must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary.

(b)

(1) A claim by a surviving spouse or child for compensation or dependency and indemnity compensation shall also be considered to be a claim for death pension and accrued benefits, and a claim by a surviving spouse or child for death pension shall be considered to be a claim for death compensation (or dependency and indemnity compensation) and accrued benefits.

(2) A claim by a parent for compensation or dependency and indemnity compensation shall also be considered to be a claim for accrued benefits.

(c)

(1) Any person who applies for or is in receipt of any compensation or pension benefit under laws administered by the Secretary shall, if requested

by the Secretary, furnish the Secretary with the social security number of such person and the social security number of any dependent or beneficiary on whose behalf, or based upon whom, such person applies for or is in receipt of such benefit. A person is not required to furnish the Secretary with a social security number for any person to whom a social security number has not been assigned.

(2) The Secretary shall deny the application of or terminate the payment of compensation or pension to a person who fails to furnish the Secretary with a social security number required to be furnished pursuant to paragraph (1) of this subsection. The Secretary may thereafter reconsider the application or reinstate payment of compensation or pension, as the case may be, if such person furnishes the Secretary with such social security number.

(3) The costs of administering this subsection shall be paid for from amounts available to the Department of Veterans Affairs for the payment of compensation and pension.

## APPENDIX J

United States Code
Title 38. Veterans' Benefits

38 U.S.C. § 5107 (1996)

### § 5107. Burden of proof; benefit of the doubt

(a) Except when otherwise provided by the Secretary in accordance with the provisions of this title, a person who submits a claim for benefits under a law administered by the Secretary shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Secretary shall assist such a claimant in developing the facts pertinent to the claim. Such assistance shall include requesting information as described in section 5106 of this title.

(b) When, after consideration of all evidence and material of record in a case before the Department with respect to benefits under laws administered by the Secretary, there is an approximate balance of positive and negative 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. Nothing in this subsection shall be construed as shifting from the claimant to the Secretary the burden specified in subsection (a) of this section.

# APPENDIX K

United States Code
Title 38. Veterans' Benefits

38 U.S.C. § 5110 (1996)

## § 5110. Effective dates of awards

(a) Unless specifically provided otherwise in this chapter, the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.

(b)

(1) The effective date of an award of disability compensation to a veteran shall be the day following the date of the veteran's discharge or release if application therefor is received within one year from such date of discharge or release.

(2) The effective date of an award of increased compensation shall be the earliest date as of which it is ascertainable that an increase in disability had occurred, if application is received within one year from such date.

(3)

(A) The effective date of an award of disability pension to a veteran described in subparagraph (B) of this paragraph shall be the date of application or the date on which the veteran became permanently and totally disabled, if the veteran applies for a retroactive award within one year from such date, whichever is to the advantage of the veteran.

(B) A veteran referred to in subparagraph (A) of this paragraph is a veteran who is permanently and totally disabled and who is prevented by a disability from applying for disability pension for a period of at least 30 days beginning on the date on which the veteran became permanently and totally disabled.

(c) The effective date of an award of disability compensation by reason of section 1151 of this title shall be the date such injury or aggravation was suffered if an application therefor is received within one year from such date.

***

(g) Subject to the provisions of section 5101 of this title, where compensation, dependency and indemnity compensation, or pension is awarded or increased pursuant to any Act or administrative issue, the effective date of such award or increase shall be fixed in accordance with the facts found but shall not be earlier than the effective date of the Act or administrative issue. In no event shall such award or increase be retroactive for more than one year from the date of application therefor or the date

of administrative determination of entitlement, whichever is earlier.

***

(i) Whenever any disallowed claim is reopened and thereafter allowed on the basis of new and material evidence resulting from the correction of the military records of the proper service department under section 1552 of title 10, or the change, correction, or modification of a discharge or dismissal under section 1553 of title 10, or from other corrective action by competent authority, the effective date of commencement of the benefits so awarded shall be the date on which an application was filed for correction of the military record or for the change, modification, or correction of a discharge or dismissal, as the case may be, or the date such disallowed claim was filed, whichever date is the later, but in no event shall such award of benefits be retroactive for more than one year from the date of reopening of such disallowed claim. This subsection shall not apply to any application or claim for Government life insurance benefits.

