DAV COURT CITATIONS

v.17

(17 Vet.App.)

PREFACE

The attached information is necessarily a work in progress, as the law is never static. This information is designed to provide a quick and ready reference to case law affecting veterans benefits administered by the Department of Veterans Affairs (VA). By its nature, any analysis of case law requires the end user to exercise considerable judgment regarding its application to the facts at hand.

Any case law analysis will necessarily be affected by the following to one degree or another:

- In the case of a new court, such as the Court of Appeals for Veterans Claims (Court), questions are being decided for the first time. As fact patterns change the Court may revisit previously decided questions reaching new conclusions.

- Legislative language is frequently changing, in some cases in response to issues recently decided by the Court.

- The Department of Veterans Affairs has only recently adopted administrative processes required by the Administrative Procedure Act for establishing rules that implement the statutes. The result has been a considerable review of agency rules, policies and directives to determine their consistency with the law.

- New case law analysis is affected by the amount of time necessary to receive, consider and publish any new analysis. Thus, any current analysis may be changed in light of newer case law that has not yet been digested.

- Any analysis will reflect the reviewer's interpretation. Parties analyzing the same case law may respectfully disagree as to the importance of the case, its ultimate meaning in the context of other case law, and finally, what the language of the decision actually meant.

For the above reasons this information is intended for the use of trained National Service Officers of the Disabled American Veterans and National Service Officers in training under the supervision of a trained National Service Officer.

HELPFUL HINTS

Finding information can be accomplished in at least three ways:

1. The Table of Contents (TOC) is hyperlinked to the information in the text. Once you have identified promising information, place the pointer over the TOC identifying that information. When the hand appears left click on the mouse once.

2. An Index has been added which is in the process of being updated. The Index is cross-referenced across different topics. The Index can simplify citation searches by pointing to a citation from different topical areas.

3. Use the "Find" function in the "Edit" pull-down on the Menu toolbar the in MS Word to search throughout the document for text including the words you have entered.

The § section symbol denotes different information under the same heading. The § allows the reader to know that the following paragraph is not a continuation of the preceding paragraph.

If you "copy and paste" from this document, you will also capture the "style" formatted into the paragraph. This may result in unexpected format changes in your document. To change the pasted paragraph to a more compatible "style" highlight the pasted paragraph(s), select "Style…" on the "Format" pulldown on the Menu toolbar and select "Normal" style.

EDITORIAL CHANGES

A document of this size and complexity will invariably contain errors that can be corrected through editing.

You are encouraged to bring editing errors to the attention of Lennox Gilmer, Appellate Counsel at LenG@vetsprobono.org.

The simplest method may be to copy the passage containing the error and paste it in a blank word document. Indicate the appropriate changes and attach to your e-mail.

Your comments and feed back will be gratefully received.

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ADMINISTRATIVE PROCEDURE ACT (APA)

§ The Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 subjected the actions of federal agencies to judicial review in 1946. In 1976 "… Congress waived sovereign immunity and permitted judgments to be entered against the United States." *Roberson v. Principi*, 17 Vet.App. 135, 146 (2003). The APA provided for judicial deference to agency factual findings allowing them to "be overturned only if they are determined by the reviewing court to be 'unsupported by substantial evidence.'" *Ibid* quoting 5 U.S.C. § 706(2)(E). However, initially, the agency later to be named the Department of Veterans Affairs, was excluded from the requirements of the APA. *Ibid*.

ADMINISTRATIVE REMEDIES, EXHAUSTION

§ Citing *Ledford v. West*, 136 F.3d 776 (Fed.Cir.1998), the CAVC held that it could not hear an argument first raised at the Court. *Maggitt v. West*, No. 97-357, slip op. 1998 WL665411 (Aug. 27, 1998) (the Federal Circuit in *Ledford*, held that a new issue could not be introduced at the Court level). But the Federal Court decision in *Ledford*, did ***not*** find that new arguments regarding issues properly before the Board could not be heard. In *Maggitt*, unlike *Ledford*, the new arguments were raised regarding issues before the Court. In error, "[t]he Veterans court summarily held that it lacked the authority to hear *Maggitt's* A[dministrative] P[rocedure] A[ct] challenge because he had not presented the issue earlier in the veteran's benefit claim process …." id est, exhausted his administrative remedies by making the APA argument at the administrative agency adjudicative level. *Maggitt v. West*, 202 F.3d 1370, 1377 (Fed.Cir.2000).

"It is well settled that when Congress has not clearly mandated the exhaustion of particular administrative remedies, the exhaustion doctrine is not jurisdictional, but is a matter for the exercise of 'sound judicial discretion.' (cites omitted) The exercise of that discretion, the Supreme Court has advised us, 'requires fashioning of exhaustion principles in a manner consistent with congressional intent and any

ADMINISTRATIVE REMEDIES, EXHAUSTION

applicable statutory scheme.'" *Id*. at 1377 citing *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). "Nothing in the statutory scheme providing benefits for veterans mandates a jurisdictional requirement of exhaustion of remedies which would require the Veterans court to disregard every legal argument not previously made before the BOARD OF VETERANS' APPEALS. In fact, such an absolute rule would be inconsistent with the nonadversarial *ex parte* system that supplies veterans benefits." (emphasis in text) *Id*.

"The test [of whether administrative remedies must be exhausted] is whether the interests of the individual weigh heavily against the institutional interests the doctrine exists to serve." *Id*. at 1377 citing McCarthy, *supra*.

"The Supreme Court, at the same time [it noted the reasons for requiring the exhaustion of administrative remedies], noted that in three broad sets of circumstances it is inappropriate to invoke the doctrine against an individual. If exhaustion will result in prejudicial delay to the individual, or if there is 'some doubt as to whether the agency was empowered to grant effective relief," *Id*. citing McCarthy, *supra*, at 146-148, the doctrine should not be invoked. Exhaustion is also inappropriate when an administrative remedy can be deemed inadequate because the administrative agency is 'shown to be biased or has otherwise predetermined the issue before it.'" *Id*. at 1378 citing McCarthy, *supra*, at 148-149.

"In addition, and perhaps most importantly for the determination of whether exhaustion should be invoked in a particular case, courts must appreciate the statutory system in which a party is seeking to avoid invocation of the exhaustion doctrine. If, for example, invocation of the doctrine would frustrate the purpose or purposes for which Congress has created a particular statutory arrangement, to the detriment of the individual, that point must be accounted for in reaching a decision whether to invoke the doctrine." *Id*. citing *McCarthy, supra*, at 144.

"In sum, we hold that the Veterans Court did not lack jurisdiction to consider Maggitt's constitutional and statutory arguments, and the request for remand [although they had not been argued below]." *Id*.

The U.S. Court of appeals for the Federal Circuit held "that the Veterans Court abused its discretion when it declined to recall judgment, stay issuance of mandate, and remand Maggitt's knee claim to the Board for reconsideration under Hodge, [155

ALL WRITS ACT (AWA)

F.3d at 1357]." *Id*. at 1380. The Veterans Court decided Maggitt two days after the Federal Circuit issued Hodge. The Veterans Court refused to remand the Maggitt appeal back to the Board in light of Hodge even though the Board decision on appeal had found the evidence in Maggitt to be new but used the materiality test established in Colvin which had just been thrown out by Hodge. Maggitt successfully argued that Hodge now allowed argument which had not been allowed under Colvin and by refusing to remand the case back to the Board the Veterans Court had denied the veteran the right to make such argument before the Board.

ALL WRITS ACT (AWA)

"POTENTIAL" JURISDICTION EXTENDS COURT'S JURISDICTION TO AWA CASES

§ "The Court's jurisdiction to issue a writ of mandamus pursuant to the AWA relies upon not *actual* jurisdiction but *potential* jurisdiction." *YI v. Principi*, 15 Vet.App. 265, 267 (1991) citing *see Hudson v. West*, 13 Vet.App. 470, 471-72 (2000) (citing *Heath v. West*, 11 Vet.App. 400, 402 (1998)). The *YI* court refused jurisdiction for consideration of a writ because the appellant sought a writ to compel the General Counsel to act. However, the Court has jurisdiction:: over decisions of the Board, not the General Counsel's actions or refusals to act except in the case they may become subject to a decision by the Board. *Id*.

WRIT OF MANDAMUS ISSUED ONLY IN EXTRAORDINARY SITUATIONS

§ The remedy of issuing a writ of mandamus "is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Ct.*, 426 U.S. 394, 402 (1976). "Before a Court may issue a writ, a petitioner must demonstrate (1) a clear and indisputable right to the writ and (2) a lack of an adequate alternative means to obtain the relief sought." *Matter of Cox*, 10 Vet.App. 361, 370, (1997) citing *Erspamer v. Derwinski*, 1 Vet.App. 3, 9 (1990); *see also Hahneman Univ. v. Edgar*, 74 F.3d 456, 461 (3d Cir. 1996). "As for the first requirement, the Court in *Erspamer* quoted *United States v. Black* as follows:

"APPARENT ENTITLEMENT" (38 C.F.R. § 3.150(b))

> The Court will not interfere by mandamus with the executive officers of the Government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; **but when they refuse to act in a case at all, ... a mandamus may be issued to compel them.**

United States v. Black, 128 U.S. 40, 48 (1888) (emphasis added): *Erspamer, supra; see also Edgar, supra* ("writ of mandamus is a drastic remedy that a court should grant only in extraordinary circumstances in response to an act amounting to a judicial usurpation of power") (internal quotation marks omitted) (quoting *Will v. United States*, 389 U.S. 90, 95 (1967)). *Cox, supra; see also Cowart v. Principi*, 16 Vet.App. 18, 19 (2002) (denying writ in appeal twice remanded from the Court where doctor's statement gave opinion of life expectancy of less than six months, in part, because the Board had advanced the case on the docket.); *see also Lamb v. Principi*, 284 F.3d 1378 (Fed.Cir.2002) (Federal Circuit refused to overturn Court of Appeals for Veterans Claims (Court) denial of writ to stop the Board from remanding the veteran's claim to the regional office thereby forcing the Board to act on the claim remanded from the Court. The Federal Circuit found that it had the authority to review the Court of Appeals for Veteran's Claims denial of a writ and, in dicta, found the Board remand of the veteran's case to the regional office, in the facts of this case, was helping the claimant)

"APPARENT ENTITLEMENT" (38 C.F.R. § 3.150(b))

FORMS MAILED FOLLOWING VETERANS' DEATH (38 C.F.R. § 3.150(B))

§ The widow argued that she was "apparently entitled" to benefits as a widow and the VA's failure to provide her claim forms in accordance with 38 C.F.R. § 3.150 (b) entitled her to an earlier effective date. Affirming the CAVC decision denying an earlier effective date for a widow's claim, the Federal Circuit held that "[e]ntitlement is only 'apparent' when it is discernable from the file that the claimant meets the basic eligibility requirements." *Westberry v. Principi*, 255 F.3d 1377, 1382 (Fed.Cir.2001).

ATTORNEY MISCONDUCT

§ Order issued by the Court, three judge panel, regarding attorney misconduct in representation before the Court. The attorney failed to file briefs on behalf of the appellant. *Donald M. Bohn, Jr., Attorney at Law*, Docket No. 97-8006, June 18, 1998 (*Cook v. Gober*, No. 96-867).

BENEFIT OF THE DOUBT

AMBIGUOUS DIAGNOSTIC CODE RESOLVED IN FAVOR OF VETERAN

§ Where the rating criteria in a diagnostic code ("DC") are ambiguous, the interpretative doubt must be resolved in favor of the veteran. *Otero-Castro v. Principi*, 16 Vet. App. 375, 382 (2002) (The Court found that Diagnostic Codes 7005 and 7007 were ambiguous when deciding whether or not a veteran should be granted a rating of 60% based on "a separate showing of left ventricular dysfunction in addition to an ejection fraction of 30% through 50%.").

APPELLANT'S TESTIMONY MAY PLACE THE EVIDENCE IN EQUIPOISE

§ "The Secretary cannot ignore appellant's testimony simply because appellant is an interested party. [] Appellant's sworn statement, then, unless sufficiently rebutted, may serve to place the evidence in equipoise." *Cartright v. Derwinski*, 2 Vet.App. 24, 25-26 (1991).

BALANCE OF POSITIVE AND NEGATIVE EVIDENCE (RELATIVE EQUIPOISE)

§ "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 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." 38 U.S.C.A. § 5107(b) (West 1995).

BENEFIT OF THE DOUBT

COURT REVIEW OF BENEFIT OF DOUBT DOCTINE

§ 38 U.S.C. § 7261 sets out the Court's "Scope of Review" of appealed Board decisions. The "Veterans Benefits Act of 2002", Pub.L. No. 107-330, § 401, 116 Stat.2820, 2832 (2002) amended § 7261(b) by adding (1) requiring the Court to "take due account of the Secretary's application of section 5107(b) of this title …" *Roberson v. Principi*, 17 Vet.App. 135, 138-146, provides an extensive analysis of the legislative history of the "benefit of the doubt" principle and Congressional intent regarding the Court's application of the "benefit of the doubt" principle.

The Court concluded that "(b)ecause the Court is precluded from finding facts, it is not authorized to make the determination as to whether the evidence is in equipoise and apply the benefit of the doubt doctrine; the Court is empowered only to ensure that the Secretary's determination in that regard is not clearly erroneous." *Roberson, supra*, at 146.

§ The Court's review of the Board's "application of the section 5107(b) equipoise standard is a factual determination that" the Court "reviews under the 'clearly erroneous' standard" *Mariano v. Principi*, 7 Vet.App. 305, 313 (2003) citing *Robison v. Principi*, 17 Vet.App. 135, 146 (2003). In *Roberson*, the Court considered arguments that amendments to 38 U.S.C. § 7261 included in the Veterans Benefits Act of 2002 had changed the Court's scope of review. However, the Court found that it was precluded by law from "finding facts" and therefore was not "authorized to make the determination as to whether the evidence is in equipoise and apply the benefit of the doubt doctrine; the Court is empowered only to ensure that the Secretary's determination in that regard is not clearly erroneous." *Ibid*.

CUE CLAIM, DOES NOT APPLY TO

§ Benefit of the doubt does not apply to a Board's decision on a CUE motion to revise a prior decision. *Livesay v. Principi*, 15 Vet.App. 165, 178 (2001) cites omitted.

BOARD OF VETERANS' APPEALS

SIGNIFICANT EVIDENCE *FOR* DENIED CLAIM, BOARD MUST EXPLAIN WHY NOT IN "RELATIVE EQUIPOISE"

§ When there is "significant evidence" in support of the veteran's claim, if the Board denies the claim, it must provide an adequate explanation as to why the evidence is not in "relative equipoise" so as to warrant application of the benefit-of-the-doubt rule in 38 U.S.C.A. § 5107(b) (West 1995). *See William (Willie) v. Brown*, 4 Vet.App. 270, 273-74 (1993).

BOARD OF VETERANS' APPEALS

ISSUES REASONABLY RAISED MUST BE DECIDED OR REMANDED

§ "The BVA 'must review all issues which are reasonably raised from a liberal reading of the appellant's substantive appeal.'" *Mingo v. Derwinski*, 2 Vet.App. 51, 54 (1992) citing *Myers v. Derwinski*, 1 Vet.App. 127, 129 (1991). This liberal reading has been extended to include issues raised in all documents or oral testimony submitted prior to the BVA decision. *See EF v. Derwinski*, 1 Vet.App. 324, 326 (1991).

§ "The Court has held that the Board is required to adjudicate all issues reasonably raised by a liberal reading of the appellant's substantive appeal, including all documents and oral testimony in the record prior to the Board decision." *Brannon v. West*, 12 Vet.App. 32, 34 (1998). The Board must either adjudicate or remand such claims. *Id*.; *see also Suttman v. Brown*, 5 Vet.App. 127, 132-33 (1993); *see also* 38 C.F.R. § 19.9 **Remand for further development**. Matters which are first raised on appeal and which have not been adjudicated at the RO should be referred to the RO by the Board. *See Godfrey v. Brown*, 7 Vet.App. 398, 408 (1995); *Hamilton v. Brown*, 39 F.3d 1574, 1585 (Fed.Cir.1994), *aff'g* 4 Vet.App. 528 (1993) (construing § 19.182 to apply to the appellate-review function of the Board and concluding that the references to AOJ in § 19.182 "signify that a remanded case is ***returned*** to the unit that made the ***initial*** determination in connection with the claim" and "do ***not*** signify

BOARD OF VETERANS' APPEALS

that the unit, in disposing of a claim on remand, is functioning as an AOJ" (emphasis in text) *Hamilton*, 4 Vet.App. 409).

Additionally, the Court has ruled that where a claim has been raised to the VA, the VA has failed to adjudicate that claim and the claimant's NOD could be reasonably construed to encompass the RO's failure to adjudicate that claim, the court remands such claims back to the Board. *See Garlejo v. Brown*, 10 Vet.App. 229, 233 (1997) citing *Isenbart v. Brown*, 7 Vet.App. 537 (1995); *Johnston v. Brown*, 10 Vet.App. 80 (1997); *Phillips v. Brown*, 10 Vet.App. 25 (1997); *Slater v. Brown*, 9 Vet.App. 240 (1996).

JURISDICTION, BOARD OF VETERANS' APPEALS (BOARD) (*SEE ALSO* JURISDICTION, GENERALLY)

ALLEGATION OF SPECIFIC ERROR OF FACT OR LAW, DISCRETIONARY (NOT JURISDICTIONAL)

§ The *Gomez* court found error in the Board's dismissal of the appealed case because the Substantive Appeal form did not contain allegations of specific error of fact or law. The Board had interpreted 38 U.S.C. § 7105(d)(5) , which permitted the Board *discretionary* authority to dismiss an appeal when allegations of error of fact or law were absent from the appeal, to be *nondiscretionary*, jurisdictional. Because the *nondiscretionary* analysis used by the Board was the wrong standard, the decision was vacated and remanded. *Gomez v. Principi*, 17 Vet.App. 369, 372 (2003).

In this case, the veteran filed a Substantive Appeal well within the time allotted, October 1996. The VA form 9 edition provided by the VA and used by the veteran was dated January 1992. That edition contained a "NO" block, which the veteran checked, that indicated that "[i]f you checked 'NO' your appeal will be reviewed on all the evidence now of record." On October 30, 1997, the veteran, through his representative, filed a statement indicating service connection for his back and neck were the issues on appeal. The statement referred to specific regulatory citations which would provide for allowance of the benefits claimed and argued that the evidence was at least in equipoise. The veteran was notified by the Board that his appeal might not be timely. *Id*, at 370, 371.

BOARD OF VETERANS' APPEALS

The Board decision on appeal specifically found that the VA form 9 was timely filed but did not include an allegation of error as required by 38 C.F.R. § 20.202. The Board decision acknowledged additional statements in the record that "might be construed as a Substantive Appeal of these issues," but were filed untimely. The Board then concluded that the veteran was statutorily barred from appealing. *Id*.

Because the veteran checked the "NO" block on the VA form 9 he was of any obligation to allege an error of fact or law, "he did not 'fail[] to allege' and, therefore, the Board did not possess any such discretion to dismiss the appellant's appeal." *Id*.

In dicta, the Court referred to *Ef v. Derwinski*, 1 Vet.App. 324, 326 (1991) which pointed to the Board's obligation to review "all issues raised in all documents . . . submitted prior to the BVA decision." Additionally, the Court found the VA form 9 "NO" block to be potentially misleading and cited *cf. Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) ("stating, as to statutory filing deadlines, that tolling of such deadlines may be available 'where the claimant has been induced or tricked by his adversary's misconduct in to filing deadline to pass'"); *Bailey v. West*, 160 F.3d 1360, 1361, 1365 (Fed.Cir.1998) (en banc) ("applying tolling in veterans benefits context where RO employee accepted appellant's signed form to appeal Board decision and apparently told him that, inter alia, 'she would take care of his appeal]'". *But cf. Cummings v. West*, 136, F.3d 1468, 1472-74 (Fed.Cir.1998) (which recognized that Appeals Notice accompanying Board decision "might be confusing" but was satisfactory). *Gomez, supra* at 373.

Additionally the *Gomez* court noted the nonadversarial, proclaimant nature of the adjudication process in which veterans often represented themselves. *Id* citing *Ef, supra.*

FEE BASIS DETERMINATIONS, BOARD HAS JURISDICTION

§ "First, under § 1703(a)(1)(A), before the Secretary is permitted to contract with a non-VA facility in order to procure fee-basis care, it must be established not only that the applicant is a veteran and that he seeks treatment for a service-connected disability, but also that VA facilities are either (1) geographically inaccessible [hereinafter prong (1)] or (2) not capable of providing the care or services that he

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requires [hereinafter prong (2)]. Because a veteran seeking treatment for a service-connected disability could thus never be eligible for fee-basis outpatient treatment under § 703(a)(1)(A) until either prong (1) or (2) has been satisfied, a determination as to an applicant's *eligibility* for fee-basis outpatient care must necessarily include a factual determination as to whether either prong (1) or (2) has been satisfied." *Meakin v. West*, 11 Vet.App. 183, 186 (1998) citing 38 U.S.C. § 7261(a)(4). "In the present case, because the appellant was denied fee basis care on the grounds that he did not satisfy either prong (1) or (2) (citations omitted) the issue is whether the appellant was 'eligible' for fee-basis outpatient treatment. Second, under the plain meaning of § 1703(a), *authorization* for fee-basis treatment takes place only after satisfaction of either prong (1) or (2), and means the letting of a contract. Third, the first sentence of § 20.101(b) by its terms extends jurisdiction to all cases involving eligibility for outpatient treatment, not just to cases involving eligibility for *VA* outpatient treatment." *Ibid* citing 38 .F.R. § 20.101(b).

"The Secretary further argues that decisions regarding fee-basis outpatient treatment are 'medical determinations concerning appropriate medical care . . . which are beyond the Board's jurisdiction.'" *Ibid* (citations omitted); *see also* 38 C.F.R. § 20.101(b). "The Court concludes [] that decisions as to whether an applicant is eligible for fee-basis care under § 1703(a)(1)(A), including determinations as to whether either prong (1) or (2) has been satisfied, are not 'medical determinations[]'[.]" *Ibid* citing 38 C.F.R. § 20.101(b).

"MANDATORY" JURISDICTION

§ "When the Board has jurisdiction over a particular matter, that jurisdiction is 'mandatory'." *Jones (Raymond) v. West*, 12 Vet.App. 98, 106 (1998) (quoting *In the Matter of the Fee Agreement of Cox*, 10 Vet.App. 361, 374 (1997) (cites omitted); *see also Suttman v. Brown* 5 Vet.App. 127, 132 (132 (1993) and *Ef v. Derwinski*, 1 Vet.App. 324, 326 (1991) (Board must adjudicate all claims reasonably raised to it).

BOARD OF VETERANS' APPEALS

MEDICAL EVIDENCE INADEQUATE, MUST REMAND

§ If the BVA finds that the medical evidence in the record is not adequate, it must remand for further development. *See Tucker v. Derwinski*, 2 Vet.App. 201, 203 (1992).

MISSTATEMENT OF ISSUE ON APPEAL VIS A VIS DECISION CONTENT (*SEE* REVISION OF DECISION, SUBSUMPTION OF PRIOR DECISION ...)

RECONSIDERATION

DE NOVO REVIEW BASED ON *ENTIRE* RECORD

§ "We hold . . . the BVA was required by law to proceed in a case under reconsideration as though the initial panel decision had never been entered and, instead, to conduct a *de novo* review 'based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.'" *Harris v. West*, 11 Vet.App. 456, 460, (1998) quoting *Boyer v. Derwinski*, 1 Vet.App. 531, 532 (1991) (emphasis in text). "Our decision in *Boyer* makes clear that the Board is not only permitted, but *required* to view all of the evidence of record (even that obtained after the BVA decision under reconsideration) when the BVA conducts its de novo review of the claim after reconsideration has been granted." *Harris, supra*. (emphasis in text).

DISCRETIONARY AND MAY BE ACCORDED AT ANY TIME

§ The statutory authority for the Chairman of the Board of Veterans' Appeals to grant motions for reconsideration is found in 38 U.S.C.A. § 7103(a) (West 1992). This authority is discretionary. *See Smith v. Brown*, 35 F.3D 1516, 1526 (Fed.Cir. 1994), holding it was the "congressional intent to make that type of review discretionary." (Emphasis in original.) See also the implementing regulation 38 C.F.R. § 20.1000, "Reconsideration of an appellate decision *may* be accorded at any time by the Board..." (Emphasis added.)

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SEE ALSO **INEXTRICABLY INTERTWINED, MOTION FOR RECONSIDERATION IS INEXTRICABLY INTERTWINED WITH THE ORIGINAL CLAIM**

REGULATIONS, REQUIRED BVA ADHERENCE TO (38 U.S.C. § 7104(A))

§ (3) The BOARD OF VETERANS' APPEALS is not free to ignore regulations which the Department of Veterans Affairs has adopted. *See Payne v. Derwinski*, 1 Vet.App. 85, 87 (1990); 38 U.S.C.A. § 7104(a)(West 1995). "The BVA is required to apply all relevant statutes and regulations appropriate to the particular case before it."

SUBSTANTIVE APPEAL FILING

EXTENSION OF TIME TO FILE

§ The time limit for filing a substantive appeal (VA Form 9) is the longer of either: (A) 60 days after the date on which the statement of the case was mailed to the claimant or (B) one year after the date on which the notification of the adjudication was mailed. 38 C.F.R. § 20.302(b). The claimant may seek an extension of the time. 38 U.S.C. §§ 7105(d)(3) and 3.109(b) (2001) (§ 3.109(b) provides for an extension of time for "good cause shown…").

In the instant case, the Notice of decisions on claims filed was mailed December 4, and 17 of 1992. On January 12, 1993, a NOD as to those decisions was filed. A May 14, 1993 letter from the VA acknowledged receipt of the NOD and included a SOC and a blank VA form 9. On July 8, 1993, the appellant, the son of the veteran, sought a 30 day extension of time to reply to the SOC. He gave as a reason the death of his mother a prior wife of the veteran.

The VA notified the appellant that he had one year from the dates notifying the appellant of the decisions to submit the VA form 9, prior to November 24, 1993 and December 17, 1993.

On December 16, 1993, the appellant submitted the VA form 9 to the VA as to the denial of both claims. A hearing officer at the RO indicated that he did not have jurisdiction to hear the appeal of the issue decided on December 4, 1992, because the substantive appeal form was filed on December 16, 1993, 12 days after the one year filing deadline. Following remand from the Board, the VARO found (1) that it

CHARACTER OF DISCHARGE

should have granted the requested 30 day extension of time to respond to the SOC (2) and that its notice to the veteran regarding the time limits for filing the substantive appeal constituted a denial of the veterans request of extension of time to file the substantive appeal. The RO found the substantive appeal was untimely because it had been filed on December 16, 1993, but was due to be filed on or before November 24, 1993. This decision was appealed and the Board found the RO had acted properly in denying the appeal.

On appeal to the Court, the Court indicated, "[d]espite the RO's erroneous statement in its January 1998 SOC, after remand by the Board, that the appellant's Substantive Appeal was due on November 24, 1993…" the parties agreed to the dates the appeal was due to be filed and the date it was filed. *Morgan v. Principi*, 16 Vet.App. 20, 24 (2002).

The Court concluded, that although the extension of time beyond the one year could have been granted, that the Board's finding that the RO acted properly was not error because it had acted within its discretionary authority. *Id*. at 28. *See also Cory v. Derwinski*, 3 Vet.App. 231, 235 (1992) and *Tulingan v. Brown*, 9 Vet.App. 484, 489 (1996) (holding that the Court is highly deferential to "good cause" determinations that are in the "sole discretion" of the Secretary but can be overturned with a finding of abuse of discretion, a high legal standard).

UNTIMELY FILED MAY NOT DEFEAT JURISDICTION

§ If the RO treats the substantive appeal filing as timely, and has not closed out the appeal, the Board is not deprived of jurisdiction. *Gonzales-Morales v. Principi*, 16 Vet.App. 556, 557 (2003) (per curiam) citing *Rowell v. Principi*, 4 Vet.App. 9, 17 (1993).

CHARACTER OF DISCHARGE

§ In affirming a Board decision which did not find Clear and Unmistakable Error, the Court found that the VA's requirement under 38 C.F.R. § 3.12, that objective corroborating evidence is required to establish the "compelling circumstances" which might excuse an AWOL was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law". *Lane v. Principi*, 16 Vet. App. 78, 85 (2002),

appeal docketed, No. 02-7358 (Fed.Cir.2002); *see also Gallegos v. Principi*, 283 F.3d 1309, 1314 (Fed.Cir.2002) (on appeal to the Federal Circuit, that part of the decision in *Gallegos v. Principi*, 14 Vet.App. 50, 57 (2000) which invalidated that part of 38 C.F.R. § 20.201 requiring an NOD to include language which could be construed to be an expressed desire for BVA review was overturned. The Federal Circuit, found that "[s]ection 20.201 is a reasonable and permissible construction of section 7105").

"CHARGED WITH" KNOWLEDGE OF FEDERAL STATUTES AND REGULATIONS

§ "The Supreme Court has held that everyone dealing with the Government is charged with knowledge of federal statutes and lawfully promulgated agency regulations. *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 . . . (1947). Thus, regulations are binding on all who seek to come within their sphere, 'regardless of actual knowledge of what is in the [r]egulations or of the hardship resulting from innocent ignorance.' *Id*. at 385." *Velez v. West*, 11 Vet.App. 148, 156 (1991) quoting *Morris(John) v. Derwinski*, 1 Vet.App. 260, 265 (1991); *see also Jaquay v. West*, 11 Vet.App. 67, 74 (1998).

CLAIMANT 38 U.S.C. § 5100 (VCAA AMENDMENT TO 38 U.S.C.)

"CLAIMANT" NOT APPLICABLE TO MOTIONS FOR REVISION OF A DECISION

§ The VCAA added § 5100 to title 38 defining "claimant" as "any individual applying for, or submitting a claim for any benefit under the laws administered by the Secretary." The *Livesay* court ruled that a motion to revise a previously denied claim is not a claim and therefore the VCAA § 3 provisions amending the 38 U.S.C. obligations of the Secretary to "notify" and "assist" "claimants" in the development of their claims. *Livesay v. Principi*, 15 Vet. App. 165 (2001)(en banc); *but cf. D'Amico v. West*, 209 F.3d 1322 (Fed.Cir.2000) (overturning the requirement for an applicant to qualify as a claimant in a reopened claim that had not previously established claimant status, id est, to be eligible to receive assistance in the development of a claim, notification regarding additional information necessary for

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the completion of a claim, benefit of the doubt, etc., under the pre-VCAA law, the applicants had to prove they were claimants by a "preponderance of the evidence").

CLAIMANT UNDER PRE-VCAA LAW

§ The *D'Amico* court overturned the requirement for an applicant to qualify as a claimant in a reopened claim that had not previously established claimant status, id est, to be eligible to receive assistance in the development of a claim, notification regarding additional information necessary for the completion of a claim, benefit of the doubt, etc., under the pre-VCAA law, the applicants had to prove they were claimants by a "preponderance of the evidence". *D'Amico v. West*, 209 F.3d 1322 (Fed.Cir.2000); *see also Holmes v. Brown*, 10 Vet.App. 38, 40 (1997) (holding that the burden for establishing the claimant's status was by a preponderance of the evidence); *Laruan v. West*, 11 Vet.App. 80, 85 (1998) and *Sarmiento v. Brown*, 7 Vet.App. 80, 84 (1994) (held that the denial of veteran's status could not be reopened under 38 U.S.C. § 5108); *Trilles v. West*, 13 Vet.App. 314, 326 (2000) (the *Trilles* court applied the *Colvin*[1] test to reopen a forfeiture of benefits case because the VA "forfeiture process" was found to be an adversarial proceeding, while the claimant may only have to submit new and material evidence, that evidence must provide a "reasonable probability that . . . the result of the proceeding would have been different")

CLAIMANT STATUS

BASED ON ACTIVE DUTY TRAINING (ADT), INACTIVE DUTY TRAINING (IDT)

§ In *Laruan v. West*, 11 Vet.App. 80, 84 (Feb. 3, 1998) (en banc), the Court held that "without predicate veteran status there is no cognizable claim to be made before the Department or this Court under title 38." The *Aguilar v. Derwinski*, 2 Vet.App. 21,

[1] *The Fed Circuit overturned that part of* Colvin v. Derwinski, *1 Vet.App. 171, 174 (1991) which required the possibility of a changed outcome for new evidence to be material in non-adversarial claims.* Hodge v. West, *155 F.3d 1356 (Fed. Cir.1998).*

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23 (1991) Court held that veteran's status had to be proven by the preponderance of the evidence. The *Laruan* Court declined to review the question of veteran's status on a de novo[2] basis. *Laruan, supra*, at 86; *see also* 38 U.S.C. §§ 101(2) (veteran defined in part as "a person who served in the active military, naval, or air service . . . ."), 1110 (VA authority to pay compensation for disabilities arising from "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") (emphasis added); 38 U.S.C. §§ 1112, 1113(a); 38 C.F.R. §§ 3.1(d), 3.303(a), 3.306 (1996).

In part, active duty is defined as any period of time including active duty training (ADT) "during which the individual was disabled or died from a disease or injury incurred or aggravated in line of duty" or inactive duty training (IDT) "during which the individual was disabled or died from an injury incurred or aggravated in the line of duty." 38 U.S.C. § 101(24); *see also* 38 C.F.R. § 3.6(a) (1995).[3]

For service connection of a disability arising from ADT or IDT, benefit of the doubt cannot be applied to establish service connection, a preponderance of the evidence is required. *See Laruan, supra. Cf. Gilbert v. Derwinski*, 1 Vet.App. 49, 54 (1991) (veterans entitled to benefit of doubt under 38 U.S.C. § 5107(b) with respect to factual determinations, meaning they need establish only approximate balance of positive and negative evidence). In *Paulson v. Brown*, 7 Vet.App. 466, 470 (1995), the Court found:

> The definitional statute, 38 U.S.C. § 101(24), makes a clear distinction between those who have served on active duty and those who have served on active duty for training (as well as those who have served on inactive duty for

[2] **De novo trial** Trying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered. *Black's Law Dictionary* 435 (6th ed. 1990) citing *Farmingdale Supermarket, Inc. v. U.. S.*, D.C.N.J., 336 F.SUPP. 534, 536.

[3] While disease may be service connected if manifested or aggravated during ADT, it cannot be service connected for IDT. *See* 38 U.S.C. § 101(24); 38 C.F.R. § 3.6(a) (1995); *see also Brooks v. Brown*, 5 Vet.App. 484, 486-87 (1993) citing *O.G.C.Prec.* 86-90 at 11 (while disease cannot be service connected, the G.C. Opinion leaves open the possibility of service connecting a disease when injury has increased the disabling affects of the disease. In the case of heart problems, citing certain court cases regarding state and federal workman's compensation law (which the opinion finds non-controlling) exertion could be considered the threshold injuring event, however, the opinion found that under the applicable statutes directing the VA "mandatory heavy exertion" could not constitute an injury under the law).

CLAIM ADJUDICATION OVERVIEW

> training). . . . Since the appellant served only on active duty for training and has not established any service-connected disability, the Board did not err in concluding that the presumption of soundness was inapplicable to the appellants case.

Ibid; *see also Biggins v. Derwinski*, 1 Vet.App 474, 477 (1991) (to be a "veteran" under the law to benefit from the presumptions accorded those who served on active duty, the claimant must have active service as established by duty in active military service or have established they have a disease or injury incurred or aggravated in line of duty during active duty training or have an injury incurred or aggravated in line of duty during inactive duty training).

Once the ADT or IDT period of service has been established as "active duty" and "veterans" status been resolved by virtue of having established entitlement to service connection for a disability, all of the benefits and presumptions accrue to that veteran but only for the period in question. *Biggins, supra* at 479 (Steinberg, J. concurring).

SPOUSE MUST PROVE BY PREPONDERANCE OF EVIDENCE

§ The VA is not obligated to determine whether a claim for surviving spousal benefits is well grounded until the spouse seeking benefits first submits "preponderating evidence" to show that he or she is a claimant under law. *Dedicatoria v. Brown*, 8 Vet.App. 441, 443 (1995); *Brillo v. Brown*, 7 Vet.App. 102, 105 (1994); *see Aguilar v. Derwinski*, 2 Vet.App. 21 (1991) (VA has obligation to assist claimant in developing information pertinent to a well-grounded claim, to give a claimant the benefit of the doubt, and to render a decision which grants every benefit which can be supported by law while protecting the interests of the government; this is not true for those who are not "claimants"); *see also Sandoval v. Brown*, 7 Vet.App. 7 (1994) ("[b]efore applying for benefits, a veteran's spouse must first supply proof of her marital status" in order to achieve claimant status).

CLAIM ADJUDICATION OVERVIEW

§ The entire thrust of the VA's nonadversarial claims system is predicated upon a structure which provides for notice and an opportunity to be heard at virtually every

CLAIM ADJUDICATION OVERVIEW

step in the process. The Secretary shall provide notice of a decision regarding a claim for benefits and "an explanation as to the procedure for obtaining review of that decision." 38 U.S.C.A. § 5104(a) (West 1991); *see Rosler v. Derwinski*, 1 Vet.App. 241, 249 (1991). "Each appellant will be accorded hearing and representation rights pursuant to the provisions of [38 U.S.C.A. Chapter 71 (West 1991)] and regulations of the Secretary." 38 U.S.C.A. § 7105(a) (West 1991). The VA regional office (RO) must provide notice of the right to appeal in regular and in simultaneously contested claims. 38 C.F.R. §§ 19.25, 19. 100 (1992). (In simultaneously contested claims, the VARO must provide notice of appeal to other contesting parties. 38 C.F.R. § 19.102 (1992).) It must provide notification of the filing of an administrative appeal. 38 C.F.R. § 19.52 (1992). It must furnish a Statement of the Case (SOC) to a claimant, 38 C.F.R. § 19.30 (1992), which "must be complete enough to allow . . . appellant to present written and/or oral arguments before the [BVA]," 38 C.F.R. § 19.29 (1992) . (In simultaneously contested claims, each interested party must be furnished with an SOC. 38 U.S.C.A. § 7105A (West 1991); 38 C.F.R. § 19.101 (1992).) A Supplemental SOC (SSOC) is required when an appellant submits additional evidence to the VARO prior to the transfer of appellant's records to the BVA, 38 C.F.R. § 19.37(a) (1992), and when a BVA remand of a case to the VARO results in additional evidentiary or procedural development and continuation of the denial of benefits, 38 C.F.R. § 19.38 (1992)) ; see generally 38 C.F.R. § 19.31 (1992); "a period of 60 days . . . will be allowed for response," 38 C.F.R. § 20.302(c) (1992) (but only 30 days, in the case of a simultaneously contested claim, 38 C.F.R. § 20.501(c) (1992)). If the BVA questions the adequacy of appellant's substantive appeal, appellant is provided "notice . . . and a period of 60 days . . . to present written argument or to request a hearing to present oral argument.") 38 C.F.R. § 20.202 (1992). The Board shall decide an appeal "only after affording the claimant an opportunity for a hearing." 38 U.S.C.A. § 7104(a) (West 1991). In connection with the right to a hearing, a claimant has the right to present evidence, testimony, and argument in support of a claim. 38 C.F.R. § 20.700 (1992). A claimant has the right to notification of the time and place of the hearing on appeal. 38 C.F.R. § 20.702(b) (1992). A claimant has the right to notification of the certification of appeal and

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transfer of the appellate record to the BVA. 38 C.F.R. § 19.36 (1992). If a "Travel Board" hearing is held, a claimant must be notified of its time and place. 38 C.F.R. § 19.76 (1992). When a "Travel Board" hearing is requested, a claimant must be furnished with an SOC if not previously furnished. 38 C.F.R. § 19.77 (1992). "After reaching a decision in a case, the Board shall promptly mail a copy of its written decision to the claimant. . . .") 38 U.S.C.A. § 7104(e) (West 1991). A claimant is entitled to a hearing if a motion for reconsideration of a final BVA decision is granted. 38 C.F.R. § 20.1003 (1992). The BVA may vacate an appellate decision which denies "due process of law" upon the request of appellant, or on the BVA's own motion. 38 C.F. R. § 20.904 (1992).

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BOARD MUST DISCUSS EVIDENCE OF SECRETARY'S COMPLIANCE WITH VCAA

§ If the Board decision was not complete at the time of enactment of the VCAA, the Board decision must discuss whether or not the documents of record satisfy the Secretary's duty to notify the claimant of evidence necessary to "substantiate" the claim and who would obtain such evidence. *Charles v. Principi*, 16 Vet.App. 370, 373-74 citing *Karnas v. Derwinski*, 1 Vet.App. 308, 313 (1991) and *Holliday v. Derwinski*, 14 Vet.App. 280, 286 (2001) (holding that VCAA provisions are potentially applicable to claims pending on date of VCAA enactment), *overruled in part by Dyment v. Principi*, 287 F.3d 1377, 1385 (Fed.Cir.2002) *and Bernklau v. Principi*, 291 F.3d 795, 806 (Fed.Cir.2002) (the Court concluded "that section 3(a) of the VCAA does not apply retroactively to require that proceedings that were complete before the Department of Veterans Affairs and were on appeal to the Court of Appeals for Veterans Claims or this court be remanded for readjudication under the new statute.").

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COURT REVIEW LIMITED IN CLAIMS ON APPEAL WHEN VCAA ENACTED

§ The Court cannot review that which has not been previously considered. Thus, in a Board decision decided before enactment of the VCAA but on appeal after enactment a remand is required. *Sanchez v. Principi*, 16 Vet.App. 16, 17 (2002) citing *Holliday v. Principi*, 14 Vet.App. 280 (2001) (*Holliday* was overruled in part by *Dyment v. Principi*, 287 F.3d 1377, 1385 (Fed.Cir.2002) *and Bernklau v. Principi*, 291 F.3d 795, 806 (Fed.Cir.2002) the Court concluded "that section 3(a) of the VCAA does not apply retroactively to require that proceedings that were complete before the Department of Veterans Affairs and were on appeal to the Court of Appeals for Veterans Claims or this court be remanded for readjudication under the new statute."). This case was remanded based on *Holliday* without consideration of other issues even though all parties agreed that there was reversible error whether or not the VCAA had been enacted. *Sanchez, supra* at 18.

REMAND

APPLICATION OF 38 U.S.C. § 5107 AS AMENDED

§ "Because VCAA § 7(a) made the amendments to (38 U.S.C.) section 5107 explicitly retroactive, any claimant whose claim for title 38 benefits was pending on the date of the VCAA's enactment, would be entitled to have that claim readjudicated under new section 5107 if that claim had been denied as not well grounded. *Holliday v. Principi*, 14 Vet.App. 280, 285 (2002).

Additionally, ". . . Congress, clearly provided that those claims that were denied or dismissed, by VA or a court, 'because the claim was not well grounded' and the denial or dismissal of which became final 'during the period beginning on July 14, 1999, and ending on the date of the enactment of [the VCAA],' may be '*readjudicated under chapter 51 of [title 38], as amended by [the VCAA]*.'" *Holliday, supra* at 285 quoting VCAA § 7(b)(1), (2) (emphasis in cite).

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APPLICATION OF VCAA TO CLAIMS DECIDED BY BOARD AFTER VCAA ENACTMENT

§ ". . . 38 U.S.C. § 5103(a) , as amended by the VCAA, and 38 C.F.R. § 3.159(b), as amended, apply to those claimants who seek to reopen a claim by submitting new and material evidence pursuant to 38 U.S.C. § 5108." *Quartuccio v. Principi*, 16 Vet.App. 183, 187 (2002)(*Quartuccio* was finally decided by the Board after passage of the VCAA November 9, 2000); *but cf. Dyment v. Principi*, 287 F.3d 1377, 1385 (Fed.Cir.2002) *and Bernklau v. Principi*, 291 F.3d 795, 806 (Fed.Cir.2002) (the Federal Circuit held "that section 3(a) of the VCAA does not apply retroactively to require that proceedings that were complete before the Department of Veterans Affairs and were on appeal to the Court of Appeals for Veterans Claims or this court [at the time of the passage of the VCAA] be remanded for readjudication under the new statute.")

RETROACTIVE APPLICATION OF VCAA SECTIONS

§ Section 3 of the VCAA amended 38 U.S.C. § 5103 to require the VA to notify the claimant of any necessary information to "substantiate" the claim and created 38 U.S.C. § 5103A which details the VA's duty to assist obligations. Section 4 of the VCAA amended 38 U.S.C. eliminating the provisions which the courts interpreted to require that claims be well grounded before the VA had any duty to assist. Section 7(a) of the VCAA provided for the amended Section 5107 (eliminating any well grounded requirement) to be applied to "any claim . . . filed before the date of the enactment of this Act and not final as of that date." *Bernklau v. Principi*, 291 F.3d 795, 803-4 (Fed.Cir.2002) quoting Veterans Claims Assistance Act of 2000 (VCAA), Pub.L. No. 106-475, 114 Stat.2096, Section 7(a). The Court noted that "[t]he VCAA does not define the term 'final,' but we understand it to mean final decisions that are no longer subject to appeal." *Id*. at 804.

"Since the early days of this Court (U.S. Supreme Court), we have declined to give retroactive effect to statutes burdening private rights unless Congress made clear its intent.". *Id*. at 804 quoting *Landgraff v. USI Film* Products, 511 U.S. 244, 270, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994)

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The decision found "Congress has not 'made clear its intent' to give retroactive effect to section 3(a) of the VCAA." *Id.* at 805 citing *Landgraff*, 511 U.S. at 270, 114 S.Ct. 1522.

The Court concluded "that section 3(a) of the VCAA does not apply retroactively to require that proceedings that were complete before the Department of Veterans Affairs and were on appeal to the Court of Appeals for Veterans Claims or this court be remanded for readjudication under the new statute." *Id*. at 806.

SUBSTANTIALLY COMPLETE APPLICATION (VCAA)

§ 38 C.F.R. § 3.159(a)(3) (2002) was validated by the U.S. Court of Appeals for the Federal Circuit. *Paralyzed Veterans v. Sec. of Veterans Affairs*, 345 F.3d 1334, 1360 (Fed. Cir. 2003). The regulation requires that a "substantially complete application" contain: claimant's name; relationship to veteran; sufficient service information to verify claimed service; the benefit claimed; any medical conditions for which a benefit is claimed; the claimant's signature, and a statement of income for certain specified claims. *Ibid*.

VA OBLIGATION TO NOTIFY RE: EVIDENCE NECESSARY TO "SUBSTANTIATE" CLAIM AND WHO WILL OBTAIN IT

§ The Court acknowledged a letter to the veteran from the VA describing ". . . evidence potentially helpful to the appellant but does not mention who is responsible for obtaining such evidence." In another letter the Secretary defined new and material evidence but did not "notify the claimant . . . of any information , and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim." *Quartuccio v. Principi*, 16 Vet.App. 183, 187 (2002) citing 38 U.S.C. § 5103(a).

