



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

Date: May 27, 2022

SS [REDACTED]

Dear Appellant:

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

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

**What's in the Board decision?**

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

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

**What if I disagree with the decision?**

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

**What if I have questions?**

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

Sincerely yours,

**Decision Management Branch**  
Office of Appellate Support

Enclosures (2)  
CC: Disabled American Veterans



# BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: May 27, 2022

SS [REDACTED]

[REDACTED]

Dear Appellant:

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

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

## **What's in the Board decision?**

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

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

## **What if I disagree with the decision?**

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

## **What if I have questions?**

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

Sincerely yours,

**Decision Management Branch**  
Office of Appellate Support

Enclosures (2)  
CC: Disabled American Veterans





**BOARD OF VETERANS' APPEALS**  
**FOR THE SECRETARY OF VETERANS AFFAIRS**

IN THE APPEAL OF

SS [REDACTED]

Docket No. 200206-68497

Represented by  
Disabled American Veterans

DATE: May 27, 2022

**ORDER**

Entitlement to service connection for headaches is dismissed.

Entitlement to service connection for segmental and somatic dysfunction of the thoracic spine, claimed as upper back pain, is granted.

Entitlement to service connection for an acquired psychiatric disorder, variously diagnosed as posttraumatic stress disorder (PTSD) with anxiety and depression, and unspecified trauma- and stressor-related disorder, is granted.

**REMANDED**

Entitlement to service connection for gastroesophageal reflux disease (GERD) is remanded.

Entitlement to service connection for sleep apnea is remanded.

Entitlement to service connection for sinusitis is remanded.

**FINDINGS OF FACT**

1. An August 2021 rating decision awarded service connection for headaches; the claim for service connection for headaches is rendered moot because there is no

justiciable case or controversy for active consideration by the Board of Veterans' Appeals (Board).

2. Resolving reasonable doubt in the Veteran's favor, his upper back disability, best characterized as segmental and somatic dysfunction of the thoracic spine, is at least as likely as not related to active service.

3. Resolving reasonable doubt in the Veteran's favor, his acquired psychiatric disorder, variously diagnosed as PTSD with anxiety and depression, and unspecified trauma- and stressor-related disorder, is related to his recounted in-service stressors.

### **CONCLUSIONS OF LAW**

1. The criteria for dismissal of entitlement to service connection for headaches are met. 38 U.S.C. § 7105.

2. The criteria for service connection for an upper back disability, best characterized as segmental and somatic dysfunction of the thoracic spine, are met. 38 U.S.C. §§ 1110, 1112, 1113, 5107; 38 C.F.R. §§ 3.102, 3.303.

3. The criteria for service connection for an acquired psychiatric disorder, variously diagnosed as PTSD with anxiety and depression, and unspecified trauma- and stressor-related disorder, are met. 38 U.S.C. § 1110, 5107(b); 38 C.F.R. §§ 3.102, 3.303, 3.304, 4.125.

### **REASONS AND BASES FOR FINDINGS AND CONCLUSIONS**

The Veteran served on active duty from August 2005 to September 2011.

By way of procedural background, a rating decision was issued on these claims under the legacy system in September 2018. In February 2019, the Veteran opted into the modernized review system, also known as the Appeals Modernization Act (AMA), by submitting a Rapid Appeals Modernization Program (RAMP) election

form and selecting the supplemental claim option. The agency of original jurisdiction (AOJ) issued an AMA rating decision pursuant to RAMP in January 2020, which is the decision on appeal.

In his February 2020 VA Form 10182, Decision Review Request: Board Appeal (Notice of Disagreement) (NOD), the Veteran elected the Hearing review option. Therefore, the Board may only consider the evidence of record at the time of the AOJ decision on appeal issued on January 30, 2020, as well as any evidence submitted by the Veteran or his representative at the Board hearing held on July 21, 2021, or within 90 days following the hearing. 38 C.F.R. § 20.302(a).

As referenced above, in July 2021, the Veteran, his spouse, Dr. K.C., and Dr. C.B. presented testimony at a Board hearing before the undersigned Acting Veterans Law Judge. A transcript of this proceeding is associated with the claims file.

Evidence was added to the claims file during a period of time when new evidence was not allowed. However, the Board is dismissing the claim of service connection for headaches due to a full grant by the AOJ and is granting the claims of upper back pain and an acquired psychiatric disorder, to include PTSD. The Board is remanding the remaining claims of service connection for GERD, sleep apnea, and sinusitis for further development, and this additional evidence will be considered by the AOJ in the adjudication of these claims.