***

## APPENDIX L

Code of Federal Regulations
Title 38. Pensions, Bonuses, and Veterans' Relief

38 C.F.R. § 3.1 (1996)

### § 3.1. Definitions

***

(p) *Claim-Application* means a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement, to **a** benefit.

***

# APPENDIX M

Code of Federal Regulations
Title 38. Pensions, Bonuses, and Veterans' Relief

38 C.F.R. § 3.152 (1996)

## § 3.152. Claims for death benefits

(a) A specific claim in the form prescribed by the Secretary (or jointly with the Secretary of Health and Human Services, as prescribed by §3.153) must be filed in order for death benefits to be paid to any individual under the laws administered by VA. (See §3.400(c) concerning effective dates of awards.)

(b)

(1) A claim by a surviving spouse or child for compensation or dependency and indemnity compensation will also be considered to be a claim for death pension and accrued benefits, and a claim by a surviving spouse or child for death pension will be considered to be a claim for death compensation or dependency and indemnity compensation and accrued benefits.

(2) A claim by a parent for compensation or dependency and indemnity compensation will also be considered to be a claim for accrued benefits.

(c)

(1) Where a child's entitlement to dependency and indemnity compensation arises by reason of termination of a surviving spouse's right to

dependency and indemnity compensation or by reason of attaining the age of 18 years, a claim will be required. (38 U.S.C. 5110(e).) (See paragraph (c)(4) of this section.) Where the award to the surviving spouse is terminated by reason of her or his death, a claim for the child will be considered a claim for any accrued benefits which may be payable.

(2) A claim filed by a surviving spouse who does not have entitlement will be accepted as a claim for a child or children in her or his custody named in the claim.

(3) Where a claim of a surviving spouse Is disallowed for any reason whatsoever and where evidence requested in order to determine entitlement from a child or children named in the surviving spouse's claim is submitted within 1 year from the date of request, requested either before or after disallowance of the surviving spouse's claim, an award for the child or children will be made as though the disallowed claim had been filed solely on their behalf. Otherwise, payments may not be made for the child or children for any period prior to the date of receipt of a new claim.

(4) Where payments of pension, compensation or dependency and indemnity compensation to a surviving spouse have been discontinued because of remarriage or death, or a child becomes eligible for dependency and indemnity compensation by reason of attaining the age of 18 years, and any necessary evidence is submitted within 1 year from date of request, an award for the child or children

named in the surviving spouse's claim will be made on the basis of the surviving spouse's claim having been converted to a claim on behalf of the child. Otherwise, payments may not be made for any period prior to the date of receipt of a new claim.

## APPENDIX N

Code of Federal Regulations
Title 38. Pensions, Bonuses, and Veterans' Relief

38 C.F.R. § 3.159 (1996)

### § 3.159. Department of Veterans Affairs assistance in developing claims

(a) Although it is the responsibility of any person filing a claim for a benefit administered by the Department of Veterans Affairs to submit evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded, the Department of Veterans Affairs shall assist a claimant in developing the facts pertinent to his or her claim. This requirement to provide assistance shall not be construed as shifting from the claimant to the Department of Veterans Affairs the responsibility to produce necessary evidence.

(b) When information sufficient to identify and locate necessary evidence is of record, the Department of Veterans Affairs shall assist a claimant by requesting, directly from the source, existing evidence which is-either in the custody of military authorities or maintained by another Federal agency. At the claimant's request, and provided that he or she has authorized the release of such evidence in a form acceptable to the custodian thereof, the Department of Veterans Affairs shall assist a claimant by attempting to obtain records maintained by State or local governmental authorities and medical, employment, or other nongovernment

records which are pertinent and specific to the claim. The Department of Veterans Affairs shall not pay any fees charged by the custodian for providing such evidence.

(c) Should its efforts to obtain evidence prove unsuccessful for any reason which the claimant could rectify, the Department of Veterans Affairs shall so notify the claimant and advise him or her that the ultimate responsibility for furnishing evidence rests with the claimant.

## APPENDIX O

Code of Federal Regulations
Title 38. Pensions, Bonuses, and Veterans' Relief

38 C.F.R. § 3.102 (1996)

### § 3.102. Reasonable doubt

It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim. It is a. substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence; the claimant is required to submit evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not justifiable basis for denying the application of the reasonable doubt doctrine if the entire, complete record otherwise warrants invoking this doctrine. The reasonable doubt doctrine is also applicable even in the absence

of official records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships.