VAE OBLIGATION NOT TRIGGERED UNTIL NEXUS EVIDENCE COMPLETES APPLICATION

§ In *Wells v. Principi*, 326 F.3d 1381, 1383 (Fed.Cir.2003), in dicta, the Federal Circuit pointed to Regional Office information to the veteran informing him that his application was incomplete and which instructed him as to additional evidence

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necessary for him to obtain to complete his application. "It told him his claim 'must include medical evidence, preferably a doctor's statement, showing a reasonable possibility that the disability you now have was caused by injury or disease which began or was made worse during military service.'" The veteran did not provide any additional evidence, the RO found the veteran's claim not well grounded and denied the claim. Upon appeal to the Board of Appeals, the Board applied the VCAA standards and concluded the veteran had not completed his application by providing nexus evidence and therefore no duty to assist obligation was triggered and the RO decision was affirmed. *Id* at 1382-84.

On appeal to the CAVC, in a single judge decision, the Board decision was affirmed. The CAVC held that "[i]n this case, the Board was under no obligation to obtain a medical opinion. As the record demonstrates, there is no competent evidence that the appellant's disability or symptoms are associated with service in the Guard." *Id* at 1383. On appeal to the Federal Circuit, the appellant argued the duty to assist was triggered by his having established he had a current disability. And, therefore, the VA was obligated to obtain a medical opinion or provide a medical examination to establish the nexus evidence the VA was requiring the veteran to obtain.

The Federal Circuit pointed to 38 U.S.C § 5103A(d)(2)(B), which limits the obligation of the VA to providing examinations to those claims in which evidence of record "indicates that the disability or symptoms may be associated with the claimant's active military, naval, or air service ….". The CAVC decision was affirmed. *Id* at 1384; *see also Charles v. Principi*, 16 Vet.App 370, 374-75 (2002) (applying *Caluza v. Brown*, 7 Vet.App. 498, 504 (1995) the Court found a current disability, continuity of symptomatology but no medical nexus evidence. The *Charles* court found that since the first two elements of the *Caluza* test was met, the duty to assist obligation to provide a VA examination was triggered under 38 U.S.C. 5103A(d)(2)(C)).

CF. PRE-VCAA NEXUS REQUIREMENT PRIOR TO DUTY TO ASSIST OBLIGATION

§ The standard for establishing well-groundedness for a claim does not require conclusive evidence of a link between the current diagnosed condition and the in

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service condition, only a "possible" link. *See Alemany v. Brown*, 9 Vet.App. 518, 519 (1996) citing *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table) (In *Alemany, supra*, the Court found the claim well-grounded because there was "competent evidence of a current seizure disorder, episodes of headaches in service, and a '**possible**' link between the seizure disorder and the headaches." (emphasis added); *Lathan v. Brown*, 7 Vet.App. 359 (1995)). *Alemany, Id.*, citing 38 U.S.C. § 5107(b)[4] found "an accurate determination of etiology is not a condition precedent to granting service connection...."

VCAA REMAND NOT APPLICABLE TO CLAIMS WHERE LAW DISPOSITIVE

§ The Court affirmed the denial of NSC pension because there was no proof of wartime service and found that the VCAA was not for application. Where "the law as mandated by statute, and not the evidence, is dispositive of this claim, the VCAA is not applicable." *Mason v. Principi*, 129, 132 (2002) citing 146 CONG. REC. S9212 (daily ed. Sept. 25, 2000) (statement of Sen. Rockefeller); *see also Smith v. Gober*, 227 (2000) (holding that VCAA did not affect federal statute that prohibits payment of interest on past due benefits), *aff'd*, 281 F.3d 1384 (Eed.Cir.2002).

WELL GROUNDEDNESS REQUIREMENT ELIMINATED

§ The Veterans Claims Assistance Act of 2000, Section 4, Pub.L. No. 106-475, 114 Stat. 2096 (Nov. 9, 2000) amended 38 U.S.C. § 5107 eliminating the "well grounded" claim requirement. Thus, any claim denied on the basis of a finding of the claim not being well grounded that was pending on November 9, 2000 or decided thereafter must be readjudicated. *Luyster v. Gober*, 14 Vet.App. 186, 187 (2000) (per curiam order) (remanding *Luyster* to the Board for readjudication under the VCAA) citing *see generally Karnas v. Derwinski*, 1 Vet.App. 308, 312-13 (1991) (when law or regulation changes after claim has been submitted, but before administrative or

[4] " (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." 38 U.S.C. § 5107(b).

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judicial appeal process has been concluded, law which is most favorable to plaintiff must be applied); *cf. Bernklau v. Principi*, 291 F.3d 795, 806 (Fed.Cir.2002) (the Federal Circuit held that, unlike section 4 of the VCAA, "section 3(a) of the VCAA does not apply retroactively to require that proceedings that were complete before the Department of Veterans Affairs and were on appeal to the Court of Appeals for Veterans Claims or this court be remanded for readjudication under the new statute."), *cf. also Mason v. Principi*, 129, 132 (2002) (the Court affirmed the denial of NSC pension because there was no proof of wartime service and found that the VCAA was not for application. Where "the law as mandated by statute, and not the evidence, is dispositive of this claim, the VCAA is not applicable."); *Livesay v. Principi*, 15 Vet. App. 165 (2001)(en banc) (the VCAA does not apply to motions for revision based on CUE).

SEE ALSO **REVISIONS OF DECISIONS/ VCAA INAPPLICABLE TO CUE CLAIM**

SEE ALSO **CONSTITUTIONAL AND DUE PROCESS CONSIDERATION/ COURT REMAND FOR APPLICATION OF VCAA NOT DENIAL OF CONSTITUTIONAL RIGHTS**

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§ 1151 CLAIM

CHAPTER 21 BENEFITS - - BENEFICIARIES MAY RECEIVE

§ Citing the statutory scheme, the Court found a person whose only entitlement to service-connection is under 38 U.S.C. § 1151, for injuries received while in VA medical care, may also be eligible for special adaptive housing under chapter 21 of Title 38. *Kilpatrick v. Principi*, 16 Vet. App. 1, 11 (2002) affirmed on appeal on other grounds *see Kilpatrick v. Principi*, 327 F.3d 1375 (Fed.Cir.2003)(affirmed based on legislative history).

CHAPTER 23 BENEFITS - - BENEFICIARIES NOT ELIGIBLE

CLAIM, TYPES AND STATUS

§ A recipient of § 1151 benefits are not eligible for benefits under chapter 23 of title 38 U.S.C. on the basis of their entitlement to benefits under § 1151. *Mintz v. Brown*, 277, 282-83 (1994).

FILED BEFORE OCTOBER 1, 1997 -- POST *GARDNER*, PREAMENDMENT CHANGE

§ Following the Supreme Court decision in *Brown v. Gardner*, 513 U.S. 115 (1994), the Congress passed an amendment to 38 U.S.C. § 1151 intended to limit the liberalizing affects of the Supreme Court interpretation of § 1151 as it existed at that time. However the effective date of the amendments was October 1, 1996. *See Jones v West*, 12 Vet. App. 460, 463 (1999) citing Pub. L. No. 104-204 § 422(b)(1), (c), 110 Stat. 2926-27 (1996) (found at 38 U.S.C. § 1151 note) (subsection (c) nullifying October 1, 1996, effective date set forth in subsection (b)(1)); *Brown, supra; Boggs v. West*, 11 Vet.App. 334, 343-44 (1998) (noting that revised section 1151 applies only to claims filed on or after "October 7 [sic], 1997", pursuant to specific provision of statute).

TORT JUDGMENTS--DIC OFFSET BY FTCA[5] JUDGMENT

§ 38 U.S.C. § 1151 (1995) provides for Dependency Indemnity Compensation to be offset by Federal Tort Claims Act (FTCA) judgments. In the case VA compensation paid to the widow results in a reduced judgment, the widow's remedy is through "the U.S. District Courts that would have jurisdiction over questions arising from that litigation". *Gantt v. Principi*, 16 Vet.App. 89, 95 (2002) quoting *Bryan v. West*, 13 Vet.App. 482, 486 (2000). Another question is the appellant's legal status in the FTCA litigation. Depending on whether her legal status was the direct beneficiary or the Administratix of the Estate, the amounts of money offset would be different. Monies paid to the estate are not offset. *Id* citing *Neal v. Derwinski*, 2 Vet.App. 296, 299 (1992). The Court also found that the widows legal status in the FTCA litigation would determine whether or not legal fees would be included in the VA offset against the widow's DIC payments. *Id* at 96 citing 38 U.S.C. § 1151.

[5] Federal Tort Claims Act.

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TREATED SAME AS CLAIM FOR SERVICE CONNECTION

§ "Pursuant to the language of prior section 1151, the Court will treat the veteran's claim for additional disability as it would a claim for service connection[.]" *Jones v West*, 12 Vet. App. 460, 463 (1999) citing *Boggs*, 11 Vet.App. 334 344-45 (1998) (considering prior section 1151 claim as a claim for service connection).

SEE ALSO **"INSURANCE, SERVICE DISABLED VETERANS (SDVI) – INELIGIBLE UNDER § 1151"**

ACCRUED BENEFITS

CLAIM VACATED BECAUSE OF DEATH, NO EFFECT ON ACCRUED BENEFITS CLAIM

§ Accrued-benefits claim by survivor will have the same character as claim veteran was pursuing at time of death, and adjudication of that accrued-benefits claim not affected by BVA or RO decision nullified by Court's order vacating BVA decision. *See Hudgins v. Brown*, 8 Vet.App. 365, 368 (1995) (per curiam order); *see also Yoma v. Brown*, 8 Vet.App. 298, 299 (1995); *Robinette v. Brown*, 8 Vet.App. 69, 80 (1995).

DENIED CLAIM PENDING AFTER DEATH UNTIL EXPIRATION OF NOA FILING TIME FOR ACCRUED BENEFITS CLAIM

§ For purposes of accrued benefits claims, if the veteran dies within 120 days of a decision denying a claim, the claim is still pending.

> In *Smith*, we held that when a veteran dies while his or her appeal is pending before the Board, the Board lacks jurisdiction to issue a decision on the merits after death, a subsequently issued Board decision is not a final decision subject to appeal, and the Court accordingly lacks jurisdiction over an appeal from that decision that is filed by the surviving spouse." *Kelsey v. West*, 13 Vet.App. 437, 438 (2000) citing *Smith v. Brown*, 10 Vet.App. 330, 334 (1997); *see also* 38 U.S.C. § 7266(a)(1) (Court may review "a final decision of the Board of Veterans' Appeals"); *Anglin v. West*, 11 Vet.App. 361, 363 (1998) (Court has jurisdiction only over final Board decisions). "We have also dismissed for lack of jurisdiction to continue to hear an appeal where a party attempts to substitute for a veteran who died during the pendency of his or her appeal to this Court. *Id* citing

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> *Zevalkink v. Brown*, 102 F.3d 1236, 1243-44 (Fed.Cir.1996), *cert. Denied*, 521 U.S. 1103, 117 S.Ct. 2478, 138 L.Ed.2d 988 (1997) (discussing with approval Court's unpublished order dismissing earlier appeal on basis that surviving spouse lacks standing because not "adversely affected" by underlying Board decision within meaning of 38 U.S.C. § 7266(a)); *see also* 38 U.S.C. § 5112(b)(1) (payment on veterans' disability compensation claims terminates on last day of month before death); *Landicho v. Brown*, 7 Vet.App. 42, 45 (1994) (where veteran appellants died while appeals pending before Court, substitution by surviving spouses claiming entitlement to accrued benefits under 38 U.S.C. § 5121(a) not permissible; appeals became moot and Court must dismiss and vacate underlying Board decision). Moreover, in *Swanson v. West*, 13 Vet.App. 197 (1997), where a veteran died one day before the Court issued its decision on his appeal, subsequent to which judgment and mandate issued, the Court recalled its judgment and mandate and dismissed the appeal, holding that the surviving spouse could not be substituted as an appellant, and stating that 'the case was moot [when the decision was issued], although the Court was not then aware of it.'" *Id* at 438 citing *Swanson*, 13 Vet.App. at 199 (dismissal ensured that Board decision and underlying regional office decision would have no preclusive effect in adjudication of any subsequent accrued-benefits claim derived from veteran's entitlement).

"Because the time frame in this case is subsequent to the time frame in *Smith, supra*, and prior to those in *Zevalkink, Landicho,* and, *Swanson, all supra*, '[t]he inevitable conclusion' is that there is no discernable basis for a different outcome here." *Kelsey, supra* citing *Swanson*, 13 Vet.App. at 199. Therefore the veteran's surviving spouse, the appellant here, lacks standing to pursue, and the Court lacks jurisdiction over, an appeal of the Boards denial of her late husband's VA benefits claims." *Kelsey, supra*, citing *cf. Marlow v. West*, 12 Vet.App. 548, 550 (1999) (discussing unpublished dismissal for lack of jurisdiction of earlier appeal on veteran's retroactive benefits claim brought after death of veteran by surviving child). "We note, however, that the NOA filed by the appellant and containing notice of her husband's death constitutes an informal, derivative, claim for accrued benefits, which she is entitled to have adjudicated." *Kelsey, supra*, citing *Landicho,* 7 Vet.App. at 50 (notice of death filed with Court and delivered to Secretary in Court's routine pleading process constituted

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informal claim by surviving spouse for accrued benefits); 38 C.F.R. §§ 3.151(a), 3.155(a) (1999).

"Accordingly, we conclude the veteran's claim remained pending [following his death subsequent to the Board decision] at the time of his death, because the 120 day period within which he could file an NOA as to the BVA decision had not yet run." *Teten v. West*, 13 Vet.App. 560, 563, (2000) citing *Kelsey, supra*, at 438; *see also Zevalkink, Swanson, Landicho*, and *Smith (Irma)*, all *supra*. "The Court thus holds that the May 1998 BVA decision erred in failing to adjudicate the appellant's claim for accrued benefits." *Teten, supra*.

DERIVATIVE OF THE VETERAN'S CLAIM

§ In *Jones v. West*, 136 F.3d 1296 (Fed.Cir.1998), the United States Court of Appeals, Federal Circuit reversed the Court of Veterans Appeals decision in *Jones v. Brown*, 8 Vet.App. 558 (1996). The Court of Veterans Appeals had ruled that accrued benefits had to be paid based on evidence in the claims folder on the date of the veteran's death.

In that case, the veteran had abandoned his claim for increased pension benefits based on the dependency of his currently claimed wife. In fact, the claims folder contained some evidence that the veteran had been previously married two times prior to his currently claimed marriage but he had submitted no evidence of dissolution of the prior marriages. When the VA requested the necessary information to adjudicate the claim, the veteran did not respond and the claim was treated as abandoned. Later the veteran died and the widow sought the accrued benefits that would have been paid the veteran for the increased pension if his claim had been favorably adjudicated. Based on the VA granting death benefits to the widow and evidence of the widow's marriage to the veteran, the Court found the widow's claim for accrued benefits to be well grounded and remanded the accrued benefits claim for adjudication based on the Courts findings that accrued benefits could be paid based on the evidence in the claims folder at the time of the veteran's death. *Jones*, 136 F.3d at 1298. The Court based its decision on 38 U.S.C. § 5121(a) (1994), which states in part:

> periodic monetary benefits . . . under laws administered by the Secretary *to which an individual was entitled at death* under existing ratings or decisions, or those based on

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> evidence in the file at date of death (. . . referred to as "accrued benefits") *and due and unpaid* for a period not to exceed one year, shall, upon the death of such individual be paid as follows:
>
> . . .
>
> (2) Upon the death of a veteran, to the living person first listed below:
>
> (A) The veteran's spouse;
>
> . . . .

Jones, 136 F.3d at 1299 quoting 38 U.S.C. § 5121.

The Federal Circuit, Court of Appeals reversed the lower Court finding that accrued benefits could not be paid based on the evidence of record alone. The Federal Circuit found that for a claim for accrued benefits to prevail, the accrued benefits claim would have to be based on a claim decided before or pending at the veteran's death. To reach this decision, the Federal Circuit found that entitlement to accrued benefits depended not only the correct interpretation of § 5121, but also included consideration of 38 U.S.C. 5101(a) (1994). § 5101(a) requires that a specific claim for benefits must be filed before the payment of any benefits. Thus, for any benefits to accrue to the widow, the veteran would have had to have money owed him based on a claim decided before or pending at his death.

The Federal Circuit quoted its findings in *Zevalkink v. Brown*, 102 F.3d 1236 (Fed.Cir.1996), in which it found "[an] 'accrued benefits claim is derivative of the veteran's claim' and so concluded that, absent unconsidered new and material evidence in the file as of the date of death, a surviving spouse could only receive accrued benefits based on 'existing ratings and decisions' and could not reopen or reargue a claim." *Id* at 1241-42 (emphasis omitted). "Thus, a consequence of the derivative nature of the surviving spouse's entitlement to a veteran's accrued benefits claim is that, without the veteran having a claim pending at time of death, the surviving spouse has no claim upon which to derive his or her own application." *Jones*, 136 F.3d at 1300.

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PERIODIC MONETARY BENEFITS OWED BEFORE DEATH VIS A VIS ACCRUED BENEFITS

§ 38 U.S.C. 5121(a) provides for the payment of periodic monetary benefits to certain dependents after the veteran's death. In one case, the eligible family member receives all the benefits which was owed the veteran based on an award of benefits due and payable to the veteran **before** his death. In the other case, accrued benefits, the eligible dependent receives up to two years of benefits which is awarded **after** the veterans death. *Bonny v. Principi*, 16 Vet.App. 504, 507 (2002); *see also Jones v. West*, 136 F.3d 1296, 1299 (Fed.Cir.1998) ("Section 5121(a) refers to a particular species of benefit -- accrued benefits -- and governs the hierarchy of eligibility for such benefits upon the death of the veteran. This [] section explains that accrued benefits are only those 'to which an individual was entitled at death under existing ratings and decisions, or those based on evidence in the file at date of death . . . and due and unpaid.").

RECIPIENTS AMOUNTS AWARDED PRE DEATH/ POSTDEATH

§ 38 U.S.C. 5121(a)(2) limits recipients of accrued benefits to children, spouse or dependent parents of the veteran. *Wilkes v. Principi*, 16 Vet.App. 237, 242 (2002) citing *Sabonis v. Brown*, 6 Vet.App. 426, 430 (1994) (Where no authority in law exists, the Board cannot grant the claim.); *see also Bonny v. Principi*, 16 Vet.App. 504, 507 (2002) (38 U.S.C. 5121(a) provides for the payment of periodic monetary benefits to certain dependents after the veteran's death. In one case, the eligible family member receives all the benefits which was owed the veteran based on an award of benefits due and payable to the veteran **before** his death. In the other case, accrued benefits, the eligible dependent receives up to two years of benefits which is awarded **after** the veterans death.).

REQUIRES PRIOR UNPAID DECISION OR PENDING CLAIM

§ "Reading sections 5101 and 5121 together compels the conclusion that, in order for a surviving spouse to be entitled to accrued benefits, the veteran must have had a claim pending at the time of his death for such benefits or else be entitled to them under an

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existing rating or decision. Section 5101(a) is a clause of general applicability and mandates that a claim must be filed in order for any type of benefit to accrue or be paid. Section 5121(a) refers to a particular species of benefit -- accrued benefits -- and governs the hierarchy of eligibility for such benefits upon the death of the veteran. This latter section explains that accrued benefits are only those 'to which an individual was entitled at death under existing ratings and decisions, or those based on evidence in the file at date of death . . . and due and unpaid.' The 'individual,' at least in this case, is the veteran himself." *Jones v. West*, 136 F.3d 1296, 1299 (Fed.Cir.1998).

AGGRAVATION OF A PREEXISTING CONDITION

ALLEVIATED IN SERVICE NOT SERVICE CONNECTIBLE

§ "[W]here a preexisting disability has been medically or surgically treated during service and the usual effects of the treatment have ameliorated the disability so that it is no more disabling than it was at entry into service, the presumption of aggravation does not attach as to that disability." *Verdon v. Brown*, 8 Vet.App. 529, 537 (1996). "A condition that worsened during service and then improved due to in-service treatment to the point that it was no more disabling than it was at induction is analogous to a condition that has flared up temporarily as described in *Hunt* [*v. Derwinski*, 1 Vet.App. 292 (1991)]." *Verdon, supra*.

PRESUMPTION OF AGGRAVATION TRIGGERED BY ANY WORSENING OF CONDITION

§ The Court has held that the presumption of aggravation may apply although the claimed condition does not increase in sufficient disability to warrant compensation. *See Browder v. Brown*, 5 Vet.App 268, 270-271 (1993) ("[T]he [Board of Veterans' Appeals (BVA or Board)] reasoned that while appellants, uncorrected visual acuity decreased in service, 'more important to the measurement of the veteran's relative visual acuity is the fact that the prescription necessary to correct his...vision...remained exactly the same at separation as it was at the pre-induction

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examination....' *See Browder*, BVA 91-16601, at 7. The Court rejected this rationale in *Browder I* (*Browder v. Derw*inski, 1 Vet.App.204 (1991))....").

PRESUMPTION OF SOUNDNESS (38 USC § 1111) VIS A VIS PRESUMPTION OF AGGRAVATION (38 USC § 1153)

§ 38 U.S.C. § 1110 provides for veterans disabled in service or who had a preexisting condition aggravated in service to be compensated by the VA. 38 U.S.C. § 1111 provides for veterans enrolled in service to be considered in sound condition except for conditions noted on entry into service except where clear and unmistakable evidence (undebatable evidence[6]) demonstrates the condition preexisted service. Thus, if a condition is not noted on entry into service, the veteran is "presumed" to have incurred the disability in service, although the condition may have preexisted service. This presumption is rebuttable only by clear and unmistakable evidence that the condition preexisted service "*and*" was not aggravated by service. Thus, if the condition is not noted on entry into service, the burden is on the VA to produce clear and unmistakable evidence that the condition preexisted service "*and*" was not aggravated by "such service". In other words, if the condition was not noted on entry into service, the VA has the exceptionally high burden of demonstrating by clear and unmistakable, undebatable, evidence that the condition preexisted service "*and*" was not aggravated in service.

Also, 38 U.S.C. § 1153 provides for veterans who have preexisting conditions to have a presumption of aggravation of the preexisting condition if the condition worsens in service unless there is a specific finding that the increase in disability was due to the natural progression of the disease.

The *Cotant v. Principi* court found that the regulations implementing § 1111 of the law, 38 C.F.R. § 3.304(b), conflicted with the statutory presumption of sound condition. *Cotant*, 17 Vet.App. 116, 127 (2003). The *Cotant* court interpreted § 1111 to provide for the veteran to be treated as though no preexisting condition existed when the veteran entered service unless the VA pointed to clear and unmistakable

[6] *See Vanerson v. West*, 12 Vet.App. 254, 258, 261 (1999) ("…'unmistakable' means that an item cannot be misinterpreted and misunderstood, i.e. it is undebatable.") (internal cites omitted).

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evidence proving the condition preexisted service "*and*" proved by clear and unmistakable evidence that the condition was not was not aggravated by service. *Id* at 127-29. However, 38 C.F.R. § 3.304(b) (2002) dropped the VA's burden to prove by clear and unmistakable evidence that the veteran's condition had *not* worsened in service. This regulatory conflict with the law required the VA to prove that the veteran's condition preexisted service but did remove the statutory obligation that the VA had to prove the veteran's condition had *not* worsened in service. *Id*.

38 U.S.C. § 1153 provides for preexisting conditions to be service connected if they worsen in service unless there is a specific finding that the condition did not increase beyond the normal progression of the disability. The *Cotant* court applied the clear and unmistakable evidence standard to the evidence necessary to establish that the veteran's disability had not increased beyond its normal progression in service and thereby rebut the presumption of aggravation created by the worsening in service of the veteran's preexisting condition. *Id* at 130-31.

(*See* Appendix B, VAOPGCPREC 3-2003 dated July 16, 2003, SUBJECT: REQUIREMENTS FOR REBUTTING THE PRESUMPTION OF SOUND CONDITION UNDER 38 U.S.C. § 1111 AND 38 C.F.R. § 3.304, issued following the decision in *Cotant, supra* and citing *Cotant*. This precedent opinion invalidated 38 C.F.R. 3.304(b) and held "A. To rebut the presumption of sound condition under 38 U.S.C. § 1111, the Department of Veterans Affairs (VA) must show by clear and unmistakable evidence both that the disease or injury existed prior to service and that the disease or injury was not aggravated by service. The claimant is not required to show that the disease or injury increased in severity during service before VA's duty under the second prong of this rebuttal standard attaches. The provisions of 38 C.F.R. § 3.304(b) are inconsistent with 38 U.S.C. § 1111 insofar as section 3.304(b) states that the presumption of sound condition may be rebutted solely by clear and unmistakable evidence that a disease or injury existed prior to service. Section 3.304(b) is therefore invalid and should not be followed.

"B. The provisions of 38 C.F.R. § 3.306(b) providing that aggravation may not be conceded unless the preexisting condition increased in severity during service, are not inconsistent with 38 U.S.C. § 1111. Section 3.306(b) properly implements 38 U.S.C. § 1153, which provides that a preexisting injury or disease will be presumed to have been aggravated in service in cases where there was an increase in disability during

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service. The requirement of an increase in disability in 38 C.F.R. § 3.306(b) applies only to determinations concerning the presumption of aggravation under 38 U.S.C. § 1153 and does not apply to determinations concerning the presumption of sound condition under 38 U.S.C. § 1111.")

NON-SERVICE-CONNECTED CONDITION AGGRAVATED BY SERVICE-CONNECTED CONDITION (38 C.F.R. § 3.310(A) (1996))

§ "[W]hen aggravation of a non-service-connected condition is proximately due to or the result of a service-connected condition, such veteran shall be compensated for the degree of disability (but only that degree) over and above the degree of disability existing prior to aggravation." *See Allen v. Brown*, 7 Vet.App. 439, 448 (1995) (en banc) (construing 38 C.F.R. § 3.301(a) (1996)). However, the Court found that 38 C.F.R. § 3.301(a) (1996) could not be applied to the converse circumstances (non-service-connected condition aggravating service-connected condition). *See Johnston v. Brown*, 10 Vet. App. 80, 86, (1997).

REMAND IF CRITERIA TO DETERMINE WORSENING CONDITION INADEQUATE

§ Remand is warranted where the Board does not explain the criteria used "to determine whether there was an increase in disability of appellant's preexisting ... condition during service and how, pursuant to such criteria, it concluded that, 'it has not been shown that there was any inservice worsening of the preexisting ... condition.'" *Browder v. Brown*, 5 Vet.App. 268, 271 (1993)*; see also Hensley v. Brown*, 5 Vet.App. 155, 163 (1993) (If, following the Board's providing adequate reasons and bases including a criteria for determining aggravation in service, if the claim is denied, based on "the natural progress of the disease, it must point to independent medical evidence or quote recognized medical treatises to provide adequate support for the medical conclusion" citing s*ee* 38 U.S.C.A. § 7104(d)(1) (West 1991); *Thurber* [*v. Brown*, 5 Vet.App. 119, 124 (1993)]; *Hatlestad II* [*v. Derwinski*, 3 Vet.App. 213, 217 (1992)]; *Colvin* [*v. Derwinski*, 1 Vet.App. 171, 174 (1991)).

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> [I]n short, a proper application of [38 U.S.C.A. § 1153 and 38 C.F.R. § 3.306(a),(b) ... places an onerous burden on the government to rebut the presumption of service connection.
>
> ....
>
> ... [I]n the case of aggravation of a preexisting condition, the government must point to a specific finding that the increase in disability was due to the natural progression of the disease.

See Akins v. Derwinski, 1 Vet.App.228, 232 (West 1991).

§ In *Crowe v. Brown*, 7 Vet.App. 238, 248 (1994), the Court found that the Board decision finding that the documented medical episodes were simply "flare ups"[7] of the claimed condition and not a worsening of the underlying condition and that the worsening of the condition was simply a natural progression of the condition not aggravated by service, required a medical opinion. In this case, the Court cited the BVA's acknowledgment that the condition worsened in service, thus, the claim was plausible and warranted a remand for an Independent Medical Expert opinion or a VAE which could provide medical information to properly adjudicate the claim.

TEMPORARY OR INTERMITTENT FLARE-UP NOT AGGRAVATION

§ Temporary or intermittent flare-ups of a preexisting injury or disease are not sufficient to be considered aggravation in service unless the underlying condition, as contrasted to symptoms, is worsened. *See Hunt v. Derwinski*, 1 Vet.App. 292, 297 (1991); *Green v. Derwinski*, 1 Vet.App. 320, 323 (1991).

CLAIM GENERALLY

BOARD IS OBLIGATED TO EXPLAIN RATING CRITERIA IN CONTEXT OF EVIDENCE

§ The Board is obligated to "explain, in the context of the facts presented, the rating criteria used in determining the category into which the veteran's symptoms fall." *Shoemaker v. Derwinski*, 3 Vet.App. 248, 253 (1992).

[7] "[A] sudden increase in symptoms of a latent or subsiding disease."' *Webster's* at 245.

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CLAIM CONSIST OF FIVE ELEMENTS

§ "There are five common elements to a veteran's application for benefits: [1] status as a veteran, [2] the existence of a disability, [3] a connection between the veteran's service and the disability, [4] the degree of disability, and [5] the effective date of the disability." Each of these elements are separately appealable. *Collaro v. West*, 136 F.3d 1304, 1308 (Fed.Cir.1998); *Maggitt v. West*, 202 F.3d 1370, 1375 (Fed.Cir.2000); *See also Vargas-Gonzales v. Principi*, 15 Vet.App. 222, 227-28 (2001) (setting out court case law in development of claim as a legal concept).

DEATH OF VETERAN EXTINGUISHES VETERAN'S CLAIM

§ "The operative event is the death of the veteran and the consequent extinguishing of his claims. *See Landicho v. Brown*, 7 Vet.App. 42, 55 (1994) (Court held that "these appeals have become moot by virtue of the deaths of the original veteran applicants"); *see also Zevalkink v. Brown*, 102 F.3d 1236, 1243-44 (Fed.Cir.1996). Thus, all of the decisions on appeal are vacated because they are not final because they are on appeal and the claim has been extinguished by the veteran's death. *Brown v. Principi*, 16 Vet.App. 487, 488 (2002).

ESSENTIAL ELEMENTS (STATUS, DISABILITY, SERVICE CONNECTION, RATING, AND WHEN IN QUESTION, EFFECTIVE DATE)

§ The initial assignment of a rating following the award of service connection is part of the original claim. *See West v. Brown*, 7 Vet. App. 329, 332 (1995) (en banc) (successful claimant has not had his case fully adjudicated until there is a decision as to all essential elements, i.e., status, disability, service connection, rating, and when in question, effective date). In light of the above, the Court holds that when a claimant is awarded service connection for a disability and subsequently appeals the RO's initial assignment of a rating for that disability, the claim continues to be well grounded as long as the rating schedule provides for a higher rating and the claim remains open. *See Shipwash v. Brown*, 8 Vet.App. 218 (1995).

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HAS CLAIM BEEN RAISED?

§ In determining whether a particular claim has been raised, the BVA must consider "all documents or oral testimony submitted prior to the BVA decision" and "'review all issues which are reasonably raised from a liberal reading'" of such documents and oral testimony. *EF v. Derwinski*, 1 Vet.App. 324, 326 (1991) (quoting *Myers v. Derwinski*, 1 Vet.App. 127, 129 (1991)); *see also Douglas v. Derwinski*, 2 Vet.App. 435, 438-40 (1992) (en banc). Where such review of all documents and oral testimony reasonably reveals that the claimant is seeking a particular benefit, the Board is required to adjudicate the issue of the claimant's entitlement to such a benefit or, if appropriate, to remand the issue to the Regional Office for development and adjudication of the issue; however, the Board may not simply ignore an issue so raised. *See Suttman v. Brown*, 5 Vet.App. 127, 132-33 (1993); *Douglas, supra*, 1 Vet.App. 438-440; *Fanning v. Brown*, 4 Vet.App. 225, 229 (1993); *Akles v. Derwinski*, 1 Vet.App. 118, 121, (1991); *Payne v. Derwinski*, 1 Vet.App. 85, 87 (1990); *see also Bernard v. Brown*, 4 Vet.App. 384, 392-94, (1993) (BVA required in some circumstances to remand claims reasonably raised by claimant but not decided by the RO.); 38 C.F.R. § 19.9 (1992) (remand for further development.).

SPECIFY BENEFIT SOUGHT - - NOT ALWAYS NECESSARY

CLAIM MAY BE FILED ON OTHER THAN FORMAL CLAIM FORM

§ The Court has ruled that evidence of a claim for Total Disability due to Individual Unemployability (TDIU) was veteran's references to difficulties maintaining employment on his VA Form 1-9 filed some years before the decision on appeal; veteran's references to unemployment due to service connected condition in another appeal preceding the current appeal; and two employee letters submitted in support of the *Isenbart* appeal decided by the Court in 1995 and the veteran's reference to loss of jobs in his Notice of Disagreement regarding the issues decided in the *Isenbart* Court decision, all of which occurred before the veteran filed a formal claim for TDIU. Although the veteran's formal claim for TDIU was filed in the month following his NOD which lead to the 1995 Court ruling, the Court accepted the issue

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of TDIU on appeal as well grounded before the RO decision appealed to the Board and finally overturned by the Court *See Isenbart v. Brown*, 7 Vet.App. 537, 540-41, (1995).

MEDICAL TREATMENT RECORDS MAY CONSTITUTE INFORMAL CLAIM (38 C.F.R. § 3.155(a) (1991))

§ In *Servello v. Derwinski*, 3 Vet.App. 196, 198 (1992), from the date the veteran had been granted service connection for a psychiatric disability he had continually sought an increased rating for that condition. However, over three years after service connection was granted for the veteran's psychiatric condition, he filed an application for an increased rating based on individual unemployability (IU) and was granted IU but only to the date of his formal application for IU. The Court vacated the Board decision and remanded the case for a readjudication consistent with the Court opinion. *Id*., at 201.

In *Servello* the Court found that "[u]nder 38 C.F.R. § 3.155(a) (1991), the submission of certain medical records *may* constitute an 'informal claim' for an increase in disability compensation. If a 'formal claim' has not been received by VA upon its receipt of an informal claim, VA must forward an application to the claimant; the claimant must return the formal claim to VA (Veterans Administration [currently Department of Veterans Affairs]) within one year to make the date of receipt of the informal claim an appropriate effective date for the claim. In addition and significantly, 38 C.F.R. § 3.157(b)(1) (1991) specifies that where, as here, a claimants formal claim for compensation already has been allowed, receipt of, inter alia, a VA report of examination *will be* accepted as an informal claim filed on the date of the examination." *Servello, supra*, at 198 (emphasis in text.).

The Court found that the Board had erred by misinterpreting 38 C.F.R. § 3.155(a) to require that the "informal claim [must] *specifically* identify the benefit sought." (emphasis in text). .... "Making such precision a prerequisite to acceptance of a communication as an informal claim would contravene the Court's precedents and public policies underlying the veterans' benefits statutory scheme. 'A claimant's claim may not be ignored or rejected by the BVA merely because it does not expressly raise the provision which corresponds to the benefits sought'." *Servello*,

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Id., at 199 citing *Douglas v. Derwinski*, 2 Vet.App. 103, 109 (1992) (*Douglas I*); *see Douglas v. Derwinski*, 2 Vet.App. 435, 442 (1992) (en banc) (*Douglas II*); *Akles v. Derwinski*, 1 Vet.App. 118, 121 (1991). "To require that veterans enumerate which sections they found applicable to their request[s] for benefits would change the [nonadversarial] atmosphere in which [VA] claims are adjudicated." *Servello, Ibid.,* citing *Akles, supra.*

In *Servello*, the Court opined "[t]he question then becomes whether any of the veteran's ... written communications to VA (preceding the date of his application for IU), whether formal or informal, evidenced a "belief" by the veteran that he was entitled to total disability benefits by virtue of unemployability. .... The veteran is not required to mention "unemployability." *Servello, supra,* citing *Gleicher v. Derwinski*, 2 Vet.App. 26, 27 (1991) (reversing BVA decision denying individual unemployability benefits where appellant had requested that BVA increase 70 percent disability rating to 100 percent but did not request specifically a total rating based on individual unemployability); *Snow v. Derwinski*, 1 Vet.App. 417 (1991) (remanding matter to BVA for consideration of individual unemployability claim where appellant had not raised it explicitly but had stated in submissions to VA that he believed he was 100 percent disabled and that last employer would not rehire him due to his service-connected PTSD).

In *Servello* the Court cited a number of pieces of evidence which were indicators that the veteran had declared himself unable to work and, thus, had placed the VA "on notice ... that [he] was in a continuous state of unemployability ...." including a claim for pension benefits. Servello, Id. at 200.

CONTESTED CLAIM

NSLI CHANGE OF BENEFICIARY IN A CONTESTED CLAIM

§ "The first point that should be taken from the large body of federal case law is that in proving both the intent and the overt act or acts, the party claiming the insured veteran intended to change his NSLI beneficiary has the burden of proof." *Fagan v. West*, 11 Vet.App. 48, 53 (1999) cites omitted; *cf. Elias v. Brown*, 10 Vet.App. 259, 263 (1997) ("The appellant cannot be entitle to the benefit of the doubt here because there are two claimants in the case. The benefit of the doubt cannot be given to both.").

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For a person to prevail in a contested NSLI beneficiary claim that person must first attempt to show "that the NSLI insured veteran had effected a beneficiary change [hereinafter 'the claimant'] . . . by proving that the insured veteran complied with the regulations in filing a valid change of dependency[8] with VA. *See Fagan , supra*, at 12 citing *Klekar v. West*, 12 Vet.App. 503, 507 (1999) (veteran's signature on change-of-beneficiary note and receipt prior to death is sufficient to satisfy 38 C.F.R. § 8.22.); *see also Curtis v. West*, 11 Vet.App. 129 (1998). However, if the provisions of 38 C.F.R. § 8.22 are not satisfied, then secondly the claimant may prevail if he can "prove by clear and convincing evidence that the insured veteran intended[9] that the claimant should be the beneficiary and also prove that the insured veteran took an overt action reasonably designed to effectuate that intent." *Fagan, supra*, citing *Hawkins v. Hawkins*, 271 F.2d 870, 874 (5th Cir. 1959); *cf. Berk v. United States*, 294 F.Supp. 578, 581 (E.D.N.Y. 1969); *Baker v. United States*, 386 F.2d 356, 359 (5th Cir. 1967); *Criscuolo v. United States*, 239 F.2d 280, 281 (7th Cir. 1956) (indicating "clear proof" standard). "Third, if the insured veteran's intent cannot be proven by clear and convincing evidence, then the claimant must prove the insured veteran's intent by a preponderance of the evidence and must prove that the insured veteran did everything reasonably necessary, or at least everything he or she subjectively and reasonably believed was necessary, to effectuate his intention." *See Fagan, supra*, at 13 citing *Bernard v. United States*, 368 F.2d 897, 901 (8th Cir. 1966); *Collins v. United States*, 161 F.2d 64, 67-68 (10th Cir. 1947); *United States v. Pahmer*, 238 F2.d 431, 433 (2d Cir. 1956) (*cert. denied*, 352 U.S. 1026 (1957).; *Senato v. United States*, 173 F.2d 493, 495 (2d Cir. 1949). ". . . during [the process of proving the claim], the claimant always has the burden of proof." *Fagan, supra*, citing *Baker*, and *Criscuolo*, all *supra* and *Bradley v. United States*, 143 F.2d 573, 576 (10th Cir. 1944).

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[8] "[I]t is not necessary that the evidence of the veteran's intent or overt act done to effectuate that intent be in the form of a writing by the veteran. Other forms of evidence of an intention to change the beneficiary may suffice." *Jones v. Brown*, 6 Vet.App. 388, 390 (1994).

[9] "An NSLI policy is an insurance contract between the government and the insured veteran." *Fagan, supra*, at 7 citing *White v. United States*, 270 U.S. 175, 180 (1926); *Wolfe v. Gober*, 11 Vet.App. 1, 2 (1997); *Collins v. United States*, 161 F.2d 64, 67 (10th Cir. 1947). "[T]he insurer has no interest in the matter except in carrying out the intentions of its policyholder." *Fagan, Supra*, quoting *John Hancock Mutual Life Insurance Co. v. Douglass*, 156 F.2d 367, 369 (7th Cir. 1946) (cited in *Collins, supra* at 68). "Accordingly, 'in the field of [NSLI] the cases are legion which hold that in [the] judging of the efficacy of an attempted change of beneficiary 'the courts brush aside all legal technicalities [that is, the requirements of § 8.22] in order to effectuate the manifest intention of the insured.'" *Fagan, supra*, quoting *United States v. Pahmer*, 238 F2.d 431, 433 (2d Cir. 1956) (*cert. denied*, 352 U.S. 1026 (1957) (quoting *Roberts v. United States*, 157 F.2d 906, 909 (4th Cir. 1946)).

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DEPENDENTS EDUCATIONAL ASSISTANCE ALLOWANCE (38U.S.C. CHAPTER 35)

§ For the purposes of Dependents Educational assistance (DEA), under Chapter 35, Title 38 U.S.C.A. (West 1995), a total disability rating under the paired organ statute, 38 U.S.C.A. § 1160 (West 1995), establishes entitlement. *See Kimberlin v. Brown*, 5 Vet.App. 174 (1993).

DEPENDENCY AND INDEMNITY COMPENSATION (DIC) 38 U.S.C. CHAPTER 13

ELIGIBILITY RESTORED TO REMARRIED VETERAN'S SPOUSES

§ "[T]he Intermodal Surface Transportation Act of 1998 removed the requirement that a remarriage be terminated prior to November 1, 1990, for a remarried surviving spouse to have his or her DIC benefits restored." *See Felix v. West*, U.S. Vet. App. No.97-928, slip op. at 3, (August 14, 1998) (nonprecedential memorandum decision) (citing Pub.L. 105-178, § 8207, 112 Stat. 107, 495, [effective date October 1998] which amended 38 U.S.C. by adding, inter alia, § 1311(e)

(1) The remarriage of the surviving spouse of a veteran shall not bar the furnishing of dependency and indemnity compensation to such person as the surviving spouse of the veteran if the remarriage is terminated by death, divorce, or annulment unless the Secretary determines that the divorce or annulment was secured through fraud or collusion.

(2) If the surviving spouse of a veteran ceases living with another person and holding himself or herself out openly to the public as that person's spouse, the bar to granting that person dependency and indemnity compensation as the surviving spouse of the veteran shall not apply.)

(Decided May 12, 1998)

RESTORED FOLLOWING REMARRIAGE IF QUALIFIED BY OCTOBER 31, 1990

§ Prior to November 1, 1990, 38 U.S.C. § 103(d)(2) provided:

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> The remarriage of the [widow] of a veteran shall not bar the furnishing of benefits to [her as the widow] of the veteran if the remarriage has been terminated by death or has been dissolved by a Court with basic authority to render divorce decrees unless the [Secretary] determines that the divorce was secured through fraud by the widow or collusion.

Congress changed the law in 1990 so that surviving spouses whose remarriage was terminated were no longer eligible to have their dependency and indemnity (DIC) benefits restored. *See Omnibus Reconciliation Act of 1990,* Pub. L. No. 101-508, § 8004, 104 Stat. 1388 (Nov. 5, 1990). Two savings provisions were provided in the *Veteran's Benefits Programs Improvement Act of 1991*, Pub. L. No. 102-86 § 502, 105 Stat. 414, 424 (1'991) [hereinafter 1991 Act] and the *Veteran's Benefits Act of 1992*, Pub. L. No. 102-568, §103, 106 Stat. 4320, 4322 (1992) [hereinafter 1992 Act]. The 1991 Act provided that the 1990 amendment would not apply if the person qualified as a surviving spouse as of October 31, 1990. The 1992 Act provided that the 1990 amendment would not apply if proceedings to terminate a remarriage had commenced before November 1, 1990. *See Owings v. Brown,* 8 Vet.App. 17 (1995); *see also* 38 C.F.R. § 3.55(a) (1996). (This dicta is extracted from an unpublished non-precedential single judge decision, *Casdorph v. Brown,* U.S. Vet. App. No.96-257, slip op. at 2-3 (Jun. 16, 1997)).

DIC ELIGIBILITY, 38 U.S.C. § 1318

§ 1318 CLAIM MUST MEET CUE CLAIM ELEMENTS

§ "[W]e hold today that a section 1318 DIC claimant must provide at least the following: The date or approximate date of the decision sought to be attacked collaterally, or otherwise provide sufficient detail so as to identify clearly the subject prior decision, and must indicate how, based on the evidence of record and the law at the time of the decision being attacked, the veteran would have been entitled to have prevailed so as to have been receiving a total disability rating for ten years immediately preceding the veteran's death." *Cole v. West,* 13 Vet.App. 268, 277 (1999) citing C*rippen v. Brown,* 9 Vet.App. 412, 418 (1996) and *Fugo v. Brown,* 6 Vet.App. 40, 44 (1993).

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"Prior to this opinion, the Court has not addressed in any of its section 1318 opinions what specifically an appellant must argue in order to obtain an adjudication by the Board of a section 1318 hypothetically 'entitled to receive' theory. In this respect, we note that the nature of a hypothetically 'entitled to receive' claim is analogous to a CUE-based section 1318 'entitled to receive' claim in that the former may succeed on the basis of only the evidence and the law that existed at a fixed point in the past." *Cole, supra*, at 278 citing *cf. Sutton v. Brown*, 9 Vet.App. 553 (1996) and *Fugo, supra*. "Accordingly, for much the same reasons as we reached the conclusion set forth in part II.B., above, as to a CUE-based section 1318 hypothetically 'entitled to receive' theory that a claimant must, prior to the Board decision, set forth how, based on the evidence in the veteran's claims file, or under VA's control, at the time of the veteran's death and the law then applicable, *Cole, supra* citing *Wingo v. West*, 11 Vet.App. 307, 312 (1998); *Carpenter I v. West*, 11 Vet.App. 140, 145 (quoting *Green v. Brown*, 10 Vet.App. 111, 118 (1997)), the veteran would have been entitled to a total rating for the 10 years immediately preceding the veteran's death." *Cole, supra*, citing 38 C.F.R. § 20.1304; *Kutscherousky v. West* 12 Vet.App. 369, 371 (1999) (per curiam order) (discussing 38 C.F.R. § 20.1304).

Because the Court first addressed these new requirements placed on § 1318 claims in *Cole, supra*, the Court remanded *Cole* and future appeals decided by the Board prior to the date of the opinion in *Cole* (Dec. 23, 1999) so "the appellant will have an opportunity to present on remand, with the degree of specificity required by this opinion, any section 1318 DIC 'entitled to receive' claim theory that she seeks to have adjudicated." *Cole, supra*, citing *Kutcherousky*, 12 Vet.App. at 372-73.