Additionally, as to the characterization of certain issues on appeal, the Board has recharacterized the claims for service connection for anxiety and depression and PTSD, which were adjudicated separately in the January 2020 rating decision, as a single claim for service connection for any acquired psychiatric disorder, however diagnosed. *See Clemons v. Shinseki*, 23 Vet. App. 1, 5 (2009).

As a final initial matter, throughout the pendency of the claims at issue, the Veteran requested copies of certain documents within the claims file or a copy of the entire claims file. Most recently, on January 12, 2022, a complete copy of the claims file was sent to the Veteran. Thus, as the Veteran has been provided with the requested copy of the claims file, the Board may proceed with appellate review.

## Dismissal

### **1. Entitlement to service connection for headaches is dismissed.**

The Veteran's application for benefits, which included a claim to reopen service connection for headaches, was received by VA on July 10, 2018, thus the appeal period for consideration is from July 10, 2018.

Following the January 2020 rating decision on appeal, an August 2021 rating decision granted service connection for headaches, effective from July 10, 2018. The grant of service connection for headaches represents a complete grant of the benefit sought on appeal. Where an appealed claim for service connection is granted during the pendency of the appeal, a second NOD must be timely filed to initiate appellate review of the claim concerning "downstream" issues such as the compensation level assigned for the disability and effective date. An NOD has not been received, although the appeal period has not yet expired. *See Grantham v. Brown*, 114 F.3d 1156, 1158-59 (Fed. Cir. 1997). Consequently, no case or controversy remains before the Board, and the appeal for service connection for headaches is dismissed. *See* 38 U.S.C. § 7105.

## Service Connection

Generally, service connection may be established for disability resulting from disease or injury incurred in or aggravated by active military service. 38 U.S.C. §§ 1110; 38 C.F.R. § 3.303. To prevail on a service connection claim on a direct incurrence basis, there must be competent evidence of (1) a current disability, (2) in-service incurrence or aggravation of a disease or injury, and (3) a nexus between the in-service disease or injury and the current disability. *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004).

### **2. Entitlement to service connection for segmental and somatic dysfunction of the thoracic spine, claimed as upper back pain, is granted.**

In his July 2018 application for benefits, which included a claim to reopen service connection for an upper back disability, the Veteran asserted his upper back pain was related to "PTSD - personal trauma." In his November 2018 NOD, the

Veteran asserted his upper back condition was due to an in-service motor vehicle accident. Most recently, in July 2021 testimony, the Veteran reported his upper back always felt sore during service, particularly after the car wreck. In July 2021 testimony, the Veteran's spouse testified that she met the Veteran seven months after the car accident, and at that time, he was still taking Advil to keep the pain under control.

In terms of a demonstration of current disability, in a July 2018 private examination report, Dr. C. B. endorsed a number of diagnoses, including mechanical back pain syndrome, degenerative disc disease, degenerative scoliosis, foraminal lateral recess/central stenosis, degenerative spondylolisthesis, intervertebral disc syndrome; however, Dr. C.B. did not indicate whether such diagnoses were of the Veteran's thoracic spine. However, in an August 2021 letter, Dr. J.L. stated the Veteran had been a patient of his since November 2019, and as to the Veteran's thoracic spine, Dr. J.L. stated the Veteran had a diagnosis of segmental and somatic dysfunction. Dr. J.L. further stated that, in November 2019, a radiographic series was performed, and also explained, in part, that spinal degeneration in Phase 1 was noticed in the thoracic region. Based on the foregoing, a current disability of the upper back, best characterized as segmental and somatic dysfunction of the thoracic spine, has been demonstrated.

As to the existence of an in-service injury, event, or disease, the January 2020 rating decision endorsed a favorable finding, specifically that the evidence showed that a qualifying event, injury, or disease had its onset during the Veteran's service. In this regard, a November 2005 private medical record documented, in part, the Veteran had been belted passenger in a sport utility vehicle (SUV) that rolled several times, hit some rock, and became airborne landing in a tree, and that he was complaining mainly of a laceration to his right forehead and some right shoulder and clavicle pain. Further, the Veteran's service treatment records documented the existence of upper back pain. For example, November 2009 and December 2009 service treatment records documented the Veteran had pain in his thoracic spine. Also, January 2010, February 2010, March 2010, April 2010, May 2010, June 2010, July 2010, August 2010, October 2010, December 2010, April 2011 and May 2011 service treatment records documented, in part, upper back pain in a list of problems. Thus, the question becomes whether the Veteran's upper back



disability is related to his service, to include his in-service motor vehicle accident and in-service complaints of upper back pain. On this question there is probative evidence in favor of and against the claim.