# APPENDIX P

Code of Federal Regulations
Title 38. Pensions, Bonuses, and Veterans' Relief

38 C.F.R. § 3.103 (1996)

## § 3.103. Procedural due process and appellate rights

(a) *Statement of policy*. Every claimant has the right to written notice of the decision made on his or her claim, the right to a hearing, and the right of representation. Proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. The provisions of this section apply to all claims for benefits and relief, and decisions thereon, within the purview of this part 3.

**APPENDIX Q**

OMB Approved No. 2900-0001
Respondent Burden: 1 hour and 30 minutes

<table>
<tr><td>Department of Veterans Affairs</td><td colspan="2">VETERAN'S APPLICATION FOR COMPENSATION OR PENSION</td></tr>
<tr><td colspan="2">IMPORTANT: Read attached General Specific Instructions before completing this form. Type, print, or write plainly.</td><td rowspan="3">(DO NOT WRITE IN THIS SPACE)<br>VA DATE STAMP<br><br>Received<br>MAR 11<br>1996<br><br>[Redacted]</td></tr>
<tr><td>1A. FIRST, MIDDLE, LAST NAME OF VETERAN<br>Robert Michael Sellers</td><td>1B. TELEPHONE NO. (Include Area Code)<br>DAY:<br>[Redacted]<br>EVENING:</td></tr>
<tr><td>1C. IF YOU SERVED UNDER ANOTHER NAME, GIVE NAME AND PERIOD DURING WHICH YOU SERVED AND SERVICE NUMBER.</td><td>3A. VETERAN'S SOCIAL SECURITY NO.<br>[Redacted]</td></tr>
</table>

| | | | |
|---|---|---|---|
| 2. MAILING ADDRESS OF VETERAN *(Number and street or rural route, city or P.O., State and ZIP Code)* [Redacted] | | 3B. SPOUSE'S SOCIAL SECURITY NO. [Redacted] | |
| 4. DATE OF BIRTH [Redacted] | 5. PLACE OF BIRTH Alabama | 6. SEX Male | 7. RAILROAD RETIREMENT NO. NA |
| 8. HAVE YOU EVER FILED A CLAIM FOR COMPENSATION FROM THE OFFICE OF WORKERS' COMPENSATION PROGRAMS? *(Formerly the U.S. Bureau of Employees Compensation)* ☐YES ☒NO | | | 9A. VA FILE NUMBER C- [Redacted] |

| 9B. HAVE YOU PREVIOUSLY FILED A CLAIM FOR ANY BENEFIT WITH VA?<br>☒NONE<br>☐VOCATIONAL REHABILITATION<br>☐DENTAL OR OUTPATIENT TREATMENT<br>☐HOSPITALIZATION OR MEDICAL CARE<br>☐VETERANS EDUCATION ASSISTANCE<br>☐WAIVER OF NSLI PREMIUMS<br>☐DISABILITY COMPENSATION OR PENSION<br>☐DEPENDENTS EDUCATIONAL ASSISTANCE<br>☐OTHER *(Specify)* | 9C. VA OFFICE HAVING YOUR RECORDS *(If known)* |
|---|---|

| SERVICE INFORMATION | | |
|---|---|---|
| NOTE: Enter complete information for each period of active duty. Attach DD Form 214 or other separation papers for all periods of active duty to expedite processing of your claim. If you do NOT have your DD Form 214 or other separation papers check (✓) here ☐ | | |
| 10A. ENTERED ACTIVE SERVICE | | 10B. SERVICE NO. |
| DATE | PLACE | |
| 4-17-64 | | [Redacted] |
| 1-15-81 | Montg. Al. | [Redacted] |
| 10C. SEPARATED FROM ACTIVE SERVICE | | 10D. GRADE, RANK OR RATING, |