DIC FOUR WAYS TO QUALIFY (38 U.S.C. §1310; 38 C.F.R. § 3.312; AND 38 U.S.C.A. § 1318(B) (PREVIOUSLY § 410(B)); 38 C.F.R. § 3.22)

§ The surviving spouse of a veteran who dies from a service-connected injury while in active military service is entitled to receive dependency and indemnity compensation (DIC) benefits. 38 U.S.C.A. § 1310 (West 1995). For such death to be considered service-connected, it must result from a disability incurred in the line of duty. 38 U.S.C.A. § 101(16) (West 1995). *See Smith v. Derwinski*, 2 Vet.App. 241, 243 (1992). "When any veteran dies after December 31, 1956, from a service-connected or compensable disability, the Secretary shall pay dependency and indemnity

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compensation to such veteran's surviving spouse, children, and parents." 38 U.S.C.A. § 1310 (West 1995). "Such a claim for DIC is generally treated as an original claim by the survivor, regardless of the status of adjudications concerning service-connected-disability claims brought by the veteran before his or her death." *See Green v. Brown*, 10 Vet.App. 111, 114-15 (1997) citing 38 C.F.R. § 20.1106 (1996); *Zevalkink v. Brown*, 6 Vet.App. 483, 491 (1994), aff'd 102 F.3d 1236 (Fed. Cir. 1996). "A DIC claim must be well grounded under 38 U.S.C. § 5107(a)." *See Green, supra,* citing *Johnson (Ethel) v. Brown*, 8 Vet.App. 423, 426 (1995); *see also Caluza v. Brown*, 7 Vet.App. 498, 506, *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (1996); *Grottveit v. Brown*, 5 Vet.App. 91, 92 (1993). "A veteran's death is due to a service-connected disability when 'such disability was either the principal or a contributing cause of death.'" *Green, supra* citing 38 C.F.R. § 3.312 (1994).

> However, even if a service-connected condition did not cause or contribute to a veteran's death, the surviving spouse is entitled to receive DIC benefits '**as if** the veterans' death were service connected' (emphasis added) when a veteran meets the requirements in 38 U.S.C. § 1318[10] (previously 38 U.S.C. § 410(b)) and 38 C.F.R. § 3.22[11] (emphasis added) (1995) []." *Green, supra.*

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[10] 38 U.S.C. § 1318(b) "A deceased veteran referred to in subsection (a) of this section is a veteran who dies, not as the result of the veteran's own willful misconduct, and who was in receipt of or entitled to receive (or but for the receipt of retired or retirement pay was entitled to receive) compensation at the time of death for a service-connected disability that either

(1) was continuously rated totally disabling for a period of 10 or more years immediately preceding death; or

(2) if so rated for a lesser period, was so rated continuously for a period of not less than five years from the date of such veteran's discharge or other release from active duty."

[11] 38 C.F.R. § 3.22 "Benefits at DIC rates in certain cases when death is not service connected.

(a) Entitlement criteria. Benefits authorized by section 1318 of Title 38, United States Code, shall be paid to a deceased veteran's surviving spouse (see §3.54(c)(2)) or children in the same manner as if the veteran's death is service connected when the following conditions are met:

(1) The veteran's death was not caused by his or her own willful misconduct, and

(2) The veteran was in receipt of or **for any reason (including** receipt of military retired or retirement pay or correction of a rating after the veteran's death based on **clear and unmistakable error**) was not in receipt of but **would have been entitled to** receive compensation at the time of death for a service-connected disablement that either:

(i) Was continuously rated totally disabling by a schedular or unemployability rating for a period of 10 or more years immediately preceding death; or

(ii) Was continuously rated totally disabling by a schedular or unemployability rating from the date of the veteran's

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Thus, "the survivor is given the right to attempt to demonstrate that the veteran hypothetically would have been entitled to receive a different decision on a service-connection-related issue [] based on evidence in the veteran's claims file or VA custody prior to the veteran's death and the law then or subsequently made retroactively applicable." *Green, supra*, at 118; *see also Bell v. Derwinski*, 2 Vet.App. 611, 612-13 (1992) (per curiam order); *cf. Hayes (Mildred) v. Brown*, 353, 358-61 (1993) (although 38 U.S.C. § 5121(a) limits survivor's accrued-benefits claim to consideration of evidence in file at veteran's death, that limitation is qualified by section 5121(c) right to submit evidence within one ear after death and VA Manual M21-1 provisions (¶ 5.25(a)) deeming to be part of a veteran's file at death certain service department and VA medical and other records)."

DIC GENERAL ELIGIBILITY

§ The surviving spouse of a veteran who dies from a service-connected injury while in active military service is entitled to receive dependency and indemnity compensation (DIC) benefits. 38 U.S.C.A. § 1310 (West 1995). For such death to be considered service-connected, it must result from a disability incurred in the line of duty. 38 U.S.C.A. § 101(16) (West 1995). *See Smith v. Derwinski*, 2 Vet.App. 241, 243 (1992). "When any veteran dies after December 31, 1956, from a service-connected or compensable disability, the Secretary shall pay dependency and indemnity compensation to such veteran's surviving spouse, children, and parents." 38 U.S.C.A. § 1310 (West 1995).

HYPOTHETICALLY ENTITLED TO RECEIVE' THEORY

§ "In contrast to the totally derivative nature of the substance of an accrued benefit claim, [] a claim for DIC is an original claim for DIC is an original claim brought by the survivor in his or her own right[]." *Wingo v. West*, 307, 312 (1998) citing *Zevalkink v. Brown*, 6 Vet.App. 483, 489, 491 (1994) *aff'd* 102 F.3d 1236 (Fed. Cir 1996). "[I]t is the appellant's application for DIC that satisfies the section 5101(a) requirement for the filing of a claim, and what remains is for the VA to make a determination of whether, under § 1318 and its implementing regulation, the veteran

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discharge or release from active duty for a period of not less than 5 years immediately preceding death." (emphasis added)

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'***for any reason (including receipt of military retired or retirement pay*** [)] . . . was not in receipt of but ***would have been entitled*** to receive compensation for a service connected disablement". (emphasis in decision) *Wingo, supra*, quoting 38 C.F.R. § 3.22(a)(2).

In essence, § 1318 gives the "survivor the 'right to attempt to demonstrate that the veteran hypothetically would have been entitled to a different decision on a service-connection-related issue . . . based on evidence in the veteran's claims folder prior to the veteran's death and the law then or subsequently made retroactively applicable'". *Wingo, supra*, at 311 quoting *Green (Doris) v. Brown*, 10 Vet.App. 111, 118 (1997) and citing *Carpenter v. West,* 11 Vet.App. 140, 145-46 (1998) (reaffirming as holding the conclusion in *Green*). "In short, 'section 1318 and its implementing regulation in § 3.22(a) allow the appellant to obtain a determination of whether the veteran hypothetically would have been entitled to receive' an award of service connection." *Wingo, supra*, at 307 quoting *Green*, 10 Vet.App. at 119; also citing *Carpenter, supra*.

SC DISABILITY PRINCIPAL OR A CONTRIBUTORY CAUSE OF DEATH (38 C.F.R. § 3.312 (1996))

§ A death is considered service connected when a service-connected disability "was either the principal or a contributory cause of death." 38 C.F.R. § 3.312 (1996); *Wray v. Brown*, 7 Vet.App. 488, 491-92 (1995).

EDUCATIONAL BENEFITS

EDUCATIONAL BENEFITS LIMITED TO AGGREGATE 48 MONTHS EXCEPT CHAPTER 31

§ 38 U.S.C. 3695(a) prohibits the award of educational benefits for chapter 34 of title 38 and chapter 1606 of title 10 for an aggregate period of more than 48 months. *Davenport v. Principi*, 16 Vet.App. 522, 527 (2002) (except for chapter 31 of title 38, all educational programs under chapters 30, 32, 34, 35, and 36 of title 38 and title chapters 107, 1606, and 1611 of title 10 are prohibited from awarding educational benefits for an aggregate period of 48 months). Veteran's service in two different enlistments did not entitle him to benefits for a longer period, and denial does not

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constitute breach of any contract with the Department of the Army to which VA is acting as an agent regarding the administration of educational benefit programs. *Id* at 527-28 citing *Harvey v. Brown*, 6 Vet.App. 416, 424 (1994) (where statutory law sets entitlement to a benefit, relief from a breach of the enlistment agreement cannot include the granting of that benefit beyond its statutory limits).

PACHECO SETTLEMENT RE: EXTENSION OF CHAPTER 34 DELIMITING DATE

§ The Court of Appeals for Veterans Claims received an NOA regarding the application of the settlement in the *Pacheco v. Department of Veterans Affairs*, No. C83-3098 (N.D.Ohio1991) District Court case. The *Pacheco* case was initiated prior to the enacting legislation creating the Court of Appeals for Veterans Claims. *West v. Principi*, 15 Vet.App. 246, 247-49 (2001). District Courts have jurisdiction to decide facial challenges to any veterans benefits law but not veterans benefits decisions. *Id* at 249 citing *Zuspann v. Brown*, 60 F.3d 1156, 1158-61 (5th Cir.1995), *cert denied* 516 U.S. 1111, 116 S.Ct. 909, 133 L.Ed.2d 841 (1996). The Court of Appeals for Veterans Claims has jurisdiction over appeals of denials of Veterans Benefits. *Id* citing Pub.L. No. 100-687, 102 Stat. 4105 (1998); 38 U.S.C. § 7252.

The *Pacheco* litigation was a class action law suit challenging the delimiting date of the title 38 U.S.C., chapter 34 educational benefits program. The *Pacheco* settlement provided for an extension of the entitlement period beyond the delimiting date under specified circumstances.

EXTRA-SCHEDULAR RATINGS (38 C.F.R. § 3.321(B))

BVA MUST REFER FOR EXTRA-SCHEDULAR CONSIDERATIONS

§ "[T]he BVA cannot consider an extra-schedular rating in the first instance; rather, the Court [has] held that the 'proper procedure for extra-schedular consideration of a claim under 38 C.F.R. § 3.321(b)(1) requires consideration in the first instance by the Under Secretary for Benefits (formerly the Chief Benefits Director) or the Director of Compensation and Pension Service.'" *Smallwood v. Brown*, 10 Vet.App. 93, 98 (1997) citing *Floyd v. Brown*, 9 Vet.App. 88, 94-96 (1996). "However, the Court in

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Floyd did not limit the BVA's duty to consider whether an extra-schedular rating should be addressed by the appropriate official. As the Court stated '[T]he Board is in fact obligated to consider the applicability of the extra-schedular rating regulation, but must then refer the matter for decision in the first instance by the appropriate VA officials.'" *id.* citing *Floyd, supra.*

EXTRA-SCHEDULAR RATING IS A COMPONENT OF INCREASED RATING

§ "The question of an extra-schedular rating is a component [a] . . . claim for an increased rating". *Bagwell v. Brown*, 9 Vet.App. 337, 339 (1996); *see also Colayong v. West*, 12 Vet.App. 524, 531 ("an extraschedular rating . . . applies in an exceptional or unusual case where a schedular rating is inadequate; in that instance, VA ***will*** consider" § 3.321(b)) (emphasis added)

INCREASED RATING CLAIM

BOARD DECISION MUST EXPLAIN WHY NEXT HIGHER RATING AND NOT HIGHER RATINGS

§ Where the veteran specifically requested an increase in a disability evaluation, the BVA has an obligation to explain why the symptoms comported with the criteria for the next higher rating and why they did not comport with the criteria for even higher ratings. *See Shoemaker v. Derwinski*, 3 Vet.App, 248, 253 (1992).

EFFECTIVE DATE OF CLAIM FOR AN INCREASED RATING (38 U.S.C. § 5110(a); 38 U.S.C. § 5110(B)(2); 38 C.F.R. §§ 3.400(o)(1), (2))

§ "The appellant argues that because the date of the receipt of his claim (for increased rating) was July 1990, the emphasized language of 38 C.F.R. § 3.400(o)(2) provides for that date to be the effective date. That phrase, however, refers to the situation in which a factually ascertainable increase occurred *more* than one year prior to the receipt of the claim for such an increase. In the case on appeal, the filing of the claim preceded the increase. Because 38 U.S.C. § 5110(b)(2) and 38 C.F.R. § 3.400(o)(2) are applicable only where the increase precedes the claim (provided also that the claim is received within one year after the increase), they are not applicable on these

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facts. As a consequence, the general rule applies, and thus, the effective date of the appellant's claim is governed by the later of the date of increase or the date the claim is received." (emphasis in text) *See Harper v. Brown*, 10 Vet.App. 125, 126-27, (1997).

INCLUDES TDIU

§ "[E]vidence of veteran's unemployability arising from an already allowed service-connected disability is indeed evidence of an increase in the severity of that disability." *Norris v. West*, 12 Vet.App. 413, 420 (1999) citing *Wood v. Derwinski*, 1 Vet.App. 367, 369 (1991).

INFORMAL CLAIM *VIS A VIS* INCREASED RATING CLAIM

§ In this case, the veteran reported tinnitus during a medical exam and was awarded service connection for tinnitus at a noncompensable rate in 1983. In 1995, the veteran sought an increased rating. In a 1995 letter, the VARO required the veteran to submit evidence in support of his claim for increased rating and required the veteran to sign an attached form to validate his claim. In 1998, the veteran again sought an increased rating by a letter from his representative received by the RO on May 27, 1998. The veteran testified during a hearing before the RO regarding the effects of the tinnitus on his work and sleep. The veteran was granted a 10% rating effective May 27, 1998.

The veteran filed a NOD arguing the effective date of a compensable rating should have been in 1995, when he claimed he had filed an "informal claim." The Board decision found that the veteran's 1995 letter was an "informal claim" for an increased rating and the veteran had failed to file a "formal claim" within one year from the date the VARO had requested he sign a form validating his claim. The Board denied the veteran's claim for an earlier effective date finding he had not filed a formal claim. *Thomas v. Principi*, 197, 198-99 (2002)

The Court found that the Board had erred in its decision when it required the veteran to submit a "formal" claim for an increased rating. The Court found such a requirement was arbitrary because service connection had already been granted

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therefore, implicitly, a formal claim for the benefit had already been filed. *Thomas, supra* at 200 citing *Bailey v. Derwinski*, 1 Vet.App. 441, 445 (1991). Citing 38 C.F.R. § 3.155(c), the Court found that once a formal claim for a benefit was filed the VA was "mandated" to treat the claim for increase as a claim. *Thomas, supra* at 200 quoting *Norris v. West*, 12 Vet.App. 413, 421 (1999) ("Holding that, where veteran has filed formal claim pursuant to §§ 3.151 or 3.152, § 3.155(c) '*mandates* that the Secretary accept an informal request for a rating increase 'as a claim'; the Secretary cannot require the veteran to take any additional action in order to perfect that 'claim'").

MAY BE INEXTRICABLY INTERTWINED WITH TDIU

§

> The rating given to a service-connected disability is related, but not necessarily inextricably, to a separate claim for TDIU. In fact, a claim for TDIU is based on an acknowledgment that even though a rating less than 100 percent under the rating schedule may be correct, objectively, there are subjective factors that may permit assigning a 100 percent rating to a particular veteran under particular facts, notwithstanding the putative correctness of the objective rating.

Parker v. Brown, 7 Vet.App. 116, 118 (1994).

> A claim for TDIU presupposes that the rating for the condition is less than 100 percent and only asks for TDIU because of 'subjective' factors that the 'objective' rating does not consider. The TDIU decision and the precise percentage rating are, therefore, not necessarily intertwined. They certainly are not ... where the appellant eschewed appeal of the rating decision and immediately filed a new claim for TDIU that neither asked for a higher rating or otherwise questioned that now final rating decision.

Vettese v. Brown, 7 Vet.App. 31, 34-35 (1994).

> Although a TDIU rating claim predicated on a particular service-connected condition is 'inextricably intertwined' with a rating increase claim, regarding the same condition, it does not necessarily follow that a rating increase claim for a particular service-connected condition is 'inextricably

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> intertwined' with a TDIU rating claim predicated on that condition.

Holland v. Brown, 6 Vet.App. 443, 446 (1994). In fact,

> … the regulations recognize that the Schedule for Rating Disabilities may be inadequate for assessing whether a particular veteran is totally disabled. An additional regulation, 38 C.F.R. § 3.340(a)(2) (1993), recognizes the two alternate methods--i.e., the Schedule for rating Disabilities and § 4.16--for assigning a total disability rating. Given these alternate methods and their respective inquiries, it cannot be said that an increased rating claim is so inextricably intertwined with a rating claim as to warrant dismissal of the former claim when the latter claim is still being adjudicated by the VA.

Id. at 447.

NEW AND MATERIAL EVIDENCE NOT REQUIRED

§ A claim for an increased rating is a new claim. *See Spurgeon v. Brown*, 10 Vet.App. 194, 196 (1997); *Proscelle v. Derwinski*, 2 Vet.App. 629, 631-32 (1992).

§ A claim for increase is a new claim; all the relevant evidence of record must be considered in order to establish the disability rating to which the veteran may be entitled. *See Lenderman v. Principi*, 3 Vet.App. 491-492 (1992).

§

> Th[e] Court held in *Proscelle v. Derwinski*, 2 Vet.App. 629 (1992) that a claim for an increase is a new claim and, therefore, not subject to the provisions of 38 U.S.C. § 7104(b) [] which require that an appellant submit new and material evidence before a claim will be reopened. Since a claim for an increase is a new claim, all the relevant evidence of record must be considered in order to establish which disability rating an appellant is entitled.

Lenderman v. Principi, 3 Vet.App. 491, 492 (1992).

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INSURANCE, SERVICE DISABLED VETERANS (SDVI) – INELIGIBLE UNDER § 1151

§ Eligibility for Service Disabled Veterans Insurance under 38 U.S.C. § 1922 depends on an actual award of service-connection. That requirement is not satisfied where the veteran receives benefits only on the "as if" basis under 38 U.S.C. § 1151 (injury in a VA medical facility). *Alleman v. Principi*, 16 Vet. App. 253, 255-56 (2002); *see also Kilpatrick v. Principi,* 16 Vet.App. 1, 10 (2002) (The Court recognized the legal authority of the Secretary to extend certain but not all service connected disabled veteran "ancillary" benefits to chapter 11 beneficiaries by regulation.).

MEDICAL AND NURSING CARE

NON-VA TREATMENT, ADVANCE AUTHORIZATION REQUIRED

§ Admission to non-VA facility at VA expense must be authorized in advance. *Malone v. Gober*, 10 Vet.App. 539, 541 (1997) citing 38 C.F.R. § 17.54 (1996).

MENTAL HEALTH

MENTAL INCOMPETENCE

APPEAL OF FAILURE TO LIFT INCOMPETENCY DETERMINATION IS NEW CLAIM REVIEWED UNDER THE CLEARLY ERRONEOUS STANDARD OF REVIEW

§ "Restoration of competency is viewed 'procedurally as similar to seeking an increased disability rating – that is, as a new claim." *Sanders v. Principi*, 17 Vet.App. 329 (2003) quoting *Sanders v. Brown*, 9 Vet.App. 525, 528 (1996); *cf Booton v. Brown*, 8 Vet.App. 368, 372 (1995), and *Procelle v. Derwinski*, 2 Vet.App. 629, 631-32 (1992). The 1996 Sanders court found that an appeal of the Board's decision not to lift an incompetency determination is considered to be a new claim; the Court's "task is to determine whether the Board's decision is clearly erroneous." *Sanders v. Brown*, 9 Vet.App. 525, 529 (1996). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53

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(1990). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." *See Butts, supra*, note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra.*.

PRESUMPTION IN FAVOR OF COMPETENCY

§ Application of 38 C.F.R. § 3.353(b), *Presumption in favor of competency*, only arises when a reasonable doubt as to the veteran's competency arises. *See Sanders*, 17 Vet.App. 333.

BASIS OF DETERMINATIONS

§ Unless the medical evidence is clear, convincing and leaves no doubt as to the person's competency, the rating agency will make no determination of incompetency without a definite expression regarding the question by the responsible medical authorities. . . . Determinations relative to incompetency should be based upon all evidence of record and there should be a consistent relationship between facts relating to commitment or hospitalization and the holding of incompetence.

38 C.F.R. § 3.353(C) (1998). "Where reasonable doubt arises regarding a [determination of incompetency] . . . such doubt will be resolved in favor of competency." 38 C.F.R. § 3.353(d) (1998).

MENTAL INCOMPETENCY 38 C.F.R. § 3.353(a) (1998)

§ (a) *Definition of mental Incompetency*. A mentally incompetent person is one who because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation. 38 C.F.R. § 3.353(a) (1998); *see also Coleman v. Brown*, 5 Vet.App. 371 (1993).

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NEW CLAIM OR PREVIOUSLY DECIDED MENTAL HEALTH CLAIM?

§ "A claim that could not have been adjudicated prior to the original notice of disagreement, because all or a significant element of that claim had not yet been diagnosed, is a new claim although both the new and the prior diagnosis relate to mental disorders." *Ephraim v. Brown*, 82 F.3d 399, 402 (Fed. Cir 1996) citing *Hamilton v. Brown* 4 Vet.App. 528, 542 (1993) (*en banc*), *aff'd*, 39 F.3d 1574 (Fed.Cir.1994). "We conclude that a claim based on the diagnosis of a new mental disorder, taken alone or in combination with a prior diagnosis of a related disorder, states a new claim, for the purposes of judicial requirement, when the new disorder had not been diagnosed and considered at the time of the prior notice of disagreement." *Id*.

NEW MENTAL HEALTH DIAGNOSIS, A NEW CLAIM, EVEN IF RELATED TO THE OLD DIAGNOSIS

§ The United States Court of Appeals, Federal Circuit Court in *Ephraim v. Brown*, 82 F.3d 399, 401 (Fed.Cir.1996) found that a claim for "a newly diagnosed disorder, whether or not related to a previously diagnosed disorder, can not be the same claim when it has not been previously considered. The regulations governing veterans' benefits recognize that '[t]he field of mental disorders represents the greatest possible variety of etiology, chronicity and disabling effects, and requires differential consideration in these respects.'" *Id*, quoting 38 C.F.R. § 4.125 (1996) (§ 4.125 (1997) was changed November 1996 to require the application of the *DSM-IV* and the reconciliation of changed mental health diagnoses in light of the possibility of [1] the new diagnosis being the progression of the previously diagnosed condition, [2] a correction of a prior diagnosis, or [3] the development of a new and separate).

NEW LAW, NEW CLAIM

(Extreme care should be used in citing *Spencer* regarding a change in law or regulation to reopen a previously denied claim based on an older law or regulation. Review "LAW OF THE CASE" PRINCIPAL, RES JUDICATA RULE ("ISSUE AND CLAIM PRECLUSION"), COLLATERAL ESTOPPEL PRINCIPAL, AND CUE later in this document. Since *Spencer*, that portion of *Spencer* which found a

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new law or regulation constituted new evidence has been thrown out. *See Routen v. West*, 142 F.3d 1434, 1439 (Fed.Cir.1998) citing, *e.g., A.C. Aukerman Co. v. R. L. Chaides Constr. Co.*, 960 F.2d 1020, 1037 (Fed.Cir.1992) ("[A] presumption is not evidence."); *see also, Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935) ("[A presumption] cannot acquire the attribute of evidence in the claimant's favor."); *New York Life Ins. Co. v. Gamer*, 303 U.S. 161, 171 (1983) ("[A] presumption is not evidence and may not be given weight as evidence."). The U.S. Court of Appeals for the Federal Circuit specifically cited *Jensen v. Brown*, 19 F3.d 1413, 1145 (Fed.Cir.1994) as not supporting the proposition that presumption was evidence. *Ibid*.)

§ "The entitlement to de novo[12] review of a previously and finally denied claim based upon an intervening change in law or regulation creating a new entitlement derives from the new law or regulation itself. When a provision of law or regulation creates a new basis of entitlement to benefits, as through liberalization of the requirements for entitlement to a benefit, an applicant's claim of entitlement under such law or regulation is a claim separate and distinct from a claim previously and finally denied prior to the liberalizing law or regulation. The applicant's latter claim, asserting rights which did not exist at the time of the prior claim, is necessarily a different claim." *Spencer v. Brown*, 4 Vet.App. 283, 288-89 (1993) citing e.g., *Sawyer v. Derwinski*, 1 Vet.App. 130, 133 (1991). "Section 7104(b) provides that ' when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered.' Where a claim is based upon a substantive right created by a statutory or regulatory provision that did not exist at the time of the prior final denial of the claim, adjudication of the latter claim is not a 'reopening' of the first, such as would be prohibited, absent new and material evidence, by section 7104(b). And the fact of the intervening change in law is itself sufficient to change the factual basis such that the latter claim is not 'a claim based upon the same factual basis' as the former claim."

[12] **De novo trial** Trying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered. *Black's Law Dictionary* 435 (6th ed. 1990) citing *Farmingdale Supermarket, Inc. v. U.. S.*, D.C.N.J., 336 F.SUPP. 534, 536.

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Spencer, 4 Vet.App. 289; *cf. Akins v. Derwinski*, 1 Vet.App 228, 230 (1991) (holding that a presumption created by statute was itself new and material evidence).

"Moreover, there is no indication that Congress or VA has intended to preclude, by operation of the finality provisions of section 7104(b), a claimant's entitlement to benefits under an intervening law providing a new basis for entitlement to benefits. That is particularly so in light of the nature of the VA benefits adjudication process, which operates with 'a high degree of informality and solicitude for the claimant' (*Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985)) and VA's policy, stated in its regulations, '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.'" *Spencer*, 4 Vet.App. 289; 38 C.F.R. § 3.103(a) (1992); *see also* 38 C.F.R. § 3.159 (1992).

"The finality provisions of section 7104(b) are closely analogous to the doctrine of res judicata that generally bars readjudication of claims which have been previously decided. The Supreme Court has stated that it is a 'general rule that res judicata is no defense where between the time of the first judgment and the second there has been an intervening change in the law creating an altered situation.'" *Spencer*, 4 Vet.App. 289; *State Farm Mutual Auto Ins. Co. v. Duel*, 324 U.S. 154, 162 (1945); *see also Texaco, Inc. v. United States*, 579 F.2d 614 (Ct. Cl. 1978). "Although the prohibition on reopening in section 7104(b), unlike the doctrine of res judicata, is a statutory requirement, essentially the same concerns apply to determine whether the latter claim is the same claim as the former. The Court concludes, therefore, that section 7104(b) does not preclude de novo[13] adjudication of a claim, on essentially the same facts as a previously and finally denied claim, where an intervening change in law or regulation has created a new basis of entitlement to a benefit. *Spencer*, 4 Vet.App. 289.

[13] **De novo trial** Trying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered. *Black's Law Dictionary* 435 (6th ed. 1990) citing *Farmingdale Supermarket, Inc. v. U.. S.*, D.C.N.J., 336 F.SUPP. 534, 536.

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PRESUMPTIVE SERVICE CONNECTION

AGENT ORANGE, VIET NAM VET PRESUMPTIVE EXPOSURE (38 U.S.C. § 1116(a)(3); 38 C.F.R. § 3.309(e))

§ In *McCartt* the veteran served in Vietnam during the Vietnam era but he had none of the conditions listed at 38 C.F.R. § 3.309(e) nor did he have a doctor's statement providing nexus between any of the conditions claimed and agent orange exposure in service. However, in spite of the nexus evidence required in *Caluza* to well ground a claim, the Board found the claim well grounded on the basis of 38 U.S.C. § 1116(a)(3). "In view of the plain language of the statute and regulation, the Court holds that neither the statutory nor the regulatory presumption will satisfy the incurrence element of *Caluza[v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed.Cir.1996) (table); *see also Epps v. Gober*, 126 F.3d 1464, 1468 (Fed. Cir 1997), *cert. denied*, -- U.S. --, 118 S.Ct. 2348, 141 L.Ed.2d 718 (1998)] where the veteran has not developed a condition enumerated in either 38 U.S.C. § 1116(a) or 38 C.F.R. § 3.309(e)." *McCartt v. West*, 12 Vet.App. 164, 168 (1999) citing *Gardner v. Brown*, 5 F.3d 1456, 1458 (Fed.Cir.1993) ("The starting point in interpreting a statute is its language, for 'if the intent of Congress is clear, that is the end of the matter.'"), *aff'd*, 513 U.S. 115, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994); *see also Butts v. Brown*, 5 Vet.App. 532, 539 (1993) (en banc) (Court reviews de novo conclusions of law).

PROXIMATE RESULTS, SECONDARY CONDITIONS (38 C.F.R. § 3.310(A))

§ "Disability which is proximately due to or the result of a service-connected disease or injury shall be service connected. When service connection is thus established for a secondary condition, the secondary condition shall be considered a part of the original claim." *See* 38 C.F.R. § 3.310(a).

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REOPENED CLAIM

ANALYSIS

§ New and Material evidence reopens a previously decided claim. *Fortuck v. Principi*, 17 Vet.App.173, 178 (2003) citing 38 U.S.C. §§ 5108, 7104(b), 7105(c); 38 C.F.R. § 3.156(a) (1999)[14].

[14] Although the *Fortuck v. Principi*, 17 Vet.App. 173 (2003) decision was promulgated after August 2001, the Court did not consider the changes to 38 C.F.R. § 3.156(a) effective August 29, 2001. The new rule, promulgated after and in consideration of the VCAA, follows:

> **§3.156 New and material evidence.**
>
> (a) A claimant may reopen a finally adjudicated claim by submitting new and material evidence. New evidence means existing evidence not previously submitted to agency decisionmakers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim. (Authority: 38 U.S.C. 501, 5103A(f), 5108)

Duty to Assist, 66 Fed. Reg. 45,620 (Aug. 29, 2001) (to be codified at 38 C.F.R. pt. 3).

While the determination as to what is "new" evidence under the new rule appears to be similar or the same as under the prior rule, the standard for determining "materiality" may require litigation to determine how that standard will be applied under the new law.

In determining whether evidence is "new and material", under the old rule, the credibility of the "new" evidence was presumed for the purpose of determining whether new and material evidence had been submitted to reopen a previously denied claim. *See Fluker v. Brown*, 5 Vet.App. 296, 298 (1993); *Justus v. Brown*, 3 Vet.App. 510, 512-13 (1992). Nothing in the regulatory changes suggest a change in this standard. Under § 3.156(a) (1999) to be material, the "new" evidence could not be "cumulative or redundant" and had to "bear directly and substantially upon the specific matter under consideration…." If the evidence was new and material the previously denied claim was reopened and all of the evidence was weighed to determine whether or not the benefit would be granted.

§ 3.156(a) (2001) requires the new evidence (evidence not previously submitted to agency decisionmakers and not redundant or cumulative) to be "existing evidence", that is, evidence currently in existence, not evidence to be created at some future date such as a VA examination necessary to "substantiate" a claim. And to be "material" must be "existing evidence that, by itself or when considered with previous evidence of record, *relates* to an *unestablished fact* necessary to *substantiate* the claim." (emphasis added). A recent Federal Circuit decision, *Paralyzed Veterans of America, et al v. Secretary of Veterans Affairs*, __ F.3d __, 02-700, slip op. at 2, 28 (Fed. Cir. Sep. 22, 2003) found this rule to be valid.

Without the introduction of new and material evidence, "…VA is not required to provide a medical examination or opinion. Section 3.159(c)(4)(iii) gives effect to this clear congressional intent and is therefore valid." *Id* at 11 citing s*ee Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Additionally, the Court pointed to the language at 38 U.S.C. § 5103A(2) (2000) to conclude that the new regulatory language at § 3.156 is consistent with the changes made by the VCAA limiting the VA obligations to assist the veteran in his attempt to reopen a claim. The Federal Circuit also found that § 5103A(a)(2) established a threshold which limits the VA's obligation to assist the veteran "if no reasonable possibility exists that such assistance would aid in

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The evidence must be both new and material. *Ibid* citing *Smith (Russell) v. West*, 12 Vet.App. 312, 314 (1999); *see Winters v. West*, 12 Vet.App. 203, 206 (1999) (en banc), *vacated and remanded on other grounds sub nom. Winters v. Gober*, 219 F.3d 1375, 1380 (Fed.Cir.2000) (expressing "no opinion" on three-step analysis applied to claims to reopen by this Court in *Winters, supra*) [hereinafter *Winters*].

First the evidence must be knew and material:

not previously submitted, and

not cumulative or redundant. *Ibid* citing 38 C.F.R. § 3.156(a) (1999); *see also Elkins v. West*, 12 Vet.App. 209, 216 (1999); *Evans (Samuel) v. Brown*, 9 Vet.App. 273, 283 (1996).

"If the evidence is not new, 'the inquiry ends and the claim cannot be reopened.'" *Ibid* citing *Smith (Russell), supra*; *see also Anglin v. West*, 203 F.3d 1343, 1347 (Fed.Cir.2000) (affirming under 38 C.F.R. § 3.156(a) (1999) decision of this Court where, "[b]ecause the evidence presented … was not new, [this Court] did not examine whether it was material"); *Vargas-Gonzales v. West*, 12 Vet.App. 321, 327 (1999).

The credibility of new evidence will be presumed and the VA "may not decline to reopen a claim for lack of new and material evidence merely because the proffered evidence is found to lack credibility." *Id* at 179 citing *see Kutscherousky v. West*, 12 Vet.App. 369, 371 (1999) (per curiam order) (concluding that Court's en banc opinions in *Elkins* and *Winters* both *supra* regarding *Hodge v. West*, 155 F.3d 1356, 1359 (Fed.Cir.1998), "in no way suggested that the Court's long-standing holding that the credibility of the new evidence is presumed for purposes of determining whether new and material evidence has been presented … has been in any way altered by *Hodge*"); *Fluker v. Brown*, 5 Vet.App. 296, 298 (1993) (noting that "[f]or purposes of determining whether a claimant has submitted new and material evidence to reopen a claim, the Court presumes the credibility of the evidence"); *Justus v. Principi*, 3 Vet.App. 510, 512-13 (1992) (finding error because BVA – by appearing "skeptical" of statement – failed to presume credibility of statement prior to

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substantiating the claim." *Paralyzed Veterans of America, supra* at 27.

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reopening stage; Court noted that its finding of error "in no way endorse[d] either the weight or credibility of statement).

BOARD MUST REVIEW ALL THE EVIDENCE IN A REOPENED CLAIM

§ "The Board must base its decisions on 'all evidence and material of record,' 38 U.S.C. § 7104(a), and must provide a 'written statement of [its] findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record,' 38 U.S.C. 7104(d)(1)." *See Seals v. Brown*, 8 Vet.App. 291, 295 (1995) (citing *Douglas v. Derwinski*, 2 Vet.App. 435, 438-39 (1992) (en banc); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57). "Pursuant to these statutory requirements, the Board must 'account for the evidence which it finds to be persuasive or unpersuasive,' and provide reasons or bases for rejecting material evidence submitted by or on behalf of the claimant. *Seals, supra* (citing *Gabrielson v. Brown*, 7 Vet.App. 36, 40 (1994); *Gilbert*, 1 Vet.App. at 57).

DUTY TO ASSIST AND INFORM APPLIES IF A COMPLETE APPLICATION

§ 38 U.S.C. § 5103(a) and 38 C.F.R. § 3.159(b) apply to an attempt to reopen a claim. *Quartuccio v. Principi*, 16 Vet.App. 183, 186 (2002) citing *Graves v. Brown*, 8 Vet.App. 522, 524 (1996) ("[W]hen a veteran has made an application to reopen a claim and the Secretary is on notice of evidence which may prove to be new and material but has not been submitted with the application, the Secretary has a duty under section 5103 to inform a claimant of the evidence that is 'necessary to complete the application.'").

In *Quartuccio*, the Court found the veteran had filed a claim to reopen and referred to Social Security records. Thus, the Secretary's duty to notify the claimant was triggered. In this case the Board's decision denying the veteran's claim indicated the veteran was drawing Social Security Administration disability benefits, but failed to obtain the Social Security Administration records. Even so the Board concluded the records would not provide new and material evidence to reopen the veteran's claim. *Id* at 185. The Court acknowledged a letter to the veteran from the VA describing ". .

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. evidence potentially helpful to the appellant but does not mention who is responsible for obtaining such evidence." In another letter the Secretary defined new and material evidence but did not "notify the claimant . . . of any information , and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim." *Id* at 187 citing 38 U.S.C. § 5103(a).

Citing *Murincsak v. Derwinski*, 2 Vet.App. 363, 370-72, the Court indicated the Secretary "must" include the Social Security Administration records in its review of the complete record. *Id* at 187-88 citing *Baker v. West*, 11 Vet.App. 163, 169 (1998) (holding that VA failed in its duty to assist the veteran by not obtaining his SSA records even when the veteran only noted that he was receiving Social Security disability.)

§ The VA is obligated to inform the applicant of evidence necessary to establish a claim if the evidence submitted by the veteran is not considered new and material. Also, if the veteran indicates there is evidence which would make his claim plausible, the case should be remanded for further development. *See Graves v. Brown*, 8 Vet.App. 522, 524 (1996).

EFFECTIVE DATE OF A REOPENED CLAIM

§ In this case, the appellant argued that the effective date of a reopened claim should be the date of the original claim. The Court held ". . . that .the effective –date statute, 38 U.S.C. §5110(a), is clear on its face with respect to granting an effective date for an award of VA periodic monetary benefits no earlier than the date that the claim for reopening was filed." *Sears v. Principi*, 16 Vet.App. 244, 248 (2002) citing *Spencer v. Brown*, 4 Vet.App. 283, 290-97 (1993).

NEW AND MATERIAL EVIDENCE

IS FACT COURT REVIEWS UNDER THE "CLEARLY ERRONEOUS" STANDARD OF REVIEW

§ Whether evidence is new and material is "generally" a question of fact which the Court reviews under the clearly erroneous standard of review. *See Elkins v. West*, 12 Vet.App. 209, 217 (1999)

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_NO_ LIKELY CHANGED OUTCOME REQUIRED (38 C.F.R. § 3.156(A) (1994))

§ The United States Court of Appeals for the Federal Circuit in *Hodge v. West*, 155 F.3d 1356 (Fed.Cir.1998), threw out the Court of Veterans Appeals definition of "materiality" used, inter alia, to assess whether the veteran has submitted evidence sufficient to reopen a previously denied claim. *See Colvin v. Derwinski*, Vet.App. 171 (1991). The *Hodge* Court found, in dicta, that the *Colvin* Court, while acknowledging the regulations as promulgated at 38 C.F.R. § 3.156 (a), impermissibly adopted the "definition of materiality" from the social security benefits scheme. *Hodge, supra,* at 1361. The *Hodge* Court at 1363 found that the *Colvin* Court required the new evidence, in the determination of its materiality, focus on the "likely impact the new evidence submitted will have on the outcome of the veteran's claim; it requires that 'there must be a reasonable possibility that the new evidence, when viewed in the context of all the evidence, both new and old, would change the outcome.'" *Hodge, supra,* quoting *Colvin* at 174.

The *Hodge* Court cited the Supreme Court decision in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) to conclude that an agency has the authority to promulgate regulations which "fill in the details necessary to administer the statute. . . . Such *legislative regulations are given controlling weight* unless they are arbitrary, capricious, or manifestly contrary to the statute." *Hodge* at 5 quoting *Chevron, supra,* at 1361 (emphasis added in *Hodge* text).

> In implementing the *Colvin* test, not only has the Court of Veterans Appeals impermissibly replaced the agency's judgment with its own, but it has imposed on veterans a requirement inconsistent with the general character of the underlying statutory scheme for awarding veterans' benefits. This court and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant.

Id at 1362 citing *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) (veterans statutes must be liberally construed for the benefit of the returning veteran (citing *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946)); *McKnight v. Gober*, 131 F.3d 1483, 1485 (Fed.Cir.1997) (noting that, where statute is

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ambiguous, "interpretive doubt is to be resolved in the veteran's favor" (citing *Brown v. Gardner*, 513 U.S. 115, 118 (1994)); *Smith*, 35 F.3d at 1522 (noting the "uniquely pro-claimant principles underlying the veterans' benefits dispensation scheme" identified by *amicus*).

The *Hodge* decision at 1363 cited the Proposed Definition, 55 Fed. Reg. at 19089, and concluded "[t]his passage suggests that the purpose behind the definition was not to require the veteran to demonstrate that the new evidence would probably change the outcome of the claim; rather it emphasizes the importance of a complete record for evaluation of the veteran's claim."

§ 3.156(a) provides in pertinent part that material evidence "means evidence . . . which bears directly and substantially upon the specific matter under consideration, . . . and which by itself or in connection with evidence previously assembled is so significant that it must be considered in order to fairly adjudicate the merits of the claim." *See* 38 C.F.R. § 3.156(a).

> We conclude, based on the Supreme Court holding in *Chevron*, that the Court of Veterans Appeals in adopting the *Colvin* test overstepped its judicial authority in failing to defer to a reasonable interpretation of an ambiguous statutory term established by the DVA's regulation. Consequently, we disapprove of the *Colvin* test as an incorrect test to evaluate whether new evidence is material, and return this appeal to the Court for reconsideration under the proper, regulatory standard. Therefore, we *VACATE AND REMAND*. (emphasis in text)

Hodge, supra, at 1356.

PHYSICIAN'S STATEMENTS TO SAME EFFECT CAN BE RELEVANT AND PROBATIVE

§ Even though there are statements by other physicians to the same effect, the diagnoses and medical opinions of a physician that corroborate another physician's previously considered diagnoses or opinions can be relevant and probative and may be sufficient to reopen a claim. *See Paller v. Principi*, 3 Vet.App. 535, 538 (1992).

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THREE STEP ANALYSIS TO DETERMINE IF EVIDENCE IS NEW AND MATERIAL

§

> Under the new *Elkins* [*v. West*, 12 Vet.App. 209 (1999)] test, the Secretary must **first** determine whether the veteran has presented new and material evidence under 38 C.F.R. § 3.156(a) (1998) in order to have a finally denied claim reopened under 38 U.S.C. § 5108. **Second**, if new and material evidence has been presented, immediately upon reopening the claim the Secretary must determine whether, based upon all the evidence of record in support of the claim, presuming its credibility, see *Robinette v. Brown*, 8 Vet.App. 69, 75-76 (1995), the claim as reopened (and as distinguished from the original claim) is well grounded pursuant to 38 U.S.C. § 5107(a). **Third**, if the claim is well grounded, the secretary may then proceed to evaluate the merits of the claim but only after ensuring that his duty to assist under 38 U.S.C. § 5107(a) has been fulfilled.

Winters v. West, 12 Vet.App. 203 206 (1999).

(It should be noted that the VCAA was enacted into law after this decision became final. The VCAA removed the "well grounded" language from 38 U.S.C. by rewriting § 5107. However, § 5103 was rewritten to require "a complete or substantially complete application" to trigger the Secretary's obligation to notify the claimant of the evidence, if not provided, "necessary to substantiate the claim" and "which portion, if any" the Secretary will attempt to obtain to meet his duty to assist the veteran under § 5103A of title 38 U.S.C. Recent Court decisions have applied the *Caluza* test to determine if the application has been "substantiate[d]" triggering the Secretary's duty to assist under § 5103A. *See Wells v. Principi*, 326 F.3d 1381, 1382-84 (Fed.Cir.2003) (Upon appeal to the Board of Appeals, the Board applied the VCAA standards and concluded the veteran had not completed his application by providing nexus evidence and therefore no duty to assist obligation was triggered and the RO decision was affirmed); *cf. Charles v. Principi*, 16 Vet.App 370, 374-75 (2002) (applying *Caluza v. Brown*, 7 Vet.App. 498, 504 (1995) the *Charles* Court found a current disability, continuity of symptomatology but no medical nexus evidence. The *Charles* court found that since the first two elements of the *Caluza* test

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was met, the duty to assist obligation to provide a VA examination was triggered under 38 U.S.C. 5103A(d)(2)(C)).

VA DUTY TO INFORM VETERAN IF NOT N & M, IF EVIDENCE PLAUSIBLE, REMAND

§ The VA is obligated to inform the applicant of evidence necessary to establish a claim if the evidence submitted by the veteran is not considered new and material. Also, if the veteran indicates there is evidence which would make his claim plausible, the case should be remanded for further development. *See Graves v. Brown*, 8 Vet.App. 522, 524 (1996).

TOTAL DISABILITY BASED ON INDIVIDUAL UNEMPLOYABILITY (TDIU) 38 C.F.R. § 4.16

ABILITY TO OBTAIN OTHER EMPLOYMENT, 38 C.F.R. § 4.16(B)

§ The Board in the *Bowling* decision referred to the lack of medical evidence indicating the veteran was unable to work at his most recent job, "work in sales for an employer he trusts, or that he is unable to do construction work (other than as a truck driver), or be self employed." The *Bowling* Court found that the Board decision, by the use of the double negatives, was relying on "the *absence* of evidence rather than any affirmative evidence of employment. Absent any such evidence, the Board's speculation cannot form the basis for a denial of the veteran's TDIU claim." *Bowling v. Principi*, 15 Vet.App. 1, 9 (2001) (emphasis in text) quoting *James v. Brown*, 7 Vet.App. 495, 497 (1995) (reversing the Board decision denying TDIU which cited no evidence to support its conclusion that it was not convinced there "were not some jobs he could do"); *Brown (Mitchell) v. Brown*, 4 Vet.App. 307, 309 (1993) (reversing Board denial of TDIU because the Board did not "point to a single piece of evidence supporting its conclusion that the veteran is able to pursue substantially gainful employment"); *Gleicher v. Derwinski*, 2 Vet.App. 26, 28 (1991) ("to merely allude to educational and occupational history, attempt in no way to relate these factors to the disabilities of the appellant, and conclude that some form of employment is available, comes very close to placing upon the appellant the burden of showing he can't get work").

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BOARD CANNOT DENY TDIU, ON CONJECTURE ABOUT ABILITY TO WORK (38 C.F.R. § 4.16)

§ "It is the Board's task to make findings based on evidence of record -- not supply missing facts. Where the veteran submits a well-grounded claim for a TDIU rating, as he has done here, the BVA may not reject that claim without producing evidence, as distinguished from mere conjecture, that the veteran can perform work that would produce sufficient income to be other than marginal. *See* 38 C.F.R. § 4.16(a); *Moore (Robert) v. Derwinski*, 1 Vet.App. 356, 358 (1991); Ferraro v. Derwinski, 1 Vet.App. 326, 331-332 (1991); (Board may not rely on its own unsubstantiated medical opinions)." *Beaty v. Brown*, 6 Vet.App. 532 (1994).

CLAIM FOR TDIU DOES NOT REQUIRE SPECIFIC CLAIM

§ "Once a veteran submits evidence of a medical disability and makes a claim for the highest rating possible, and additionally submits evidence of unemployability, the 'identify the benefit sought' requirement of 38 C.F.R. § 3.155(a) is met and the VA must consider TDIU. *Roberson v. Principi*, 251 F.3d 1378, 1384 (2001) citing *Hodge v. West*, 155 F.3d 1356 (Fed.Cir.1998) (mandating the development of a claim to the optimum which requires the VA to determine all claims raised by the evidence and to apply all relevant laws and regulations "regardless of whether the claim is specifically labeled as a claim for TDIU.")