The evidence against the claim includes a January 2020 VA examiner's opinion. The January 2020 VA examiner found the claimed condition was less likely than not incurred in or caused by the claimed in-service injury, event, or illness. As a rationale, the January 2020 VA examiner explained medical record review did not reveal any current back condition for the Veteran, therefore, it was her opinion that the Veteran's current complaint of a back condition was less likely than not related to any in service complaint.

The evidence in favor of the claim includes the August 2021 letter from Dr. J.L. In the August 2021 letter, Dr. J.L. stated, after review of pertinent records, it was his professional opinion that it was highly probable that the Veteran's condition was a direct result of his military occupation and motor vehicle accident. Dr. J.L. further explained the occupation that the Veteran had in military service required manual strain on the spine.

In weighing the January 2020 VA examiner's opinion and Dr. J.L.'s August 2021 opinion, the Board observes the January 2020 VA examiner did not conduct an examination but only was tasked with providing a nexus opinion. Further, Dr. J.L.'s August 2021 letter, which endorsed a diagnosis of segmental and somatic dysfunction of the thoracic spine, was not of record when the January 2020 VA examiner provided her opinion. This lessens the probative value of the January 2020 VA opinion.

Furthermore, the Board finds the August 2021 private opinion provided by Dr. J.L. highly probative, as he has been the Veteran's treating physician during a significant portion of the appeal period and his opinion was accompanied by sufficient rationale based on accurate citation to the Veteran's military occupation and in-service motor vehicle accident. *See Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 304 (2008). Moreover, Dr. J.L.'s opinion is consistent with the Veteran's July 2021 testimony, in which he reported that his upper back felt sore during service, particularly after the car wreck. Similarly, in July 2021 testimony, the

Veteran's spouse testified that she met the Veteran seven months after the car accident, and he was still taking Advil to keep the pain under control.

Upon review of the record, the Board finds the evidence to at least be in equipoise as to whether the Veteran's current upper back disability is related to service. Accordingly, after resolving all doubt in favor of the Veteran, the Board finds that service connection for segmental and somatic dysfunction of the thoracic spine, claimed as upper back pain, is warranted. 38 U.S.C. § 5107; 38 C.F.R. § 3.102.

**3. Entitlement to service connection for an acquired psychiatric disorder, variously diagnosed as PTSD with anxiety and depression, and unspecified trauma-and stressor-related disorder, is granted.**

The Veteran contends that service connection for an acquired psychiatric disorder, to include PTSD, is warranted. Specifically, in a July 2018 statement, the Veteran reported, while stationed at Ramstein Air Force Base in Germany in July 2007, the occurrence of muggings from Turks and Kurds in the area. In another July 2018 statement, the Veteran also reported that, while stationed at Ramstein Air Force Base in Germany in June 2006, transferring cases that held human remains were a part of his daily duties. In another July 2018 statement, the Veteran reported he was involved in a motor vehicle accident in November 2005.

Additionally, during an August 2018 VA examination, the Veteran reported he loaded dead bodies of soldiers, in caskets, while in Germany, that came from the war zone. He also reported stress from his wife's 16-year-old sister living with them, as she ran away a couple of times, and that he had heard about fellow soldiers in Germany being attacked by Kurdish refugees. In a November 2018 NOD, the Veteran asserted he had anxiety, depression, and PTSD due to a motor vehicle accident during in service. In a February 2019 statement, the Veteran's spouse reported the Veteran had had anxiety with driving since she met him and noted he attributed this to the motor vehicle accident. In a February 2019 statement, the Veteran's friend, R.M., reported that when riding in a vehicle with the Veteran, the Veteran's anxiety and irritability could be quite noticeable with traffic and poor weather conditions. In a February 2019 statement, the Veteran also generally linked his depression and high level of anxiety to the in-service motor vehicle accident.