| DATE | PLACE | ORGANIZATION OR BRANCH OF SERVICE |
|---|---|---|
| 2-7-69 | Little Creek, VA | BM2 Navy |
| 2-29-96 | Ft. Rucker, Al. | Army E-5 SGT. |
| 10E. HAVE YOU EVER BEEN A PRISONER OF WAR?<br>☐YES<br>☒NO<br>*(If "Yes," complete Items 10F and 10 G)* | 10F. NAME OF COUNTRY | 10G. DATES OF CONFINEMENT<br><br>FILE:<br>PROCESSED BY TARGET<br>110<br>DATE 3-12-96<br>NAME /s/ |

| RESERVE AND NATIONAL GUARD SERVICE | | |
|---|---|---|
| NOTE: Enter complete information for each period of Reserve and National Guard service. Attach any separation papers you have. | | |
| 11A. Entered Service | | 11B. SERVICE NO. |
| DATE | PLACE | |
| | | |
| 11C. SEPARATED FROM SERVICE | | 11D. GRADE, RANK OR RATING, ORGANIZATION, OR BRANCH OF SERVICE |
| DATE | PLACE | |
| | | |

| 12. IF DISABILITY OCCURRED DURING ACTIVE OR INACTIVE DUTY FOR TRAINING, GIVE BRANCH OF SERVICE AND DATE OF OCCURRENCE<br>Right Leg—Numbness & tingling—1995 (U.S. Army) Hearing Loss<br>Left Knee Injury—11-7-81 / Back Injury from Parachute Jume 1981 or 1982 / Rt Middle & Index Finger Injury—July-90 | | |
|---|---|---|
| 13A. IF YOU ARE NOW A MEMBER OF THE RESERVE FORCES OR NATIONAL GUARD GIVE THE BRANCH OF SERVICE<br>NA | 13B. RESERVE STATUS<br>☐ACTIVE<br>☐INACTIVE<br>☐RESERVE OBLIGATION | 13C. RESERVE OR NATIONAL GUARD UNIT ADDRESS |

| 14A. ARE YOU NOW RECEIVING OR WILL YOU RECEIVE RETIREMENT OR RETAINER PAY FROM THE ARMED FORCES?<br>☒YES ☐NO<br>*(If "Yes," complete Item 14B, 14C, and 14D)* | 14B. BRANCH OF SERVICE<br>Army |
|---|---|
| 14C. MONTHLY AMOUNT | 14D. RETIRED STATUS<br>☒PERMANENT |

| | |
|---|---|
| $857.00 | ☐TEMPORARY DISABILITY RETIRED LIST |
| 15A. HAVE YOU EVER APPLIED FOR OR RECEIVED DISABILITY SEVERANCE PAY FROM THE ARMED FORCES?<br>☐YES ☒NO<br>*(If "Yes," complete Item 15B)* | 15B. AMOUNT<br>$ |
| 16A. HAVE YOU RECEIVED LUMP SUM READJUSTMENT OR SEPARATION PAY FROM THE ARMED FORCES?<br>☐YES ☒NO<br>*(If "Yes," complete Item 16B)* | 16B. AMOUNT<br>$ |
| NATURE AND HISTORY OF DISABILITIES | |

| 17. NATURE OF SICKNESS, DISEASE OR INJURIES FOR WHICH THIS CLAIM IS MADE AND DATE EACH BEGAN<br>Right Leg numbness—1995/ Left Knee Injury—11/81/ Back Injury—6-1981 or 1982<br>Rt. Middle & INdex Finger Injury—July 1990. (U.S. Army)<br>Hearing Loss—(See records of hearing tests) | |
|---|---|
| 18A. ARE YOU NOW OR HAVE YOU BEEN HOSPITALIZED OR FURNISHED DOMICILIARY CARE WITHIN THE PAST 3 MONTHS?<br>☐YES ☒NO<br>*(If "Yes," complete Item 18B and 18C)* | |
| 18B. DATES OF HOSPITALIZATION OR DOMICILIARY CARE | 18C. NAME AND ADDRESS OF INSTITUTION |
| YOU MUST SIGN AND DATE THIS FORM AT THE BOTTOM OF PAGE 10. | |



| SKIP ITEMS 19, 20 AND 21 IF YOU ARE NOT CLAIMING COMPENSATION FOR A SERVICE-CONNECTED DISABILITY. |
|---|
| *IF YOU RECEIVED ANY TREATMENT WHILE IN SERVICE, COMPLETE THE FOLLOWING INFORMATION (ATTACH TO THIS APPLICATION COPIES OF ANY SERVICE MEDICAL RECORDS YOU HAVE)* |