SPECIFY BENEFIT SOUGHT - - NOT ALWAYS NECESSARY

§ In *Servello v. Derwinski*, 3 Vet.App. 196, 198 (1992), from the date the veteran had been granted service connection for a psychiatric disability he had continually sought an increased rating for that condition. However, over three years after service connection was granted for the veteran's psychiatric condition, he filed an application for an increased rating based on individual unemployability (IU) and was granted IU but only to the date of his formal application for IU. The Court vacated the Board decision and remanded the case for a readjudication consistent with the Court opinion. *Id*., at 201.

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In *Servello* the Court found that "[u]nder 38 C.F.R. § 3.155(a) (1991), the submission of certain medical records may constitute an 'informal claim' for an increase in disability compensation. If a 'formal claim' has not been received by VA upon its receipt of an informal claim, VA must forward an application to the claimant; the claimant must return the formal claim to VA (Veterans Administration [currently Department of Veterans Affairs]) within one year to make the date of receipt of the informal claim an appropriate effective date for the claim. In addition and significantly, 38 C.F.R. § 3.157(b)(1) (1991) specifies that where, as here, a claimants formal claim for compensation already has been allowed, receipt of, inter alia, a VA report of examination will be accepted as an informal claim filed on the date of the examination." *Servello, supra*, at 198 (emphasis in text.).

The Court found that the Board had erred by misinterpreting 38 C.F.R. § 3.155(a) to require that the "informal claim [must] specifically identify the benefit sought." (emphasis in text). .... "Making such precision a prerequisite to acceptance of a communication as an informal claim would contravene the Court's precedents and public policies underlying the veterans' benefits statutory scheme. 'A claimant's claim may not be ignored or rejected by the BVA merely because it does not expressly raise the provision which corresponds to the benefits sought'." *Servello, Id*., at 199 citing *Douglas v. Derwinski*, 2 Vet.App. 103, 109(1992) (*Douglas I*); *see Douglas v. Derwinski*, 2 Vet.App. 435, 442 (1992) (en banc) (*Douglas II*); *Akles v. Derwinski*, 1 Vet.App. 118, 121 (1991). "To require that veterans enumerate which sections they found applicable to their request[s] for benefits would change the [nonadversarial] atmosphere in which [VA] claims are adjudicated." *Servello, Ibid*., citing *Akles, supra*.

In *Servello*, the Court opined "[t]he question then becomes whether any of the veteran's ... written communications to VA (preceding the date of his application for IU), whether formal or informal, evidenced a "belief" by the veteran that he was entitled to total disability benefits by virtue of unemployability. .... The veteran is not required to mention "unemployability." *Servello, supra*, citing *Gleicher v. Derwinski*, 2 Vet.App. 26, 27 (1991) (reversing BVA decision denying individual unemployability benefits where appellant had requested that BVA increase 70 percent disability rating to 100 percent but did not request specifically a total rating based on individual unemployability); *Snow v. Derwinski*, 1 Vet.App. 417 (1991) (remanding matter to BVA for consideration of individual unemployability claim where appellant

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had not raised it explicitly but had stated in submissions to VA that he believed he was 100 percent disabled and that last employer would not rehire him due to his service-connected PTSD).

In *Servello* the Court cited a number of pieces of evidence which were indicators that the veteran had declared himself unable to work and, thus, had placed the VA "on notice ... that [he] was in a continuous state of unemployability ...." including a claim for pension benefits. *Servello, Id*. at 200.

SUBSTANTIALLY GAINFUL EMPLOYMENT, 38 C.F.R. § 4.16(B)

§ "Substantially gainful employment" under 38 C.F.R. § 4.16(b) has been defined by the Court as the ability to earn "a living wage". *Bowling v. Principi*, 15 Vet.App. 1, 7 (2001) quoting *Moore (Robert) v. Derwinski*, 1 Vet.App. 356, 358 (1991). The *Faust* Court held that a person is engaged in a "substantially gainful occupation" when that occupation "provides annual income that exceeds the poverty threshold for one person". *Bowling supra*, quoting *Faust v. West*, 13 Vet.App. 342, 355-56 (2000); *see also Roberson v. Principi*, 251 F.3d 1378, 1385 (Fed.Cir.2001) (the substantially gainful employment language in 38 C.F.R. § 3.340(a)(1) (1983) does not mean the veteran has to be 100 percent unemployable to qualify for TDIU).

TDIU CLAIMED WITH REFERENCES TO EMPLOYMENT PROBLEMS

§ The Court has ruled that evidence of a claim for Total Disability due to Individual Unemployability (TDIU) was veteran's references to difficulties maintaining employment on his VA Form 1-9 filed some years before the decision on appeal; veteran's references to unemployment due to service connected condition in another appeal preceding the current appeal; and two employee letters submitted in support of the *Isenbart* appeal decided by the Court in 1995 and the veteran's reference to loss of jobs in his Notice of Disagreement regarding the issues decided in the *Isenbart* Court decision, all of which occurred before the veteran filed a formal claim for TDIU. Although the veteran's formal claim for TDIU was filed in the month following his NOD which lead to the 1995 Court ruling, the Court accepted the issue of TDIU on appeal as well grounded before the RO decision appealed to the Board

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and finally overturned by the Court. *See Isenbart v. Brown*, 7 Vet.App. 537, 540-41, (1995).

TDIU DENIAL REQUIRES EVIDENCE NOT CONJECTURE

§ "'[T]he BVA may not reject [a veteran's] claim without producing evidence, *as distinguished from mere conjecture*, that the veteran can perform work that would produce sufficient income to be other than marginal'." *Bowling v. Principi*, 15 Vet.App. 1, 9 (2001) (emphasis in text) quoting *Beaty v. Brown*, 6 Vet.App. 532, 539 (1994) citing *see also James v. Brown*, 7 Vet.App. 495, 497 (1995) ("Board 'was not convinced that there were not some jobs he could do' but no evidence supported that conclusion").

"UNEQUIVICAL" PROFESSIONAL OPINION OF UNEMPLOYABILITY NOT REQUIRED

§ "'[A]n unequivocal professional opinion … that the veteran was unemployable' is not 'an evidentiary prerequisite to a … TDIU rating.'" *Bowling v. Principi*, 15 Vet.App. 1, 9 (2001) quoting *Beaty v. Brown*, 6 Vet.App. 532, 537-39.

SEE ALSO CLAIM, TYPES AND STATUS; INCREASED RATING; INCREASED RATING CLAIM MAY BE INEXTRICABLY INTERTWINED WITH TDIU

UNEMPLOYABILITY, GENERALLY (*SEE ALSO* TOTAL DISABILITY BASED ON INDIVIDUAL UNEMPLOYABILITY (TDIU))

BOARD MUST CONSIDER SS ALJ UNEMPLOYABILITY DETERMINATION

§ While not binding on BVA, the Social Security ALJ determination of unemployability must be considered with other evidence presented by the veteran. *See Washington v. Derwinski*, 1 Vet.App. 459, 465 (1991).

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CONSIDER PAIN, VOCATIONAL BACKGROUND, EDUCATION IN UNEMPLOYABILITY CLAIM

§ Pain, vocational background and education level are factors to be considered in unemployability claims. Hatlestad (I) v. Derwinski, 1 Vet. App. 164, 167-168 (1991).

INDIVIDUAL UNEMPLOYABILITY AND SMC UNDER 38 § 1114(S) (STATUTORY HOUSEBOUND)

§ General Counsel Precedent Opinion (G.C. Prec.) 2-94 allowed an interpretation of 38 U.S.C. § 114(s) for statutory housebound benefits to be granted on the basis of a total rating based on individual unemployability (TDIU) (less than 100 percent schedular rating)[15]. However, G.C. Prec. 6-99[16] finds the opposite, § 1114(s) cannot be provided on the basis of a total disability based on TDIU.

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[15] G.C. Prec. 2-94, ¶ 7, "We find nothing in the language of section 1114(s) to indicate that Congress meant to exclude service-connected disabilities rated as total under 38 C.F.R. § 4.28, 4.29, or 4.30. (Although it is not the question before us, we also find nothing in the language of section 1114(s) to indicate that Congress meant to exclude service-connected disabilities rated as total under 38 C.F.R. § 4.16, i.e., a total rating based on individual unemployability.) Where statutory language does not establish a condition to its application, such a condition may not be construed unless a straightforward application of the language as written would violate or affect the clear purpose of the enactment. *Dameron v. Brodhead*, 345 U.S. 322, 326 (1953) (citations omitted). The clear purpose of Pub. L. No. 86-663 was to create a rate of compensation intermediate to the rates for veterans so disabled as to warrant a higher rate of special monthly compensation under 38 U.S.C. § 1114 (such as for the permanently bedridden or those needing the regular aid and attendance of another person) and veterans with a total disability who nevertheless can supplement their disability compensation by working. S. Rep. No. 1745, 86th Cong., 2d Sess. 2 (1960), *reprinted in* 1960 U.S.C.C.A.N. 3197, 3198. Congress did not manifestly restrict the applicability of section 1114(s) to total ratings of indefinite duration, and the application of section 1114(s) to temporary total ratings would not violate the clear purpose of Pub. L. No. 86-663. Accordingly, VA may not impose its own restrictions on the applicability of section 1114(s). In our view, it is likely that the CVA would invalidate 38 C.F.R. § 3.350(i) on these grounds in an appeal in which its validity was at issue."

[16] G.C. Prec. 6-99, ¶ 14, "Turning to the question of whether any additional benefit would be available in the case of a veteran having one service-connected disability rated 100-percent disabling under the rating schedule and another, separate disability rated totally disabling under 38 C.F.R. § 4.16(a), 38 U.S.C. § 1114 establishes the rates of compensation associated with specific levels of disability. Subsection (j) of this section specifies a monthly monetary benefit payable "if and while [a] disability is rated as total." A number of subsections provide for the payment of higher amounts for specific disabilities or combinations of disabilities. However, no provision specifically provides for additional compensation in the case of a veteran with a service-connected disability rated as totally disabling and a separate TDIU rating for another, separate disability. Section 1114(s) does provide a higher rate of compensation "[i]f the veteran has a service-connected disability rated as total, and . . . has additional service-connected disability or disabilities independently ratable at 60 percent or more." However, we do not believe this statute may be read as authorizing a higher rate of compensation where a veteran has a total disability rating under 38 C.F.R. § 4.16(a) and a schedular rating of 60 percent or more. Since, as noted above, a rating under section 4.16(a) takes into account all of a veteran's service-connected disabilities, paying a higher rate of compensation based on a combination of a TDIU rating and a schedular rating would allow the same disability to be counted twice in determining the applicable rate and would conflict with the statutory requirement for "additional" disability.

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SUBSTANTIAL GAINFUL EMPLOYMENT, NOT PRECLUDED FROM ALL WORK

§ Inability to engage in substantial gainful employment does not mean a veteran must be precluded from all types of work. *See Ferraro v. Derwinski*, 1 Vet.App. 326, 332 (1991).

UNEMPLOYABILITY, AVERAGE PERSON UNABLE TO FOLLOW SUBSTANTIALLY GAINFUL EMPLOYMENT

§ A total disability rating based upon individual unemployability (IU) will be assigned "when there is present any impairment in mind or body which is sufficient to render it impossible for an average person to follow a substantially gainful employment." *See* 38 C.F.R. § 3.340(a) (1995); *Fluharty v. Derwinski*, 2 Vet.App. 409, 411 (1992); *Hatlestad(I) v. Derwinski*, 1 Vet.App. 164, 165 (1991). The BVA must consider the effects of the veteran's service-connected disability or disabilities in the context of his or her employment and educational background. See *Fluharty*, *supra*, at 412-13; *Hyder v. Derwinski*, 1 Vet.App. 221, 223 (1992); *Hatlestad(I) , supra*, at 168.

VA MEDICAL TREATMENT APPLICATION DOES NOT CONSTITUTE A NEW OR INFORMAL CLAIM FOR BENEFITS

§ "The veteran argues in his brief that the Board erred in not considering the veteran's attempt to obtain assistance from the VAMC in 1969 as an informal claim for benefits under 38 C.F.R. § 3.155. Appellant's Br. at 7-8. Section 3.155 provides in part,

> (a) Any communication or action, indicating an intent to apply for one or more benefits under the laws administered by the Department of Veterans Affairs, from a claimant . . . may be considered an informal claim. Such informal claim must identify the benefit sought.

Further, TDIU ratings were established by regulation to assist veterans who did not otherwise qualify for compensation at the rate provided in 38 U.S.C. § 1114(j) for total disability. *See* 38 C.F.R. § 3.340(a)(2) ("[t]otal ratings are authorized for any disability or combination of disabilities for which the Schedule for Rating Disabilities prescribes a 100 percent evaluation or, *with less disability*, where the requirements of [section 4.16] are present" (emphasis added)). It would represent a significant departure from the purpose of TDIU ratings to allow a veteran with a TDIU rating to combine that rating with a schedular rating to qualify for additional compensation under 38 U.S.C. § 1114(s). Therefore, in our view, no additional monetary benefit would be available in the hypothetical case of a veteran having one service-connected disability rated 100-percent disabling under the rating schedule and another, separate disability for which the veteran has been awarded a TDIU rating."

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"38 C.F.R. § 3.155 (1992). In his appeal to this Court, the veteran counterdesignated the record on appeal with VA Form 10-7131, Exchange of Beneficiary Information and Request for Administrative or Adjudicative Action, dated in October 1969. R. at 5. With regard to this form, the Secretary of Veterans Affairs (Secretary) argues,

This form is designed for use by VA medical centers, outpatient clinics, and regional offices for the exchange of information, or to request administrative and adjudicative action relating to or required by a veteran's status when applying for or receiving hospital or other medical services. [Citation omitted.]

"In this case the form reflects that on October 11, 1969, the veteran sought admission to the VAMC. The VAMC requested information from the VARO concerning the veteran's file number, whether he was receiving any monetary benefits, or whether he was service-connected for any disorders. In reply, and on the same form, the VARO indicated that the veteran was not on the record as service-connected, nor had there been any claims filed by the veteran for either compensation or pension.

"This document does not reflect the nature of the medical treatment sought. It does not describe the medical services rendered, if any. It does not identify any benefit sought by the veteran; indeed, it in no way reflects that the veteran was seeking to apply for disability compensation. In short, it is an internal VA administrative information- gathering mechanism and may not be construed as a claim for entitlement to service connection for PTSD or residuals of frostbite of the feet, informal or otherwise."

See Dunson v. Brown, 4 Vet.App. 327, 329-30 (1993).

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AGENT ORANGE EXPOSURE

NEHMER DECISION - EFFECTIVE DATES FOR AGENT ORANGE CLAIM

§ The veteran served in the U.S. Army from January 1968 to December 1969, including service in Vietnam. The veteran died of lung cancer on June 28, 1979. The widow filed for Dependency Indemnity Compensation (DIC) in August 1979. In an October

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1980 Board decision the claim was denied. *Williams v. Principi*, 15 Vet.App. 189, 190 (2001) (en banc).

The Congress passed the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub.L. 98-542, §§ 5-6, 98 Stat. 2725, 2727 (1984) (Dioxin Act) which required the VA to promulgate regulations establishing standards and criteria for resolving claims by veterans with Vietnam service based on exposure to herbicide containing dioxin.

Prior to the promulgation of the required regulations, the appellant submitted another DIC claim in June 1985. The RO confirmed the prior denial.

Effective September 25, 1985, the VA promulgated regulations providing presumptive service connection for chloracne. *Williams supra* at 190-91 citing 50 Fed.Reg. 34, 458 (1985) and 38 C.F.R. § 3.311a(d) (1986).

In February 1987 a class action law suit was filed in Federal District Court against the VA opposing the newly promulgated regulations. The lawsuit alleged that the VA regulations were too restrictive. *Id* at 191 citing *Nehmer v. United States Veterans Administration*, 712 F.Supp. 1404, 1408-10 (N.D.Cal.1989) (*Nehmer I*). In May 1989, the District Court agreed that the VA regulations were too restrictive, found § 3.311a(d) invalid and voided all decisions based on that rule. *Williams, supra*, 192 citing *Nehmer I*, 712 F.Supp. at 1409.

To resolve issues arising out of *Nehmer I*, the parties entered into a stipulation which was entered into the District Court's final judgment. *Id* at 192 citing *Nehmer v. United States Veterans Administration* (*Nehmer II*), 32 F.Supp.2d 1175, 1176 (N.D.Cal.1999). The Stipulation (Stipulation I) provided for denied claims to be readjudicated if the regulations later provided for service connection for additional disabilities beside chloracne if the claims had been voided by the 1989, *Nehmer I*, decision. Additionally the effective date of awards stemming from such adjudications would be the date of claim of the voided decision. *Id* citing *Nehmer* Stipulation, para. 5 and *Nehmer II*, 32 F.Supp.2d at 1177. Additionally, the parties stipulated that claims based on Agent Orange exposure filed after May 3, 1989, would have effective dates of the date the claim was filed, the date the claimant became disabled or death occurred. *Id* citing *Nehmer* Stipulation II, par. 5.

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On October 20, 1989, the widow resubmitted her claim. The VA responded by telling the widow they were rewriting the Agent Orange regulations and would adjudicate her claim after the regulations were complete.

The Congress enacted the Agent Orange Act of 1991, Pub.L. No. 102-4, § 2, 105 Stat. 11 (1991) (Agent Orange Act) in February 1991. The Agent Orange Act provided for Vietnam veterans to be presumptively service connection for conditions listed in the statute and provided for the addition of other conditions in the future. The VA promulgated final regulations effective June 1994 which provided for herbicide exposed veterans to be presumptively service connect for a number of conditions including respiratory cancers.

In July 1994, the RO readjudicated and granted the widow's claim effective October 20, 1989 based on her claim to reopen on October 1989. The widow objected requesting an earlier effective date in 1979, the year of her original claim for DIC. The decision was appealed to the Board. In an April 1998 decision, the Board agreed with the RO referring to the fact that her initial claim was not adjudicated under § 3.311a(d) and, thus, did not fall under *Nehmer*. *Id* at 192-94.

In February 1999, the District Court decision in *Nehmer II*, reiterated the fact that the *Nehmer 1* decision had voided all decisions made under 38 C.F.R. § 3.311a(d). Additionally, the *Nehmer II* court held that the decision in *Nehmer I* was not intended to void every pre-May 1989 benefits decision but only the decisions made by the VA that would be later found under valid Agent Orange regulations to be service connected. The *Nehmer II* court rejected the VA criteria for readjudication under *Nehmer* that (1) the claimant had to have asserted that the herbicide was a factor in the veteran's death or disability , or (2) the VA denial of the claim had to expressly cite § 3.311a as grounds for the denial. *Id* at 194-95.

The *Williams* court found that the *Nehmer I* decision did not include VA decisions *not* made under § 3.311a. Since the widow filed her 1979 claim prior to the promulgation of the voided regulation, § 3.311a, the *Nehmer* decisions did not apply. As to the 1989 claim, the *Williams* court found that while the VA had mischaracterized the 1989 submission as a reopened claim. Citing *Spencer v. Brown*, the court indicated that a claim based on a statutory or regulatory provision that did not exist at the time of the previous denial is not a reopened claim. *Williams supra* at 197 citing *Spencer,*

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4 Vet.App. 283, 289 (1993). Thus, an earlier effective date based on a claim to reopen was not available based on the 1989 submission. However, application of 38 U.S.C. § 5110(g) provides for an earlier effective date as of the passage of a new law if the claim is filed within a year of passage, in this case the Dioxin Act of 1984 was passed providing for the possibility of a an earlier effective date as of October 24, 1984, the date of enactment of the law.

ALCOHOLISM, SECONDARY SERVICE CONNECTION OF RELATED DISABILITIES, CLAIM ON OR BEFORE OCTOBER 31, 1990

§ "Alcohol dependence is deemed by statute to be the result of willful misconduct and cannot itself be service connected." *See* 38 U.S.C. §§ 105(a), 1110. "However, prior to November 1990, disabilities secondary to alcoholism were not covered by the 'willful misconduct' bar." *See Gabrielson v. Brown*, 7 Vet.App. 36, 41 (1994). .... "It was for the express purpose of 'preclud[ing] payment of compensation for certain secondary effects arising from willful misconduct,' including 'injuries or disease incurred during service as the result of ... the abuse of alcohol,' that 38 U.S.C. § 1110 was amended by the Omnibus Reconciliation Act of 1990, Pub.L. No. 101-508. § 8052, 104 Stat. 1388, 1388-1, 1388-351 (1990) (OBRA)." *Id.*, citing H.R. Conf.Rep. No. 964, 101st Cong.. 2nd Sess. 997 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2017, 2374, 2702. .... "However, the statutory amendment applied only to claims filed *after* October 31, 1990." *Id.*, citing OBRA § 8052(b).

DENTAL TREATMENT

DENIAL OF TREATMENT, DUE PROCESS REQUIRED

§ In *Grovhoug v. Brown*, 7 Vet.App. 209, 213-14 (1994), the Court found that a veteran who had been entitled to dental treatment under the old law, even though he was rated at 0 percent, could not be denied dental treatment under the new law provisions (Public Law 84-83 (1955)) which requires a compensable rating without due process, such as a reduction notice.

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DISEASES LISTED AT 38 C.F.R. § 3.309 ARE CHRONIC DISEASES

§ Diseases listed at 38 C.F.R. § 3.309 are designated as "chronic" by the regulation. *See Brannon v. Derwinski*, 314, 315 (1991).

EARS

TINNITUS

EACH EAR RATED SEPARATELY

§ The veteran had been service connected for bilateral high frequency hearing loss and tinnitus. The veteran's tinnitus was evaluated as noncompensable. The issue on appeal was a compensable evaluation for tinnitus. Arguments at the Court included the obligation of the VA to provide a compensable evaluation for each ear. *Wanner v. Principi*, 17 Vet.App. 4, 9 (2003) citing 38 C.F.R. § 4.25 ((b) … the disabilities arising from a single disease entity . . . are to be rated separately as are all other disabling conditions, if any.") and *Esteban v. Brown*, 6 Vet.App. 259, 262 (1994). The Court found the Board decision provided inadequate reasons and bases and remanded the case for readjudication in light of § 4.25 (b). *Wanner, supra*, at 15.

PERSISTENT VIS A VIS RECURRENT

:*See*

§ The *Smith v. Principi* Court reversed the Board decision finding the veteran's tinnitus was not "persistent" and denying a compensable evaluation. The Court granted two 10% evaluations finding the Board's decision to deny the veteran a compensable rating was "arbitrary, capricious, [and] an abuse of discretion…." because it conflicted with 38 U.S.C. § 1110 which required disabled veterans to be compensated. *Smith*, 17 Vet.App. 168, 169 citing *Wanner v. Principi*, 17 Vet.App. 4, 17-18.

The *Smith* Court referred to a proposed rule change to DC 6260 published at 59 Fed.Reg. 17295 (Apr. 12, 1994) which acknowledged the potential for applying too narrow a standard when the word "persistent" was used. The proposed rule change at 17,297, in the Supplementary Information section, indicated that the Secretary was proposing that the words requiring "persistent" tinnitus for a 10% evaluation in DC

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should be changed from "persistent" tinnitus because the word persistent suggested "a meaning of 'constant'" to "'recurrent' meaning the tinnitus might not always be present, but that it does return at regular intervals. ***Requiring that tinnitus be 'recurrent' will allow a realistic evaluation of the typical disablement from this condition***." *Id* at 170-71 (emphasis added in cite) quoting 59 Fed.Reg. at 17,297.

"…in light of the regulatory history, the ambiguity as to the meaning of 'persistent', and the Secretary's failure to include a manageable definition in the DC, the Court must resolve all reasonable interpretive doubt in favor of the veteran." *Ibid*, at 171 citing *Brown v. Gardner*, 513 U.S. 115, 118, 115 S.Ct.552, 130 L.Ed.2d 462 (1994) (other citations omitted).

38 C.F.R. § 4.87A (1998) DC 6260 IMPERMISSABLY REQUIRES TRAUMA TO SERVICE CONNECT TINNITUS

§ 38 C.F.R. § 4.87a, DC 6260 requires tinnitus due to trauma to service connect. Regulations published in 1999 and later did not continue that requirement. The Court found the trauma requirement, which excluded certain veterans otherwise eligible under 38 U.S.C. § 1110, had no legal basis and, consequently, was arbitrary and capricious and ruled the 1998 regulation was invalid. *Wanner v. Principi*, 17 Vet.App. 4, 18 (2003).

MENTAL DISORDERS

DSM-IV, MULTIAXIAL DIAGNOSIS

§ Mental disorders are categorized in two classification systems. At the time of this writing, the latest manual is the Diagnostic and Statistical Manual of Mental Disorders (4th Edition) (DSM-IV) published in 1994 by the American Psychiatric Association and the International Classification of Diseases [an international classification system for all medical diagnoses including mental disorders] published by the World Health Organization. The multiaxial diagnostic system was set forth in 1980 with DSM-III and is an integral part of DSM-IV. According to the DSM-IV, the multiaxial system provides a biopsychosocial approach assessment. The system ensures that information needed for treatment planning, prediction of outcome, and research is recorded. The clinician describes the patient's condition using Axes I

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through V of the multiaxial diagnostic system. Axes I and II of DSM-IV are utilized for multiple diagnoses. Axis I is the category for clinical mental disorders. and syndromes, and Axis II is the category for personality disorders and developmental disorders. Axis III is the category for medical, physical disorders or conditions. Axis IV is the category for psychosocial stressors encountered by the patient during the prior 12 months to evaluation. The clinician rates the individual's overall level of functioning on Axis V. *See American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders* 25-31 (4th ed. 1994) (Note: the *American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders* (4th ed. Text Revision 2000) (hereinafter *DSM-IV-TR*) was published in the year 2000).

PERSONALITY DISORDER, SERVICE CONNECTION (NONPRECEDENTIAL OPINION)

§ "It is undisputed that the veteran's personality disorder either manifested itself in service, or was aggravated thereby. (cites omitted) This being the case, VA was under a self-imposed duty to account for the differing diagnoses, and determine whether the veteran's current condition is related to the paranoid personality disorder. The Board's failure to address the applicable regulations was, under 38 U.S.C. § 7261(a)(3)(A), 'not in accordance with law,' and require the Court to vacate the BVA decision." (nonprecedential memorandum opinion by Chief Judge Nebeker).

Grant, supra quoting *Douglas v. Derwinski*, 2 Vet.App. 435, 439 (1992).

POST TRAUMATIC STRESS DISORDER (PTSD)

COMBAT STRESSOR

§ "This Court has held that, under 38 U.S.C. § 1154(b), 38 C.F.R. § 3.304, and the Manual M21-1 provisions then applicable, where it is determined that the veteran was engaged in combat with the enemy and the claimed stressors are related to such combat, the veteran's lay testimony regarding claimed stressors must be accepted as conclusive as to their occurrence and that no further development for corroborative evidence will be required, provided that the veteran's testimony is found to be 'satisfactory' and 'consistent with the circumstances, conditions, or hardships of such

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service'[]" *Cohen v. Brown*, 10 Vet.App. 128, 146 quoting 38 U.S.C. § 1154(b); citing *Zarycki v. Brown*, 6 Vet.App. 91, 98 (1993); *see also Caluza v. Brown*, 7 Vet.App. 498, 507 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table) ("Section 1154(b) provides a factual basis upon which a determination can be made that a particular disease or injury was incurred or aggravated in service but not a basis to link etiologically the condition in service to the current condition. *Cohen, supra,* at 138 citing *Caluza, supra.*); 57 Fed. Reg. 34,536 (proposed rule for what became § 3.304(f) (Aug. 5, 1992)) ("noting in the supplementary information: 'The chaotic circumstances of combat, however, preclude the maintenance of detailed records. Consequently, the Secretary has determined that when service department records indicate that the veteran engaged in combat or was awarded a combat citation and the claimed stressor is related to the combat experience, ***further development to document the occurrence of the claimed stressor i[s] unnecessary***'" (emphasis added in *Cohen*) *Cohen,* supra, at 146 citing 57 Fed. Reg. 34, 536.); 58 Fed. Reg. 29,109 (final rule May 19, 1993) (noting in the supplementary information that § 3.304(f) is consistent with § 1154(b) and referencing the rule change bringing the PTSD rules into line with the law consistent with *Zang v. Brown*, 8 Vet.App. 246, 255-56 (1995) (Steinberg, J., separate views)).

The Court has ruled that the Board must "make a finding as to the credibility of the veteran's sworn testimony describing his duties while in Vietnam," *see Lizaso v. Brown*, 5 Vet.App. 380, 386 (1993); *Ohland v. Derwinski*, 1 Vet.App. 147, 149-50 (1991); *Hatlestad v. Derwinski*, 1 Vet.App. 164, 169-70 (1991). In addition, the Board is obligated to "articulate clearly whether it found the veteran to have engaged in combat .... and, if so, whether the claimed stressor was related to such combat." *See Zarycki, supra,* at 98; *see also Caluza, supra; Gabrielson v. Brown*, 7 Vet.App. 36, 39-40 (1994); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990).

In *Cohen*, the Court indicated "if the veteran was engaged in combat in connection with any of the asserted stressors that might be construed as combat related (that is, mortar fire while on convoys and guard duty, or being fired on when returning from R&R (rest and recuperation), then under section 1154(b), his lay evidence as to stressors related to such combat must be accepted unless inconsistent with the

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circumstances, conditions, or hardships of service or unless the BVA finds by clear and convincing evidence that a particular asserted stressful event did not occur." *Cohen, supra,* at 146 citing *Caluza,* 7 Vet.App. at 508-09; *see also Collette v. Brown*, 82 F.3d 389, 392 (Fed. Cir 1996) (noting that § 1154(b) "does not create a statutory presumption that a combat veteran's alleged disease or injury is service-connected", but "considerably lighten[s] the burden of a veteran who seeks benefits for an allegedly service-connected disease or injury and who alleges that the disease of injury was incurred in, or aggravated by, combat service"); *cf. Jensen v. Brown*, 19 F.3d 1413, 1417 (Fed. Cir. 1994) (38 C.F.R. § 3.306, derived from § 1154(b), creates a presumption of aggravation but "not service-connection, or even that the determination of aggravation is irrebuttable"); *Jensen, supra,* at 393 (VA may rebut section 1154(b) presumption by clear and convincing evidence to the contrary).

CREDIBLE EVIDENCE OF STRESSOR DOES NOT REQUIRE EVIDENCE OF PERSONAL EXPOSURE

§ While 38 C.F.R. § 3.304(f) requires the presence of three elements for service connection of PTSD, the element requiring credible supporting evidence that the claimed inservice stressor actually occurred does not require evidence of personal exposure. It is enough that the evidence establish the stressful events occurred and "impl[y] his personal exposure." *Pentecost v. Principi*, 16 Vet.App. 124, 128 (2002) quoting *Suozzi v. Brown*, 10 Vet.App. 307, 311 (1997). In this case, the veteran was stationed at Da Nang, Vietnam at the time independent evidence established the base was under rocket attack. *Id*. at 127-28.

DSM-III-R *VIS A VIS* DSM-IV CRITERIA FOR DIAGNOSIS

§ The first regulation for PTSD, 38 C.F.R. § 3.304, was effective May 19, 1993 (*see* 58 Fed. Reg. 29,109, 29,110). However, the VA adjudication manual, which was in effect, required essentially the same three elements incorporated in the new rule. *See Cohen v. Brown*, 10 Vet. App. 128, 138 (1997) (citing **VA Adjudication Procedure Manual, M21-1** [hereinafter Manual M21-1], Subchapter (Subch.) XII, ¶ 50.45 (Jan 25, 1989) (providing that service connection for PTSD requires diagnosis showing history of stressful events which are thought to have caused condition and description of past and present symptoms (including a description of "the relationship between

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past events and current symptoms" in terms of "a link between current symptoms and an in[-]service stressful event(s)")); *see also* Manual M21-1, Part VI, ¶ 7.46 (Oct. 11, 1995).

"VA regulations in 38 C.F.R. § 4.125 (1989) and (1995) relating to mental disorders in general had adopted the nomenclature of the 1980 third edition of the DSM (DSM-III); however, the DSM had been revised in 1987 (generally referred to as DSM-III-R, the third edition revised) and again in 1994 (DSM-IV, the fourth edition). On October 8, 1996, VA issued a final rule amending that portion of its Schedule for Rating Disabilities pertaining to mental disorders." *Cohen, supra* at 139 (citing 61 Fed. Reg. 52,695 (Oct. 8, 1996)); *see also* 60 Fed. Reg. 54,826 (Oct. 26, 1995). "The revised regulations took effect on November 7, 1996 . . . . This new final rule makes no change in the specific § 3.304(f) PTSD regulation, but revised 38 C.F.R. § 4.125 and 4.126, and replaced § 4.130 with a new section that specifically adopts DSM-IV as the basis for the nomenclature of the rating schedule for mental disorders." *Cohen, supra* (citing 61 Fed. Reg. 52, 700 (Nov. 1996 amendments) [hereinafter (Nov 96 amnds)]).

In *Cohen, supra,* at 140 the Court indicated that the rule § 3.304(f) requires a "'clear diagnosis' of PTSD", thus, an unequivocal diagnosis of PTSD is required. "[A] clear (that is, unequivocal) PTSD diagnosis by a mental-health professional must be presumed (unless evidence shows to the contrary) to have been made in accordance with the applicable DSM criteria as to both the adequacy of the symptomatology and the sufficiency of the stressor. Mental health professionals are experts and are presumed to know the DSM requirements applicable to their practice and to have taken them into account in providing a PTSD diagnosis." *Id*.

In the case that "the Board believes that that [examination] report does not accord with the applicable DSM diagnostic criteria" the Board is mandated to return the report to the Regional Office (RO) for clarification. *Id*. (citing 38 C.F.R. § 4.125 (Nov 96 amnds); 38 C.F.R. § 4.126 (1996); Manual M21-1, part VI, ¶ 7.46(e) (1995); Manual M21-1, Subch. XII, ¶ 50.45(c) (1989); VA Gen. Coun. Prec. 10-95, ¶ 1 (Mar. 31, 1995); *see also* 38 C.F.R. §§ 4.2, 19.9 (1996); *cf. Massey v Brown,* 7 Vet.App. 204, 208 (1994) (Board consideration of factors wholly outside rating criteria is legal error)). "The Board cannot use the DSM provisions themselves as a basis for

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rejecting the veteran's favorable medical evidence as to the sufficiency of a stressor or the adequacy of the veteran's symptomatology (but rather must rely on independent medical evidence) even if the clarification sought is not provided by the original examiner." *See Cohen, supra,* at 140 (citing *Hayes v. Brown,* 5 Vet.App. 60, 66 (1993) (refers to application of 38 U.S.C. § 1154(b); 38 C.F.R. § 3.304(d)(1996) to "satisfactory lay" or other evidence when disability incurred in combat.); *Austin v. Brown,* 6 Vet.App. 547, 554-55 (1994) ("discussing 38 C.F.R. § 1.551(c)'s prohibition against **adversely** affecting anyone by matter not published in Federal Register" (emphasis in text) *see Cohen, supra,* at 139.); *Karnas v. Derwinski,* 1 Vet.App. 308, 312-13 (1991) (when law or regulation changes during appeal, the most favorable must be applied); *Fugere v. Derwinski,* 1 Vet.App. 103, 109 (1990) ("without adherence to Administrative Procedure Act notice-and-comment process and specific notice to the public of intent to revoke Manual M21-1 provision protecting benefit entitlement, Secretary cannot revoke that provision" *see Cohen, supra,* at 139)).

Cohen, supra, at 141 cites VA Gen. Coun. Prec. 10-95, ¶ 1 (Mar. 31, 1995), ¶ 7 which states "[T]he criteria for [PTSD] have been significantly revised in DSM-IV. The DSM-III requirement that the psychologically traumatic event or stressor be one 'that would evoke significant symptoms of distress in almost everyone' has been deleted, and DSM-IV instead requires that the person's response to the stressor involve intense fear, helplessness, or horror." The Court noted that the changes in the DSM-IV at 427-28 changed the criteria for diagnosing PTSD "[t]hese criteria are no longer based solely on usual experience and response but are individualized (geared to the specific individual's actual experience and response)." *Cohen, supra,* at 141.

"Relating to stressors, the *DSM-IV* provides examples of traumatic events that are experienced directly, such as military combat, and those that are witnessed. (*DSM-III-R* had provided that '[s]tressors producing this disorder include . . . deliberately caused disasters (e.g., bombing, torture, death camps).' *DSM-III-R*at 248.) The Manual M21-1 also provides the following guidance that may be applied in a manner favorable to the veteran" 'A stressor is not to be limited to just one single episode. A group of experiences also may affect an individual, leading to a diagnosis of PTSD.'" *Cohen, supra,* at 142 quoting Manual M21-1, Part VI, ¶ 7.46(b)(2) (1995); Manual M21-1, Subch. XII. ¶ 50.45(f)(2) (1989); *see Hayes, Austin, Karnas,* and *Fugere,* all *supra*.

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Thus, under *Cohen*, previous cases denied because the stressor was not of "sufficient gravity [as] to evoke the [PTSD] symptoms in almost anyone" (citing *Swann v. Brown*, 5 Vet.App. 229, 233 (1993) which was denied by the Court after the Court rejected the veteran's diagnosis of PTSD and exposure to mortar fire and of a "Viet Cong corpse hanging in a tree"; *Zarycki v. Brown*, 6 Vet.App. 91, 99 (1993)) "these two cases would not apply to the consideration of the DSM-IV criteria." *Cohen, supra*, at 142.

IF NONCOMBAT, CORROBORATION OF STRESSOR REQUIRED

§ The Court has held that a claim for service connection for PTSD based on a non-combat stressor, must be supported by evidence other than the veteran's statements and the physician's opinion providing a nexus to the claimed stressor. Such a claim must be also supported by "corroborating evidence" that the claimed in-service stressor actually occurred. *See Moreau v. Brown*, 9 Vet.App. 389, 395 (1996); *cf. Pentecost v. Principi*, 16 Vet.App. 124, 128 (2002) (evidence of direct personal exposure not required only that the events occurred and imply his personnel exposure) (quotes omitted).

IN-SERVICE DIAGNOSED PTSD NO CORROBORATED STRESSOR NECESSARY

§ "[T]he governing regulation in instances where PTSD first manifested during service is 38 C.F.R. 3.303 (a) [not 3.304(f)]. Direct service connection is warranted under this regulation if the diagnosis was made in service and all other pertinent eligibility criteria are met, even if the stressor event took place before service. This is analogous to a grant of service connection for hereditary conditions that are first manifested during service."[17] VA Fast Letter 99-85 (August 26, 1999).

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August 26, 1999

Director (00/21) In Reply Refer To: 211 (99-85)
All VBA Regional Offices and Centers Fast Letter

Subject: Service Connection for Post Traumatic Stress Disorder (PTSD) diagnosed In-Service

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SC COURT REVIEW IS CLEARLY ERRONEOUS STANDARD OF REVIEW

§ Whether service connection is warranted for Post Traumatic Stress disorder (PTSD) is a finding of fact. *See Wood v. Derwinski*, 1 Vet.App. 190, 192 (1991). The Court reviews the BVA's factual findings only to determine whether they are "clearly erroneous." *See Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). "[I]f there is a 'plausible' basis in the record for the factual determinations of the BVA, even if this Court might not have reached the same factual determinations, we cannot overturn them." *Id.* The BVA is not bound to accept appellant's uncorroborated account of his Vietnam experiences, nor is it bound to accept a doctor's opinion that the veteran's PTSD is secondary to his wartime experience in Vietnam. *See Wood, supra,* at 192; *Wilson v. Derwinski*, 2 Vet.App. 614, 618 (1992). Manual M21-1 provides that if a claimed stressor is not combat related, a history of a stressor as related by the veteran is in itself, insufficient. *See Swann v. Brown*, 5 Vet.App. 229, 233 (1993). *Cf., Collette v. Brown*, 82 F.3d 389, 393 (Fed. Cir. 1996) as appears in 9 Vet.App. [7], [11] (1996) (If the veteran has "proffered 'satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease.' 38 U.S.C. § 1154(b) [and that evidence is] 'consistent with the circumstances, conditions, or

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1. Some regional offices are denying service connection for properly diagnosed PTSD in claims where the condition first manifests itself during service in a delayed response to a stressor that occurred prior to entry onto active duty and there is no in-service stressor to account for the diagnosis of PTSD.

2. Under 38 CFR 3.304 (f), service connection for PTSD requires, among other things, "credible supporting evidence that the claimed in-service stressor actually occurred." This regulation applies to PTSD diagnosed after service where it is claimed that the stressor occurred in service. This provision is cited as the basis used to deny service connection in the situations mentioned above in paragraph 1.

3. However, the governing regulation in instances where PTSD first manifested during service is 38 CFR 3.303 (a). Direct service connection is warranted under this regulation if the diagnosis was made in service and all other pertinent eligibility criteria are met, even if the stressor event took place before service. This is analogous to a grant of service connection for hereditary conditions that are first manifested during service.

4. If you have questions concerning this issue, please contact Ms. Lynda Petty at (202) 273-6981 or by e-mail.

/s/
Robert J. Epley, Director
Compensation and Pension Service

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hardships of such service.'[] even if no official record of incurrence exists [then] a factual presumption arises that the alleged injury or disease is service-connected.....The VA may rebut the presumption by presenting 'clear and convincing evidence to the contrary.'")

UNCORROBORATED ASSAULT

§ The Court, In *Patton*, citing *YR v. West*, 11 Vet.App. 393, 398 (1998), found that the necessity for corroborating a stressor is relaxed in "personal assault cases". *Patton v. West*, 12 Vet.App. 272, 280 (1999) (Holdaway, R.M., dissenting) citing Manual M21-1, Part III, ¶5.14c(8), (9)[18].

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[18] Manual M21-1, Part III, ¶5.14 c. **PTSD Claims Based on Personal Assault**

(1) Veterans claiming service connection for disability due to an in-service personal assault face unique problems documenting their claims. Personal assault is an event of human design that threatens or inflicts harm. Examples of this are rape, physical assault, domestic battering, robbery, mugging, and stalking. Although these incidents are most often thought of as involving female veterans, male veterans may also be involved. Care must be taken to tailor development for a male or female veteran. These incidents are often violent and may lead to the development of PTSD secondary to personal assault.

(2) Because assault is an extremely personal and sensitive issue, many incidents of personal assault are not officially reported, and victims of this type of in-service trauma may find it difficult to produce evidence to support the occurrence of the stressor. Therefore, alternative evidence must be sought.

(3) To service connect PTSD, there must be credible evidence to support the veteran's assertion that the stressful event occurred. This does not mean that the evidence actually proves that the incident occurred, rather that the preponderance of evidence supports the conclusion that it occurred.

(4) Review the claim and all attached documents. Develop for SMRs and MPRJ information as needed.

(a) Service records not normally requested may be needed to develop this type of claim. Responses to the development letter attachment shown in Exhibit B.11 may identify additional information sources. These include:

- A rape crisis center or center for domestic abuse,
- A counseling facility,
- A health clinic,
- Family members or roommates,
- A faculty member,
- Civilian police reports,

- Medical reports from civilian physicians or caregivers,
- A chaplain or clergy, or
- Fellow service persons.

(b) Any reports from the military police, shore patrol, provost marshal's office, or other military law enforcement. Development may include phone, fax, e-mail, or correspondence as long as documented in the file.

(5) Identifying possible sources of alternative evidence will require that you ask the veteran for information concerning the incident. This should be done as compassionately as possible in order to avoid further traumatization. The PTSD stressor development letter used by regional offices to solicit details concerning a combat stressful incident is inappropriate for this type of PTSD claim. Use Exhibit B.10 or a letter developed locally for this type of claim.

(6) The attachment to the development letter shown in Exhibit B.9 is inappropriate for PTSD claims based on personal assault and should not be used for that purpose. Instead use Exhibit B.11 to this letter or an attachment developed locally.

(7) Rating specialists must carefully evaluate all the available evidence. If the military record contains no documentation that a personal assault occurred, alternative evidence might still establish an in-service stressful incident. Behavior changes that occurred at the time of the incident may indicate the occurrence of an in-service stressor. Examples of behavior changes that might indicate a stressor are (but are not limited to):

(a) Visits to a medical or counseling clinic or dispensary without a specific diagnosis or specific ailment;

(b) Sudden requests that the veteran’s military occupational series or duty assignment be changed without other justification;

(c) Lay statements indicating increased use or abuse of leave without an apparent reason such as family obligations or family illness;

(d) Changes in performance and performance evaluations;

(e) Lay statements describing episodes of depression, panic attacks or anxiety but no identifiable reasons for the episodes;

(f) Increased or decreased use of prescription medications;

(g) Increased use of over-the-counter medications;

(h) Evidence of substance abuse such as alcohol or drugs;

(i) Increased disregard for military or civilian authority;

(j) Obsessive behavior such as overeating or undereating;

(k) Pregnancy tests around the time of the incident;

(l) Increased interest in tests for HIV or sexually transmitted diseases;

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TOBACCO PRODUCTS, INJURY OR DISEASE ATTRIBUTABLE TO (38 U.S.C. § 1103(A); 38 C.F.R. § 3.300)

§ 38 U.S.C. § 1103(a) and 38 C.F.R. § 3.300 deny service connection for claims filed after the date of June 9, 1998 for disease or injury attributable to tobacco use. *Kane v. Principi*, 17 Vet.App. 97, 103 (2003) (affirming Board decision which denied DIC to widow whose claim was filed after June 9, 1998 based on her husband's death due to service connected conditions attributable to use of tobacco products).

TUBERCULOSIS (38 C.F.R. § 3.307(A)(3))

TB SC REQUIRES CLINICAL, X-RAY OR LABORATORY STUDIES, OR HOSPITAL OBSERVATION

§ A private physician's statement will not be accepted for the purpose of establishing presumptive service connection under 38 C.F.R. § 3.307(a)(3) (1995) "unless confirmed by acceptable clinical, x-ray or laboratory studies, or by findings of active tuberculosis based upon acceptable hospital observation or treatment." *See Tubianosa v. Derwinski*, 3 Vet.App. 180, 183-84 (1992).

(m) Unexplained economic or social behavior changes;

(n) Treatment for physical injuries around the time of the claimed trauma but not reported as a result of the trauma;

(o) Breakup of a primary relationship.

(8) Rating specialists may rely on the preponderance of evidence to support their conclusions even if the record does not contain direct contemporary evidence. In personal assault claims, secondary evidence may need interpretation by a clinician, especially if it involves behavior changes. Evidence that documents such behavior changes may require interpretation in relationship to the medical diagnosis by a VA neuropsychiatric physician.