Similarly, in July 2021 testimony, the Veteran reported, in part, he was involved in a car wreck during service. Specifically, he testified that the vehicle hit a very large boulder and was propelled into a pine tree. He testified the motor vehicle accident resulted in a scar on his forehead due to a pine tree branch striking his head and knocking him unconscious. He also testified he sustained a separated right clavicle from the seatbelt. In July 2021 testimony, the Veteran also described that while stationed at Ramstein Air Base, Germany, from 2005 to 2008, he was responsible for loading and unloading everything and anything that would be able to fit onto a cargo airplane, including personnel. He testified that at one point, personnel that had met an unfortunate demise would come back and have to be properly handled, and his duty was to clean that aircraft of any human excrement that leaked on the plane.

Preliminarily, the Board notes, in a February 2018 VA treatment record, the Veteran stated, in part, he had had problems with anxiety and “overthinking” since high school and that it got worse throughout his time in the military. Similarly, in a June 2018 VA treatment record, the Veteran stated, in part, that although he never recognized how he felt as depression before, he believed he was depressed, and further stated that he believed his depression stemmed from events from childhood/adolescence. Similarly, an August 2018 VA treatment record noted the Veteran reported long term problems with anxiety dating back to high school.

However, the Veteran’s May 2004 examination, conducted in conjunction with his enlistment into active service, did not note any defects or diagnoses with respect to a psychiatric disorder, and thus, the presumption of soundness applies.

*See McKinney v. McDonald*, 28 Vet. App. 15, 22-23 (2016). Further, there is not clear and unmistakable evidence to rebut the presumption of soundness. Thus, the Board will accordingly consider the claim based on the law and regulation for service connection discussed above, as well as the regulations for PTSD, discussed below.

In that regard, service connection for PTSD generally requires medical evidence diagnosing the condition in accordance with 38 C.F.R. § 4.125(a); a link, established by medical evidence, between current symptoms and an in-service stressor; and credible supporting evidence that the in-service stressor occurred. 38 C.F.R. § 3.304(f). For cases certified to the Board on or after August 4, 2014,

the diagnosis of PTSD must be in accordance with the American Psychiatric Association's Diagnostic and Statistical Manual for Mental Disorders, Fifth Edition (DSM-5). 38 C.F.R. § 4.125(a); Schedule for Rating Disabilities-Mental Disorders and Definition of Psychosis for Certain VA Purposes, 79 Fed. Reg. 45,093 (Aug. 4, 2014) (Applicability Date) (updating 38 C.F.R. § 4.125 to reference DSM-5). The present appeal was certified and transferred to the Board in April 2020.

In terms of a demonstration of current disability, the January 2020 rating decision endorsed a favorable finding that the Veteran had been diagnosed with a disability. In this regard, the Veteran has received multiple psychiatric diagnoses proximate to and during the pendency of this appeal. Specifically, an August 2018 VA examiner endorsed a diagnosis of unspecified trauma- and stressor-related disorder and also found the Veteran's depression and anxiety were symptoms of unspecified trauma- and stressor-related disorder, not separate diagnoses. The August 2018 VA examiner also found the Veteran did not meet the diagnostic criteria for PTSD under DSM-5 criteria. Conversely, in a July 2021 private medical letter, Dr. K.C. endorsed a diagnosis of PTSD with anxiety and depression. Although Dr. K.C. did not specify if this diagnosis was provided under the DSM-5, as Dr. K.C. explained the Veteran had been under his care since October 2019, which was after VA's regulation change to the DSM-5, the Board will resolve reasonable doubt in the Veteran's favor and accept Dr. K.C.'s diagnosis as valid and as provided in accordance with the DSM-5.

The Veteran's medical records also reflect findings generally consistent with the above diagnoses. For example, March 2018, April 2018, May 2018, June 2018, September 2018, November 2018, and December 2018 VA treatment records, dated proximate to and during the appeal period, endorsed a diagnosis of unspecified anxiety disorder, based on criteria from the DSM-5. Similarly, an August 2018 VA treatment record endorsed a diagnosis of anxiety in accordance with the DSM-5.

Thus, for the purposes of the appeal, the Veteran is acknowledged to have an acquired psychiatric disorder, variously diagnosed as PTSD with anxiety and depression, and unspecified trauma- and stressor-related disorder.

With respect to in-service stressors, as discussed above, the Veteran has contended, in part, that he endured a stressor related to his involvement in the transportation of the bodies of fallen service-members and another stressor related to an in-service motor vehicle accident. As service connection is granted on the basis of these recounted stressors, the Board will limit the discussion to these two stressors.