| 19A. NATURE OF SICKNESS, DISEASE, OR INJURY | 19B. TREATMENT DATES | |
|---|---|---|
| | BEGINNING DATE | ENDING DATE |
| Left Knee Injury | 11-7-81 | discharge |
| Back Injury<br>Right Middle & Index Fingers | 1981.1982<br>July, 1990 | discharge<br>1992 |

| 19C. NAME, NUMBER OR LOCATION OF HOSPITAL, FIRST-AID STATION, DRESSING STATION, OR INFIRMARY | 19D. ORGANIZATION/UNIT AT TIME OF SICKNESS, DISEASE, OR INJURY WAS INCURRED |
|---|---|
| 20th Special Forces<br>Montgomery, Al. | 20th Special Forces |
| " & Maxwell AFB.<br>Maxwell AFB. | "<br>Det1-781st Trans. G'ana |

20. LIST CIVILIAN PHYSICIANS AND HOSPITALS WHERE YOU WERE TREATED FOR ANY SICKNESS, INJURY, OR DISEASE FOR WHICH YOU ARE CLAIMING SERVICE CONNECTION BEFORE, DURING, OR SINCE YOUR SERVICE, AND ANY MILITARY HOSPITALS SINCE YOUR LAST DISCHARGE

| A. NAME | B. PRESENT ADDRESS | C. DISABILITY | D. DATE |
|---|---|---|---|
| NA | | | |
| | | | |

| 21. LIST PERSONS OTHER THAN PHYSICIANS WHO KNOW ANY FACTS ABOUT SICKNESS, DISEASE, OR INJURY SHOWN IN ITEM 19A, WHICH YOU HAD BEFORE, DURING, OR SINCE YOUR SERVICE. | | | |
|---|---|---|---|
| A. NAME | B. PRESENT ADDRESS | C. DISABILITY | D. DATE |
| | | | |
| | | | |

| IF YOU CLAIM TO BE TOTALLY DISABLED<br>*Complete Items 22A through 25E)* | |
|---|---|
| 22A. ARE YOU NOW EMPLOYED<br>☐YES ☐NO | 22B. IF YOU WERE SELF-EMPLOYED BEFORE BECOMING TOTALLY DISABLED, WHAT PART OF THE WORK DID YOU DO? |
| 22C. DATE YOU LAST WORKED | 22D. IF YOU ARE STILL SELF-EMPLOYED WHAT PART OF THE WORK DO YOU DO NOW? |
| 23A. EDUCATION<br>*(Circle highest year completed)*<br>1 2 3 4 5 6 7 8<br>(GRADE SCHOOL)<br>1 2 3 4<br>(HIGH SCHOOL)<br>1 2 3 4<br>(COLLEGE) | 23B. NATURE OF AND TIME SPENT IN OTHER EDUCATION AND TRAINING |

| LIST ALL YOUR EMPLOYMENT, INCLUDING SELF-EMPLOYMENT, FOR ONE YEAR BEFORE YOU BECAME TOTALLY DISABLED | | |
|---|---|---|
| 24A. NAME AND ADDRESS OF EMPLOYER | 24B. KIND OF WORK | 24C. MONTHS WORKED |
| | | |
| | | |

| 24D. TIME LOST FROM ILLNESS | 24E. TOTAL EARNINGS |
|---|---|
| | |
| | |

| LIST ALL YOUR EMPLOYMENT, INCLUDING SELF-EMPLOYMENT, SINCE YOU BECAME TOTALLY DISABLED | | |
|---|---|---|
| 25A. NAME AND ADDRESS OF EMPLOYER | 25B. KIND OF WORK | 25C. MONTHS WORKED |
| | | |
| | | |