CLEAR AND UNMISTAKABLE ERROR (CUE) (*SEE* REVISION OF DECISIONS)

COMPENSATION, VA DISABILITY, OFFSET BY MILITARY SEPARATION, SEVERANCE OR READJUSTMENT PAY

REDUCTION IN BENEFIT DUE TO RECOUPMENT REQUIRES APPLICATION OF 38 C.F.R. §§ 3.105, 3.2600(D) AND IN THE CASE OF RECOUPMENT § 1.912(A)

§ In this case, the VA had recovered part of the veteran's special separation bonus (SSB). However, on appeal, in a later decision, the VA increased the amount to be collected. The Court held that the recouped funds were a "benefit" or benefit claim" and required consideration of 38 C.F.R. § 3.105(b) which sets out the procedures for reducing or discontinuing benefits and § 3.2600(d) which prohibits decisions on later review from revising the decision in a manner that is less advantageous to the veteran. The exception to § 3.2600 being a decision of clear and unmistakable error in a prior decision. The Court also held that 38 C.F.R. 1.912(a) (requiring notice prior to commencement of offset) had to be considered. The failure of the Board to discuss these provisions was an inadequate statement of reasons and bases sufficient to vacate and remand the decision for readjudication. *Majeed v. Principi*, 16 Vet.App. 421, 432 (2002).

VA RECOUPMENT OF MILITARY SEPARATION, SEVERANCE OR READJUSTMENT PAY

§ Title 10 U.S.C. § 1174(h)(2) provides for the VA to subtract from any compensation due the veteran any military separation, severance or readjustment pay except any amounts withheld for federal income tax. *Majeed v. Principi*, 16 Vet.App. 421, 428-29 (2002) citing 10 U.S.C. § 1174(h)(2).

The Court held that the amounts received referred to in § 1174 was the amount entitled to receive including any funds recouped as debt by the military not just the amount received by the veteran in a check. In this case, the debt to the military was money received by the veteran and which was used to cover debts he owed, in this case, to the military. *Id* at 429.

COMBAT STATUS (38 U.S.C. § 1154(b))

COMBAT STATUS (38 U.S.C. § 1154(b))

CLAIMANT TESTIMONY MUST BE CONSIDERED

§ The veteran appealed the denial of his claim for PTSD. . The veteran claimed PTSD due to stress from combat which was otherwise not corroborated. The *Moran* Court found that the Board erred when it only considered MOS and absence of medals to determine combat status. The Court found that the Board's failure to consider the credibility of the veteran's testimony regarding his engagement in combat was a failure to consider all of the evidence of record and the Board did not provide adequate reasons or bases for its decision. *Moran v. Principi*, 17 Vet.App. 149, 154-55 (2003) citing *Gaines v. West*, 11 Vet.App. 353, 359 (1998) (failed to address appellant's sworn testimony regarding combat status); *Cohen v. Brown*, 10 Vet.App. 128, 145-46 (1997); *Dizoglio v. Brown*, 9 Vet.App. 163, 166 (1996).

DUTY TO ASSIST "PARTICULARLY GREAT" WHEN SMRS UNAVAILABLE IN § 1154(B) CASE

§ "[T]he Secretary's duty to assist under the facts of this case was particularly great in light of the unavailability of the veteran's exit examination and full Army medical records and the applicability of section 354(b) (now § 1154(b)). Against this background, it was incumbent on VA to insure that its current examination and the report thereof was as complete and thorough as possible in dealing with the veteran's contentions." *Moore v. Derwinski*, 1 Vet.App. 401, 406 (1991).

EVIDENTIARY STANDARD OF PROOF RELAXED IN § 1154(B)

§ ". . . 38 U.S.C. § 1154(b), by relaxing the evidentiary requirements for adjudication of certain combat-related VA-disability-compensation claims, specifically allows combat veterans, in certain circumstances, to use lay evidence to establish service incurrence of a disease or injury -- that is, what occurred in service -- both as to the evidence that a claimant must submit in order to make such a claim well grounded and as to the evidence necessary in order for service connection of a disease or injury to be awarded." *Velez v. West*, 11 Vet.App. 148, 153 (1998) citing *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed.Cir.1996) (table);

COMBAT STATUS (38 U.S.C. § 1154(b))

Jensen v. Brown, 19 F.3d 1413, 1416-17 (Fed.Cir.1994); *Chipego v. Brown*, 4 Vet.App. 102, 105 (1993); *Sheets v. Derwinski*, 2 Vet.App. 512, 515 (1992); *Smith (Morgan) v. Derwinski*, 2 Vet.App. 137, 140 (1992). "Section 1154(b) provides:

> In the case of any veteran who engaged in combat with the enemy in active service with a military, naval, or air organization of the United States during a period of war, campaign, or expedition, the Secretary shall accept as sufficient proof of service[]connection of any disease or injury alleged to have been incurred in or aggravated by such service satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease, if consistent with the circumstances, conditions, or hardships of such service, notwithstanding the fact that there is no official record of such incurrence or aggravation in such service, and, to that end, shall resolve every reasonable doubt in favor of the veteran. Service[]connection of such injury or disease may be rebutted by clear and convincing evidence to the contrary. The reasons for granting or denying service[]connection in each case shall be recorded in full.

Velez, supra, quoting 38 U.S.C. § 1154(b). "The regulation implementing section 1154(b) is at 38 C.F.R. § 3.304(d) (1997)." *Velez, supra*.

G.C. PREC 12-99, DETERMINATION AS TO WHETHER A VETERAN "ENGAGED IN COMBAT WITH THE ENEMY"

"ENGAGED IN COMBAT WITH THE ENEMY"

§ "a. The ordinary meaning of the phrase "engaged in combat with the enemy," as used in 38 U.S.C. § 1154(b), requires that a veteran have participated in events constituting an actual fight or encounter with a military foe or hostile unit or instrumentality. Nothing in the language or history of that statute or any Department of Veterans Affairs (VA) regulation suggests a more specific definition. The issue of whether any particular set of circumstances constitutes engagement in combat with the enemy for purposes of section 1154(b) must be resolved on a case-by-case basis. VA may issue regulations clarifying the types of activities that will be considered to fall within the scope of the term." G.C. Prec 12-99 page 8, ¶ a.

COMBAT STATUS (38 U.S.C. § 1154(b))

PROOF OF COMBAT

§ "b. The determination as to what evidence may be satisfactory proof that a veteran "engaged in combat with the enemy" necessarily depends on the facts of each case. Determining whether evidence establishes that a veteran engaged in combat with the enemy requires evaluation of all pertinent evidence in each case, and assessment of the credibility, probative value, and relative weight of the evidence." G.C. Prec 12-99 page 8, ¶ b.

EVIDENCE IS PERTINENT IF IT IS PROBATIVE AND MUST BE CONSIDRED

§ "c. There is no statutory or regulatory limitation on the types of evidence that may be used in any case to support a finding that a veteran engaged in combat with the enemy. Accordingly, any evidence which is probative of that fact may be used by a veteran to support an assertion that the veteran engaged in combat with the enemy, and VA must consider any such evidence in connection with all other pertinent evidence of record." G.C. Prec 12-99 page 8, ¶ c.

PARTICIPATION IN "OPERATION" OR "CAMPAIGN" MAY NOT BE SUFFICIENT

§ "d. Whether a particular statement in service-department records indicating that the veteran participated in a particular "operation" or "campaign" is sufficient to establish that the veteran engaged in combat with the enemy depends upon the language and context of the records in each case. As a general matter, evidence of participation in an "operation" or "campaign" often would not, in itself, establish that a veteran engaged in combat, because those terms ordinarily may encompass both combat and non-combat activities. However, there may be circumstances in which the context of a particular service-department record indicates that reference to a particular operation or campaign reflects engagement in combat. Further, evidence of participation in a particular "operation" or "campaign" must be considered by VA in relation to other evidence of record, even if it does not, in itself, conclusively establish engagement in combat with the enemy." G.C. Prec 12-99 page 8-9, ¶ d.

COMBAT STATUS (38 U.S.C. § 1154(b))

BENEFIT OF THE DOUBT RE: COMBAT DETERMINATION

§ "e. The benefit-of-the-doubt rule in 38 U.S.C. § 5107(b) applies to determinations of whether a veteran engaged in combat with the enemy for purposes of 38 U.S.C. § 1154(b) in the same manner as it applies to any other determination material to resolution of a claim for VA benefits. VA must evaluate the credibility and probative value of all pertinent evidence of record and determine whether there is an approximate balance of positive and negative evidence or whether the evidence preponderates either for or against a finding that the veteran engaged in combat. If there is an approximate balance of positive and negative evidence, the issue must be resolved in the veteran's favor." G.C. Prec 12-99 page 8, ¶ e.

MEDICAL NEXUS EVIDENCE REQUIRED TO SERVICE CONNECT

§ "[T]he provisions of section 1154(b) do not provide a substitute for medical nexus evidence, but rather serve only to reduce the evidentiary burden for combat veterans with respect to the second *Caluza* requirement , [that is] the submission of evidence of incurrence or aggravation of an injury or disease in service". *Huston v. Principi*, 17 Vet.App. 195, 205 (2003) quoting *Clyburn v. West*, 12 Vet.App. 296, 303 (1999); citing *Wade v. West*, 11 Vet.App. 302, 305 (1998).

MOS NOT DETERMINATIVE

§ "[E]ngagement in combat is not necessarily determined simply by reference to the existence or nonexistence of certain awards or MOSs ...." *Dizoglio v. Brown*, 9 Vet.App. 163, 166 (1996).

THREE STEP ANALYSIS IN CLAIM WITH § 1154(B) APPLICATION

§ "In *Collette v. Brown*, the Court of Appeals for the Federal Circuit stated:

> [Section] 1154(b) sets forth a three-step, sequential analysis that must be undertaken when a combat veteran seeks benefits under the method of proof provided by the statute. As the first step, it must be determined whether the veteran has proffered "satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease." 38

COMBAT STATUS (38 U.S.C. § 1154(b))

> U.S.C. § 1154(b). As the second step, it must be determined whether the proffered evidence is "consistent with the circumstances, conditions, or hardships of such service." *Id.* The statute provides that if these two inquiries are met, the Secretary "shall accept" the veteran's evidence as "sufficient proof of service-connection," even if no official record of such incurrence exists. . . .
>
> . . . . [A]s the third step of the analysis, it must be determined whether . . . service[]connection [has been rebutted] by "clear and convincing evidence to the contrary."

Velez v. West, 11 Vet.App. 148, 153 (1998), quoting *Collette v. Brown*, 82 F.2d 389, 392-93 (Fed.Cir.1996). "Subsequently, this Court, in *Libertine v. Brown*, concluded as follows regarding *Collette*:

> It is unclear whether in setting forth this analysis the Federal Circuit intended to alter the medical nexus requirement set forth in *Caluza*[, 7 Vet.App. at 507] (holding that section 1154(b) relates only to what happened in service ("what happened then") and does not excuse need for medical evidence of nexus to service, and that term "service connection" in that statute means "service incurrence or aggravation.") The Federal Circuit's silence regarding this issue, in the face of its positive affirmation of *Caluza* with respect to the meaning of "satisfactory" evidence . . . and its holding, as *Caluza* had suggested, 7 Vet.App. at 510-12, that the weighing of contrary evidence cannot be considered under § 1154(b) as part of the first two steps but only as part of rebuttal of service incurrence under the clear-and-convincing evidence standard, can be fairly read as not affecting *Caluza*'s medical nexus analysis, a reading that the Court adopts.

Velez, at 154 quoting *Libertine*, 9 Vet.App. 521, 524-25 (1996), *appeal dismissed for lack of jurisdiction*, 132 F.3d 50 (1997) (table). "This *Libertine*/*Caluza* interpretation of section 1154(b) and the Federal Circuit's opinion in *Collette* has become deeply embedded in this Court's case law." *Velez, supra,* citing *e.g., Turpen v. Gober*, 10 Vet.App. 536, 539 (1997) (holding that, absent medical-nexus evidence, there was "no reasonable possibility that consideration of § 1154(b) by the Board could change the outcome of the case on the merits"); *Brock v. Brown*, 10 Vet.App. 155, 162 (1997) ("reduced evidentiary burden provided for combat veterans by 38 U.S.C. § 1154(b) relate[s] only to the question of service ***incurrence***, 'that is, what happened

CONSTITUTIONAL AND DUE PROCESS CONSIDERATION

then--not the questions of either current disability or nexus to service, as to both of which competent medical evidence is generally required'" (quoting *Caluza*, 7 Vet.App. at 507)); *Cohen (Douglas) v. Brown*, 10 Vet.App. 128, 138 (1997) ("[s]ection 1154(b) provides a factual basis upon which a determination can be made that a particular disease or injury was incurred or aggravated in service but not a basis to link etiologically the condition in service to the current condition").

§ "...[38 U.S.C.] § 1154(b) sets forth a three-step, sequential analysis that must be undertaken when a combat veteran seeks benefits under the method of proof provided by the statute. As the first step, it must be determined whether the veteran has proffered 'satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease.'" *Collette v. Brown*, 82 F.3d 389, 392-93 (Fed.Cir.1996)[19] citing 38 U.S.C. § 1154(b). "As the second step, it must be determined whether the proffered evidence is 'consistent with the circumstances, conditions, or hardships of such service.'" *Id* citing § 1154(b). "The statute provides that if these two inquiries are met, the Secretary 'shall accept' the veterans evidence as 'sufficient proof of service-connection,' even if no official record of such incurrence exists." *Id* citing § 1154(b). "Thus, if a veteran satisfies both of these inquiries mandated by the statute, a factual presumption arises that the alleged injury or disease is service-connected." *Id*.

***SEE ALSO*: EVIDENCE, LAY TESTIMONY, COMBAT INJURY REQUIRES ONLY LAY TESTIMONY (38 U.S.C.A. § 1154(B) (WEST 1995); 38 C.F.R. § 3.304(D))**

CONSTITUTIONAL AND DUE PROCESS CONSIDERATION

CONSTITUTIONAL QUESTION, COURT USUALLY CANNOT DECIDE IN FIRST INSTANCE

§ Because the Court's review is limited to the record of proceedings before the VARO or the Board, generally constitutional questions must be raised in the first instance before the VARO or the BVA. *Suttman v. Brown*, 5 Vet.App. 127, 139 (1993).

[19] 9 Vet.App. [11]

CONSTITUTIONAL AND DUE PROCESS CONSIDERATION

WAIVER OF RIGHTS

WAIVER OF RIGHTS GENERALLY

§ For an appellant to waive a right, he must possess the right, have knowledge of the right , and "he must intend, voluntarily and freely, to relinquish or surrender that right." *Janssen v. Principi*, 15 Vet.App. 370, 374 (2001) citing *United States v. Olano*, 507 U.S. 725, 732-33, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (holding waiver is the "'intentional relinquishment or abandonment of a known right'" (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938))); *McCall v. U.S. Postal service*, 839 F.2d 664, 668 (Fed.Cir.1988) (upholding employee's waiver of appeal of disciplinary action, U.S. Court of Appeals for the Federal Circuit (Federal Circuit) acknowledged that Merit Systems Protection Board had deemed such "right to appeal … susceptible to waiver if the action was the informed, intentional abandonment of a known right, free of any coercion or duress"); *Callicotte v. Carlucci*, 698 F.Supp. 944, 946 (D.D.C.1988) (recognizing that whether "particular waiver is enforceable … [depends on] whether it was made knowingly, voluntarily and freely").

The question of a waiver of a statutory right can be controlled by the statute, inter alia. *Janssen supra* citing *Olano*, 507 U.S. at 733, 113 S.Ct. 1770, "absent some affirmative indication of Congress' intent to waiver … [the Court must] presume[] that statutory provisions are subject to waiver …." *United States v. Mezzanatto*, 513 U.S. 196, 201, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995) (citing *Evans v. Jeff D.* 475 U.S.717,730-32, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986)).

APPELLANT CAN WAIVE VCAA RIGHTS AT BOARD

§ Appellant can waive rights afforded by VCAA on remand from the Court. *Bowling v. Principi*, 15 Vet.App. 1, 16-17 (2001) citing *Cf.* 38 C.F.R. § 20.1304(c) (2000) (provides for waiver of remand to RO for SSOC when additional evidence submitted at the Board); *Sutton v. Brown*, 9 Vet.App. 553, 567-69 (discussing application of § 20.1304(c), including waiver provision); *Allday v. Brown*, 7 Vet.App. 517, 533 (2001) (appellant can "expressly waive … due process rights [before the BVA] … if he wishes to do so").

CONSTITUTIONAL AND DUE PROCESS CONSIDERATION

APPELLANT CAN WAIVE VCAA RIGHTS AT COURT

§ "[T]he preliminary issue to be addressed is whether an appellant can waive this Court's consideration on appeal of rights guaranteed him by an act of Congress (i.e., the VCAA). We hold that in cases such as this, where the appellant is represented by counsel, whom the Court presumes to be versed in the facts of the case and to know and to understand the law as it relates to those facts, the appellant can waive this Court's consideration of such rights on appeal." *Janssen v. Principi*, 15 Vet.App. 370, 374 (2001). The *Janssen* court went on to explain that in this case, the veteran was waiving his right to notice and additional development under the VCAA. The court found that the veteran, with advice of counsel, was in the best position to know whether or not there was additional evidence that could be developed and granted the waiver. *Id*.

WAIVER OF RIGHTS DENIED

§ In *Baker v. West and Kingston v. West* motion to waive readjudication pursuant to *Karnas v. Derwinski*, 1 Vet.App. 308, 313 (1991) was denied because the outcome could not be known until a fact finder applied the facts of the case to the new regulations. The regulations had changed during the course of the appeal. *Janssen v. West*, 15 Vet.App. 370, 375 (2001) citing *Baker*, 11 Vet.App. 163 (1998) and *Kingston*, 11 Vet.App. 272 (1998).

COURT'S REMAND FOR APPLICATION OF VCAA NOT DENIAL OF CONSTITUTIONAL RIGHTS

§ *Pro se* appellant *Arnesen*, appealed many issues from a Court of Veterans Appeals (Court) decision most of which could not be addressed in the limited scope of the Federal Circuit review authority. *See Forshey v. Principi*, 284 F.3d 1335, 1338 (Fed.Cir.2002) (*en banc*). However, one issue addressed was the appellant's contention that a Court remand for application of the VCAA without deciding the claims violated his constitutional rights. The Federal Circuit affirmed the Court's decision finding a remand did not violate the appellant's due process or constitutional rights. *Arnesen v. Principi*, F.3d 1353, 1357-58 (Fed.Cir.2002)

CONSTITUTIONAL AND DUE PROCESS CONSIDERATION

CONSTITUTIONAL CONSIDERATIONS

§ In *Thurber v. Brown*, 5 Vet.App. 119, 122-23 (1993) the Court noted Constitutional considerations regarding due process principles involved in the termination of a VA benefit.

The due process clause of the Fifth Amendment of the United States Constitution requires that when an individual is to be deprived of a property interest as a result of federal government action, the aggrieved party must be provided with notice and an opportunity to be heard. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Fugere v. Derwinski*, 1 Vet.App. 103, 108 (1990). Opportunity to be heard must be accorded "at a meaningful time and in a meaningful manner." *Mathews* 424 U.S. at 333 (citations omitted). The termination of a veteran's benefit is an example of such a property interest:

It is now well recognized that "the interest of an individual in continued receipt of [Social Security disability] benefits is a statutorily created 'property' interest protected by the Fifth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). . . . The Supreme Court has noted that veterans benefits, entitlement to which is established by service to country at great personal risk, are "akin to Social Security benefits." *Walters v. National Assoc. of Radiation Survivors*, 473 U.S. 305, 333 (1985). . . .

Fugere, 1 Vet.App. at 108; see *Devine v. Cleland*, 616 F.2d 1080 (9th Cir. 1980) (VA educational assistance allowance constitutes a property right protected by the Fifth Amendment due process clause); *Plato v. Roudebush*, 397 F.Supp. 1295 (D. Md. 1975) (veteran's widow's benefits constitute a property right protected by the Fifth Amendment due process clause).

Although the Supreme Court has not yet ruled on the extent to which applicants for, rather than recipients of, government benefits have property rights in their expectations, *see Lyng v. Payne*, 476 U.S. 926, 942 (1986); *Walters v. Nat'l Assoc. of Radiation Survivors*, 473 U.S. at 312, some lower federal courts have accorded due process rights to applicants. See, e.g., *Ressler v. Pierce*, 692 F.2d 1212, 1214-16 (9th Cir. 1982) (applicant for federal rent subsidies); *Kelly v. R.R. Retirement Bd.*, 625 F.2d 486, 489-90 (3d Cir. 1980) (applicant for disabled child's annuity under

"CONSTRUCTIVE" KNOWLEDGE, VA GENERATED DOCUMENTS, (SEE ALSO ROA ISSUE)

Railroad Retirement Act); *Butland v. Bowen*, 673 F.Supp. 638 (D.Mass. 1987) (applicant for social security disability benefits); *Dealy v. Heckler*, 616 F.Supp. 880, 884-86 (W.D.Mo. 1984) (applicant for social security disability benefits); *but see, e.g., Lozano v. Derwinski*, 1 Vet. App. 184, 186 (1990); *Hill v. Group Three Housing Development Corp.*, 799 F. 2d 385, 391 (8th Cir. 1986); *Eidson v. Pierce*, 745 F.2d 453, 460 (7th Cir. 1984); *Overton v. John Knox Retirement Tower, Inc.*, 720 F.Supp. 934 (M.D. Ala. 1989).

Because of the silence of the applicable statute and regulations regarding notice and opportunity to be heard, *Gonzales v. United States*, 348 U.S. 407 (1955), is worthy of note. In *Gonzales*, the petitioner appealed his conviction for refusing to submit to induction into the armed forces. He argued that his classification was invalid because he had not been provided a copy of, and accorded an opportunity to reply to, the recommendation of the Department of Justice (DOJ) denying conscientious objector classification which DOJ had submitted to the Selective Service Appeal Board. The Supreme Court, noting that the applicable statute and regulations were silent on the matter, held that it was implicit in them "-- viewed against our underlying concepts of procedural regularity and basic fair play -- that a copy of the recommendation . . . be furnished the registrant at the time it is forwarded to the Appeal Board, and that he be afforded an opportunity to reply." *Id.* at 411-12.

Finally, in the criminal setting, the government has a constitutional obligation to disclose material evidence favorable to the defendant. *See United States v. Bagley*, 473 U.S. 667 (1985); *see also Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1976).

***SEE ALSO* PROCEDURAL DUE PROCESS**

"CONSTRUCTIVE" KNOWLEDGE, VA GENERATED DOCUMENTS, (*SEE ALSO* ROA ISSUE)

§ "[T]he Secretary must insure, by whatever means necessary, that those items considered by the Board in arriving at its decision are included in the record on appeal. Where, as here, a dispute arises as to the content of the record and where the documents proffered by the appellant are within the Secretary's control and could reasonably be expected to be a part of the record 'before the Secretary and the Board'

CONTINUITY AND CHRONICITY (38 C.F.R. § 3.303(b))

such documents are in contemplation of law, before the Secretary and the Board and should be included in the record. If such material could be determinative of the claim and was not considered by the Board, a remand for adjudication would be in order." *Bell v. Derwinski*, 2 Vet.App. 611, 613 (1992).

CONTINUITY AND CHRONICITY (38 C.F.R. § 3.303(b))

(While there are references in this section to "well groundedness", there is no longer a requirement to well ground a claim. These cases are cited because they provide the Court's interpretation of the statute which establishes the chronicity and symptomatology basis for providing nexus evidence necessary to grant the benefit claimed.)

§

> The chronicity provision of § 3.303(b) is applicable where evidence, regardless of its date, shows that a veteran had a chronic condition in service or during an applicable presumption period and still has such a condition. Such evidence must be medical unless it relates to a condition as to which, under the Court's case law, lay observation is competent. If the chronicity provision is not applicable, a claim may still be well grounded or reopened on the basis of § 3.303(b) if the condition is observed during service or any applicable presumption period, continuity of symptomatology is demonstrated thereafter, and competent evidence relates the present condition to that symptomatology.

See Savage v. Gober, 10 Vet.App.488, 498 (1997).

§ "Section 3.303(b) provides that a veteran may utilize the 'chronic disease shown as such in service' provision when the evidence demonstrates: (1) that the veteran had a chronic disease in service, or during an applicable presumption [hereinafter element 1]; and (2) that the veteran presently has the same condition [hereinafter element 2]. *See Savage v. Gober*, 10 Vet.App. 488, 495 (1997).

CONTINUITY AND CHRONICITY (38 C.F.R. § 3.303(b))

"With respect to element 1, two questions are posed: (a) is medical evidence needed to demonstrate the existence in service or in the presumption period of such chronic disease, or will lay evidence suffice; and (b) must such evidence be contemporaneous with the time period to which it refers, or can post-service or post-presumption-period evidence address existence in service?" *Id*.

"With respect to question (a), the answer depends on whether the disability is of a type that requires medical expertise to demonstrate its existence (*see Epps v. Gober*, 126 F.3d 1464, 1468 (Fed.Cir.1997), *aff'd* 9 Vet.App. 341 (1996) (adopting this Court's definition of a well-grounded claim as set forth in *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd*, 78 F3.d 604 (Fed.Cir.1996) (table), and *Grottveit v. Brown*, 5 Vet.App. 211, 214 (1993); *Caluza*, 7 Vet.App. at 506; *Heuer v. Brown*, 7 Vet.App. 379, 384 (1995)) or whether the disability is of the type as to which lay observation is competent to identify its existence (*see Falzone v. Brown*, 8 Vet.App. 398, 403 (1995) (citing *Harvey v. Brown*, 6 Vet.App. 390, 393 (1994) for the proposition that medical causation evidence may not be necessary for conditions that lend themselves to lay observation such as flat feet); *Layno v. Brown*, 6 Vet.App. 465, 470 (1994): *Horowitz v. Brown*, 5 Vet.App. 217, 221-22 (1993); *Budnik v. Derwinski*, 3 Vet.App. 185, 186-87 (1992))." *Id* at 10-11.

CONTINUITY OF SYMPTOMATOLOGY, NO CHRONIC DIAGNOSIS (38 C.F.R. § 3.303(B))

§ "If the evidence fails to demonstrate the applicability of the chronicity provision of [38 C.F.R.] § 3.303(b), a VA claimant may still obtain the benefit of § 3.303(b) (that is, providing a substitute way of showing in-service incurrence and medical nexus for purposes of well grounding or reopening a claim, as set forth in part II.B., *supra*) if continuity of symptomatology is demonstrated. The questions raised by the regulation with respect to establishing continuity of symptomatology are: (a) how is the existence of continuity of symptomatology determined; (b) does a condition 'noted during service' require a noting contemporaneous to service or through any special documentation; and (c) is any medical evidence of nexus needed in order to obtain the benefit of this provision?" *Savage v. Gober*, 10 Vet.App. 488, 495-96 (1997).

CONTINUITY AND CHRONICITY (38 C.F.R. § 3.303(b))

"With respect to question (a), whether there is continuity of symptomatology in connection with well-grounding a claim, *see Caluza v. Brown*, 7 Vet.App. 498, 504 (1995); *Grottveit v. Brown*, 5 Vet.App. 91, 93 (1993), or reopening a finally denied claim, *see Evans v. Brown*, 9 Vet.App. 273, 283 (1996); *Moray v. Brown*, 5 Vet.App. 211, 213-14 (1993), is a question that the Court determines de novo." *Savage, supra* at 496 citing 38 U.S.C. § 7261(a)(1); *see also Robinette*, 8 Vet.App. at 76 (evidence presumed credible for purpose of determining whether claim is well grounded); *Justus v. Principi*, 3 Vet.App. 510, 513 (1992) (evidence presumed credible for purpose of determining whether evidence is new and material). "If the Court is reviewing a BVA decision on the merits, a determination by the BVA as to continuity of symptomatology would be one of fact that the Court would review under the clearly erroneous standard." *Savage, supra* citing 38 U.S.C. § 7261(a)(4) (review by the Court is as to BVA "finding of material fact made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary"); *Gilbert v. Derwinski*, l Vet.App. 49, 53 (1990) ("if there is a 'plausible' basis in the record for the factual determinations of the BVA . . . [the Court] cannot overturn them").

"Regardless of context, the Court notes that symptoms, not treatment, are the essence of any evidence of continuity of symptomatology." *Savage, supra* citing *Wilson v. Derwinski*, 2 Vet.App 16, 19 (1991) ("regulation requires continuity of symptomatology, not continuity of treatment"). "As to threshold determinations of well groundedness or the existence of new and material evidence, such evidence is generally presumed credible and is not subject to weighing." *Savage, supra* citing *King (Roderick) v. Brown*, 5 Vet.App. 19, 21 (1993); *Justus, supra* (in determining whether evidence is new and material, "credibility" of newly presented evidence is to be presumed unless evidence is inherently incredible or beyond competence of witness). (However, the Court notes that in a merits context the lack of evidence of treatment may bear on the credibility of the evidence of continuity.)

"With respect to question (b), the Secretary asserts that the noting requirements of § 3.304(b) ("[o]nly such conditions as are recorded in examination reports are to considered as noted") are to be superimposed on § 3.303(b). The Court rejects the Secretary's assertion and holds that as long as the condition is noted at the time the veteran was in service such noting need not be reflected in any written documentation (other than as required to be in a format sufficient for inclusion as part of the record

CONTINUITY AND CHRONICITY (38 C.F.R. § 3.303(b))

and proceedings before the Secretary and the Board (*see Rogozinski v. Derwinski*, l Vet.App. 93, 94 (1990))), either contemporaneous to service or otherwise. In so holding, the Court notes the following. First, nothing in the language of § 3.303(b) suggests that 'being noted' is limited to recordation in examination reports. Second, the recordation-in-examination report requirement of § 3.304(b) is for the veteran's benefit rather than to his or her detriment, as would be the case if it were superimposed on § 3.303(b). Third, the Secretary's argument contains the seeds of its own defeat; the very fact that the Secretary has required in § 3.304(b) written documentation for the notation of a preexisting condition strongly suggests that reading such a documentation requirement into § 3.303(b), where the Secretary did not elect to include one specifically, would be unwarranted." *Savage, supra* citing *Russello v. United States*, 464 U.S. 16, 23 (1983) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)) (internal quotation marks omitted); *Smith v. Brown*, 35 F.3d 1516, 1523 (Fed.Cir.1994) ("canons of construction of course apply equally to any legal text and not merely to statutes"). "Fourth, the principal definition of 'noted' does not require a writing, WEBSTER'S NEW WORLD DICTIONARY 927 (3d College ed. 1991) (defining "noted" as "1 to pay close attention to; heed; notice; observe[;] 2 to set down in writing; make a note of"). Fifth, to the extent that the language of the regulation is ambiguous, 'interpretive doubt is to be construed in the veteran's favor.'" *Savage, supra* at 497 citing *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994). "Sixth, if service records have been lost through no fault of the veteran, it would be unfair to require that a writing be contained in a service record. Seventh, limitations on dating and type of evidence have been found in only the few instances where there has been clear regulatory guidance to that effect." *Savage, supra* citing *Russell v. Principi*, 3 Vet.App. 310, 313-14 (1992) (*en banc*) and *Tubianosa v. Derwinski*, 3 Vet.App. 181, 184 (1992) (interpreting 38 C.F.R. § 3.374(c) and holding that private physician's diagnosis of tuberculosis being manifest during the presumption period must be corroborated by "acceptable clinical, x-ray or laboratory studies"); *Espiritu v. Derwinski*, 2 Vet.App. 492, 494-95 (1992) (expert evidence required where subject matter necessitates expert opinion). "Of course, as to type of evidence, unless the condition is of a type as to which a lay person's observation is competent, medical evidence of noting will be required. *Savage, supra* citing *Caluza, supra.*

CONTINUITY AND CHRONICITY (38 C.F.R. § 3.303(b))

"With regard to question (c), if the continuity of symptomatology provision of § 3.303(b) requires that there be medical-nexus evidence relating the veteran's present disability to service (*Savage, supra* citing *Grottveit* and *Moray, supra* (medical-nexus evidence of relationship between present disability and service is generally required for purposes of well grounding a claim and reopening a previously disallowed claim)), the continuity of symptomatology provision would simply be a nullity. Thus, the Court holds that no such medical-nexus evidence is required. Nevertheless, because it would not necessarily follow that there is a relationship between any present disability and the continuity of symptomatology demonstrated, medical evidence (*Savage, supra* citing *Epps*, *Caluza*, *Heuer* and *Grottveit*, all *supra*) is required to demonstrate such a relationship unless such a relationship is one as to which a lay person's observation is competent (*Savage, supra* citing *Falzone v. Brown*, 8 Vet.App. 398, 403 (1995); *Layno v. Brown*, 6 Vet.App. 465, 470 (1994); *Horowitz v. Brown*, 5 Vet.App. 217, 221-22 (1993); *Budnik v. Derwinski*, 3 Vet.App. 185, 186-87 (1992)).

CONTINUITY OF SYMPTOMATOLOGY, NOT TREATMENT (§ 3.303(B))

§ "[T]he Court notes that symptoms, not treatment, are the essence of any evidence of continuity of symptomatology." *See Savage v. Gober*, 10 Vet.App. 488, 496 (1997) citing *Wilson v. Derwinski*, 2 Vet.App. 16, 19 (1991) ("regulation requires continuity of symptomatology, not continuity of treatment").

OBSERVABLE CONDITIONS, FLAT FEET, LAY TESTIMONY SUFFICIENT

§ "[T]he issue of continuity of symptoms ... potentially bears upon the issue of a nexus between in-service []injuries and the appellant's current []condition." *See Carroll v. Brown*, 8 Vet.App. 128, 132 (1995); *Godfrey v. Brown*, 7 Vet.App. 398, 406 (1995); *cf. Wilson v. Derwinski*, 2 Vet.App. 16, 19 (1991) (noting that 38 C.F.R. § 3.303(b) "requires continuity of symptomatology, not continuity of treatment"); *see also Jones v. Derwinski*, 1 Vet.App. 210, 216 (1991) (although diagnoses rendered during service and subsequent thereto are not required to be identical, evidence of continuity of symptomatology can provide a linkage between an inservice and post-service diagnosis).

COURT AND BOARD REMAND, VA, INCLUDING SUBSEQUENT BOARD, MUST FOLLOW

"However, where the determinative issue is not one of medical causation but of continuity of symptomatology, lay testimony may suffice to reopen a claim. *See* 38 C.F.R. § 3.303(A) (1994) (VA must consider all evidence, including medical and lay evidence); *cf. Godfrey v. Brown*, 7 Vet.App. 398, 406 (1995) (certain medical records, while new, were not material because they were not relevant to and probative of the issue of continuity of symptomatology after service); *Cornele v. Brown*, 6 Vet.App. 59, 62 (1993) (physician's report was not material because it did not relate to continuity of symptomatology and thus did not link in-service accident to current cervical spine disability). "In this instance, the appellant's statements relate to continuity of symptomatology. When viewed in the context of all the evidence, including ... the notation in a service medical record indicating possible worsening in severity during service, the statements are material." *Falzone v. Brown*, 8 Vet.App. 398, 403 (1995).

In, *Falzone, supra*, "the appellant [] described the observable flatness of his feet and the accompanying pain. Therefore, his own statements are competent as to the issues of continuity of pain since service and the observable flatness of his feet." *Falzone, supra*, at 405.

OBSERVABLE SYMPTOMS, LAY TESTIMONY SUFFICIENT

§ "Lay testimony is competent only when it regards the features or symptoms of an injury or illness." *See Layno v. Brown*, 6 Vet.App. 465, 470 (1994) citing *Horowitz v. Brown*, 5 Vet.App. 217, 221-22 (1993); *Culver v. Derwinski*, 3 Vet.App. 292, 297-99 (1992); *Budnik v. Derwinski*, 3 Vet.App. 185, 186-87 (1992); *Mohr v. Derwinski*, 3 Vet.App.63, 65 (1992); *Fisher v. Derwinski*, 2 Vet.App. 406, 408 (1992). "A lay witness may testify as to his or her observations of the features or symptoms that a claimant exhibited." *Id.* citing *Horowitz*, 5 Vet.App. at 221-22.

COURT AND BOARD REMAND, VA, INCLUDING SUBSEQUENT BOARD, MUST FOLLOW

§ The Court (Court of Veterans Appeals (Court or COVA)) vacated and remanded a November 1993 BOARD OF VETERANS' APPEALS (Board or BVA) decision for an adequate examination. An August 1995 Board decision remanded the claim to the

COURT AND BOARD REMAND, VA, INCLUDING SUBSEQUENT BOARD, MUST FOLLOW

VA regional office (RO) with instructions. Following hospitalization, the RO readjudicated the claim without providing the VA compensation and pension examination (VAE) ordered by the 1993 Court and by the 1995 Board decisions. A January 8, 1997, Board decision affirmed the RO decision which denied an increased rating after considering the veteran's hospital report. This was the claim previously remanded by the 1993 Court and the 1995 Board decision with instructions. The 1997 *Stegall* Court vacated and remanded the 1997 Board decision with instructions and an explanation of the Court's position regarding the failure of the VA to comply with the prior Court and Board remands in this claim. *See Stegall v. West*, 11 Vet.App. 268, 270-71 (1998).

> The protracted circumstances of this case and others which come all too frequently before this Court demonstrate the compelling need to hold, as we do, that a remand by this Court or the Board confers on the veteran or other claimant, as a matter of law, the right to compliance with the remand orders. We hold further that a remand by this Court or the Board imposes upon the Secretary of Veterans Affairs a concomitant duty to ensure compliance with the terms of the remand, either personally or as the "the head of the Department." 38 U.S.C. § 303. It matters not that the agencies of original jurisdiction as well as those other agencies of the VA responsible for evaluations, examinations, and medical opinions are not under the Board as part of a vertical chain of command which would subject them to the direct mandates of the Board. It is the Secretary who is responsible for the "proper execution and administration of all laws administered by the Department and for the control, direction, and management of the Department." 38 U.S.C. § 303. Moreover, the Secretary is by statute both the one to whom a veteran may appeal an initial denial as a matter of right (38 U.S.C. § 7104(a)), and a party, represented by the General Counsel, to every appeal before this Court (38 U.S.C. § 7263(a)). Finally, we hold also that where as here, the remand orders of the Board or this Court or not complied with, the Board itself errs in failing to insure compliance.

Stegall, 11 Vet. App. at 271.

§ The court has also held that in a not well-grounded claim, no duty to assist arises, so that in a not well-grounded claim *Stegall, supra*, does not apply even if the remand order is not followed. *See Roberts v. West*, 13 Vet.App. 185, 188-89 (1999). However, compare to a more recent Federal Circuit decision, *Nolen v. Gober*, 222 F.3d 1356, 1360 (Fed.Cir.2000), which found that once the well groundedness threshold has been crossed the duty to assist attaches. There is no need for additional well groundedness determinations. In fact, without the issue having been previously raised, it is fundamentally unfair to redecide the question without notice to the parties. Thus, under *Nolen, supra*, once the VA or the Court remanded a veteran's claim, it appears to be impossible to undo the duty to assist obligation which has attached.

COURT, OTHER, JURISDICTION

§ "The [Federal] District Court has jurisdiction to hear a facial challenge to a veterans benefits statute, but not a challenge to a denial of benefits under any veterans benefits statutes." *West v. Principi*, 15 Vet.App. 246, 249 (2001) citing *Zuspann v. Brown*, 60 F.3d 1156, 1158-61 (5th Cir.1995), *cert denied* 516, U.S. 1111, 116 S.Ct. 909, 133 L.Ed.2d 841 (1996).

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COURT OF VETERANS APPEALS REMANDS CAN BE REVIEWED BY FED. CIR.

§ "[D]ecisions of the Court of Veterans Appeals rendering an interpretation of a statutory provision and remanding for further proceedings in accordance with that interpretation constitute final and appealable decisions." *Jones v. West*, 136 F.3d 1296, 1298 (Fed.Cir.1998) citing *Travelstead v. Derwinski*, 978 F.2d 1244, 1248 (Fed.Cir.1992) (holding that a Court of Veterans Appeals decision interpreting 38 U.S.C. § 3713, overruling the Secretary's prior interpretation and remanding back to the Board was a final and appealable decision); *see also Sullivan v. Finkelstein*, 496 U.S. 617, 625 (1990) (holding that a district court's remand order effectively

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invalidating certain regulations of the Secretary of Health and Human Services was an immediately appealable order).

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CLEARLY ERRONEOUS

BOARD DECISION AFFIRMED UNLESS FINDING IS CLEARLY ERRONEOUS

§ The Court must affirm factual findings of the BVA unless they are found to be "clearly erroneous." 38 U.S.C.A. § 7261(a)(4) (West 1995); *See Lovelace v. Derwinski* 1 Vet.App. 73 (1990); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990).

FACTUAL FINDING

§ The Court of Veterans Appeals is directed to review factual determinations by the BVA under clearly erroneous standard. *Hunt v. Derwinski*, 1 Vet.App. 292, 295 (1991). It is not the function of the Court to decide whether a veteran was injured or whether any such injury occurred in or was aggravated during military service. Rather, the Court must determine whether a factual determination of the BVA is clear error. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

FACTUAL FINDING CLEARLY ERRONEOUS IF COURT BELIEVES MISTAKE WAS MADE

§ A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990).

§ The Court reviews BVA fact-finding under the "clearly erroneous " standard; "if there is a 'plausible' basis in the record for the factual determinations of the BVA,...[the Court] cannot overturn them." *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990).

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SET ASIDE CLEARLY ERRONEOUS FINDINGS

§ The Court of Veterans Appeals is authorized to set aside findings of material fact made by the Board of Veterans' Appeals when they are clearly erroneous. *See Brannon v. Derwinski*, 1 Vet.App. 314, 317 (1991). Determinations regarding degree of impairment are factual findings which may be set aside only if clearly erroneous. *See Moore v. Derwinski*, 1 Vet.App. 356, 358 (1991).

CANNOT SUBSTITUTE ITS JUDGEMENT FOR BOARD, IF PLAUSIBLE

§ The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990).

DOES NOT DETERMINE DISABILITY IN FIRST INSTANCE

§ It is not the function of the Court to determine in the first instance the degree of disability; "rather it is the function of this Court to decide whether such factual determinations made by the BVA in a particular case constituted clear error." *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990).

DOES NOT MAKE FACTUAL FINDINGS IN FIRST INSTANCE

§ It is not the function of the Court to determine in the first instance the degree of disability; "rather, it is the function of this Court to decide whether such factual determinations made by the BVA in a particular case constituted clear error." *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990); *see also Lovelace v. Derwinski*, 1 Vet.App 72, 74 (1990) (Determinations as to degrees of disability are factual findings which may be set aside only if found to be 'clearly erroneous'.); *Moore v. Derwinski*, 1 Vet.App. 356 (1991).

MAY NOT ADDRESS OTHER ISSUES WHEN REMANDED REGARDING "UNDOUBTED ERROR"

§ Citing *Dunn v. West*, 11 Vet.App. 462 (1998) the *Best* Court denied a motion for reconsideration of a single judge opinion or a panel decision of appeal of an appeal

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remanded for application of VCAA without considering the issues on appeal. *Best v. Principi*, 15 Vet.App. 18, 19 (2001) (per curiam order) citing *Dunn*, at 467 (the Court's remand of the appellant's PTSD claim under one theory mooted the remaining theories that would also mandate a remand of that claim); *cf. Aronson v. Brown*, 7 Vet.App. 153, 155 (1994) (when underlying issue on appeal is granted, the appellant's request for extraordinary relief and recusal is mooted); *see also Sanchez v. Principi*, 16 Vet.App. 16, 17-18 (2002) (this case was remanded based on *Holliday v. Principi*, 14 Vet.App. 280 (2001) for application of the VCAA without consideration of the issues on appeal even though all parties agreed that there was reversible error whether or not the VCAA had been enacted).

EFFECTIVE DATE OF COURT DECISION

§ "A 'decision of this Court, unless or until overturned…, is a decision of the Court on the date it is issued; any rulings, interpretations, or conclusions of law contained in such a decision are authoritative and binding as of the date the decision is issued.'" *Samuel Cora-Rivera v. Principi*, 17 Vet.App. 96, 97 (2003) quoting *Tobler v. Derwinski*, 2 Vet.App. 8, 14 (1995).

EVIDENCE BEFORE THE COURT

CAN ONLY REVIEW RECORD BEFORE BOARD

§ "This Court is precluded by statute from including in the ROA [record on appeal] any material that was not contained in the 'record of proceedings before the Secretary and the Board.'" *See Wilhoite v. West*, 11 Vet.App. 251, 252 (1998) (per curiam order) quoting 38 U.S.C. § 7252(b); citing *Rogozinski v. Derwinski*, 1 Vet.App. 19 (1990) (review in Court shall be on record of proceedings before Secretary and Board); *cf. Bell v. Derwinski*, 2 Vet.App. 611, 613 (1992) (where records are within the Secretary's control and could reasonably be expected to be a part of the record, such records are considered to be "before the Secretary and the Board" and should be included in the record. A readjudication by the VA is in order if the counter-designated records could be determinative of the issue).

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§ "This court may consider only the record that was before the Board." *Nici v. Brown*, 9 Vet.App. 494, 497-98 (1996) citing 38 U.S.C. § 7252(b). "This limitation, a common one for appellate courts, has been iterated and reiterated by our Court in numerous opinions." *Nici*, at 498 citing *e.g., Gabrielson v. Brown*, 7 Vet.App. 36, 41-42 (1994); *Obert v. Brown*, 5 Vet.App. 30, 32 (1993); *Rogozinski v. Derwinski*, 1 Vet.App. 19 (1990); *cf. Bell v. Derwinski*, 2 Vet.App. 611, 613 (1992) (where records are within the Secretary's control and could reasonably be expected to be a part of the record, such records are considered to be "before the Secretary and the Board" and should be included in the record. A readjudication by the VA is in order if the counter-designated records could be determinative of the issue).

EXTRA-RECORD MATERIAL (38 U.S.C. § 7252(B))

§ "Review of the Court shall be on the record of proceedings before the Secretary and the Board [of Veterans' Appeals]." 38 U.S.C. § 7252(b). "[Extra record material not before the Board] are excluded so as not to influence the Court's review of a BVA decision based on evidence which the BVA did not weigh or at least have an opportunity to weigh when it made its decision." *Winslow v. Brown*, 8 Vet.App. 469, 473 (1996).

RECORD ON APPEAL(ROA)

CERTIFIED LIST INCLUDED IN RECORD ON APPEAL (ROA)

§ "The Certified List states that it is 'the inclusive list of evidence and material of record deemed relevant in the adjudication of the issue(s) set forth in the Board [of Veterans' Appeals] decision." In *Burrell v. Brown*, 9 Vet.App. 265 (1996) (per curiam) the Court "Ordered that the Certified List be included in the ROA."