In this regard, as noted above, a November 2005 private medical record documented, in part, the Veteran had been a belted passenger in an SUV that rolled several times, hit some rock, and became airborne landing in a tree, and that he was complaining mainly of a laceration to his right forehead and some right shoulder and clavicle pain. A November 2005 service treatment record documented the Veteran required suture removal, for a suture placed seven days ago, specifically from a motor vehicle accident with a laceration to his right forehead. A March 2006 service treatment record noted the Veteran had been a front seat passenger in a small SUV going 85 mph on a residential county road, which ran a stop sign on a hill and the driver of the SUV lost control, and car rolled approximately five times, resulting in head lacerations and shoulder pain. Thus, the Veteran's in-service stressor of a November 2005 motor vehicle accident is conceded.

In addition, a June 2008 performance report, in part, noted the Veteran had aided in a transload of 26 fallen warfighters, that the warriors were honored with dignity and respect, and rushed home to loved ones. In light of this documentation, and resolving reasonable doubt in favor of the Veteran, the Board finds that the evidence supports the occurrence of a stressor related to the Veteran's involvement in the transportation of the bodies of fallen service members.

The Board also finds that the Veteran's diagnoses of PTSD with anxiety and depression, and unspecified trauma-and stressor-related disorder, are the current psychiatric conditions that are related to the stressors discussed above. In this regard, in July 2021 testimony, Dr. K.C. explained, as to the Veteran's PTSD with anxiety and depression, the triggering events were the aircraft cleaning event and the motor vehicle accident. Also, in a July 2021 private medical letter, Dr. K.C. found the Veteran's involvement in transporting fallen service members caused the Veteran to develop PTSD along with anxiety and depression.



Therefore, the Board finds the evidence to at least be in relative equipoise as to whether the Veteran's current acquired psychiatric disorder, variously diagnosed as PTSD with anxiety and depression and unspecified trauma- and stressor-related disorder, is related to service. Accordingly, after resolving all doubt in favor of the Veteran, the Board finds that service connection for an acquired psychiatric disorder, variously diagnosed as PTSD with anxiety and depression, and unspecified trauma- and stressor-related disorder, is warranted. 38 U.S.C. § 5107; 38 C.F.R. § 3.102.

### **REASONS FOR REMAND**

#### **1. Entitlement to service connection for GERD is remanded.**

The Board finds that the evidence of record at the time of the January 2020 rating decision under review was sufficient to trigger VA's duty to assist in obtaining a VA examination and corresponding opinions on a direct incurrence basis and as secondary to the Veteran's service-connected bilateral shoulder disability. Specifically, in a February 2019 private letter, Dr. C.B., opined, in part, it was least to the 90 percent level of probability that the Veteran's current GERD was caused by nonsteroidal anti-inflammatory drugs (NSAIDs) prescribed for his migraines. However, elsewhere in the same letter Dr. C.B. opined that the Veteran used Motrin and NSAIDs to control his shoulder pain and these were known to cause GERD. Further, in a July 2021 private letter, Dr. C.B. linked the Veteran's GERD to his traumatic brain injury (TBI) and medications, specifically Motrin and NSAIDs, used to control his shoulder pain. Thus, Dr. C.B.'s opinion is unclear as to whether the Veteran's GERD was caused or aggravated by his migraines, bilateral shoulder disability, and/or TBI. Further, Dr. C.B. cited to a summary of a study for the proposition that NSAID or aspirin use was a significant risk factor for GERD symptoms; however, the Board observes that a risk factor is not synonymous with causation nor was the study provided in its entirety.

Nonetheless, at the time of the January 2020 rating decision, a July 2018 private examination report, from Dr. C.B., documented the Veteran had been diagnosed with GERD in 2018. A September 2018 upper gastrointestinal endoscopy provided

findings that were overall most likely related to acid-related injury and helicobacter pylori infection. Thus, there is evidence of current disability.

Additionally, at the time of the January 2020 rating decision, the Veteran was service-connected for a right shoulder disability and a left shoulder disability. Further, in a statement from the Veteran, received by VA in July 2018, he reported, in part, that he noticed that he had stomach acid return to his throat after basic military training. He more specifically noted that, after working out or eating mildly spicy foods, he would experience the uncomfortable feeling of the return of stomach acid. He also reported that, over the course of his military service, he also experienced difficulty swallowing his saliva and had blood in his fecal excrement but did not seek any medical assistance while in service, due to a fear of losing the opportunity to serve his country. Additionally, in a February 2019 letter, the Veteran's spouse described, in part, that she first noticed the Veteran had issues with heartburn around the summer of 2008, and further described he was no longer able to enjoy spicier foods due his symptoms.