| 25D. TIME LOST FROM ILLNESS | 25E. TOTAL EARNINGS |
|---|---|
| | |
| | |

| MARITAL AND DEPENDENCY INFORMATION |
|---|

| | | |
|---|---|---|
| 28A. MARITAL STATUS *(If widowed or divorced, complete Items 26B, 26F and 29A through 29D only)*<br>☒MARRIED<br>☐WIDOWED<br>☐DIVORCED<br>☐NEVER MARRIED<br>*(If so, do not complete Items 26B through 30D)* | 26B. SPOUSE'S BIRTHDATE<br>11-16-46 | |
| 26C. NUMBER OF TIMES YOU HAVE BEEN MARRIED<br>One | 26D. NUMBER OF TIMES YOUR PRESENT SPOUSE HAS BEEN MARRIED<br>Two | |
| 26E. IS YOUR SPOUSE ALSO A VETERAN?<br>☐YES ☒NO<br>*(If "Yes," complete Items 26F, if known)* | 26F. SPOUSE'S VA FILE NO *(if any)*<br>C- NA | |
| 27A. DO YOU LIVE TOGETHER?<br>☒YES ☐NO<br>*(If "No," complete Items 18B through 18D)* | 27B. REASON FOR SEPARATION *(For example, marital problems, job requirements, health, etc.)* | 27C. PRESENT ADDRESS OF SPOUSE |
| 27D. AMOUNT YOU CONTRIBUTE TO YOUR SPOUSE'S SUPPORT MONTHLY<br>$ | | |

| 28. CHECK ( ✓) WHETHER YOUR CURRENT MARRIAGE WAS PERFORMED BY:<br>☒CLERGYMAN OR AUTHORIZED PUBLIC OFFICIAL<br>☐OTHER *(Explain)* |
|---|
| YOU MUST SIGN AND DATE THIS FORM AT THE BOTTOM OF PAGE 10. |



| NOTE: Furnish the following information about each of your marriages. A certified copy of the public or church record of your CURRENT marriage is required. | |
|---|---|
| 29A. DATE AND PLACE OF MARRIAGE | 29B. TO WHOM MARRIED |
| 11-7-71, ButlerCo.Al. | Victoria Joan Booker |
| | |
| 29C. TERMINATED *(Death, Divorce)* | 29D. DATE AND PLACE TERMINATED |
| NA | NA |
| | |
| *FURNISH THE FOLLOWING INFORMATION ABOUT EACH PREVIOUS MARRIAGE OF YOUR PRESENT SPOUSE* | |
| 30A. DATE AND PLACE OF MARRIAGE | 30B. TO WHOM MARRIED |
| unk. | Charles Trolgen |
| | |
| 30C. TERMINATED *(Death, Divorce)* | 30D. DATE AND PLACE TERMINATED |

| | |
|---|---|
| divorced | 6-16-69, Greenville, AL |
| | |

| IDENTIFICATION OF CHILDREN AND INFORMATION RELATIVE TO CUSTODY | | |
|---|---|---|
| NOTE: Furnish the following information for each of your unmarried children. A certified copy of the public or church record of birth or court record of adoption is required. | | |
| 31A. NAME OF CHILD *(First, middle initial, last)* | 31B. DATE OF BIRTH *(Month, day, year)* | 31C. SOCIAL SECURITY NUMBER OF CHILD |
| Mandy Michelle Sellers | [Redacted] | |
| | | |

| 31D. CHECK EACH APPLICABLE CATEGORY | | |
|---|---|---|
| MARRIED PREVIOUSLY | STEPCHILD OR ADOPTED | ILLEGITIMATE |
| | | |
| | | |

| OVER 18 ATTENDING SCHOOL | SERIOUSLY DISABLED |
|---|---|
| X | |
| | |

| 31E. NAME(S) OF ANY CHILD(REN) NOT IN YOUR CUSTODY | 31F. NAME AND ADDRESS OF PERSON HAVING CUSTODY | 31G. MONTHLY AMOUNT YOU CONTRIBUTE TO CHILD'S SUPPORT $ |
|---|---|---|

| 32A. IS YOUR FATHER DEPENDENT UPON YOU FOR SUPPORT? ☐YES ☒NO *(If "Yes," complete Item 34B)* | 32B. NAME AND ADDRESS OF DEPENDENT FATHER | 32C. IS YOUR MOTHER DEPENDENT UPON YOU FOR SUPPORT ☐YES ☒NO *(If "Yes," complete Item 32D)* |
|---|---|---|
| 32D. NAME AND ADDRESS OF DEPENDENT MOTHER | 32E. NAME AND ADDRESS OF NEAREST RELATIVE Margarette G. Sellers [Redacted] | 32F. RELATIONSHIP OF NEAREST RELATIVE mother |