RECORD ON APPEAL (ROA), COUNTER DESIGNATION OF ROA (CDR) INCLUDING VA GENERATED RECORDS NOT BEFORE THE BOARD

§ Where records are within the Secretary's control and could reasonably be expected to be a part of the record, such records are considered to be "before the Secretary and the Board" and should be included in the record. *Bell v. Derwinski*, 2 Vet.App. 611,

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613 (1992). A readjudication by the VA is in order if the counter-designated records could be determinative of the issue. *Ibid*.

RECORD ON APPEAL (ROA) IS NOT COMPLETE C-FILE

§ The *Homan v. Principi* Court denied a motion to submit the whole claims folder as the record on appeal (ROA) finding the Veterans Benefits Act of 2002, Public Law 107-330, did not affect the Court's procedures for adopting a ROA. ". . . Rule 10 of this Court's Rules of Practice and Procedures specifically states that the 'record on appeal may not include materials not relevant to the issues on appeal." *Homan*, 16 Vet.App. 1, 3 (2003) (per curiam) quoting *King v. Brown*, 5 Vet.App. 19, 22-23 (1993).

INHERENT POWER TO PUNISH

§ In *Jones v. Derwinski*, 1 Vet.App. 596, 606-608 (1991), the Court described its legally established and inherent authority to sanction the "misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice", the misbehavior of officers of the Court "in their official transactions" or "disobedience or resistance to its lawful writ, process, order, rule, decree, or command." *Id.* at 606 citing 38 U.S.C. § 7265; *see also Chambers v. Nasco, Inc. (90-256)*, 501 U.S. 32 (1991); *Ex Parte Robinson*, 19 Wall. 505, 22 L.Ed. 205 (1873); *Anderson v. Dunn*, 6 Wheat. 204, 5 L.Ed. 242 (1821).

In further explanation of the Court's inherent powers, the Court proclaimed its "authority to discipline attorneys before the court: '[t]he power of a court over members of its bar is at least as great as its authority over litigants.'" *Jones, supra*, at 607 quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766, 100 S.Ct. 2455, 2464, 65 L.Ed.2d 488 (1980); *see also Ex Parte Burr*, 9 Wheat. 529, 531, 6 L.Ed. 152, 152 (1824).

In *Jones*, the Court sanctioned the representative of the Secretary for failing to correct a statement which they learned was false. The Court found the failure to act abused the judicial processes. The sanctions imposed required the Secretary to compensate

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the petitioners for the expenses and the professional time invested in "this second petition", the petition filed which lead to the sanction. *Jones, supra,* at 608.

In *Crampton v. Gober*, 10 Vet.App. 386, 388 (1997) (per curium order), the Court ruled that the pro se appellant had filed numerous motions (25 since the motion construed to be seeking panel review) variously titled totaling over 250 pages, "many having no bearing upon the issue before the Court" which was the timely filing of a NOA. Citing U.S. Vet. App. R. 27(c), 32 (g) ("motions may not exceed 25 pages except by permission of the Court" *Crampton, supra*) and *Jones, supra*, the Court indicated "[T]he number and length of these filings are now approaching an abuse of judicial process." *Crampton, supra.*

"ISSUES" ON APPEAL / ARGUMENTS FIRST RAISED ON APPEAL

ABANDONED IF NOT ARGUED ON APPEAL

§ When the appellant does not address an issue in the formal pleadings, "the Court will consider those claims to have been abandoned as part of this appeal." *See Ford v. Gober*, 10 Vet.App. 531, 535 (1997) citing *Degmetich v. Brown*, 8 Vet.App. 208, 209 (1995), *aff'd*, 104 F3.d 1328 (Fed.Cir.1997); *Grivois v. Brown*, 6 Vet.App. 136, 138 (1994) (an argument that constitutes a mere assertion without analysis is deemed an abandonment of such argument); *Bucklinger v. Brown*, 5 Vet.App. 435, 436 (1993); *see also Lalonde v. West*., 12 Vet.App. 272, 272 (1998).

WILL NOT HEAR ISSUE RAISED FIRST TIME ON APPEAL

§ The Court has repeatedly held that if an issue is not raised before the Board, the Court will not hear the issue for the first time on appeal. *See Sondel v. Brown*, 6 Vet.App. 218, 220 (1994); *Horowitz v. Brown*, 5 Vet.App. 217, 225 (1993); *Herzog v. Derwinski*, 2 Vet.App. 502, 503 (1992; *Branham v. Derwinski*, 1 Vet.App. 93, 94 (1990); *see also Andre v. Principi*, 301 F.3d 1354, 1362 (Fed.Cir.2002) (affirming the Court of Appeals for Veterans Claims refusal to accept jurisdiction of a CUE issue first raised at the Court, not at the VA); *Ledford v. West*, 136 F.3d 776 (Fed.Cir.1998) (affirming refusal of CAVC to hear arguments regarding issue of reduction in benefits because issue appealed was effective date for the increase in his schedular rating not the 1981 rating decision which changed his unemployability rating to a schedular

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rating[20] which issue had not been raised below); *Grantham v. Brown*, 114 F.3d 1156, 1159 (Fed.Cir.1997) (in dicta, the federal circuit indicated "[T]he issues appealable to the BVA are only those that have been framed in the SOC. Because the claimant must relate all challenges to the AOJ decision based on the issues framed in the SOC, the claimant cannot raise any new issues that were not covered in the SOC."); *cf. Akles v. Derwinski*, 1 Vet.App. 118, 120-21 (1991) (question of veteran's increased rating was appealed, question of special monthly compensation was not addressed prior to appeal to Court. Arguing this was a new issue not addressed below, the VA asked the Court to "summarily reject this new issue." The Court denied the VA's motion citing Paragraph 46.08(a) of the M21-1 manual which instructs rating boards to consider "ancillary benefits" such as "Special Monthly Compensation"); *but cf. Travelstead v. Derwinski*, 1 Vet.App. 344, 346 (Court accepting jurisdiction over issue addressed at RO but not considered at BVA); *In the Matter of the Fee Agreement of Hugh D. Cox*, 11 Vet.App. 158, 162 (1998) quoting *In the Matter of the Fee Agreement of William G. Smith*, 10 Vet.App. 311, 314 (1997)[21] ("Where the

[20] In *Ledford's* case, he had originally been found (December 1977) to be totally disabled based on individual unemployability. Pursuant to a VA Circular 21-80-7, his rating was changed from 100% due to unemployability to 100% schedular due to service-connected neuropsychiatric condition. He did not appeal this change.

In September 1985 *Ledford's* rating was reduced to 70% based on a VA examination which found the neuropsychiatric condition to be in partial remission. If the veteran's rating had been based on unemployability rather than a schedular rating, the VA could not have reduced the veteran's rating without evidence that he was employable. No such requirement exists for reductions in schedular ratings.

In December 1985, *Ledford* filed an NOD regarding the reduction. Following continued disagreement with the reduction, the Board granted 100% effective April 19, 1990.

Ledford objected to the effective date assigned arguing that the 1985 reduction was CUE and requesting an earlier effective date of February 1, 1986.

In his appeal to the Court, *Ledford* challenged the 1981 rating decision which changed his 100% rating from a unemployability rating, with certain protections, to a schedular rating without those protections, which allowed the RO to reduce his evaluation without having to prove he was now employable.

The Court's ruling that the question regarding the 1981 rating decision was not before the Court was affirmed by the Federal Circuit.

[21] In these cases, the VA argued that since the attorney sought attorneys fees for matters not decided by Board decisions, TDIU in both cases, the attorneys were not eligible to receive payment, computed based on an attorney fee agreement, for that portion of the veteran's compensation which resulted when the veteran was granted entitlement to service connection for TDIU following remand. In essence, the attorneys' representation stemmed from the issues on appeal to the Court, thus, the VA argued, since the Board decisions on appeal to the Court did not decide the question of TDIU, and TDIU was not granted until the matter had been decided and granted on remand

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BVA fails to adjudicate a claim that was reasonably raised before it, the net outcome for the veteran amounts to a denial of the benefit sought.").

MAY HEAR ARGUMENT IN FIRST INSTANCE IF IT HAS JURISDICTION OVER ISSUE

§ The Court may hear argument presented to it in the first instance when it has jurisdiction over issue to which argument is directed. *Barger v. Principi*, 16 Vet.App. 132, 137 (2002) citing *Maggitt v. West*, 202 F.3d 1370, 1377 (Fed.Cir.2000).

JURISDICTION, COURT (*SEE ALSO* JURISDICTION, GENERALLY)

BVA RECONSIDERATION, COURT REVIEW OF

BASED ON NEW AND MATERIAL SMRS

§ If the denied petition for reconsideration has "alleg[ed] new evidence or changed circumstances ... judicial review might be available." *See Patterson v. Brown*, 5 Vet.App. 362, 365 (1993). Furthermore, the Court has limited the type of evidence which is capable of providing a basis for reconsideration to specific new and material evidence in the form of service records or reports. *See Romero v. Brown*, 6 Vet.App. 410, 413 (1994); 38 C.F.R. § 20.1000(b) (1995).

DENIAL OF BVA RECONSIDERATION

§ When the "Court has jurisdiction over the underlying BVA appeal, the appeal of the Chairman's denial of the motion to reconsider that decision is properly before the Court." *Engelke v. Gober*, 10 Vet.App. 396, 399 (1997) citing *Mayer v. Brown*, 37 F.3d 618 (Fed.Cir.1994). "However, the Court's willingness to review these denials has been limited to cases in which the movant alleges either new evidence or changed circumstances[22]." *Id.* Citing *Owens v. Brown*, 7 Vet.App. 429, 433 (1995); *Losh v.*

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from the Court, the attorneys were not eligible for payment based on compensation based on TDIU. The Court disagreed finding that the representation at the Court insured that the Boards failure to adjudicated the TDIU claims resulted in their being remanded for adjudication.

[22] "While this Court has never defined 'changed circumstances,' the origin of the phrase in this Court's jurisprudence is found in the *Patterson* case. The Court held, taking from dicta found in *I.C.C. v. Locomotive Engineers*, 482 U.S. 270 (1987), that 'where a petition for reconsideration alleging new evidence or changed circumstances was denied, judicial review might be available.'" *Id.* citing *Patterson*, 5 Vet.App. at 365. In *McCall v. Brown*, this Court found that the Secretary's own admissions of error in an underlying Board decision constituted

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Brown, 6 Vet.App. 87, 90 (1993). "Where a claimant alleges only 'material error' or attempts to lace before the Court an argument that is best reserved for a direct appeal from the underlying BVA decision, the Court will not review the denial of the motion to reconsider." *Id.* citing *Patterson v. Brown*, 5 Vet.App. 362 (1993).

NEW EVIDENCE OR CHANGED CIRCUMSTANCES

§ The Court will not exercise its jurisdiction where a party merely petitions the BVA for reconsideration on the same record that was before the BVA when it rendered the decision being reconsidered. If, however, the denied petition for reconsideration alleges new evidence or changed circumstances, judicial review might be available. *See Patterson v. Brown*, 5 Vet.App. 362, 365 (1993).

VALID NOD REQUIRED

§ "The Court holds that a jurisdictionally-valid NOD must have been submitted with respect to the claim for which reconsideration is sought in order to empower this Court to review a denial of such reconsideration by the Chairman of the [BVA]. A motion for reconsideration is inextricably intertwined with the original claim. Absent a post-November 17, 1988, NOD, the Court has no discretion to hear an appeal." *Pagaduan v. Brown*, 6 Vet.App. 9, 10 (1993).

UNADJUDICATED CLAIM JURISDICTION

§ While the Court generally has jurisdiction only over adverse Board decisions[23], the Court has remanded parts of Board decisions which have failed to adjudicate claims

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'changed circumstances' warranting this Court's exercise of jurisdiction over the denial of the motion for reconsideration." *Id.* citing *McCall*, 6 Vet.App. 215 217 (1994). "There have been no other decisions in which this Court has exercised jurisdiction on, or has attempted to define, 'changed circumstances.'" *Id.* at 5-6.

"In order to be faithful to both *Locomotive Engineers* and the Veterans' Judicial Review Act, Pub. L. 100-687, 102 Stat. 4105 (1988), any 'changed circumstances' would have to be one of the variety set forth in 38 C.F.R. § 20.1000 (e.g., obvious error, new government records, fraud)." *Id.* at 6 citing *McCall, supra* ("changed circumstances" was concession by the Secretary of obvious error).

[23] 38 U.S.C.A. § 7266(a) (West 1995) provides that "In order to obtain review by the Court of Veterans Appeals of a final decision of the Board of Veterans' Appeals, a person adversely affected by that action must file a notice of appeal with the Court. Any such notice must be filed within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title." "If a claimant files a motion for reconsideration of a final BVA decision during the 120-day judicial appeal period, the finality of the initial BVA decision is abated. A new 120-day period begins to run on the date on which the BVA mails to the claimant notice of its denial of the motion to

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reasonably raised by the appellant when the RO failed to adjudicate the claim and the veteran filed an notice of disagreement (NOD) regarding the failure to adjudicate such claim. The filing of a NOD is the necessary prerequisite for the Board and the Court to obtain jurisdiction over the failure to of the RO to adjudicate the claim. *See Isenbart v. Brown*, 7 Vet.App. 537, 541 (1995); *Hamilton v. Brown*, 4 Vet.App. 528, 531 (1993); *Slater v. Brown*, 9 Vet.App. 240, 244-45 (1996); *Johnston v. Brown*, 10 Vet.App. 80, 90-91 (1997) (Steinberg, J. concurring); *see also Hazan v. Gober*, 10 Vet.App. 511, 516 (1997) ("[t]he Court cannot remand a matter over which it has no jurisdiction, which requires a document that can properly be construed as an NOD expressing disagreement with an RO decision . . . .") citing 38 U.S.C. § 7251; *Slater v. Brown*, 9 Vet.App. 240, 244-45 (1996); *Johnston v. Brown*, 10 Vet.App. 80, 89-91 (1997) (Steinberg, J. concurring).

The Steinberg concurrence in *Johnston*, *supra*, pointed out

> [a]lthough in earlier cases the court had found jurisdiction over inferred claims *without looking* at the NOD question (*see Douglas v. Derwinski*, 2 Vet.App. 435, 439-40 (1992) (en banc); *Ef v. Derwinski*, 1 Vet.App. 324, 326 (1991); *Payne v. Derwinski*, 1 Vet.App. 85, 87 (1990)), I believe that *Isenbart* and *Slater* represent an evolution of the law since then and that an NOD is now required in order for the Court to have jurisdiction to remand for the BVA's failure to adjudicate a claim whether inferred or, as here, made directly. The majority opinion ignores this issue." (emphasis in text)

Johnston, 10 Vet.App. 89-91.

§ The Court has characterized the failure of the Board to adjudicate issues before it as potentially being a final adverse opinion. As a practical matter, because of the length of time involved in the appeals process, the veteran's opportunity to file a timely NOD on the question may have run out and the only remaining way for the veteran to obtain a reconsideration of the question is to raise a claim for CUE, which is

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reconsider, or, if the claimant withdraws the request for reconsideration (*see West Penn*, 860 F.2d at 588), on the date on which the BVA receives a notification from the claimant of the withdrawal." *Rosler v. Derwinski*, l Vet.App. 241, 249 (1991).

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extremely difficult to prove. "Where the BVA fails to adjudicate a claim that was reasonably raised before it, the net outcome for the veteran amounts to a denial of the benefit sought." *In the Matter of the Fee Agreement of Hugh D. Cox*, 11 Vet.App. 158, 162 (1998) quoting *In the Matter of the Fee Agreement of William G. Smith*, 10 Vet.App. 311, 314 (1997).[24]

§ In *Manlincon v. West*, 12 Vet.App. 238 at 3, (March 12, 1999) the Court vacated the portion of a Board decision which referred Dependency Indemnity Compensation (DIC) claim back to the VA RO, *not* remanded it for an SOC. In *Manlincon v. West, supra*, the Court found the widow had filed a proper NOD, albeit in her substantive appeal, therefore the Board had to address the question on appeal. *Manlincon v. West, supra.*

§ "…[W]here the issue of finality of a decision is specifically raised, the Board and this Court have jurisdiction to review that issue." *Roberson v. Principi*, 17 Vet.App. 135, 137 (2003) citing *cf. Fenderson West*, 12 Vet.App. 119 (1999) (Court accepted jurisdiction and remanded claim where Board declined jurisdiction finding the veteran had failed to file a substantive appeal regarding that claim) *and Holland v. Gober*, 10 Vet.App. 433, 436 (1997) (per curiam order) (remanding for SOC after NOD was filed) *with Tablazon v. Brown*, 8 Vet.App. 359 (1995) (dismissing appeal of Board's decision to reopen a claim, noting RO's original denial had not become final) *and Rivers v. Gober*, 10 Vet.App. 469 (1997) (dismissing appeal of a claim that had been reasonably raised at the RO and the Board and had not been decided).

[24] In these cases, the VA argued that since the attorney sought attorneys fees for matters not decided by Board decisions, TDIU in both cases, the attorneys were not eligible to receive payment, computed based on an attorney fee agreement, for that portion of the veteran's compensation which resulted when the veteran was granted entitlement to service connection for TDIU following remand. In essence, the attorneys' representation stemmed from the issues on appeal to the Court, thus, the VA argued, since the Board decisions on appeal to the Court did not decide the question of TDIU, and TDIU was not granted until the matter had been decided and granted on remand from the Court, the attorneys were not eligible for payment based on compensation based on TDIU. The Court disagreed finding that the representation at the Court insured that the Boards failure to adjudicated the TDIU claims resulted in their being remanded for adjudication.

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The *Roberson* Court found the question of the pendency of a claim was raised in the veteran's claim of CUE (the RO and subsequently the Board denied the veteran's CUE claim but failed to consider the veteran's argument that the VA had failed to adjudicate his 1984 TDIU claim) and, therefore, the Court had jurisdiction to consider whether the TDIU claim was still pending although the CUE claim was denied. *Roberson, supra* at 138.

JURISDICTION DENIED UNTIL RO OR BVA ACTION, CLAIM REMAINS OPEN AND PENDING

§ Unless the record before the Court contains a Regional Office (RO) or BVA decision, the Court does not have jurisdiction to decide it. If the claim has not been adjudicated by the Regional Office (RO), it will remain open and pending until final action is taken. *Hanson v. Brown*, 9 Vet.App. 29, 31 (1996); *Meeks v. Brown*, 5 Vet.App. 284 (1993). This Court has jurisdiction only to review BVA decisions which resulted from an Notice of Disagreement (NOD) filed on or after November 18, 1988. *Hamilton v. Brown*, 4 Vet.App. 528 (1993) (en banc), *aff'd*, 39 F.3d 1574 (Fed. Cir 1994); Veterans' Judicial Review Act, Pub. L. No. 100-687, § 402, 102 Stat.4105, 4122 (1998) (found at 38 U.S.C. § 7251 note).

JURISDICTION LOST WHEN DECISION APPEALED TO FEDERAL CIRCUIT

§ A single judge decision dismissed the appellant's case. Subsequent to the dismissal, through counsel, two motions were filed at the Court of Appeals for Veterans Claims (Court) and a NOA filed to the Federal Circuit conditioned on the Court's denial of the two motions. The Court dismissed the appellant's motions for lack of jurisdiction because the case had been appealed to the Federal Circuit. *Levi v. Principi*, 16 Vet.App. 87, 88 (2002).

CONSTITUTIONAL QUESTIONS

COURT JURISDICTION

§ 38 U.S.C. § 7261(a)(3) provides for the Court to "hold unlawful and set aside" regulations which are unconstitutional. *Wanner .v Principi*, 17 Vet.App. 4, 14 (2003) citing 38 U.S.C. § 7261(a)(B); *Robison v. Brown*, 9 Vet.App. 398, 399-400

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(1996)(reiterating holding that Court is "empowered to make determinations regarding the interpretation and application of regulation and constitutional claims.").

CAN REVIEW CONSTITUTIONALITY OF RATING SCHEDULE PROVISIONS

§ The Federal Circuit has held that the 38 U.S.C. § 502 prohibition against reviewing a revision of the rating schedule does not preclude that court's review of the constitutionality of such a revision. The CAVC, in dicta, noted the similarity of the § 502 language to the 38 U.S.C. § 7252(b)(2) which similarly prohibits the CAVC review of the rating schedule, implying that such a review would be appropriate. *Wanner v. Principi*, 17 Vet.App. 4, 14 (2003).

CAN REVIEW DIAGNOSTIC CODE (DC) TO DETERMINE IF CONTRARY TO LAW

§ The *Wanner v. Principi* Court cited *Villano* and *Hood* to conclude that 38 U.S.C. 7252(b) did not prohibit the Court's review of the schedule of ratings to determine if a diagnostic code was contrary to law. *Wanner*, 17 Vet.App. 4, 14 (2003) citing *Villano v. Brown*, 10 Vet.App. 248, 250 (1997) (held that the Court could "review … the schedule of ratings" for the limited purpose of determining "whether a particular [DC] is contrary to law".) and *Hood v. Brown*, 4 Vet.App 301, 304 (1993) (in *Hood* the Court was not "reviewing the schedule or percentage ratings or the percentages prescribed by that schedule.")

JURISDICTION TO REVIEW CONSTITUTIONAL AND STATUTORY ARGUMENTS NOT PRECLUDED BY FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

§ The Court has jurisdiction to consider constitutional and statutory arguments whether or not administrative remedies have been exhausted. *Wanner v. Principi*, 17 Vet.App. 4, 15 (2003) citing *Maggitt v. West*, 202 F.3d 1370, 1378-79 (Fed.Cir.2000).

DOES NOT RETAIN GENERAL AND CONTINUING JURISDICTION OVER REMANDED MATTERS

§ Citing *Cleary v. Brown*, 8 Vet.App. 305, 307-08 (1995) the *Bruce* Court ruled that it could not retain jurisdiction on the veteran's appeal following remand to the Board.

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Bruce v. Principi, 15 Vet.App. 27, 29 (2001) (per curiam order) citing *Cleary*, at 307-08 (denying motion for the Court to retain jurisdiction of the appeal following remand to the Board the Court pointed to 38 U.S.C. § 7252(a) which restricts the Court's jurisdiction to final Board decisions. To remand a Board decision, the Court vacates the prior decision rendering it nonfinal and thus, removing the statutorily established Court jurisdiction)

"CASE OR CONTROVERSY" REQUIRED FOR COURT JURISDICTION

§ "This Court has adopted the jurisdictional restrictions of the case or controversy rubric under Article III of the Constitution of the United States." *Herlehy v. Principi*, 15 Vet.App. 33, 35 (2001) (per curiam order) citing *Mokal v. Derwinski*, 1 Vet.App. 12, 13 (1990) (adopting case or controversy jurisdictional restraints imposed by Article III); *see also Aronson .v Brown*, 7 Vet.App. 153, 155 (1994) (Dismissing the appeal because VA's compliance with the Court's order mooted the question on appeal and there was no case or controversy to be adjudicated).

NOTICE OF DISAGREEMENT MUST ENCOMPASS ISSUE FOR APPELLATE REVIEW

§ For appellate review, the "language contained in the NOD [must] sufficiently encompass[] the RO's failure to adjudicate the TDIU claim." *Slater v. Brown*, 9 Vet.App. 240, 244 (1996) citing *Isenbart v. Brown*, 7 Vet.App. 537, 541 (1995).

RECONSIDERATION MOTION DENIES COURT JURISDICTION

§ The Counsel for the Secretary of Veterans Affairs (Secretary) filed a motion to dismiss the appeal with the Court on December 15, 1998, pursuant to the Court's holding in *Pulac v. Brown*, 10 Vet.App. 11 (1997) (per curiam order) because the veteran's motion for reconsideration was received at the BVA one day before the mailing of the NOA to the Court. The filing of a motion for reconsideration renders the BVA decision nonfinal, therefore, jurisdiction remains with the BVA and the Court does not have jurisdiction. *See Mayer v. Brown*, 37 F.3d 618, 619 (Fed.Cir.1994); *Losh v. Brown*, 6 Vet.App. 87, 90 (1993).

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REVISION OF DECISION PENDING OR FILED ON OR AFTER NOVEMBER 21, 1997

§ "Pursuant to [38 U.S.C.] section 7111, this Court has jurisdiction to review a BVA decision that considered a claim asserting CUE in a previous BVA decision if that claim was pending or was filed on or after November 21, 1997[25]." *Jordan v. Principi*, 17 Vet.App. 261, 266 (2003) citing *see Swanson v. West*, 12 Vet.App. 442, 452 (1999); *Lane v. West*, 11 Vet.App. 412, 413 (1998) (per curiam order); *Wilson (Richard) v. West*, 11 Vet.App. 253, 254 (1998) (per curiam order).

SUA SPONTE "BOARD RECONSIDERATION" OF BOARD DECISION DOES NOT DEFEAT COURT JURISDICTION

§ "[O]nce a case is reconsidered, the 'decision of the panel shall constitute the final decision of the Board' and the previous BVA decision is nullified." *Smith v. Brown*, 8 Vet.App. 546, 550 (1996) citing *Boyer v. Derwinski*, 1 Vet.App. 531, 532-35 (1991); 38 U.S.C. § 7103. However, citing *Frazer*, the *Smith* Court found that a jurisdiction conferring NOD gave the appellant the right to judicial review subsequent to an adverse BVA decision. *See Frazer v. Brown*, 6 Vet.App. 19, 23 (1993) citing *Cerullo*, the *Smith* Court found that the BVA Chairman could not deprive the veteran of his right to judicial review by granting reconsideration following the filing of an NOA. *See Cerullo v. Derwinski*, 1 Vet.App. 195, 196 (1991) (cites omitted). "To conclude that the granting of a motion for reconsideration by the Chairman . . . could divest the post-VJRA NOD of its jurisdiction-conferring ability as to judicial review would contravene the plain language and the purpose of the VJRA." *Smith, supra*, at 551.

[25] Public Law 105-111 was enacted November 21, 1997, "To amend title 38, United States Code, to allow revision of veterans benefits decisions based on clear and unmistakable error. (NOTE: Nov. 21, 1997 - [H.R. 1090]). *See* Appendix C – Public Laws and Explanations.

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NOTICE OF APPEAL (NOA)

COURT REVIEW OF A FINAL BOARD DECISION REQUIRES NOA BY ADVERSELY AFFECTED PERSON (38 U.S.C.A. § 7266(A) (WEST 1995))

§ 38 U.S.C.A. § 7266(a) (West 1998) provides that: "In order to obtain review by the Court of Appeals for Veterans Claims of a *final* decision of the Board . . . a person adversely affected by that action must file a notice of appeal with the Court . . . within 120 days after the date on which notice of the decision is mailed . . . ." (emphasis in decision) *Rosler v. Derwinski*, 1 Vet.App. 241, 244 (1991) quoting 38 U.S.C. § 4066(a) (1988) now amended to 38 U.S.C. § 7266(a).

MOTION FOR RECONSIDERATION FILED WITHIN 120-DAY APPEAL PERIOD, TOLLS THE 120 DAY STATUTE OF LIMITATIONS TO FILE NOA

§ Filing of a motion for reconsideration of a Board decision within 120 days of the mailing of the Board decision abates the finality of that Board decision. For purposes of filing a NOA to the Court, "[a] new 120-day period begins to run on the date on which the BVA mails . . ." (1) a notice of the denial to reconsider, (2) a notice of the decision in the reconsideration, or (3) the date the Board receives the appellant's withdrawal of the motion for reconsideration. *Rosler v. Derwinski*, 1 Vet.App. 241, 249 (1991). If the appellant subsequently files another motion for reconsideration within the 120-day appeal period, the 120-day appeal period continues to be extended. *Perez v. Derwinski*, 2 Vet.App. 149, 150 (1992) (citing 38 C.F.R. 19.186(a) (1991) the Court indicated that since the VA did not limit the number of times an appellant could seek reconsideration, each time, in this case three times, the appellant sought reconsideration prior to the 120-day time limit, under *Rosler*, *supra*, the time for filing an NOA to the Court was tolled).

MOTION FOR RECONSIDERATION MUST INCLUDE IDENTIFICATION OF ISSSUE OR ISSUES TO BE RECONSIDERED FOR NOA ENLARGEMENT OF TIME

§ The *Brown* court noted references to the ex parte, nonadversarial nature of the VA processes as outlined in the Secretaries response to the May 13, 1999, Court order.

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The Court compared the *Perez v. Derwinski*, 2 Vet.App. 149 (1992) decision to note that in that case the veteran's 120 day statutorily set time to file a NOA was tolled three times by the filing of motions for reconsideration extending the time for filing a NOA to the Court. *Brown v. West*, 13 Vet.App. 88, 90 (1999);C*f.*, *Perez, supra*.

The *Perez, Id*, court found that each of the three pieces of correspondence to the Board specifically requested a reconsideration on the denial of a service connection and alleged the failure to apply the benefit of the doubt to his case. Each motion for reconsideration was filed within 120 days of the Board's denial of the original motion and Board actions disposing the subsequent correspondence. The Board acted on but did not treat the veteran's second and third letters as motions for reconsideration.

The *Brown, supra* Court referred to 38 C.F.R. § 20.1001(a) requirements for a motion for reconsideration to include identification of the issue or issues the claimant wishes reconsidered. S The *Brown* Court noted the absence of any language requesting a reconsideration of any issue and found the veteran's correspondence was not a motion for reconsideration that would toll the time to file a NOA to the Court. *Id.*

MOTION TO BOARD TO VACATE DECISION, SAME AS RECONSIDERATION FOR TOLLING 120-DAY STATUTE OF LIMITATIONS

§ The *Browne* Court held that a motion to vacate a Board decision is the equivalent of a motion for Board reconsideration of a Board decision for the purposes of rendering the underlying Board decision nonfinal and beginning a new 120-day appeal period. *Browne v. Principi*, 16 Vet.App. 278, 281 (2002) citing *Losh v. Brown*, 6 Vet.App. 87, 89; *see also Rosler v. Derwinski*, 1 Vet.App. 241, 249 (1991) (to abate the finality of the BVA's decision the appellant's motion for reconsideration must be filed with the BVA within 120 days after notice of the BVA's decision is mailed).

MOTION FOR BOARD RECONSIDERATION "POSTMARKED" WITHIN 120 DAYS OF DECISION TOLLS COURT NOA STATUTE OF LIMITATIONS

§ The Federal Circuit in *Linville v. West*, 165 f.3d 1382 (Fed.Cir.1999) interpreted 38 C.F.R. § 20.305(a) ("Rule 305(a)") to apply to filings for motions for reconsideration

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before the Board if the appeal is later appealed to the Court. § 20.305(a) provides for the VA to accept the postmark date to be the date of filing when written documents are to be filed with the Board within time limits set out in the rules.

Because the filing of a motion for the Board reconsideration of a decision has no prescribed time limits for Board filing, the Court reasoned that § 20.305(a) did not apply and the date stamped received in the mailroom was used to establish Linville's filing date at the Board. The date of receipt of the motion in the mailroom exceeded the 120 day time limit. *Linville v. West*, 11 Vet.App. 60, 62 (1998) (en banc). Citing *Rosler v. Derwinski*, 1 Vet.App. 241, 249 (1991), the *Linville* Court noted that the filing of a motion for reconsideration within 120 days of the Board decision tolls the date for establishing the 120 day statute of limitations for filing an NOA to the Court. Using the mailroom date stamp, the Court held that *Linville* had filed his NOA with the Court outside the 120 day statute of limitations and dismissed his appeal. *Linville supra*, at 62-64.

The Federal Circuit reversed the Court's dismissal of *Linville's* appeal holding that § 20.305(a) did apply and since the postmark on the envelope filing the motion for reconsideration with the Board was within the 120 day limit it tolled the time for filing an NOA with the Court. *Linville*, at 1385.

The controversy arose out of (1) the rule allowing a motion for reconsideration to the Board to be filed at any time, and (2) § 20.305(a) providing for the postmark to be used to establish filing dates for written submissions that were required to be filed within certain time limits. The Federal Circuit reasoned that such a literal reading of § 20.305(a) ignored the holdings in *Rosler* and its progeny, and held that the motions for reconsideration of Board decisions being appealed to the Court did have a time limit and, therefore, § 20.305(a) did apply and *Linville* had timely filed his NOA with the Court. *Ibid*.

NOA VALIDITY

§ "In *Chadwick v. Derwinski*, 1 Vet.App. 74, 76 (1990), the Court interpreted (38 U.S.C.) section 7266(a) to require that a document submitted must request Court review in order to constitute a valid NOA (notice of appeal). The Court held that a document submitted on a VA form not intended for use as an NOA was nonetheless a

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valid NOA because it 'was filed by the appellant; it requested review by the Court; and was received by the Court within the requisite 120 day period.'" 38 U.S.C. § 7266(a); *Perez v. Brown*, 9 Vet.App. 452, 455 (1996) citing *Chadwick, supra*; *See also Calma v. Brown*, 9 Vet.App. 11, 15 (1996). "In *Calma*, the Court elaborated on the meaning of the section 7266(a) requirement that an NOA must request Court review in order to qualify as a valid NOA. The Court held that an 'NOA need not contain a literal statement that a BVA decision is being appealed to the Court, as long as the intent to seek Court review is clear from the document as a whole and the circumstances of its filing with the Court.'". *Perez, supra*, citing *Calma, supra.*

NOA MUST STATE THE INTENT TO APPEAL

§ In this case, the widow requested NOA forms within 120 days of the date of the Board decision, however, she did not file the NOA until after the 120-day time limit. The Court ruled that the appellant's letter requesting forms failed to express the appellant's intent to appeal the BVA decision which is required of a valid NOA. *Lariosa v. Principi*, 16 Vet.App. 323, 325 citing *Perez v. Brown*, 9 Vet.App. 452 (1996).

NOA TIMELY FILED, 120 DAY STATUTE OF LIMITATIONS (*SEE ALSO* EQUITABLE TOLLING OF STATUTE OF LIMITATIONS)

§ A final decision of the Board of Veterans' Appeals can be reviewed by the Court of Appeals for Veterans Claims if a notice of appeal is filed within 120 days after the date of mailing of the Board decision. *See* 38 U.S.C. § 7266 (a).

§ To be timely filed under Rule 4 of the Court's Rules of Practice and Procedure and precedents construing 38 U.S.C.A. § 7266(a) (West 1995), a correctly addressed Notice of Appeal must be postmarked by the U.S. Postal Service within 120 days after the BVA decision is mailed to an appellant. *See Butler v. Derwinski*, 960 F.2d 139 (Fed. Cir. 1992); *Hill v. Brown*, 9 Vet.App. 246, 248 (1996).

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ONLY POSTMARKED MAIL RECEIVES DATE OF MAILING/NOA FILING DATE

§ 38 U.S.C. § 7266(a)(2) provides for delivering or mailing the NOA to the Court. The date of filing is either the date received, if delivered, or the date of a legible U.S. postmark showing the date the NOA was placed in the mail. 38 U.S.C. §§ 7266(a)(3)(A) and (B) and (a)(4). NOA sent by FedEx does not meet the mailing requirements for assigning date of mailing as date of filing. Thus, date of receipt is date of filing. *Mapu v. Principi*, 16 Vet.App. 320, 321-22 (2002) (Per Curiam Order).

SEE ALSO EQUITABLE TOLLING OF STATUTE OF LIMITATIONS, *ET SEQ.*

REMAND

REMAND NOT FOR REWRITE, BUT CRITICAL EXAMINATION OF DECISION

§ Remand is not merely for the purpose of rewriting the opinion so that it will superficially comply with the reasons or bases requirement. A remand is meant to entail a critical examination of the justification for the decision. *See Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991).

REMAND USUAL REMEDY FOR ERRORS FOUND ON APPEAL

§ A remand is the usual remedy for the errors most frequently encountered on appeal. Reversal is warranted only when there is absolutely no plausible basis for the BVA's decision and where that decision is clearly erroneous in light of the uncontroverted evidence. *Kay v. Principi*, 16 Vet. App. 529, 533 (2002) citing *Hersey v. Derwinski*, 2 Vet.App. 91, 95 (1992); *see also Rose v. West*, 11 Vet. App. 169, 172 (1998) citing *Traut v. Brown*, 6 Vet.App. 495, 500 (1994).

The *Best* Court held that on remand for one issue, generally the other issues are mooted because the Board is required to readjudicate the matter anew. *Best supra*, at 19 citing *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991) ("A remand is meant to entail a critical examination of the justification for the decision. The Court expects that the BVA will reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well supported decision in this case").

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REVERSAL, UNCONTRADICTED FAVORABLE MEDICAL EVIDENCE

§ Where medical evidence of record addresses all elements of service connection, is uncontradicted by competent evidence, and definitively supports appellants position, reversal rather than remand is appropriate. *See Rose v. West*, 11 Vet. App. 169, 172 (1998) citing *Traut v. Brown*, 6 Vet.App. 495, 500 (1994).

REVERSAL IS REMEDY FOR IMPLAUSIBLE DECISION IN FACE OF UNCONTROVERTED EVIDENCE FAVORING APPELLANT

§ Reversal of a BVA decision is the appropriate remedy when "[t]here is absolutely no plausible basis for the BVA's decision" and where that decision is "clearly erroneous in light of the **uncontroverted** evidence in the appellant's favor." *See Hersey v. Derwinski*, 2 Vet.App. 91, 95 (1992). (Emphasis added.) But, as the Supreme Court has stated:

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.

Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985); *see also Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 347 (D.C. Cir. 1989) ("The proper course in a case with an inadequate record is to vacate the agency's decision and to remand the matter to the agency for further proceedings.").

REVIEWABILITY OF ADMINISTRATIVE ACTIONS, STATUTORY PRECLUSION OF COURT REVIEW, AND STATUTORILY ESTABLISHED AGENCY DISCRETION

§ *Tulingan v. Brown*, 9 Vet.App. 484, 487-94 (1996) (Farley, J. concurring).

This "begrudging concurrence", by dicta, provides a review of cases and history of Court review of administrative decisions, especially as such reviews may affect VA administrative decisions under VJRA.

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This concurring opinion focuses on the limits of Court review in cases where the statute provides administrative discretion. *See also Villaruz v. Brown*, 7 Vet.App. 561 (1995).

RULES OF THE COURT

SUSPENSION OF COURT RULES (COURT RULE 2)

§ "[T]he Court may, for good cause shown or to expedite a decision, suspend the application of any Court rule and may order proceedings in accordance with its direction, but the Court may not extend the time for filing an NOA (Notice of Appeal). It is most doubtful that the content requirements of Court Rule 3(c) are subject to waiver under Rule 2." *Perez v. Brown*, 9 Vet.App. 452, 455 (1996) citing *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988) (holding that Federal Rule of Appellate Procedure (FRAP) Rule 3 (on which this Court's Rule 3 is based) presented jurisdictional requirements that could not be waived). *But cf. Bailey v. U.S. Dep't of Army Corps of Eng'rs*, 35 F.3d 1118, 1119 n.3 (7th Cir. 1994); *Dodger's Bar & Grill v. Johnson City Bd. of Comm'rs*, 32 F.3d 1436, 1440 (10th Cir. 1994); *Garcia v. Walsh*, 20 F.3d 608, 609 (5th Cir. 1994) (all to the effect that 1993 FRAP Rule 3 revision permits greater leeway in naming in NOAs the parties taking an appeal), *with Osterberger v. Relocation Realty Service Corp.*, 921 F.2d 72, 74 (5th Cir. 1991) (appearing to hold, contrary to *Torres*, *supra*, that rule requiring identification of decision on appeal was not jurisdictional). For example, the Court could consider finding good cause for a waiver to be the Clerk of the Court's letter to the veteran did not inform him that the enclosed NOA form needed to be returned to the Court by a certain date. *See Perez, supra.*

SEALED COURT RECORDS

PRESUMPTION OF PUBLIC ACCESS

§ "[T]here is a presumption that that the public is entitled to access to judicial records filed with this court." *YI v. Principi*, 15 Vet.App. 265, 267 (2001) (per curiam order) citing *see Stam v. Derwinski*, 317, 319 (1991); *see also* 38 U.S.C. § 7268(a) ("All decisions of the Court of Appeals for Veterans Claims and all briefs, motions, [and]

"DE NOVO" REVIEW

documents … received by the Court … shall be public records open to the inspection of the public.")

"DE NOVO" REVIEW

CAVC APPELLATE REVIEW NOT DE NOVO

§ "The phrase '*de novo* review,' although occasionally used by both this court and the [CAVC], may in certain contexts be misunderstood. Appellate courts can 'review' only that which has happened in the past, while the term '*de novo*' may be understood to mean anew, without reference to what has gone before. To the extent that '*de novo*' connotes judicial review anew and without reference to what has gone before, the term fails to accurately describe the appellate process, and particularly is this so when it is applied to review of issues upon which any measure of deference is accorded to the decision on review." *Hensley v. West*, 212 F.3d 1255, 1263 (2000).

The CAVC, by statute, is prohibited from conducting de novo review of findings of fact by the BOARD OF VETERANS' APPEALS. *Id* citing 38 U.S.C. § 7261(c). Citing the Supreme Court, the *Hensley* court found the that the 38 U.S.C. restrictions on the court are consistent with the general rule that "appellate tribunals are not appropriate fora for initial fact finding. Thus, the Supreme Court has held that when a court of appeals reviews a district court decision, it may remand if it believes the district court failed to make findings of fact essential to the decision; it may set aside findings of fact it determines to be clearly erroneous; or it may reverse incorrect judgments of law based on proper factual findings; '[b]ut it should not simply [make] factual findings on its own.'" *Id*, quoting *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714, 106 S.Ct. 1527, 89 L.Ed.2d 739 (1986); *see also First Interstate Bank v. United States* 61 F.3d 876, 882 (Fed.Cir.1995).

DEBT TO VA

WAIVER

DECISION (*SEE ALSO* "LAW OF THE CASE", RES JUDICATA)

BVA DECISION AFFIRMING AOJ DECISION SUBSUMES AOJ DECISION

§ When determination of AOJ is affirmed by BVA, such determination is subsumed by final appellate decision. *Herndon v. Principi*, 311 F.3d 1121, 1125 (Fed.Cir.2002); *Talbert v. Brown*, 7 Vet.App. 352, 355 (1995) citing 38 C.F.R. § 20.1104 (1995); *see also Yoma v. Brown*, 8 Vet.App. 298, 299 (1995) (per curiam order) (concluding that Court's decision vacating BVA decision has legal effect of nullifying previous underlying merits adjudication by AOJ (RO) because RO decision was subsumed in BVA decision).

FINALITY OF VA DECISION ONLY VITIATED BY STATUTORY VIOLATIONS AND CUE (PART OF *HAYRE* REVERSED)

§ "Principles of finality and *res judicata* apply to agency decisions that have not been appealed and have become final." *Cook v. Principi*, 318 F.3d 1334, 1336 (Fed.Cir.20002) (en banc) citing *Astoria Fed. Savs.& Loan Ass'n v. Solimino*, 501 U.S. 104, 107-08, 111 S.Ct. 2166, 115 L.Ed. 96 (1991), *see also Routen v. West*, 142 F.3d 1434, 1437 (Fed.Cir.1998) (applying finality to and *res judicata* to VA decisions). "Unless otherwise provided by law, the cases are closed and the matter is thus ended." *Cook supra* at 1337 quoting *Routen supra* at 142 F.3d at 1438.

Overruling that part of the *Hayre v. West*, 188 F.3d 1327 (Fed.Cir.1999) decision that had provided for a third method for vitiating the finality of a VA decision, "grave procedural error", the *Cook* court found that "[t]he statutory scheme provides only two exceptions to the rule of finality. . . .", CUE and reopening of a previously denied claim based on new and material evidence. *Cook* at 1339.

However, the *Cook* court recognized that in some cases a decision may never become final, obviating the need to vitiate, because the veteran may not be able to proceed

DICTA

with an appeal pending the VA's compliance with their statutory obligation[26] to provide ". . . information or material critical to the appellate process. . . ." *Id* at 1340 citing *Tablazon v. Brown*, 8 Vet.App. 359 (1995) (the RO rating did not become final when the VA failed to provide the statutorily required statement of the case thereby denying the veteran the right to appeal); *Hauck v. Brown*, 6 Vet.App. 518 (1994) (failure to notify the veteran of the denial of his claim tolled the one year appeal period); *Kuo v. Derwinski*, 2 Vet.App. 662 (1992) (the RO rating did not become final when the VA failed to provide the statutorily required statement of the case thereby denying the veteran the right to appeal); and *Ashley v. Derwinski*, 2 Vet.App. 307 (1992) (because the Board failed to mail their decision in accordance with the statutes, the 120-day statute of limitations to appeal to the Court was tolled).

DICTA

§ The danger of these dicta is that, although theoretically and technically not binding, practically, they give the appearance of carrying the cloak of judicial acceptance. As one scholar has stated, "Much depends on the character of the dictum. Mere obiter may be entitled to little weight, while a carefully considered statement . . . , though technically dictum, must carry great weight, and may even . . . be regarded as conclusive." Charles A. Wright, The Law of Federal Courts § 58, at 374 (4th ed. 1983); *see also McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13, 19 (1st Cir. 1991) (giving effect to considered dictum of the Supreme Court). The majority should heed its own cautions and not make overly broad pronouncements that are neither warranted by the facts of this specific case nor supported by a majority of the full Court. See ante at __, slip op. at 14 (citing and quoting Zenith Radio Corp. v. United States, 437 U.S. 443, 462 (1978); *Wright v. United States*, 302 U.S. 583, 593 (1938); *Osaka Shosen Kaisha Line v. United States*, 300 U. S. 98 (1937); *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 399 (1821); *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700, 708 n.8 (Fed.Cir.1992); *Smith v. Orr*, 855 F.2d 1544, 1550

[26] Title 38 U.S.C. § 5104(a) and (b) were amended by Pub.L. No. 101-237, § 115(b), 103 Stat. at 2066, effective after January 31, 1990. This amendment required the VA, upon denial of a benefit, must provide to the claimant, a statement of the reasons for the decision and a summary of the evidence considered by the VA. The Federal Circuit decision in *Cook, supra*, noted, in dicta, that nothing in the congressional history of title 38 U.S.C. § 5104(b) suggests that decisions rendered prior to 1990 without the information required in Pub.L. No. 101-237, § 115(b) would serve to reopen a final decision.

(Fed.Cir.1988)). Through its dicta, the majority seeks to dictate the result of any remand to the Board. *See Lasovick v. Brown*, 6 Vet.App. 141, 153 (1994) (Ivers, D., concurring in part and dissenting in part).

DUE PROCESS (*SEE* PROCEDURAL DUE PROCESS)

DUTY TO ASSIST (38 U.S.C. § 5103A)

BREACH OF THE DUTY TO ASSIST, NOT CUE (*SEE* REVISION OF DECISIONS, BREACH OF THE DUTY TO ASSIST)

DEVELOPMENT OF RECORDS BY VA

VA MUST OBTAIN "RELEVANT" RECORDS

§ "When VA is put on notice prior to the issuance of a final decision of the possible existence of certain records (in this case, Social Security Disability records) and their relevance, the BVA must seek to obtain those records." *Hayes (Gerald) v. Brown*, 9 Vet.App. 67, 73-74 (1996) (quoting *Murincsak v. Derwinski*, 2 Vet.App. 363, 373 (1992)).