Based on the foregoing evidence that was of record at the time of the decision on appeal, the AOJ's failure to obtain a VA examination and corresponding opinions addressing the claim on a direct incurrence basis and as secondary to a service-connected disability was a pre-decisional error. *See McLendon v. Nicholson*, 20 Vet. App. 79 (2006); *see also* 38 C.F.R. § 3.159 (c)(4). Accordingly, remand is warranted for an examination and corresponding opinions addressing the claim on these theories of entitlement.

## **2. Entitlement to service connection for sleep apnea is remanded.**

The Board finds that the evidence of record at the time of the January 2020 rating decision under review triggered VA's duty to assist by obtaining an adequate VA opinion addressing the claim on a direct incurrence basis.

At the time of the January 2020 rating decision, VA treatment records, dated in March 2018 and April 2018, documented the Veteran was provided with, and subsequently returned, a home study testing device for sleep apnea, and an April 2018 VA letter to the Veteran informed him the April 2018 sleep study found evidence of sleep apnea. Also, a May 2018 VA treatment record documented the

sleep study found features compatible with mild obstructive sleep apnea. Also of record at the time of the January 2020 rating decision is a July 2018 statement from the Veteran in which he reported his wife complained of his snoring shortly after they married in January 2007. Additionally, in a February 2019 statement, the Veteran's spouse reported, in part, that the Veteran had been living with symptoms of sleep apnea since she met him in June 2006 and that he often woke himself with the loud snoring and often kept her up as well.

A December 2019 VA examiner provided a negative nexus opinion on a direct incurrence basis. As rationale, the examiner cited to evidence, including a February 2008 service treatment record, which noted the Veteran reported 12 days of inadequate sleep in the past 30 days due to stress and also incorrectly cited to Dr. C.B.'s February 2019 private medical letter as a VA opinion. The December 2019 VA examiner found there was no association between the Veteran's sleep disturbances during service (almost 20 years before the diagnosis) and the current diagnosis of sleep apnea. Specifically, the December 2019 VA examiner indicated that the Veteran's sleep disturbances during service were due to stress at work and opined the Veteran's diagnosis of sleep apnea was less than likely than not incurred in and/or caused by complaints of inadequate sleep during service. However, the December 2019 VA examiner's opinion does not adequately address the Veteran's July 2018 statement, in which he reported, in part, that his wife complained of his snoring shortly after they married in January 2007, or the February 2019 statement from the Veteran's spouse in which she reported, in part, that the Veteran had been living with symptoms of sleep apnea since she met him in June 2006, and that he often woke himself with the loud snoring and often kept her up as well. Accordingly, remand is required to obtain a supplemental VA medical opinion that accounts for the foregoing evidence. *Barr v. Nicholson*, 21 Vet. App. 303, 309 (2011).

### **3. Entitlement to service connection for sinusitis is remanded.**

The Board finds that the evidence of record at the time of the January 2020 rating decision under review was sufficient to trigger VA's duty to assist in obtaining a VA examination and corresponding opinion addressing the claim on a direct incurrence basis. Specifically, in February 2019, Dr. C.B. opined, in part, that the Veteran had sinusitis in service as per lay letters which showed chronicity of symptoms, and

that this was sufficient for a rating. However, as to the diagnosis of sinusitis, this disorder of record is not an enumerated “chronic disease” listed under 38 C.F.R. § 3.309(a); therefore, the presumptive provisions based on “chronic” symptoms in service and “continuous” symptoms since service at 38 C.F.R. § 3.303(b) do not apply for this particular disorder. *Walker v. Shinseki*, 708 F.3d 1331, 1338-39 (Fed. Cir. 2013).

Nonetheless, at the time of the January 2020 rating decision, of record was a private examination report, from Dr. C.B., which documented the Veteran was diagnosed with sinusitis in 2018. Also of record at the time of the January 2020 rating decision, was a July 2018 statement from the Veteran, in which he reported he noticed sinusitis in 2010, when cleaning an old hangar. Specifically, he reported there were owl pellets and other dusts and dander from which he had minimal protection. He also stated that before having to clean this hangar, he had experienced no issues with his sinuses. Thus, as prior to the rating decision on appeal there was evidence of current sinusitis, an in-service event, and an indication of a link between sinusitis disability and service, the AOJ’s failure to obtain a VA examination and corresponding nexus opinion on the question of direct incurrence was a pre-decisional error. *See McLendon*, 20 Vet. App. at 81; *see also* 38 C.F.R. § 3.159(c)(4). Accordingly, remand is warranted for an examination and a corresponding opinion addressing the claim on a direct incurrence basis.