| NET WORTH OF VETERANS AND DEPENDENTS | |
|---|---|
| NOTE: Items 33A through 33D should be completed ONLY if you are applying for nonservice-connected pension. | |
| ITEM NO. | SOURCE |
| 33A | STOCKS, BONDS, BANK DEPOSITS |
| 33B | REAL ESTATE *(Do not include residence)* |
| 33C | OTHER PROPERTY |
| 33D | TOTAL NET WORTH |

| AMOUNTS | | |
|---|---|---|
| VETERAN | SPOUSE | NAME OF CHILDREN |

| | | | | |
|---|---|---|---|---|
| | | | | |
| $ | $ | $ | $ | $ |
| | | | | |
| | | | | |
| $ | $ | $ | $ | $ |

| | | |
|---|---|---|
| INCOME RECEIVED AND EXPECTED FROM ALL SOURCES | | |
| NOTE: Items 34A through 39B should be completed ONLY if you are applying for nonservice-connected pension. | | |
| 34A. HAVE YOU OR YOUR SPOUSE APPLIED FOR OR ARE YOU RECEIVING OR ENTITLED TO RECEIVE ANY BENEFITS FROM THE SOCIAL SECURITY ADMINISTRATION (OTHER THAN SSI) OR RAILROAD RETIREMENT BOARD? ☐YES ☐NO *(If "Yes," complete Items 34B thru 34F as applicable)* | 34B. MONTHLY AMOUNT *(Include Medicare Deduction)* | |
| | VETERAN | $ |
| | SPOUSE | $ |
| 34C. BEGINNING DATE | 34D. DATE YOU EXPECT BENEFITS TO BEGIN | |
| | | |

| | |
|---|---|
| 34E. WILL YOU OR YOUR SPOUSE APPLY FOR EITHER BENEFIT DURING THE NEXT 12 MONTHS?<br>☐YES ☐NO | 34F. DATE OF INTENTION TO APPLY<br>VETERAN: SPOUSE: |
| 35A. HAVE YOU OR YOUR SPOUSE APPLIED FOR OR ARE YOU RECEIVING OR ENTITLED TO RECEIVE ANNUITY OR RETIREMENT BENEFITS OR ENDOWMENT INSURANCE FROM ANY OTHER SOURCE?<br>☐YES ☐NO<br>*(If "Yes," complete Items 35B thru 35E)* | |
| YOU MUST SIGN AND DATE THIS FORM AT THE BOTTOM OF PAGE 10 | |

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| 35B. MONTHLY AMOUNT | | 35C. BEGINNING DATE |
|---|---|---|
| VETERAN | $ | |
| SPOUSE | $ | |
| 35D. DATE OF INTENTION TO APPLY | | 35E. SOURCE OF BENEFITS |
| | | |
| | | |
| VETERAN'S AND DEPENDENTS' MONTHLY INCOME | | |

| NOTE: For each source report gross monthly amount, including deductions, for each family member. | | | | |
|---|---|---|---|---|
| ITEM NO. | | SOURCE OF MONTHLY INCOME | | |
| 36A | | SOCIAL SECURITY | | |
| 36B | | U.S. CIVIL SERVICE | | |
| 36C | | U.S. RAILROAD RETIREMENT | | |
| 36D | | MILITARY RETIREMENT | | |
| 36E | | BLACK LUNG BENEFIT | | |
| 36F | | SUPPLEMENTAL SECURITY/PUBLIC ASSIST. | | |
| 36G | | ALL OTHER MONTHLY INCOME *(Specify Source)* | | |
| AMOUNTS *(If none, write "NONE" or "0")* | | | | |
| VETERAN | SPOUSE | NAME OF CHILDREN | | |
| | | | | |
| $ | $ | $ | $ | $ |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |

| | | | | |
|---|---|---|---|---|
| VETERAN'S AND DEPENDENTS' OTHER INCOME *(If none, write "NONE" or "0")* | | | | |
| NOTE: Please provide the amount of annual income or one-time nonrecurring income (specify source) for the 12 month period preceding the date the claim is filed with the Department of Veterans Affairs. | | | | |
| 37A | | | TOTAL WAGES | |
| 37B | | | TOTAL INTEREST AND DIVIDENDS | |
| 37C | | | ALL OTHER INCOME *(Specify Source)* | |
| | | | | |
| | | | | |
| | | | | |
| NOTE: Please provide the amount of expected annual income or one-time nonrecurring income (specify source) for the 12 month period following the date the claim is filed with the Department of Veterans Affairs. | | | | |
| 38A | | | TOTAL WAGES | |
| 38B | | | TOTAL INTEREST AND DIVIDENDS | |
| 38C | | | ALL OTHER INCOME *(Specify Source)* | |
| | | | | |
| | | | | |
| | | | | |