DEVELOPMENT OF RECORDS IDENTIFIED BY THE VETERAN (38 C.F.R. §§ 3.159(B), 3.203(c))

§ "When information sufficient to identify and locate necessary evidence is of record, [VA] 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." *See* 38 C.F.R. § 3.159(b) (1996); *White v. Derwinski*, 519, 521 (1991) (applying § 3.159(b) to obtain service department records as to claim to reopen); *Moore (Howard) v. Derwinski*, 1 Vet.App. 401, 406 (1991) (requiring VA to satisfy heightened duty to assist where service department records destroyed); *cf. Cohen v. Brown*, 10 Vet.App. 128, 148-49 (1997) (holding that VA's failure to notify claimant of agency response to VA request for information and to make additional request for information based on further details provided by claimant violated VA's duty to assist); *Sarmiento v. Brown*, 7 Vet.App. 80, 85 (1994) (VA required to resubmit request for verification of service under § 3.203(c) after claimant submitted new

DUTY TO ASSIST (38 U.S.C. § 5103A)

information); *Dixon v. Derwinski*, 3 Vet.App. 261, 263 (1992) (holding that VA violated duty to assist by failing to notify veteran in lost-records case that alternate methods of supporting claim would be considered).

DEVELOPMENT FOR SERVICE RECORDS (38 C.F.R. § 3.203(c))

§ In *Sarmiento v. Brown*, 7 Vet.App. 80, 85 (1994), the Filipino veteran indicated that the reason the service department had not verified his qualifying service was that the VA had made the prior verification request using the wrong name. The VA then refused to seek another verification of service under the new name. The Court ruled that, although the veteran had not established eligibility for benefits by submitting "evidence of service or submits insufficient evidence", the VA had obligated itself under 38 C.F.R. § 3.203(c) to request such verification from the service department. *See* 38 C.F.R. § 3.203(c) ("When a claimant does not submit evidence of service ... the [VA] *shall* request verification of service from the service department.") The Court found that the development of such records under § 3.203(c) was "couched in mandatory, not discretionary terms and unlike 38 U.S.C. § 5107(a) which only obligates the Secretary to assist '*such* a claimant' (emphasis in quoted citation), the regulation does not make the Secretary's evidentiary duty contingent upon the submission of a well-grounded claim. There is no stated limit on the number of times that the Secretary 'shall' request service department verification when one claiming entitlement fails to submit qualifying evidence of service." *Sarmiento, supra*.

DUTY TO ASSIST CONTINUES WHILE THE CLAIM IS PENDING BEFORE THE BVA

§ "When the VA is put on notice prior to the issuance of a final decision of the possible existence of certain records and their relevance, the BVA must seek to obtain those records before proceeding with the appeal....The duty to assist the veteran does not end with the rating decision of the VARO, but continues while the claim is pending before the BVA." *Murincsak v. Derwinski*, 2 Vet.App. 363, 373 (1992).

DUTY TO ASSIST (38 U.S.C. § 5103A)

DUTY TO ASSIST MAY INCLUDE MEDICAL EXAMINATION

§ "The 'duty to assist' is neither optional nor discretionary." *Littke v. Derwinski*, 1 Vet.App. 90, 92 (1990). "[F]ulfillment of the statutory duty to assist here includes the conduct of a thorough and contemporaneous medical examination, one which takes into account the records of the prior medical treatment, so that the evaluation of the claimed disability will be a fully informed one." *Green v. Derwinski* 1 Vet.App. 121, 124 (1991).

DUTY TO ASSIST NOT OPTIONAL

§ (2) "The 'duty to assist' is neither optional nor discretionary." *Littke v. Derwinski*, 1 Vet.App. 90, 92 (1990).

DUTY TO ASSIST OBLIGATES THE VA TO OBTAIN SSA RECORDS REFERRED TO BY THE VETERAN (38 U.S.C. §§ 5106, 5107(A))

§

> Clearly, in the fulfillment of the Secretary's duty to assist, []SSA {Social Security Administration} records are pertinent in accurately rating a veteran's disability in light of his entire medical history ...
>
> ....
>
> At a minimum, the decision of the decision of the administrative law judge at the SAA 'is evidence which cannot be ignored and to the extent its conclusions are not accepted, reasons or bases should be given therefore.

Murincsak v. Derwinski, 2 Vet.App. 363, 372 (1992) citing *Collier v. Derwinski*, 413, 417 (1991); s*ee Webster v. Derwinski*, 1 Vet.App. 155, 159 (1991); *Sammarco v. Derwinski*, 1 Vet.App. 111, 112 (1991); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990).

DUTY TO ASSIST NULLIFIED BY FAILURE TO COOPERATE

§ In *Olson* the veteran filed a claim for an increased rating but refused to appear at some VA compensation and pension examinations (VAE) and, at other times, appeared for the examination but refused to be examined. Additionally, the veteran

DUTY TO ASSIST (38 U.S.C. § 5103A)

claimed to have withheld information necessary to the development of medical records until the VA met his demands. The Court affirmed the Board decision denying an increased rating mainly on the basis that the veteran refused to cooperate. *See Olson v. Principi*, 3 Vet.App. 480, 483 (1992) citing 38 C.F.R. § 3.326; *Wood v. Derwinski*, 1 Vet.App. 190, 193 (1991) (in order to trigger the duty to assist, when the appellant has information important to his claim, the appellant cannot set passively by. "The duty to assist is not always a one-way street . . . .").

DUTY TO ASSIST MAY INCLUDE MEDICAL EXAMINATION

§ "The 'duty to assist' is neither optional nor discretionary." *Littke v. Derwinski*, 1 Vet.App. 90, 92 (1990). "[F]ulfillment of the statutory duty to assist here includes the conduct of a thorough and contemporaneous medical examination, one which takes into account the records of the prior medical treatment, so that the evaluation of the claimed disability will be a fully informed one." *Green v. Derwinski* 1 Vet.App. 121, 124 (1991).

DUTY TO ASSIST THRESHOLD (VCAA)

REQUIRES "REASONABLE POSSIBILITY" OF "SUBSTANTIATING CLAIM"

§ "…[T]he VCAA provides that the VA is not required to provide assistance to a claimant, including a medical exam, if 'no reasonable possibility exists' that such assistance would aid in substantiating a claim." *Paralyzed Veterans v. Sec. of Veterans Affairs*, 345 F.3d 1334, 1356 (Fed. Cir. 2003) citing 38 U.S.C. § 5103A(a)(2) .

EVALUATE CONDITION DURING ACTIVE NOT INACTIVE PHASE

§ "This Court has held that where there is a history of remission and recurrence of a condition, the duty to assist encompasses the obligation to evaluate a condition during an active rather than inactive phase." *Ardison v. Brown*, 6 Vet.App. 405, 407-08 (1994).

DUTY TO ASSIST (38 U.S.C. § 5103A)

IF CURRENT DISABILITY, AND CONTINUITY OF SYMPTOMATOLOGY, VA MUST PROVIDE VAE

§ In *Charles v. Principi*, the Court found {1} there was medical evidence that the veteran had a current disability of tinnitus [(citing 38 U.S.C. 5103A(d) (2) (A) and *Caluza v. Brown*, 7 Vet.App. 498, 504 (1995) (where determinative issue involves either medical etiology or medical diagnosis, competent medical evidence is required)], {2} competent evidence of inservice and continuity of symptomatology provided by the veteran's testimony (citing *Caluza, supra* (where determinative issue does not require medical expertise, lay evidence may suffice by itself); *Falzone v. Brown*, 8 Vet.App. 398, 406 (1995); *see also Layno v. Brown*, 6 Vet.App. 465, 469-70 (1994) (lay evidence is competent to establish features or symptoms of injury or illness)), and {3} the third element of "competent medical evidence addressing whether there is a nexus between his tinnitus and his active service was absent (*see* 38 U.S.C. § 5103A(d)(2)(C)). Since all of the elements to establish the claim was satisfied except for the medical nexus evidence, the Secretary was obligated by his duty to assist requirements to provide a medical examination. *Charles v. Principi*, 16 Vet.App 370, 374-75 (2002) citing 38 U.S.C. § 5103A(d).

INCARCERATED VETERANS

INCARCERATED VETERANS ENTITLED TO SAME CARE AND CONSIDERATION — DUTY TO ASSIST

§ As it relates to the VA's duty to assist "[w]e ... caution those who adjudicate claims of incarcerated veterans to be certain that they tailor their assistance to the peculiar circumstances of confinement. Such individuals are entitled to the same care and consideration as their fellow veterans." *Wood v. Derwinski*, 1 Vet.App. 190, 193 (1991).

§ In regard to an incarcerated veteran's claim for an increased rating, Citing *Wood v. Derwinski*, 1 Vet.App. 190, 193 (1991), the Court opined "[a]lthough the RO claimed an inability to get a fee-basis physician to conduct an examination in the correctional facility, the record contains neither information concerning the efforts expended by

DUTY TO NOTIFY OF REQUIRED INFO AND EVIDENCE (38 U.S.C. § 5103)

the RO in that regard nor any explanation as to why a psychiatrist employed by the VA was not directed to perform the examination." The Court remanded the claim for an examination. *Bolton v. Brown*, 8 Vet.App. 185, 191 (1995).

OVERDEVELOPMENT, VA DECIDES WHEN TO DEVELOP EVIDENCE

§ 38 C.F.R. § 3.304(c) provides the VA discretionary authority to develop any case to the degree it finds necessary. *Shoffner v. Principi*, 16 Vet. App. 208, 213 (2002)[27].

SEE ALSO EXAMINATION, VA (VAE)

SEE ALSO VETERANS CLAIMS ASSISTANCE ACT OF 2000 (VCAA), RETROACTIVE APPLICATION OF VCAA SECTIONS

DUTY TO NOTIFY OF REQUIRED INFO AND EVIDENCE (38 U.S.C. § 5103)

38 C.F.R. §3.159(B)(1) (2002) INVALIDATED

§ 38 C.F.R. § 3.159(b)(1) (2002) was held "invalid because it impose(d) on claimants an arbitrary new deadline that does not represent a reasonable exercise of VA's authority." The new regulation attempted to implement the Veterans Claims Assistance Act of 2000, Pub.L. No. 106-475, 114 Stat.2096 (VCAA) provisions amending 38 U.S.C. §§ 5103(a) and 5103(b)(1) to require the VA to notify a claimant, who has filed a "complete or substantially complete" application, of any information, and any medical or lay evidence, not previously provided to the VA that is necessary to substantiate the claim. While the law provided for the veteran to have up to a year from the date of such notification to provide the additional information or evidence, 38 C.F.R. § 3.159(b)(1) (2002) provided for the VA to allow the veteran 30 days to submit the noticed information and then to adjudicate the claim. The

[27] However, the Federal Circuit accepted jurisdiction in a case with implications, in dicta, for contrary holdings. S*ee Adams v. Principi*, 256 F.3d 1318, 1321 (Fed.Cir.2001). The Federal Circuit in *Adams* noted that it has "generally declined to review non-final orders of the Veterans Court, and we have held that remand orders from the Veterans Court ordinarily are not appealable because they are not final." *Id* citing *Allen v. Principi*, 237 F.3d 1368, 1372 (Fed.Cir.2001); *Winn v. Brown*, 110 F.3d 56, 57 (Fed.Cir.1997). However, in *Adams*, supra, the Federal Circuit held that it can accept jurisdiction over a CAVC remanded appeal if it appears the "remand deprives [the appellant] of his *claimed* right to a decision in his favor on the record as it now stands and might result in that issue becoming moot after further proceedings in the Board of Veterans' Appeals." (emphasis added) The implication, but not the holding, is that if favorable evidence is sufficient to grant the claim it may be error (for the Board? or the CAVC?) to remand the issue for additional development.

DUTY TO NOTIFY OF REQUIRED INFO AND EVIDENCE (38 U.S.C. § 5103)

regulation then provided that the claim would be readjudicated in consideration of any additional information received within the one year time frame.

The Court held that, "…the question is whether a premature denial claim, short of one year, with the promise to reopen reasonably satisfies the one-year requirement. We hold that it does not." *Paralyzed Veterans v. Sec. of Veterans Affairs*, 345 F.3d 1334, 1346 (Fed. Cir. 2003).

VCAA NEW OBLIGATIONS

§ "As this Court has stated in numerous dispositions in reliance on *Quartuccio* [*v. Principi*, 16 Vet.App. 183, 187 (2002)], the VCAA has imposed additional notice obligations on the Secretary, and it is not for the Secretary or this Court to predict what evidentiary development may or may not result from such notice." The Court held that it was enough that the law required the notice, therefore no showing of prejudice was necessary to find error. *Huston v. Principi*, 17 Vet.App. 195, 203 (2003) citing *cf. Charles v. Principi*, 16 Vet.App. 370, 374 (2002) *and Quartuccio, supra*; *Sanchez-Benitez v. Principi*, 259 F.3d 1356, 1363 (Fed.Cir2001) ("vacating Court decision that determined, on basis of record before Court, that remand and further development would not aid appellant in prevailing on issue not yet addressed by Board").

§ 38 C.F.R. § 3.159(b)(1) (2002), IMPLEMENTING VCAA'S DUTY TO NOTIFY, INVALIDATED

§ 38 C.F.R. § 3.159(b)(1) (2002) was held "invalid because it impose(d) on claimants an arbitrary new deadline that does not represent a reasonable exercise of VA's authority." The new regulation attempted to implement the Veterans Claims Assistance Act of 2000, Pub.L. No. 106-475, 114 Stat.2096 (VCAA) provisions amending 38 U.S.C. §§ 5103(a) and 5103(b)(1) to require the VA to notify a claimant, who has filed a "complete or substantially complete" application, of any information, and any medical or lay evidence, not previously provided to the VA that is necessary to substantiate the claim. While the law provided for the veteran to have up to a year from the date of such notification to provide the additional information or

evidence, 38 C.F.R. § 3.159(b)(1) (2002) provided for the VA to allow the veteran 30 days to submit the noticed information and then to adjudicate the claim. The regulation then provided that the claim would be readjudicated in consideration of any additional information received within the one year time frame.

The Court held that, "…the question is whether a premature denial claim, short of one year, with the promise to reopen reasonably satisfies the one-year requirement. We hold that it does not." *Paralyzed Veterans v. Sec. of Veterans Affairs*, 345 F.3d 1334, 1346 (Fed. Cir. 2003).

SMRS, LOST OR DESTROYED, OBLIGATE THE BOARD TO ADVISE OF OTHER FORMS OF EVIDENCE

§ Where a veteran's service medical records have been lost or destroyed, the Board is obligated "to advise that veteran claimant to obtain other forms of evidence, such as lay testimony." *Layno v. Brown*, 6 Vet.App. at 469; *see Dixon v. Derwinski*, 3 Vet.App. 261, 263 (1992); *Garlejo v. Derwinski*, 2 Vet.App. 619, 620 (1992). The Board is certainly free to assess the credibility of the lay testimony, *see Smith v. Derwinski*, 1 Vet.App. 235, 237 (1991), but it is not free to ignore that evidence. *See Horowitz v. Brown*, 5 Vet.App. at 222; *Pritchett v. Derwinski*, 2 Vet.App. 116, 122 (1992).

EQUIPOISE (*SEE* BENEFIT OF THE DOUBT)

EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

EQUITABLE TOLLING, REBUTTABLE PRINCIPLE OF

§ The United States Court of Appeals for the Federal Circuit reversed and remanded the Court of Veterans Appeals (Court or COVA) decision in *Bailey v. Gober*, 10 Vet.App. 453 (1997). The Court decision denied jurisdiction to consider an appeal and did not apply the legal principle of the rebuttable presumption of equitable tolling. The Federal Circuit decision in *Bailey* found that the rebuttable presumption of equitable tolling should have been considered. *Bailey v. West*, 160 F.3d 1360,

EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

1365 (Fed.Cir. 1998) (en banc) (Michel concurred but did not join in the opinion; Bryson, Lourie, Rader and Schall dissented).

The Federal Circuit en banc decision cited the U. S. Supreme Court decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), to conclude that the rebuttable presumption of equitable tolling could be applied to enlarge the statutorily set time limits for filing an appeal to the Court of Veterans Appeals (Court or COVA). The Supreme Court decision in *Irwin* noted the court's inconsistent application of the principle of a rebuttable presumption of equitable tolling in civil rights litigation against the government, a principle commonly applied to private defendants in civil rights litigation, and concluded the principle should also apply in litigation against the government. *See Bailey, supra*, at 1364 citing *Irwin, supra,* at 95. Additionally, the Federal Circuit decision also cited *Houston v. Lack*, 487 U.S. 266, 280 (1988) (Scalia dissenting), which provided for equitable tolling for convicted felons because the prisoner "cannot control or oversee delivery to and receipt by the court clerk." *Bailey, supra*, at 12 citing *e.g., Houston, supra* (prisoner's delivery of notice of appeal to prison authority deemed filed, though statute requires receipt by the clerk).

"*Irwin* and other cases explain that equitable tolling is available in suits between private litigants where, 'the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.'" *Bailey, supra*, quoting *Irwin* at 96 (footnotes omitted); *see also Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1346 (Fed.Cir.1995).

The federal Circuit decision continued by noting that the U. S. Supreme Court decision did not distinguish between time limitations associated with ***statutes of limitation*** ("[T]he time period []within which a litigant must first file suit following the point at which the cause of action arose . . . ." *Bailey, supra*, at 1364) and ***time for review*** ("[O]ther time limits [which] specify the time in which a person must move from one adjudicative forum to another." *Id*.) and concluded that in the Court of Veterans Appeals, due to its unique nature and procedures for adopting Court rules, the rebuttable presumption of equitable tolling applied to the ***time for review***.

The Federal Circuit decision noted that the *Bailey* decision ***overruled*** language in prior decisions which denied consideration of the principle of the rebuttable

EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

presumption of equitable tolling such as *Cummings v. West*, 136 F.3d 1468, 1472 n.2 (Fed.Cir.1998); *Mayer v. Brown*, 37 F.3d 618, 619 (Fed.Cir.1994); *Butler v. Derwinski*, 960 F.2d 139, 140-41 (Fed.Cir.1992); *see Machado v. Derwinski*, 928 F.2d 389, 391 (Fed.Cir.1991). *See Bailey, supra,* at 1368.

IF NOA TIMELY FILED AT AOJ, 120 DAY TIME LIMIT IS TOLLED

§ "We hold as a matter of law that a veteran who misfiles his or her notice of appeal at the same VARO from which the claim originated within the 120-day time judicial appeal period of 38 U.S.C. § 7266, thereby actively pursues his or her judicial remedies, despite the defective filing, so as to toll the statute of limitations." *Santana-Venegas v. Principi*, 314 F.3d 1293, 1298 (2002); citing *Bailey v. West*, 160 F.3d 1360, 1365 (Fed.Cir.1998) (overruling previous holdings that the 120-day time limit could not be waived); *see also Jaquay v. Principi*, 304 F.3d 1276, 1287-89 (Fed.Cir.2002) (holding that a veteran who misfiled his motion for reconsideration of a BVA decision with the VARO within 120 days of the date of the decision exercised "due diligence" which equitably tolled the 120-day statute of limitations for appeals to the Court (38 U.S.C. § 7266)) ("The filing of the misdirected paper itself satisfies the diligence requirement as a matter of law.") citing *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 467, 82 S.Ct. 913, 8 L.Ed.2d 39 (1962).

§ "We hold that, as a matter of law, a veteran who attempts to file a notice of appeal [to the U.S. Court of Appeals] by completing a document that is clearly intended to serve as a notice of appeal and who has that document delivered to the regional office from which the veteran's claim originated within the 120-day statutory period for appeal is entitled to invoke the doctrine of equitable tolling." *Bailey v. Principi*, 351 F.3d 1381, 1385 (Fed.Cir. 2003); *see also, e.g., Santana-Venegas v. Principi*, 314 F.3d 1293, 1298 (Fed.Cir.2002) ("We hold as a matter of law that a veteran who misfiles his or her notice of appeal at the same [regional office] from which the claim originated within the 120-day judicial appeal period of 38 U.S.C. § 7266, thereby actively pursues his or her judicial remedies, despite the defective filing, so as to toll the statute of limitations."); *Jaquay v. Principi*, 304 F.3d 1276, 1287-89 (Fed.Cir.2002) (holding that a veteran who misfiled his motion for reconsideration of

EQUITABLE TOLLING OF STATUTE OF LIMITATIONS

a BVA decision with the VARO within 120 days of the date of the decision exercised "due diligence" which equitably tolled the 120-day statute of limitations for appeals to the Court (38 U.S.C. § 7266)); *Bailey v. West*, 160 F.3d 1360, 1365 (Fed.Cir. 1998) citing *Irwin v. Department of Veterans Affairs*, 498 U.S.C. 89 (1990) (found the rebuttable presumption of equitable tolling could be applied to enlarge the statutorily set time limits for filing an appeal to the Court of Veterans Appeals).

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EQUITABLE TOLLING CAN NOT EXTEND ONE YEAR STATUTORY LIMIT ON CLAIM FILED WITHIN ONE YEAR OF DISCHARGE EFFECTIVE DATE

§ In this case, the veteran filed a claim for service connection of anxiety and depression over one year following separation from service. She had been administratively separated for diagnosed anxiety disorder and personality disorder. The veteran

claimed not to know that she could apply for benefits until the month before she filed her claim. The veteran sought assignment of an earlier effective date base on the legal principle of equitable tolling citing the VA's obligation to provide benefits information to veterans. *Andrews v. Principi*, 16 Vet.App. 309, 311 (2002) citing 38 U.S.C. §§ 7721(a) and 7722(b) and (c).

Citing *Rodriguez v. West*, 189 F.3d 1351 (Fed.Cir.1999), the Court found that equitable tolling could not be extended to 38 U.S.C. § 5110. *Andrews, supra* at 318.

ERRONEOUS ADVICE BY A GOVERNMENT EMPLOYEE

§ "[E]rroneous advice given by a government employee cannot be used to estop the government from denying benefits." *McTighe v. Brown*, 7 Vet.App. 29, 30 (1994); *see also Walker v. Brown*, 8 Vet.App. 356, 359 (1995).

ERROR, HARMLESS VIS A VIS PREJUDICIAL ERROR

§ "[W]here a remand to the Board for readjudication in light of the statutory and regulatory structure would not produce any benefit to the appellant, the Board's failure to discuss whether the apparent increase in disability during the third period of active service was due to the natural progress of the disease is harmless. *See Stadin v. Brown*, 8 Vet.App. 280, 286 (1995) citing 38 U.S.C. § 7261(b)) (Court shall take due account of rule of prejudicial error); *Wray v. Brown*, 7 Vet.App. 488, 493 (1995) (failure to discuss every expert opinion was harmless error where remand would not benefit claimant); *Tedeschi v. Brown*, 7 Vet.App. 411, 414 (1995) (lack of medical evidence of causation coupled with evidence of non-service-connected cause provided plausible basis for Board's decision so that Board's failure to provide reasons or bases for selection of diagnostic codes was harmless error); *Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991) (remand for clearer statement of 'reasons and bases' under 38 U.S.C. § 7104(d)(1) was not required where overwhelming evidence supported Board's decision); *see also Allen v. Brown*, 7 Vet.App. 439, 450 (1995) (en banc) (only basis for determining that failure to provide reasons and bases was not

ERROR, HARMLESS VIS A VIS PREJUDICIAL ERROR

prejudicial to claimant would be where overwhelming evidence supported result reached by Board).

§

> The court is required by statute to "take due account of the rule of prejudicial error." (citing 38 U.S.C. § 7261(b); *Luallen v. Brown*, 8 Vet.App. 92, 96 (1995) (where the BVA erred in purporting to dismiss the appellant's claim under 38 U.S.C. § 7105(d)(5) such error did not result in prejudice to the appellant, since the Court affirmed the BVA decision on other grounds); *Godwin v. Derwinski*, 1 Vet.App. 419, 425 (1991) (BVA's application of the wrong standard in evaluating a hearing loss claim was not prejudicial error warranting a favorable determination where the claim should not have been reopened in the first place); *see also Yabut v. Brown*, 6 Vet.App. 79, 84-85 (1993).) Thus, even where the Court concludes that an error has been committed, it need not – indeed *must* not – vacate or reverse the BVA decision if *it is clear* that the claimant would have been unsuccessful irrespective of the error. (emphasis in text) Similarly, a remand is not required in those situations where doing so would result imposition of unnecessary burdens on the BVA without the possibility of any benefits flowing to the appellant. (citing *See Soyini v. Derwinski*, 1 Vet.App. 540, (1991) (strict adherence to the requirement that the BVA articulate its reasons and bases does not "dictate an unquestioning , blind adherence in the face of overwhelming evidence in support of the [same favorable] result"); *see also Sabonis v. Brown*, 6 Vet.App. 426 (1994) (where the BVA failed to adjudicate an issue of clear and unmistakable error, but the appellant failed to raise the issue with the type of specificity required, there was no basis for a remand).)

Winters v. West, 12 Vet.App. 203, 207 (1999).

BVA ADDRESSES A QUESTION NOT ADDRESSED BY THE RO, PREJUDICIAL ERROR

§ The *Huston* Court held that the appellant had been prejudiced by the BOARD deciding the veteran's motion for revision of a decision based on clear and unmistakable error in the first instance without offering to remand the claim to the

EVIDENCE

RO. *Huston v. Principi*, 17 Vet.App. 195, 207 (2003) citing *Sutton v. Brown*, 9 Vet.App. 553, 564-70 (1996); *Marsh v. West*, 11 Vet.App. 468, 471 (1998); *cf. Bernard v. Brown*, 4 Vet.App. 384, 394 (1993) (The Court has held that when the BVA addresses a question in its decision that has not been addressed by the RO, "it must consider whether the claimant has been given adequate notice of the need to submit evidence or argument on that question and an opportunity to submit such evidence and argument and to address that question at a hearing, and if not, whether the claimant has been prejudiced thereby." A determination by the BOARD that an appellant has not been prejudiced "must be supported by an adequate statement of reasons and bases.").

HARMLESS ERROR, NOT PREJUDICIAL, NO REMAND

§ The *Huston* Court held that although the Board decision failed to provide adequate reasons and bases to support its fact finding and denial of the veterans claim, the appellant was not prejudiced because there was no medical nexus evidence which was necessary for a favorable decision and the claim would not be remanded on those grounds. *Huston v. Principi*, 17 Vet.App. 195, 205 (2003) citing 38 U.S.C. § 7261(b)(2); *Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991).

EVIDENCE

BVA CANNOT RELY EXCLUSIVELY UPON FAVORABLE EVIDENCE

§ The BVA cannot rely only upon evidence it considers to be favorable to its position. It must base its decision upon all the evidence of record. *See Smith v. Derwinski*, 2 Vet.App. 137, 141 (1992) citing *Willis v. Derwinski*, 1 Vet.App. 63, 66 (1990).

BVA FAILURE TO ADDRESS EVIDENCE CONCLUSIVE

§ The BVA's failure to address evidence in its decision is conclusive of whether it considered such evidence. *See Douglas v. Derwinski*, 2 Vet.App. 435, 440 (1992).

EVIDENCE

BVA MUST CONSIDER CLAIMANT'S SWORN TESTIMONY

§ A claimant's sworn testimony is evidence which the Board must consider, and the Board must "provide adequate reasons or bases for its rejection of the appellant's testimonial evidence," and the evidence of record. *See Pruitt v. Derwinski*, 2 Vet.App. 83, 85 (1992); *see also Suttman v. Brown*, 5 Vet.App. 127, 132 (1993); *EF v. Derwinski*, 1 Vet.App. 324 (1991). The BVA cannot ignore assertions made by an appellant in support of his appeal. *See Sm*ith v. Derwinski, 2 Vet.App. 137, 141 (1992).

BVA PROVIDES ANALYSIS OF CREDIBILITY AND PROBATIVE VALUE

§ Board decisions must contain an "analysis of the credibility or probative value of the evidence submitted by and on behalf of appellant in support of [her] claim nor a statement of the reasons or bases for the implicit rejection of this evidence by the Board." *Gabrielson v. Derwinski*, 7 Vet.App. 36, 40 (1994) citing *Gilbert v. Derwinski*, 1 Vet.App. 49, 59 (1990). "Therefore, the case should be remanded." *Id.*, citing *Ledford v. Derwinski*, 3 Vet.App. 87, 89-90 (1992) ("A remand is required where the BVA fails to provide an adequate statement of 'reasons and bases' for its findings and conclusions, with respect to both the merits and the application of the 'benefit of the doubt' under 38 U.S.C. § 5107 (b)").

CLEAR AND UNMISTAKABLE EVIDENCE SUFFICIENT TO REBUT PRESUMPTION OF SOUNDNESS

BARE, CONCLUSORY MEDICAL BOARD OPINION IS NOT

§ A Medical Board finding that a veteran's condition was EPTE and was not aggravated in service was not accepted by the *Miller* Court as clear and unmistakable sufficient to rebut the presumption of sound condition on entry into service because the medical opinion was not supported by evidence of record contemporary to the time in question. "A bare conclusion, even one written by a professional, without a factual predicate in the record does not constitute clear and unmistakable evidence sufficient to rebut the presumption of soundness." *Miller v. West*, 11 Vet.App. 345, 348 (1998).

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MEDICAL BOARD OPINION BASED ON CONTEMPORANEOUS EVIDENCE CAN BE

§ The *Jordan v. Principi* Court found the Board medical opinion supported by contemporaneous medical evidence of record when it found the condition was EPTE and not aggravated by service was clear and unmistakable sufficient to rebut the presumption of soundness on entry into service. *Jordan*, 17 Vet.App. 261, 281 (2003). In part, the *Jordan* Court relied on the decision in *Adam v. West*, which cited current regulations (38 C.F.R. § 3.304(b)(1)), to conclude that medical evidence "is contemplated for purposes of rebutting the presumption of sound condition…." And therefore a Board medical opinion based on that evidence was sufficient to rebut the presumption of soundness. *Adam*, 13 Vet.App. 453, 456 (2000) citing *Vanerson v. West*, 12 Vet.App. 254, 260-61 (2000) (providing for "the evidence as a whole, [to] clearly and unmistakably demonstrate[] that the injury or disease existed prior to service.").

COURT DOES NOT DETERMINE CREDIBILITY

§ "[I]t is not the function of [the] Court to determine the credibility of evidence. *See Lizaso v. Brown* 5 Vet.App. 380, 386 (1993); *Goodsell v. Brown*, 5 Vet.App. 36, 40 (1993); *Abernathy v. Derwinski*, 2 Vet.App. 391, 394 (1992); *Hatlestad v. Derwinski*, 1 Vet.App. 164, 169 (1991); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990).

EVIDENCE NOT REQUIRED TO BE CONTEMPORANEOUS OR MEDICAL (38 C.F.R. § 3.303(D))

§ Nowhere is it required that in order to establish a claim, a veteran must submit evidence "contemporaneous" with the time of injury, nor is it required that the evidence be medical in nature. *See* 38 C.F.R. § 3.303(d) (1991); s*ee also Cartright v. Derwinski*, 2 Vet.App. 24 (1991).

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INDEPENDENT MEDICAL EVIDENCE, IMPARTIAL PROCESS TO OBTAIN, "FAIR PROCESS PRINCIPLE"

§ "We hold that basic fair play requires that evidence be procured by the agency in an impartial, unbiased, and neutral manner." *Austin v. Brown*, 6 Vet.App. 547, 552 (1994) citing *Thurber v. Brown*, 5 Vet.App. 119 (1993).

"The Supreme Court case of *Gonzales v. United States*, 348 U.S. 407, 75 S.Ct. 409, 99 L.Ed. 467 (1995), referenced in *Thurber*, is perhaps most aptly illustrative of this fair process principle. In *Gonzales* the Supreme Court held that despite the silence of the applicable statute and regulations when 'viewed against our underlying concepts of procedural regularity and basic fair play." *Austin, supra* at 551-52 citing *Thurber, supra*, at 123 quoting *Gonzales*, 348 U.S. at 412, 75 S.Ct. at 412) (emphasis added). "[A]lthough the combination of investigative and adjudicative functions does not necessarily create an unconstitutional 'bias or the risk of bias or prejudgment' in the administrative adjudication, the Supreme Court cautioned that we should be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice'." *Austin supra*, at 552 citing *Withrow v. Larkin*, 421 U.S. 35, 47, 54, 95 S.Ct. 1456, 1464, 1468, 43 L.Ed.2d 712 (1975). "'[I]n order to establish improper prejudgment of a case, it must appear to 'a disinterested observer ... that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it'." *Austin supra*, at 552 citing *City of Charlottesville v. FERC*, 774 F.2d 1205, 1212 (D.C. Cir. 1985), cert. denied, 475 U.S. 1108, 106 S.Ct. 1515, 89 L.Ed.2d 914 (1986).

INDEPENDENT MEDICAL EXPERT (IME) OPINION

§ "An [Independent Medical Expert] IME opinion is only that, an opinion. In an adversarial proceeding, such an opinion would have been subject to cross-examination on its factual underpinnings and its expert conclusions. The VA claims adjudication process is not adversarial, but the Board's statutory obligation under 38 U.S.C. § 7104(d)(1) to state 'the reasons or bases for its findings and conclusions' serves a function similar to that of cross examination in adversarial litigation. The BVA cannot evade this statutory responsibility merely by adopting an IME opinion as its own, where, as here, the IME opinion fails to discuss all the evidence which

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appears to support appellant's position. Accordingly, the BVA decision here contained 'neither an analysis of the credibility or probative value of the evidence submitted by and on behalf of appellant in support of [her] claim nor a statement of the reasons or bases for the implicit rejection of this evidence by the Board.'" *See Gabrielson v. Brown*, 7 Vet.App. 36, 40, (1994) citing *Gilbert v. Derwinski*, 1 Vet.App. 49, 59 (1994). "Therefore, the case should be remanded." *See Gabrielson, supra* citing *Ledford v. Derwinski*, 3 Vet.App. 87, 89-90 (1992).

LAY TESTIMONY

COMBAT INJURY REQUIRES ONLY LAY TESTIMONY (38 U.S.C.A. § 1154(B) (WEST 1995); 38 C.F.R. § 3.304(D))

§ Under 38 U.S.C.A. § 1154(b) (West 1995) and its implementing regulations, 38 C.F.R. § 3.304(d), a veteran may establish a claim of entitlement to service connection for a combat -related injury on the basis of lay testimony alone and the BVA may not rely solely upon the lack of an official record contemporaneous with a claimed injury or disorder in denying service connection for that injury or disorder. *See Swanson v. Brown*, 4 Vet.App. 148, 152 (1993); *Chipego v. Brown*, 4 Vet.App. 102, 105 (1993); *Sheets v. Derwinski*, 2 Vet.App. 512, 515 (1992); *Smith v. Derwinski*, 2 Vet.App. 137, 140 (1992). Although the BVA is not required to accept as correct every assertion made by a veteran with respect to whether a disability was incurred in or aggravated by service, it may not rely on the fact that the veteran's lay testimony is not supported by corroborative clinical evidence in order to meet its requirement of rebutting the veteran's lay testimony with "clear and convincing evidence to the contrary." 38 U.S.C.A. § 1154(b) (West 1992); *See Sheets, supra.*

LAY TESTIMONY SUFFICIENT TO SC COMBAT RELATED INJURY

§ A veteran may establish a claim of service connection for a combat-related injury on the basis of sworn statements alone, and he does not need to supply objective medical evidence to support the claim. *See Smith v. Derwinski*, 2 Vet.App. 137, 140 (1992).

TESTIMONY, CREDIBILITY DETERMINATION, HEARING OFFICER

§

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> In the case of oral testimony[28], a hearing officer may properly consider the demeanor of the witness, the facial plausibility of the testimony, and the consistency of the witness' testimony with other testimony and affidavits submitted on behalf of the veteran. In determining whether documents submitted by a veteran are 'satisfactory' evidence under section 1154(b), a VA adjudicator may properly consider internal consistency, facial plausibility, and consistency with other evidence submitted on behalf of the veteran.

See Caluza v. Brown, 7 Vet.App. 498, 511 (1995).

LAY TESTIMONY, REQUIRES WITNESS COMPETENT TO TESTIFY TO FACT

§ "As a general matter, in order for any testimony to be probative of any fact, the witness must be competent to testify as to the facts under consideration. *See Layno v. Brown*, 6 Vet.App. 465, 469 (1994) citing *Espiritu v. Derwinski*, 2 Vet.App. 492 (1992); Fed.R.Evid. 601. "First a witness must have personal knowledge in order to be competent to testify to a matter." *Id* citing Fed.R.Evid. 602; *Jaroslawicz v. Seedman*, 528 F.2d 727, 732 (2d Cir.1975) (witness not competent to testify about event at which he was not present). "Personal knowledge is that which comes to the witness through the use of his senses--that which is heard, felt seen, smelled, or

[28] "Credible testimony is that which is plausible or capable of being believed." *Caluza v. brown*, 7 Vet.App. 498, 511 (1995) (citing *Indiana Metal Prods. v. NLRB*, 442 F.2d 46, 52 (7th Cir.1971);citing *Lester v. State*, 212 Tenn.338, 370 S.W.2d 405, 408 (1963)); *See also Weliska's Case*, 125 Me. 147, 131 A. 860, 862 (1926); *Erdmann V. Erdmann*, 127 Mont. 252,261 P.2d 367, 369 (1953) ("A credible witness is one whose statements are within reason and believable...."). "The term 'credibility 'is generally used to refer to the assessment of oral testimony." *Caluza, supra*, (citing *e.g., Anderson v. Bessemer City*, 470 U.S. 564, 557, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985) ("only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said"); *NLRB v. Walton Manufacturing Co.*, 369 U.S. 404, 408, 82 S.Ct. 853, 855, 7 L.Ed.2d 829 (1962) trier of fact "sees the witnesses and hears them testify, while the [NLRB] and the reviewing court look only at cold records"); *Jackson v. Veterans Admin.*, 768 F.2d 1325, 1331 (Fed. Cir. 1985) (trier of fact has opportunity to observe "demeanor" of witness in determining credibility). *Caluza, supra*

"The credibility of a witness can be impeached by a showing of interest, bias, inconsistent statements, or, to a certain extent, bad character. *See Caluza, supra* (citing *State v. Asbury*, 187 W.Va. 87, 415 S.E.2d 891, 895 (1992)); *see also, Burns v. HHS*, 3 F.3d 415, 417 (Fed. Cir. 1993) (testimony was impeached by witness' "inconsistent affidavits" and "expressed recognition of the difficulties of remembering specific dates of events that happened ... long ago"); *Mings v. Department of Justice*, 813, F.2d 384, 389 (Fed. Cir. 1987) (Impeachment by testimony which was inconsistent with prior written statements). "Although credibility is often defined as determined by the demeanor of a witness, a document may also be credible evidence." *Caluza, supra*. (citing *e.g., Fasolino Foods v. Banca Nazionale del Lavoro*, 761 F.Supp. 1010. 1014 (S.D.N.Y.1991); *In re National student Marketing Litigation*, 598 F.Supp.575, 579 (D.D.C. 1984).

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tasted." *Id* citing *United States v. Brown*, 540, F.2d 1048, 1053 (10th Cir.1976) (witnesses may testify "upon concrete facts within their own observation and recollection--that is, facts perceived from their own senses, as distinguished from their opinions or conclusions drawn from such facts"), *cert. denied*, 429 U.S. 1100, 97 S.Ct. 1122, 51 L.Ed.2d. 549 (1977). "Competency, however, must be distinguished 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. *Id* citing *Cartright v. Derwinski*, 2 Vet.App. 24, 25 (1991) ("Although interest may affect the credibility of testimony, it does not affect competency to testify."); *Mason v. United States*, 402 F.2d 732, 738 (8th Cir.1968) ("While the opportunity of . . . [the] witness to observe . . . was relatively brief, this factor goes to the weight of the evidence, not to its admissibility."), *cert. denied*, 394 U.S. 950, 89 S.Ct. 1288, 22 L.Ed.2d 484 (1969).

LAY TESTIMONY CAN ESTABLISH CONTINUITY OF SYMPTOMATOLOGY AND OBSERVABLE CONDITIONS (38 C.F.R. § 3.303(A))

§ The Court has held that a lay assertion of medical causation will not serve to reopen a claim. However, where the determinative issue is not one of medical causation but of continuity of symptomatology, lay testimony may suffice to reopen a claim. *Moray v. Brown*, 5 Vet.App. 211, 214 (1993) *citing to Grottveit v. Brown*, 5 Vet.App. 91, 92 (1993); *also see* 38 C.F.R. § 3.303(b) (VA must consider all evidence, including medical and lay evidence); *cf. Godfrey v. Brown*, 7 Vet.App. 398, 406 (1995) (certain medical records, while new, were not material because they were not relevant to and probative of the issue of continuity of symptomatology after service); *Cornele v. Brown*, 6 Vet.App. 59, 62 (1993) (physician's report was not material because it did not relate to continuity of symptomatology and thus did not link in-service accident to current cervical spine disability). "In this instance, the appellant's statements relate to continuity of symptomatology. When viewed in the context of all the evidence, including ... the notation in a service medical record indicating possible worsening in

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severity during service, the statements are material." *Falzone v. Brown*, 8 Vet.App. 398, 403 (1995).

"In the instant case, the appellant has described the observable flatness of his feet and the accompanying pain. Therefore, his own statements are competent as to the issues of continuity of pain since service and the observable flatness of his feet." *Falzone, supra,* at 405.

LAY TESTIMONY IS NOT MEDICAL NEXUS EVIDENCE

§ Where medical evidence of nexus or etiology is required to well ground a claim, lay persons testimony cannot meet the requirement because they are not competent to offer a medical opinion. *See Stadin v. Brown*, 8 Vet.App. 280, 284 (1995) (lay testimony cannot provide medical evidence because lay persons are not competent to offer medical opinions); *cf. Charles v. Principi*, 16 Vet.App 370, 374-75 (2002) citing 38 U.S.C. § 5103A(d); *Caluza v. Brown*, 7 Vet.App. 498, 504 (1995) (where determinative issue involves either medical etiology or medical diagnosis, competent medical evidence is required)]. Competent evidence of inservice and continuity of symptomatology provided by the veteran's testimony where determinative issue does not require medical expertise, lay evidence may suffice by itself); *Falzone v. Brown*, 8 Vet.App. 398, 406 (1995); *Layno v. Brown*, 6 Vet.App. 465, 469-70 (1994) (lay evidence is competent to establish features or symptoms of injury or illness).

LAY WITNESS TESTIMONY MAY BE SUFFICIENT

§ "[L]ay witnesses are competent to provide testimony that may be sufficient to substantiate a claim of service connection for an injury." *Layno v. Brown*, 6 Vet.App. 465, 469 (1994); *Smith (Bernard) v. Brown*, 9 Vet.App. 363 (1996); *see* 38 U.S.C.A. § 1154(a) (West 1995) (evidence to be considered in service connection claims includes "all pertinent medical and lay evidence; 38 C.F.R. § 3.303(a) (1995) (determination of service connection to be based on "entire evidence of record"); *see Horowitz v. Brown*, 5 Vet.App. 217, 221-22 (1993) (Court remanded service connection claim for Meniere's syndrome where Board did not provide adequate reasons or bases for rejecting lay evidence of consistent symptomatology), *overruled*

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in part, Butts v. Brown, 5 Vet.App. 532, 540 (1993) (en banc) (overruling only that part of *Horowitz* concerned with standard of judicial review of Board's selection of diagnostic code for tinnitus claim); *Cartright v. Derwinski*, 2 Vet.App. 24, 25 (1991) (VA regulations do not "provide that a veteran must establish service connection through medical records alone."). Indeed, where a veteran's service medical records have been lost or destroyed, the Board is obligated "to advise that claimant may obtain other forms of evidence, such as lay testimony." *See Layno* at 469; *see Dixon v. Derwinski*, 3 Vet.App. 261, 263 (1992); *Garlejo v. Derwinski*, 2 Vet.App. 619, 620 (1992). The Board is certainly free to assess the credibility of the lay testimony, *see Smith v. Derwinski*, 1 Vet.App. 235, 237 (1991), but it is not free to ignore that evidence. *See Horowitz* at 222; *Pritchett v. Derwinski*, 2 Vet.App. 116, 122 (1992) (absent "clearly stated reasons and bases, to include an assessment of credibility by the BVA," the Court cannot review the Board's ultimate conclusion); *Gilbert v. Derwinski*, 1 Vet.App. 49 (1990). (A bare conclusory statement, without both supporting analysis and explanation, is neither helpful to the veteran, nor `clear enough to permit effective judicial review', nor in compliance with statutory requirements.") (Quoting *International Longshoremen's National Mediation Board*, 870 F.2d 733, 735 (D.C. Cir. 1989)).

MEDICAL OPINION EVIDENCE

BVA CONSIDERATION OF MEDICAL OPINION EVIDENCE

BOARD CAN CONSIDER ONLY INDEPENDENT MEDICAL EVIDENCE

§ BVA panels must consider only independent medical evidence to support their findings rather than their own medical judgment in the guise of a Board opinion. *See Flash v. Brown*, 8 Vet.App 332, 339 (1995); *Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991); *Tucker v. Derwinski*, 2 Vet.App. 201, 203 (1992).

BVA CANNOT SIMPLY POINT TO ABSENCE OF MEDICAL EVIDENCE

§ The BVA "must do more than simply point to an absence of medical evidence." *See Rowell v. Principi*, 4 Vet.App. 9, 19 (1993).

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BVA MUST PROVIDE A MEDICAL BASIS, OTHER THAN ITS OWN

§ The Board "must provide a medical basis other than its own unsubstantiated conclusions to support its ultimate decision." *Ussery v. Brown*, 8 Vet.App. 64, 67 (1995); *see also ZN v. Brown*, 183, 194 (1994) (citing in-service symptomatology the Board reached its own medical conclusion that the veteran did not acquire aids in service).

BVA OBLIGATED TO OBTAIN INDEPENDENT MEDICAL OPINION

§ In response to the Court's holding in *Austin v. Brown*, 6 Vet.App. 547 (1994), the Chairman of the Board of Veterans' Appeals issued Memorandum No. 1-9417, August 16, 1994. As a result the Board may not rely upon a medical opinion obtained from a BVA Medical Adviser since it violates the "fair process principle underlying *Thurber*." *See Thurber v. Brown*, 5 Vet.App. 119, 126 (1993).

BOARD MAY FAVOR ONE MEDICAL OPINION OVER ANOTHER

§ "It is not error for the BVA to favor the opinion of one competent medical expert over that of another when the Board gives an adequate statement of reasons and bases. It is the responsibility of the BVA, not this Court, to assess the credibility and weight to be given to evidence." *Owens v. Brown*, 7 Vet.App. 429, 433 (1995) citing *Wood v. Derwinski*, 1 Vet.App. 190, 192 (1991).