The matters are REMANDED for the following actions:

1. Schedule the Veteran for a VA examination for his GERD. The examiner must review the claims file and address the following:
  - (a.) Is it at least as likely as not (at least an approximate balance of positive and negative evidence) that the Veteran has a diagnosis of GERD that is related service? Please explain why or why not, specifically considering and discussing 1) the Veteran’s report that he noticed that he had stomach acid return to his throat after basic military training, and more specifically that he

noticed after working out or eating mildly spicy foods he would experience return of stomach acid; 2) his report that during service he also experienced difficulty swallowing his saliva and noticed blood in his fecal excrement; and 3) the statement from the Veteran's spouse, which described, in part, that she first noticed the Veteran had issues with heartburn around the summer of 2008.

(b.) Does the Veteran have a diagnosis of GERD that is at least as likely as not proximately due to his service-connected right shoulder disability and/or service-connected left shoulder disability, to include his use of Motrin and/or NSAIDs to treat those disabilities? Please explain why or why not.

(c.) Does the Veteran have a diagnosis of GERD, that is at least as likely as not aggravated (any increase in disability) by his service-connected right shoulder disability and/or service-connected left shoulder disability, to include use of Motrin and/or NSAIDs to treat those disabilities? Please explain why or why not.

Please provide a rationale to support the opinion(s).

In providing the requested opinion(s), please consider the Veteran's and his spouse's description of the Veteran's in-service symptoms as well as his post-service symptoms. If there is any medical reason to accept or reject the proposition that the Veteran and his spouse reported symptoms in service and thereafter represented the onset of the Veteran's current disability, this should be noted. Stated another way, do the Veteran's and his spouse's



reports about the Veteran's symptoms align with how the currently diagnosed disability is known to develop or are the Veteran's reports generally inconsistent with medical knowledge or implausible?

2. Obtain a supplemental opinion from an appropriate clinician (with examination, if deemed necessary by the clinician) regarding the Veteran's sleep apnea. Please address the following:

Is it at least as likely as not (at least an approximate balance of positive and negative evidence) that the Veteran's sleep apnea is related to service? Please explain why or why not, specifically considering and discussing 1) the Veteran's report that his wife complained of his snoring shortly after they married in January 2007; and 2) the statement, from the Veteran's spouse, in which she reported the Veteran had been living with symptoms of sleep apnea since she met him in June 2006, and that he often woke himself with the loud snoring and often kept her up as well.

Please provide a rationale to support the opinion.

In providing the requested opinion, consider the Veteran's and his spouse description of the Veteran's in-service symptoms as well as his post-service symptoms. If there is any medical reason to accept or reject the proposition that the Veteran and his spouse reported symptoms in service and thereafter represented the onset of the Veteran's current disability, this should be noted. Stated another way, do the Veteran's and his spouse's reports about the Veteran's symptoms align with how the currently diagnosed disability is known to develop or are

the Veteran's reports generally inconsistent with medical knowledge or implausible?

3. Schedule the Veteran for a VA examination for his sinusitis. The examiner must review the claims file and address the following:

Does the Veteran have a diagnosis of sinusitis that is at least as likely as not (at least an approximate balance of positive and negative evidence) related to service? Please explain why or why not, specifically considering and discussing the Veteran's report that he noticed sinusitis in 2010 and that his sinusitis is related to cleaning an old hangar with exposure to owl pellets, dust, and dander.

(Continued on the next page)

Please provide a rationale to support the opinion.

In providing the requested opinion, consider the Veteran's description of his in-service symptoms as well as his post-service symptoms. If there is any medical reason to accept or reject the proposition that the Veteran reported symptoms in service and thereafter represented the onset of the Veteran's current disability, this should be noted. Stated another way, do the Veteran's reports his symptoms align with how the currently diagnosed disability is known to develop or are the Veteran's reports generally inconsistent with medical knowledge or implausible?



---

L. STEPANICK  
Acting Veterans Law Judge  
Board of Veterans' Appeals

Attorney for the Board

M. Espinoza, Counsel

*The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.*