| 39A. GROSS AMOUNT OF FINAL PAY RECEIVED | 40. REMARKS *(Identify your statements by their applicable item number. If additional space is required, attach separate sheet and identify your statements by their item numbers)*<br>Request s/c for disabilities occurring during active duty service |
|---|---|
| 39B. DATE FINAL PAY RECEIVED | |

NOTE: Items 41A through 41G should be completed only if you are applying for nonservice-connected pension.

INFORMATION CONCERNING MEDICAL, LEGAL OR OTHER EXPENSES

NOTE: Family medical expenses actually paid by you may be deductible from your income. Show the amount of unreimbursed medical expenses you paid for yourself or relatives you are under an obligation to support. Also, show medical, legal or other expenses you paid because of a disability for which civilian disability benefits have been awarded. When determining your income, we may be able to deduct them from the disability benefits for the year in which the expenses are paid. Do not include any expenses for which you were reimbursed. Show the Medicare deduction in line 1.

| 41A. AMOUNT PAID BY YOU | 41B. DATE PAID | 41C. PURPOSE *(Doctor's fees, hospital charges, Attorney fees, etc.)* |
|---|---|---|
| | | |

| | | |
|---|---|---|
| | | Medicare (Part B) |
| | | |
| | | |
| | | |

| 41D. PAID TO *(Name of doctor, hospital, pharmacy, Attorney, etc.)* | 41E. DISABILITY OR RELATIONSHIP OF PERSON FOR WHOM EXPENSES PAID |
|---|---|
| SOCIAL SECURITY ADMINISTRATION | |
| | |
| | |
| | |
| 41F. ARE YOU NOW A PATIENT IN A NURSING HOME?<br>☐YES ☐NO<br>*(If "Yes," please complete Item 41G)* | 41G. DOES MEDICAID COVER ALL OR PART OF YOUR NURSING HOME COSTS?<br>☐YES ☐NO<br>*(If "Yes," give the name and address of the nursing home in Item 40, "Remarks"))* |
| NOTE: Filing of this application constitutes a waiver of military retired pay in the amount of any VA compensation to which you may be entitled. See instructions for Items 14A thru 14D inclusive, Retired Pay. | |

| |
|---|
| CERTIFICATION AND AUTHORIZATION FOR RELEASE OF INFORMATION—I CERTIFY THAT the foregoing statements are true and complete to the best of my knowledge and belief. I CONSENT THAT any physician, surgeon, dentist, or hospital that has treated or examined me for any purpose, or that I have consulted professionally, may furnish to the Department of Veterans Affairs any information about myself, and I waive any privilege which renders such information confidential. DO YOU WANT TO HAVE MEDICAL AND OTHER INFORMATION ABOUT YOU INCLUDED IN THE "PERSIAN GULF WAR VETERANS HEALTH REGISTRY?" (See "GENERAL INSTRUCTIONS," paragraph K.) ☐YES ☐NO |

| 42. SIGNATURE OF CLAIMANT<br>SIGN HERE ▶<br>/s/ Robert M. Sellers | 43. DATE SIGNED<br>2-26-96 |
|---|---|

| WITNESSES TO SIGNATURE OF CLAIMANT IF MADE BY "X" MARK<br>NOTE: A signature by mark must be witnessed by two persons to whom the person making the statement is personally known. The witnesses must sign their names in Items 44A and 45A and type or print their names and addresses in Items 44B and 45B. | |
|---|---|
| 44A. SIGNATURE OF WITNESS | 45A. SIGNATURE OF WITNESS |
| 44B. NAME AND ADDRESS OF WITNESS *(Type or print)* | 45B. NAME AND ADDRESS OF WITNESS *(Type or print)* |

PENALTY: The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false, or for the fraudulent acceptance of any payment to which you are not entitled.