IN CONTRARY CONCLUSIONS, BOARD MUST POINT TO INDEPENDENT MEDICAL EVIDENCE

§ "Although the BVA is not required to accept examining physicians' findings, it is required to state reasons and bases for contrary conclusions and point to medical bases other than its own opinion for the decision." *See Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991); *Simon v. Derwinski*, 2 Vet.App. 621, 623 (1992).

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CURRENT MEDICAL FINDINGS IS NOT LESS VALUABLE THAN HISTORICAL FINDINGS

§ "Although a rating specialist is directed to review the recorded history of a disability in order to make a more accurate evaluation, *see* 38 C.F.R. § 4.2 (1993), the regulation does not give past medical reports precedence over current findings." *Francisco v. Brown*, 7 Vet.App. 55, 58 (1994).

LAY PERSONS CANNOT OFFER MEDICAL OPINIONS

§ Lay persons are not competent to offer medical opinions. *See Espiritu v. Derwinski*, 2 Vet.App. 492, 494 (1992).

MEDICAL NEXUS EVIDENCE, PARSING OF MEDICAL OPINIONS

§ "The Courts word parsing some of its medical nexus cases has created an unclear picture for ascertaining what degree of certainty is necessary in a medical opinion in order to establish a plausible medical nexus. *Compare Obert v. Brown*, 5.Vet.App. 30, 33 (1993) (suggesting that a doctors opinion, expressed in terms of *may*, was too speculative, on its own, to establish a well-grounded claim), and *Tirpak V. Derwinski*, 2 Vet.App. 609, 610-11 (1992) (holding that a doctor's opinion that the veteran's service-connected condition "may or may not" have contributed to his cause of death was inadequate nexus evidence to well grounded the claim), *with Alemany v. Brown*, 9 Vet.App. 518, 519 (1996) (holding that a medical opinion that said, "It is possible that the stress of war may have unleashed a process that was dormant and latent[,] and it is possible that he would have never in his life developed convulsions," if not for the stress of the war, was sufficient nexus evidence to well ground a claim), *Molloy v. Brown*, 9 Vet.App. 513, 516 (1996) (stating that a medical opinion, expressed in terms of could was sufficient to satisfy the nexus requirement of a well-grounded claim), *Watai v. Brown* 9 Vet.App. 441, 443 (1996) (holding that two medical opinions, one stating that there "probably" was a relationship to service and the other stating "there very well might have been," was sufficient medical nexus evidence for a well-grounded claim), and *Lathan v. Brown*, 7 Vet.App. 359, 366 (1995) (holding that medical evidence expressed in terms of *possible* was, sufficient for a well-

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grounded claim and stating that a medical opinion need not be expressed in terms of certainty to satisfy the requirements of a well-grounded claim); *see also Hernandez-Toyens v. West*, 11 Vet.App. 379, 382 (1998) (holding that evidence of a "possible or plausible" connection between veteran's "current condition and . . . in-service incurrence" was sufficient to well ground the claim and summarizing the case law on the degree of certainty required in medical opinions)." *See Hicks v. West*, 12 Vet.App. 86, 90-91 (1998).

MEDICAL "NON-EVIDENCE", NO OPINION ONE WAY OR THE OTHER

§ A medical opinion that does not opine whether a medical condition did or did not exist, that is, an opinion that is inconclusive, may be characterized as "non-evidence". *See Perman v. Brown*, 5 Vet.App. 237, 241 (1993) citing *Sklar v. Brown*, 5 Vet.App. 140, 145-46 (1993); *Kates v. Brown*, 5 Vet.App. 93-95 (1993); *Tirpak v. Derwinski*, 2 Vet.App. 609 (1992).

OPINION BASED ON *REJECTED* HISTORY PROVIDED BY VETERAN NOT "PROBATIVE"

§ "In *Reonal v. Brown*, 5 Vet.App. 458, 460-61 (1993), the Court stated:

> The issue here is the basis upon which [the doctor's] opinion was made. [The doctor] relied upon appellant's account of his medical history and service ground, recitations which had already been rejected by the earlier RO decision. An opinion based upon an inaccurate factual premise has no probative value. (emphasis in text)

See Kightly v. Brown, 6 Vet.App. 200, 205 (1994).

MEDICAL OPINION DOES NOT REQUIRE MEDICAL DOCTOR

§ "A nurse's statement, like a doctor's statement, regarding the possibility of diabetes resulting from his treatment as a POW is sufficient to make the appellant's claim well ground." *Goss v. Brown*, 9 Vet.App. 109, 115-16 (1996) citing *Williams (Willie) v. Brown*, 4 Vet.App. 270, 273 (1993) ("[n]owhere is it provided in law or regulation that opinions by the examining psychiatrists are inherently more persuasive than that

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of other competent mental health professionals," there including a registered nurse); *Espiritu v. Derwinski*, 2 Vet.App. 492, 494 (1992); *cf. Jenkins v. United States*, 307 F.2d 637, 644 (D.C.Cir.1962) (to qualify as an expert, a person need not be licensed to practice medicine, but just have "'special knowledge and skill in diagnosing and treating human ailments'" (citations omitted)); *cf. Black v. Brown*, 10 Vet.App. 279, 284 (1997) (limited the value of a nurse's testimony to well ground her husband's claim. In *Black, supra*, the Court, prior to determining well groundedness, determined that: 1. the nurse did not establish that she had training in cardiology (the claim was service connection of a cardiac condition); nor, 2. had she established that she participated in the treatment of the veteran. Failing these two tests, the Court ruled her testimony could not well ground the case as a trained medical person. Judge Kramer dissented).

MEDICAL OPINION PROBATIVE BASED ON HISTORY PROVIDED BY VETERAN

§ There is nothing inherently nonprobative about a medical opinion predicated on history. It is only history which has been rejected as inaccurate that can render a health practitioner's statement predicated on that history nonprobative. *See Elkins v. Brown*, 5 Vet.App. 474, 478 (1993) ("Appellant's factual contentions have been considered previously by the RO and the BVA, and they cannot be accepted as 'new and material' evidence simply because they now form the basis of a medical opinion); *Reonal v. Brown*, 5 Vet.App. 458, 460-61 (1993) (finding that presumption of credibility did not arise because physician's opinion was based upon "an inaccurate factual premise" and thus had "no probative value" since it relied upon veteran's "account of his medical history and service background which had already been *rejected* by RO, and hence holding opinion not to be "material" evidence); *cf. Swann v. Brown*, 5 Vet.App. 229 (1993) (Board not bound to accept opinions of two doctors who made diagnoses of post-traumatic stress disorder almost 20 years following appellant's separation from service and who necessarily relied on history as related by appellant. "Their diagnoses can be no better than the facts alleged by the appellant.")

EVIDENCE

MOST RECENT EXAMINATION MAY NOT BE CONTROLLING

§ "While the Court reasoned (in *Francisco v. Brown*, 7 Vet.App. 55 (1994)) that the present level of disability is the issue to be decided, the Court's decision does not stand for the proposition that the most recent examination is necessarily and always *controlling*." *Jacobsen v. West*, 13 Vet.App. 35, 36 (1999) (emphasis in text) citing *cf. Fenderson v. West*, 12 Vet.App. 119 (1999) (The rule which provides that the present level of disability is of primary importance when entitlement to an increased rating is at issue, is not applicable to the assignment of an initial rating for a disability). In *Jacobsen, supra*, the Court vacated and remanded the Board decision finding that the VA relied on the most recent examination of three although the first two were consistent and the third was inadequate.

TREATING PHYSICIAN OPINION, NO GREATER WEIGHT

§ While the Court has required that "the BVA must articulate the reasons or bases for accepting or rejecting the medical opinion of treating physicians[]" the Court has declined to "adopt a rule that gives the opinions of treating physicians greater weight in evaluating claims made by veterans." *Guerrieri v. Brown*, 4 Vet.App. 467, 473 (1993) citing *Chisem v. Brown*, 4 Vet.App. 169, 176 (1993).

MEDICAL TREATISE EVIDENCE

§

> A veteran with a competent medical diagnosis of a current disorder may invoke an accepted medical treatise in order to establish the required (medical) nexus[29] (for service connection); in an appropriate case it should not be necessary

[29] In Quartuccio, the Court found {1} there was medical evidence that the veteran had a current disability of tinnitus [(citing 38 U.S.C. 5103A(d) (2) (A) and *Caluza v. Brown*, 7 Vet.App. 498, 504 (1995) (where determinative issue involves either medical etiology or medical diagnosis, competent medical evidence is required)], {2} competent evidence of inservice and continuity of symptomatology provided by the veteran's testimony (citing *Caluza, supra* (where determinative issue does not require medical expertise, lay evidence may suffice by itself); *Falzone v. Brown*, 8 Vet.App. 398, 406 (1995); *see also Layno v. Brown*, 6 Vet.App. 465, 469-70 (1994) (lay evidence is competent to establish features or symptoms of injury or illness)), and {3} the third element of "competent medical evidence addressing whether there is a nexus between his tinnitus and his active service was absent (*see* 38 U.S.C. § 5103A(d)(2)(C)). Since all of the elements to establish the claim was satisfied except for the medical nexus evidence, the Secretary was obligated by his duty to assist requirements to provide a medical examination. *Charles v. Principi*, 16 Vet.App 370, 374-75 (2002) citing 38 U.S.C. § 5103A(d).

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> to obtain the services of medical personnel to show how the treatise applies to his case.

Hensley v. West, 212 F.3d 1255, 1265 (Fed.Cir.2000); citing *see also Wallin v. West*, 11 Vet.App. 509, 514 (1998) (holding that medical treatises can serve as the requisite evidence of nexus).

PRESUMPTION IS NOT EVIDENCE

§ "This court has never treated a presumption as any form of evidence." *See Routen v. West*, 142 F.3d 1434, 1439 (Fed.Cir.1998) citing, *e.g., A.C. Aukerman Co. v. R. L. Chaides Constr. Co.*, 960 F.2d 1020, 1037 (Fed.Cir.1992) ("[A] presumption is not evidence."); *see also, Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935) ("[A presumption] cannot acquire the attribute of evidence in the claimant's favor."); *New York Life Ins. Co. v. Gamer*, 303 U.S. 161, 171 (1983) ("[A] presumption is not evidence and may not be given weight as evidence."). The U.S. Court of Appeals for the Federal Circuit specifically cited *Jensen v. Brown*, 19 F3.d 1413, 1145 (Fed.Cir.1994) as <u>not</u> supporting the proposition that presumption was evidence. *Ibid*.

The Federal Circuit *Routen, ibid*, decision found that the Court of Veterans appeals had "read[] more into the *Jensen, supra*, decision than was there (in the Federal Circuit decision)[]" when it concluded "[i]t appears that the Federal Circuit in reversing this Court has determined, as a matter of law, that 38 C.F.R. § 3.306(b)(2)[30] constituted 'new and material' evidence, and that appellant's claim must be reopened." *Routen, supra*, quoting *Jensen v. Brown*, 7 Vet.App. 27, 28 (1994).

"[W]e . . . hold that the misapplication of, or failure to apply, a statutory or regulatory burden-shifting presumption does not constitute 'new and material evidence' for the purpose of reopening a claim under 38 U.S.C. § 5108." *Routen, supra*, at 1440.

[30] The *Routen* Court did not take judicial notice of the fact that Public Law 93-295, with effective date of May 1, 1974, was not adopted as a final rule (§ 3.306) until December 15, 1992, (over 18 years after the law had become effective) and made retroactive effective May 1, 1974. *See* 57 Fed. Reg. 59,296 (Dec. 15, 1992). Thus, any adjudication of a claim where § 3.306 had application has potential clear and unmistakable error if the veteran filed the claim in the period May 1974 through the end of November 1992. In essence, the VA may have failed to apply the law in these cases assuming the regulations were adequate when, in fact, the rules were not in conformance with the law.

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In *Routen, ibid*, the Federal Circuit supported its holdings by citing *A.C. Aukerman*, 960 F.2d at 1037; *Michael H. Graham*, 1 *Handbook of Federal Evidence*, § 301.1 at 156-57 & nn. 1-3 (4th ed. 1996) ("[I]t is now universally recognized that a presumption is a rule of law for the handling of evidence, not a species of evidence."); Ronald J. Allen, *Presumptions, Inferences and Burden of Proof in Federal Civil Actions -- An Anatomy of Unnecessary Ambiguity and a Proposal for Reform*, 72 Nw. U. L. Rev. 892, 903 (1982) ("Presumptions are not evidence -- they are labels applied to decisions about evidentiary matters.").

The Federal Circuit, in *Routen, ibid*, continued:

> [t]he presumption affords a party, for whose benefit the presumption runs, the luxury of not having to produce specific evidence to establish the point at issue. When the predicate evidence is established that triggers the presumption, the further evidentiary gap is filled by the presumption. *See* 1 *Winstein's Federal Evidence* § 301.02[1], at 301-7 2d ed. 1997); 2 *McCormick on Evidence* § 342, at 450 (Johnson W. Strong ed., 4th ed. 1992). However, when the opposing party puts in proof to the contrary of that provided by the presumption, and that proof meets the requisite level, the presumption disappears. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1980); *A.C. Aukerman*, 960 F.2d at 1037 ("[A] presumption . . . completely vanishes upon the introduction of evidence sufficient to support a finding of the nonexistence of the presumed fact."); *see also Winstein's Federal Evidence* § 301App. 100, at 301App.-13 (explaining that in the "bursting bubble" theory once the presumption is overcome, then it disappears from the case); 9 *Wigmore on Evidence* § 2487, at 295-96 (*Chadburn* rev. 1981). *See generally Charles V. Laughlin, In Support of the Thayer Theory of Presumptions* 52 Mich. L. Rev. 195 (1953).

The party originally favored by the presumption is now put to his factually-supported proof. This is because the presumption does not shift the burden of persuasion, and the party on whom that burden falls must ultimately prove the point at issue by the requisite standard of proof. *See* Fed. R. Evidence. 301; *A.C. Aukerman*, 960 F.2d at 1038-39. *But see McCormick on Evidence* § 344, at 470-72 (describing an alternative to the bursting bubble rule in which application of a presumption shifts the burden of

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persuasion); Edmund M. Morgan, *Presumptions*, 12 Wash. L. Rev. 225 (1937). *Ibid* at 1440.

Here, the question is what evidence constitutes "new and material evidence" entitling a petitioner to reopen a previously decided and closed case. By its terms, § 5108 requires "evidence," which the regulations describe as "evidence not previously submitted to agency decisionmakers which bears directly and substantially upon the specific matter under consideration, [and] which is neither cumulative nor redundant." 38 C.F.R. § 3.156(a) (1997). Once new and material factual *evidence* is presented that warrants reopening of the case, the presumption may well result in a decision in favor of the veteran. But that is a matter that goes to the merits of the case, not one that goes to the question of whether the rules of finality are overcome[31]. *Ibid* at 1440-41.

The *Routen* court held that *Spencer v. Brown*, 17 F.3d 368 (Fed.Cir.1994) "upon a showing of a new basis of entitlement to a claimed benefit as a result of an intervening change in law or regulation, 38 U.S.C. § 7104(b) does not preclude consideration of the claim even though based on facts in a previously and finally denied claim." *See Spencer supra*, at 373.

The *Routen* court then, with approval, quoted *Spencer v. Brown*, 4 Vet.App. 283, 288-89 (1993):

> When a provision of law or regulation creates a new basis of entitlement to benefits, as through liberalization of the requirements for entitlement to a benefit, an applicant's claim of entitlement under such law or regulation is a claim separate and distinct from a claim previously and finally denied prior to the liberalizing law or regulation. The applicant's later (sic latter) claim, asserting rights which did not exist at the time of the prior claim, is necessarily a different claim.

The *Routen* court quoted the Federal Circuit decision in *Spencer*, *supra* at 372, which quoted the Court of Veterans Appeals decision in *Spencer*, 4 Vet.App. 288-89, in

[31] "*Accord* Vet. Aff. Op. Gen. Couns Prec. 38-97, 1997 WL 796591 (reaching the same conclusion for four reasons: (1) a presumption is not evidence, (2) misapplication or failure to apply a pertinent statute or regulation is really 'clear and unmistakable error,' (3) *Akins* and *Corpuz* are not binding precedent for the proposition that a misapplied presumption may serve as 'new and material' evidence under § 5108, and (4) the Federal Circuit did not decide the issue as a matter of law in *Jensen*). *Routen v. West*, 142 F.3d 1434, 1441 (foot note 2) (Fed.Cir.1998).

EVIDENTIARY STANDARD OF PROOF

support of the proposition that § 7104(b) "does not prevent consideration of a new claim based on earlier adjudicated facts, 'wh[en] an intervening and substantive change in law or regulation created a new basis for entitlement to a benefit.'" *Routen, supra,* at 1441. The *Routen* court continued by explaining its rationale:

> There is a good argument that, if a new law provides for benefits not previously available, even though grounded on some but not all of the same facts adjudicated under an earlier law, a new cause of action is created along with a new entitlement to a remedy. Thus, if the old law required proof of facts A, B, and C, and the new law requires proof of facts A, B, and D, a veteran who lost the A, B, C case under the old law because he could not establish C would seem free to claim under the new law, assuming he can establish A, B, and D. *Routen supra* at 1441-42.

EVIDENTIARY STANDARD OF PROOF

CLEAR AND CONVINCING EVIDENCE STANDARD OF PROOF

§ Clear and convincing proof is "[t]hat proof which results in reasonable certainty of the truth of the ultimate fact in controversy." Black's Law Dictionary 251 (6th ed. 1990) citing *Lepr v. Caputo*, 131 N.J.Super. 118, 328 A.2d 650, 652. Proof which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. Clear and convincing proof will be shown where the truth of the facts asserted is highly probable. *Id*, citing *In re Estate of Lobo, Minn.App.*, 348 N.W.2d 413, 414.

A standard of proof "higher [] than a preponderance of the evidence, [but] is a [standard of proof with a] lower burden to satisfy than clear and unmistakable evidence." *See Vanerson v. West*, 12 Vet.App. 254, 258-59 (1999) citing *cf. Crippen v. Brown*, 9 Vet.App. 412, 418 (1996) (stating that "clear and unmistakable error" means an error that is undebatable); *Russell v. Principi*, 3 Vet.App. 310 1992) (en banc) ("The words 'clear and unmistakable error' are self defining. They are errors that are undebatable, so that it can be said that reasonable minds could only conclude that the original decision was fatally flawed.").

EXAMINATION, VA (VAE)

CLEAR AND UNMISTAKABLE EVIDENCE STANDARD OF PROOF (RESERVED)

CLEAR ERROR EVIDENCE STANDARD OF PROOF (RESERVED)

CLEARLY ERRONEOUS EVIDENCE STANDARD OF PROOF (RESERVED)

Obvious error *Dinsay v. Brown*, 9 Vet.App. 79, 88 (1996); (*Smith (William) v. Brown*, 35 F.3d 1516, 1521 (Fed.Cir.1994); *Chisem v. Brown*, 8 Vet.App. 374 (1995); *see also Russell v. Principi*, 3 Vet.App. 310, 314 (1992) (en banc).

EXAMINATION, VA (VAE)

ADEQUACY OF EXAM (38 C.F.R. §§ 4.2, 4.10, 4.41 (1995))

§ To provide an adequate basis for fair adjudication, the examining physician's report must furnish "in addition to the etiological, anatomical, pathological, laboratory and prognostic data required for ordinary medical classification, full description of the effects of disability upon the person's ordinary activity." 38 C.F.R. § 4.10 (1995); *see also* 38 C.F.R. §§ 4.2, 4.41 ("it is essential to trace the medical-industrial history of the disabled person from the original injury ... and the course of recovery to date"), § 4.42 ("when complete examinations are not conducted covering all systems of the body affected by disease or injury, it is impossible to visualize the nature and extent of the service connected disability") (1993). *See Schafrath v. Derwinski*, 1 Vet. App. 589, 595 (1991).

BVA REMAND FOR EXAM IF EVIDENCE INADEQUATE

§ If the BVA finds that the medical evidence in the record is not adequate, it must remand for further development. *See Tucker v. Derwinski*, 2 Vet.App. 201, 203 (1992).

CLAIM FOR INCREASE, EVIDENCE TOO OLD, NEW EXAM REQUIRED

§ Where the veteran claims a disability is worse than when originally rated, and the available evidence is too old to adequately evaluate the state of the condition, the VA

EXAMINATION, VA (VAE)

must provide a new examination. *See Proscelle v. Derwinski*, 2 Vet.App. 629, 632 (1992); *Olson v. Principi*, 3 Vet.App. 480, 482 (1992).

EVALUATION REQUIRED DURING ACTIVE PHASE

§ "This Court has held that where there is a history of remission and recurrence of a condition, the duty to assist encompasses the obligation to evaluate a condition during an active rather than inactive phase." *Ardison v. Brown*, 6 Vet.App. 405, 407-08 (1994).

EXAMINATION MUST DESCRIBE DISABILITY IMPACT ON ORDINARY ACTIVITIES (38 C.F.R. §§ 4.2, 4.10, 4.41)

§ To provide an adequate basis for fair adjudication, the examining physician's report must furnish "in addition to the etiological, anatomical, pathological, laboratory and prognostic data required for ordinary medical classification, full description of the effects of disability upon the person's ordinary activity." 38 C.F.R. § 4.10 (1995); *see also* 38 C.F.R. §§ 4.2, 4.41 ("it is essential to trace the medical-industrial history of the disabled person from the original injury ... and the course of recovery to date"), § 4.42 ("when complete examinations are not conducted covering all systems of the body affected by disease or injury, it is impossible to visualize the nature and extent of the service connected disability") (1993). *See Schafrath v. Derwinski*, 1 Vet. App. 589, 595 (1991).

LIMITATION OF MOTION AND FUNCTIONAL LOSS DUE TO PAIN PORTRAYED IN EXAMINATION (38 C.F.R. § 4.40 (1995))

§ The Court has held that when the VA evaluates a disability which causes limitation of motion due to pain, the additional factors involved in a disability evaluation, as described by 38 C.F.R. § 4.40 (1995), are also required "to be considered and portrayed in the rating examination as to functional loss on use or due to flare-ups." *DeLuca v. Brown*, 8 Vet.App. 202 (1995).

EXAMINATION, VA (VAE)

PAIN, CONSIDERATION IN A RATING DECISION (38 C.F.R. §§ 4.40, 4.45(F), AND 4.59)

§ The BVA has a well-established statutory duty to provide a written statement of its 'findings and conclusions' setting forth sufficient 'reasons or bases' for its decision. *See Smallwood v. Brown*, U.S. Vet.App. No. 94-609, (Feb. 3, 1997), slip op. at 10 citing 38 U.S.C. § 7104(d)(1) also citing *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990); *see also Peters v. Brown*, 6 Vet.App. 540, 542 (1994). Accordingly, if the BVA fails to provide an adequate statement of its 'reasons or bases' the case must be remanded for further adjudication. *Smallwood, supra*, at 9 citing *Gilbert*, 1 Vet.App. at 57.

Where[] the BVA has failed to provide adequate reasons or bases with respect to considerations of the veteran's assertions of pain, this Court has consistently remanded the case. *See Smallwood supra*, at 10 citing *Voyles v. Brown*, 5 Vet.App. 451, 453 (1993) (remanding for a "consideration of appellant's pain, as will as any limitation of motion due to his service connected disabilities"); *Fanning v. Brown*, 4 Vet.App. 225, 231 (1993) (remanding for a "consideration of appellant's employability in light of the pain he suffers"); *Quarles v. Derwinski*, 3 Vet.App. 129 (1992) (remanding because the BVA failed to analyze the effect of the veteran's back pain on his disability). At the very minimum, the BVA must 'consider or discuss how regulations 4.40, 4.45(f), [and 4.59] apply [or do not apply] to the facts presented in the case.' *Smallwood supra*, at 10 citing *Voyles*, 5 Vet.App. at 453; *see also* 38 C.F.R. §§ 4.40, 4.45(f), 4.59.

FACTUAL FINDING (*SEE ALSO* STANDARD OF JUDICIAL REVIEW, QUESTION OF FACT, SUBJECT TO "CLEARLY ERRONEOUS" STANDARD OF REVIEW…)

"FAIR PROCESS PRINCIPLE" (*SEE* EVIDENCE, INDEPENDENT MEDICAL EVIDENCE, IMPARTIAL PROCESS TO OBTAIN, "FAIR PROCESS PRINCIPLE")

FINALITY OF DECISION (*SEE ALSO* PROCEDURAL DUE PROCESS)

BVA RECONSIDERATION

§ To abate the finality of the BVA's decision the appellant's motion for reconsideration must be filed with the BVA within 120 days after notice of the BVA's decision is mailed. *See Rosler v. Derwinski*, 1 Vet.App. 241, 249 (1991).

FORFEITURE OF BENEFITS BASED ON FRAUD

IN FORFEITURE OF BENEFITS CASES, APPLICANT MUST PROVE STATUS BEFORE CAN ESTABLISH CLAIM (*SEE ALSO* CLAIMANT 38 U.S.C. § 5100 (VCAA AMENDMENT TO 38 U.S.C.))

§ The Court reviews the Board's findings regarding forfeiture as a question of fact which the Court reviews under the clearly erroneous standard. *Villaruz v. Brown*, 7 Vet.App. 561, 565 (1995); *Wood v. Derwinski*, 1 Vet.App. 190, 192 (1991); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert, supra*. "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." *See Butts, supra,* note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra.*

"With the outstanding [date] forfeiture, the appellant is not a benefits eligible claimant. Her eligibility status no longer exists, and her present effort is to establish it through another reopening." *Villeza v. Brown*, 9 Vet.App. 353, 357 (1996) (the Court ruled that the appellant could not reopen a claim before she established her eligibility to file a claim to reopen by a preponderance of the evidence which bears directly on whether she had acted in a false and fraudulent manner in her efforts to restore her benefits) (citing *Villaruz v. Brown*, 7 Vet.App. 561, 565 (1995)). "As such, she is in a posture not unlike that described in *Aguilar v. Derwinski*, 2 Vet.App. 21 (1991), where we held that the purported widow of a veteran had the burden of establishing eligibility by a preponderance of the evidence. Only when that burden is met does the non-adversarial claims process become operable. *Id.*, citing *Sarmiento v. Brown*, 7 Vet.App. 80 (1994) (holding that no "duty to assist" attaches until the appellant attains the status of claimant under 38 U.S.C. § 102(2)); *see also Rogers v. Derwinski*, 2 Vet.App. 419, 422 (1992) ("[W]hen dealing with a question of status, this Court has held ... that the person seeking to establish that status must prove it by a preponderance of the evidence. Therefore, the benefit of the doubt doctrine is not applicable here.").

HARMLESS ERROR (*SEE* ERROR, HARMLESS VIS A VIS PREJUDICIAL ERROR)

INCREASED RATING CLAIM (*SEE* CLAIM, TYPE AND STATUS; INCREASED RATING CLAIM)

INDEPENDENT MEDICAL EXPERT (IME) (38 U.S.C. § 7109(a))

IME AUTHORIZED, NOT REQUIRED BY 38 §7109(A)

§ 38 U..C. § 7109(a) does not require an "outside experts opinion" when used in reference to obtaining a medical opinion. "The provision is simply an enabling provision allowing the Board, in instances of medical complexity or controversy, the purely discretionary authority to seek an outside opinion." *Winsett v. West*, U.S. Vet. App. No. 95-1109, slip op. at 9, (Sep 21, 1998) citing 38 U.S.C. § 7109(a).

"[W]hether the Board chooses to refer a particular case for an independent medical opinion is entirely within its discretion. It is uncontested that the Board has the

authority, and in many cases the duty, to obtain an expert medical opinion irrespective of section 7109." *Id* citing 38 U.S.C. §5109 (statutory authority for Secretary rather than Board to an independent medical opinion), *Ashley v. Brown*, 6 Vet.App. 52, 58 (1993) and *Colvin v. Derwinski*, 1 Vet.App. 171, 174 (1991); *see also Perry v. Brown*, 9 Vet.App. 2, 6 (1996) ("The Board may seek to obtain [a medical opinion] itself through a VA Veterans Health Administration or non-VA IME opinion, or through a remand to the RO for it to obtain an IME opinion, or to provide for a VA examination of the veteran." (citations omitted)).

INEXTRICABLY INTERTWINED

MOTION FOR RECONSIDERATION IS INEXTRICABLY INTERTWINED WITH THE ORIGINAL CLAIM

§

> The Court holds that a jurisdictionally-valid NOD must have been submitted with respect to the claim for which reconsideration is sought in order to empower this Court to review a denial of such reconsideration by the Chairman of the [BVA]. A motion for reconsideration is inextricably intertwined with the original claim. Absent a post-November 17, 1988, NOD, the Court has no discretion to hear an appeal.

Pagaduan v. Brown, 6 Vet.App. 9, 10 (1993) (Note the post November 17, 1988, NOD requirement has been eliminated by a change in the statutes).

SEE ALSO CLAIM, TYPES AND STATUS; INCREASED RATING; INCREASED RATING CLAIM MAY BE INEXTRICABLY INTERTWINED WITH TDIU

INTEREST ASSESSED ON BACK AWARD PAYMENTS

§ Citing the "no interest rule", the United States Court of Appeals, Federal Circuit, held that claimants who win awards of back benefits are not entitled to interest on the awards. *Smith v. Principi*, 281 F.3d 1384, 1387-88 (Fed.Cir.2002), *see also Smith V. Gober*, 14 Vet.App. 227, 230-31 (2000) quoting *Library of Congress v. Shaw*, 478 U.S. 310, 315, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986) ("For well over a century, this Court [U.S. Supreme Court], executive agencies, and Congress itself consistently

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have recognized that federal statutes cannot be read to permit interest to run on a recovery against the United States unless Congress affirmatively mandates that result.").

JUDICIAL DECISIONS

RETROACTIVITY OF PRIOR JUDICIAL DECISIONS

§ (Excerpted in total from *Brewer v. West*, 11 Vet.App. 228,232-33 (1998))

The retroactivity of judicial decisions pertaining to civil matters has been the subject of several recent Supreme Court decisions. As an initial matter, the Court notes that a judicial decision may be applied prospectively in one of two ways. *See Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 114 (1993) (O'Connor, J., and Rehnquist, C.J., dissenting). First, in what is known as "pure prospectivity", a court may refuse to apply its decision not only to the litigants before the Court but also as to any case where the relevant facts predate the decision. *Ibid*. Second, a court may apply the rule to some cases, including the case being litigated before it, but not all cases where the relevant facts occurred before the court's decision. *Ibid*. This later approach is known as "selective prospectivity". *Ibid*.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), the Supreme Court in 1971 enunciated several factors to be considered when deciding whether to apply a decision to events that predated the decision: First, a judicial decision generally will not be applied retroactively when it establishes a new principle of law, either by overruling clear precedent or by deciding an issue of first impression. *Id*. at 106. Second, a court must consider whether retroactive application of the decision will further the purpose and effect of the rule in question. *Id*. at 106-07. Finally, the court must determine whether retroactive application will produce "substantial inequitable results". *Id*. at 107. The appellant urges this Court to adopt the *Chevron* approach and apply it to the present matter. Appellant's Br. at 16-18.

However, subsequent Supreme Court decisions have criticized and modified the above *Chevron* approach. For example, as the Supreme Court noted in 1993 (*see Harper*, 509 U.S. at 96), a majority of the Justices in 1991 had agreed in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 29, 544 (1991), that a new rule of federal

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law that is applied to the parties in the case announcing the rule must be applied as well to all cases pending on direct review. *See also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 214 (1995). Proponents of the *Beam* approach contended that this view of retroactivity superseded the *Chevron* approach. *See Beam*, 501 U.S. at 540 (opinion of Souter and Stevens, JJ.).

Ultimately, a unified majority opinion pertaining to the retroactivity of judicial decisions in civil matters emerged in 1993 in *Harper*, *supra*, where the Supreme Court adopted the rule set forth in *Beam*, which it phrased as follows: "a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law". *Ibid*. In so holding, the Court proclaimed unequivocally: "we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases". *Ibid*. A dissent contended, however, that the Court's holding merely prohibited selective prospectivity and did not foreclose the possibility of pure prospectivity. 509 U.S. at 114 (O'Connor, J., and Rehnquist, C.J., dissenting); *see also Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995) (stating in dictum that change in law might not be applied retroactively (including to the parties before the Court) in special instances of tax cases and cases involving qualified immunity due to unique reliance considerations).

RETROSPECTIVE APPLICATION OF JUDICIAL INTERPRETATION IN *KARNAS* OR *CAMPHOR*

§

> [T]he Court concludes that any interpretation of *Karnas* or *Camphor*, . . . that would prohibit the Court from applying retroactively a judicial decision issued during the course of an appeal and made applicable to the parties to the parties to that decision simply because its application would be less favorable to the appellant would be inconsistent with controlling Supreme Court precedent and is hereby rejected by this Court.

Brewer v. West, 11 Vet.App. 228, 234 (1998) citing *Karnas v. Derwinski*, 1 Vet.App. 308 (1991); *Camphor v. Brown*, 5 Vet.App. 514 (1993); *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 114, 113 S.Ct. 2510, 2527, 125 L.Ed.2d 74 (1993) (O'Connor, J., and Rehnquist, C.J. dissenting).

JURISDICTION, GENERALLY

§ The ultimate burden of establishing jurisdiction rests with the appellant. *See Mcnutt v. G.M.A.C.* 298 U.S. 178, 189, 56 S.Ct. 780, 80 L.Ed. 1135 (1936); *Bethea v. Derwinski*, 2 Vet.App. 252, 255 (1992).

> [I]t is well established judicial doctrine that any statutory tribunal must ensure that it has jurisdiction over each case *before* adjudicating the merits, that a potential jurisdictional defect may be raised by the court or tribunal, *sua sponte* or by any party, at any stage of the proceedings, and, once apparent, must be adjudicated.

Barnett v. Brown, 83 F.3d 1380 (Fed.Cir.1996) (emphasis in text) citing *e.g., FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-31, 110 S.Ct. 596, 607-08, 107 L.Ed.2d 603 (1990). "[A] court must deny jurisdiction 'in all cases where such jurisdiction does not affirmatively appear in the record.'" *Hayre v. Principi*, 15 Vet.App. 48, 50 (2001) citing *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884). "Jurisdiction must derive exclusively from a clear and unambiguous act of Congress." *Hayre supra*, at 51 citing *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 818, 108 S.Ct. 2166, 2178, 100; *see also Prenzler v. Derwinski*, 928 F.2d 392 (Fed.Cir.1991); *Archbold v. Brown*, 9 Vet.App. 124, 130 (1996). "Jurisdiction may not be 'assumed,' 'conceded,' or 'implied,' and cannot be bestowed on a court by the court itself, or any other court. Moreover, the act of Congress bestowing jurisdiction must be strictly construed." *Hayre supra* quoting *Healy v. Ratta*, 292 U.S. 263, 54 S.Ct. 700, 78 L.Ed. 1248(1934).

LACK OF LEGAL MERIT

§ "[W]here the law and not the evidence is dispositive, the claim should be denied or the appeal to the BVA terminated because of the absence of legal merit or the lack of entitlement under the law. *See Sabonis v. Brown*, 6 Vet.App. 426, 430 (1994); *Cf.* Fed.R.Civ.P. 12(b)(6) ("failure to state a claim upon which relief can be granted").

LAW CHANGE REQUIRES ADJUDICATION UNDER BOTH LAWS

§ *Desousa v. Gober*, 10 Vet.App. 461, 468 (1997) cites *Karnas* and makes it clear that a decision regarding an issue which has been affected by a law or regulation change must have an adjudication under both standards to satisfy the reasons or bases requirements used to justify the decision reached.

§ Where a law or regulation is changed during the adjudication process, the most favorable law must be applied. "The rule which we adopt would also comport with the general thrust of the duty-to-assist and benefit-of-the-doubt doctrines embedded in title 38 of the United States Code and Code of Federal Regulations which spring from a general desire to protect and do justice to the veteran who has, often at great personal cost, served our country." *Desousa, supra* citing 38 U.S.C. § 3007(a), (b) (1988); 38 C.F.R. §§ 3.102, 3.103 (1990); s*ee Karnas v. Derwinski*, 1 Vet.App. 308, 313 (1991) citing *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969); *Bradley v. School Bd.*, 416 U.S. 696 (1974) ("We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision unless to do so would work manifest injustice or there is statutory direction or legislative history to the contrary."); *Bennett v. New Jersey*, 470 U.S. 632 (1985) ("absent a clear indication to the contrary in the relevant statutes or legislative history, changes in the substantive standards governing federal grant programs do not alter obligations and liabilities arising under earlier grants." *Id*. at 641.); *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988)).

BUT CF; CLAIM PROCESSING UNDER VCAA, RETROACTIVE APPLICATION OF VCAA SECTIONS (NOTIFICATION REQUIREMENTS UNDER VCAA NOT RETROACTIVE)

LAW OF THE CASE (RES JUDICATA)

"LAW OF THE CASE" PRINCIPAL, RES JUDICATA RULE ("ISSUE AND CLAIM PRECLUSION"), COLLATERAL ESTOPPEL PRINCIPAL, AND CUE

§ "Under the 'law of the case' doctrine appellate courts generally will not review or consider issues that have already been decided in a previous appeal of the same case."

LAW OF THE CASE (RES JUDICATA)

See Chisem v. Gober, 10 Vet.App. 526, 527-28 (1997) citing *In the Matter of the Fee Agreement of William G. Smith in Case No. 92-1072*, 10 Vet.App. 311, 314 (1997) (under law of the case doctrine, "Board was not free to do anything contrary to this Court's [prior] action" with respect to same claim); *Browder v. Brown*, 5 Vet.App. 268, 270 (1993). "However, the Federal Circuit recognizes three exceptions to the law of the case doctrine: (1) when the evidence at trial substantially different from that in the former trial upon which the appellate court based its decision; (2) when the controlling authority has since made a contrary decision of law; and (3) when the appellate decision was clearly erroneous." *Chisem, supra*, at 3 citing *Kori Corp. v. Wilco March Buggies and Draglines, Inc.*, 761 F.2d 649, 657 (Fed.Cir.1985); *see also Chisem v. Brown*, 8 Vet.App. 374, 375 (1995) ("Where a case is addressed by an appellant court, remanded then returned to the appellate court, the 'law of the case' doctrine operates to preclude reconsideration of identical issues").

> Under the doctrine of res judicata ('issue and claim preclusion'), a judgment entered on the merits by a court of competent jurisdiction in a prior suit involving the same parties or their privies settles that cause of action and precludes further claims by the parties or their privies based on the same cause of action, including the issues actually litigated and determined in that suit, as well as those which might have been litigated or adjudicated therein.

See McDowell v. Brown, 5 Vet.App. 401, 405(1993); *see also Johnson v. Brown*, 7 Vet.App. 25, 16 (1994), citations omitted.

Res judicata is a rule that limits the review of a previously decided matter, whereas "law of the case" is a legal principal that generally refers to a matter decided by a higher tribunal. *See Black's Law Dictionary* 887-88 and 1305-06; *cf. Collateral estoppel, Ibid* at 1306 ("'Res judicata' bars relitigation between of the same cause of action between the same parties where there is a prior judgment, whereas 'collateral estoppel' bars relitigation of a particular issue or determinative fact." *Roper v. Mabry*, 15 Vet.App. 819, 551 P.2d 1381, 1384.).

LAW OF THE CASE (RES JUDICATA)

The Court, in deciding *Hazan v. Gober*, 10 Vet.App. 511, 521 (1997)[32], found that the failure of the Board to address the 1989 testimony in its 1994 decision "***as the sole basis*** for an earlier effective date is nonprejudicial error (emphasis in text) (citing *Edenfield v. Brown*, 8 Vet.App. 384, 390-91 (1995) (en banc)) because the Board was collaterally estopped from viewing that evidence any differently from the way it had in 1990, absent a finding that the Board had committed obvious error in its 1990 decision." citing *Chisem v. Brown*, 4 Vet.App. 169, 177 (1993) (Board has "discretion to *correct* an 'obvious' error when one is found" and that discretion is not subject to review in this Court); (citations omitted). The following citations were provided in *Hazan* to explain its decision:

University of Tennessee v. Elliott, 478 U.S. 788, 797 (1986) ("[w]e have previously recognized that it is sound policy to apply principles of issue preclusion to the fact-finding of administrative bodies in a judicial capacity"); *Migra v. Warren City Sch. Dist. Bd. of Educ*., 465 U.S. 75, 76 n.1 (1984) ("[i]ssue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided"); *Strott v. Derwinski*, 1 Vet.App. 114, 117 (1991) ("'issue and claim preclusion' . . . historically called '*res judicata*' . . . means that decisions once made are not subject to reexamination except for compelling reasons"), *aff'd*, 964 F.2d 1124 (Fed Cir. 1992); *cf Spencer v. Brown*, 4 Vet.App. 283, 289 (1993) ("section 7104(b) does not preclude de novo[33] adjudication of a claim, on essentially the same facts as previously and finally denied claim, where an intervening change in law or regulation has created a new basis of entitlement").

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[32] The appellant argued that he should be given an earlier effective date for an increased rating based on testimony he had provided in 1989. In an unappealed 1990 decision, the Board had previously considered the veteran's 1989 testimony and denied a claim for increased rating. Subsequent to this decision, the veteran submitted a private orthopedic specialist's opinion to reopen his claim. Based on the new medical evidence, the regional office granted an increased evaluation for the veteran's service connected back in a November 1990 decision with an effective date of April 1990, the date of examination. The veteran filed a notice of disagreement claiming an earlier effective date of November 1979 for service connection for cervical disk disease (CDD) and claiming clear and unmistakable error (CUE) for failure of the VA to provide an examination by an orthopedic surgeon based on a 1980 Board remand.

While the Court held that res judicata had application in this case, it also found that the medical opinion which resulted in the increased evaluation had to be considered along with all the other evidence of record including the 1989 testimony. Thus, since the appellant was a doctor, in light of the orthopedist's medical opinion, his 1989 statement could very well support an earlier effective date. Id est, all of the evidence, together, may establish a date within a year of the claim for increase, in which it could be ascertained that the veteran's disability increased in severity warranting a higher evaluation.

[33] **De novo trial** Trying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered. *Black's Law Dictionary* 435 (6th ed. 1990) citing *Farmingdale Supermarket, Inc. v. U.. S.*, D.C.N.J., 336 F.SUPP. 534, 536.

LAW OF THE CASE (RES JUDICATA)

The Court is generally prevented from setting aside a prior decision except for "good cause or to prevent injustice, and only when 'unusual circumstances exist sufficient to justify modification or recall of a prior judgment'". *See McNaron v. Brown*, 10 Vet.App. 61, 63 (1997) citing *Zipfel v. Halliburton Co.*, 861 F2.d 565, 567 (9th Cir. 1988).

The Supreme Court applied the rule of res judicata to administrative decisions which have become final. *See Astoria Fed. Savs. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-08 (1991).

§ We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) in those determinations of administrative bodies that have attained finality. "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated t apply res judicata to enforce repose." *United States v. Utah Constr. & Mining Co*, 384 U.S. 394, 422 (1996). Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution. *See Parkinson Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). The principle holds true when the court has resolved an issue, and should do so equally when the issue has been decided by an administrative agency, be it state or federal, *see University of Tennessee v. Elliot*, 478 U.S. 788 (1986), which acts in the judicial capacity.

§ "It is well-accepted that the application of the law of the case doctrine is discretionary." *Hudson v. Principi*, 260 F.3d 1357, 1363 (Fed.Cir.2001) citing *see, e.g., Intergraph Corp. v. Intel Corp.*, 253 F.3d 695, 698 (Fed.Cir.2001); *Free v. Abbott Labs.*, 164 F.3d 270, 272 (5th Cir.1999). "It is also well-established that the law of the case doctrine is a rule of practice and not a limit on the court's power, *see, e.g.*, 18 *James Wm. Moore et al., Moore's Federal Practice* § 134.21[1], at 134-46

(3d ed.1999), and that 'law of the case should not be applied woodenly in a way inconsistent with substantial justice,' *United States v. Miller*, 822 F.2d 828, 832 (9th Cir.1987)." *Hudson supra*, at 1363-64.

LEGAL PRINCIPLE

MISDEED CANNOT IMPROVE POSITION

§ An ancient maxim applies here: Nemo ex suo delicto meliorem suam conditionem facere potest. "No one can make his position better by his own misdeed," also rendered, "No one can take advantage of his own wrong." California Code Sec. 3517, Field's Draft New York Civil Code Sec. 1972.

LINE OF DUTY (*SEE* PRESUMPTION IN FAVOR OF LINE OF DUTY (38 U.S.C. § 105))

MAIL

BVA DECISION MUST BE MAILED TO APPELLANT AND REPRESENTATIVE

§ "The BVA must mail decision copies to both the claimant and any representative, and a defect in mailing to either one can toll the start of the 120-day period for appeal to the Court." *Perez v. Brown*, 9 Vet.App. 452, 454 (1996) citing 38 U.S.C. § 7104(e); *Ashley v. Brown*, 2 Vet.App. 307, 311 (1992). "In *Leo v. Brown*, the Court held that the BVA decision must be mailed to the 'last known address' of the claimant and the claimant's representative as required by section 7104(e)." *Perez, supra*, quoting *Leo*, 8 Vet.App. 410, 413 (1995). "In *Hill v. Brown*, the Court held that any address in block 12 does not bear on the question of the 'last known address' of the representative." *Perez, supra*, quoting *Hill*, 9 Vet.App. 246, 249 (1996).

> The Court further held that in a case with a post-May 31, 1994, BVA decision where the claimant has designated a recognized national veterans service organization representative but did not specify an address in block 3, and where that organization has specified — as of the date of the BVA decision in question — to the BVA an address for the

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> mailing of BVA decision copies, the Court will presume that any mailing of such a BVA decision copy to the designated representative was properly carried out by mailing to that designated representative's last known address.

Perez, supra, quoting *Hill*. "Such presumption may be rebutted by the claimant by showing that the decision copy was not, in fact, mailed to the address designated by the representative." *Perez, supra*, citing *Hill*.

TOLLING OF 120 DAY STATUTE OF LIMITATIONS FOR FILING NOA (*SEE ALSO* EQUITABLE TOLLING)

MAIL NOTICE -- IN SECRETARY'S CONTROL TOLLS THE 120 DAY FILING SATUTE OF LIMITATIONS

§ The appellant's notification to the Department of Veterans Affairs Regional Office of his new mailing address was within the Secretary of Veterans Affairs control when the Board decision was made and, thus, was before the Board at that time. *See Cross v. Brown*, 9 Vet.App. 18, 20 (1996).

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CLAIM IS COMPRISED OF SEPARATE ISSUES WHICH MAY BE SEPARATELY APPEALED

§

> The court recently held in *Grantham v. Brown*, 114 F.3d 1156 (Fed.Cir.1997), that a veteran's overall claim, or case, for benefits is comprised of separate issues, and that the Court of Veterans Appeals has jurisdiction to consider an appeal concerning one or more of those issues, provided a NOD has been filed after the effective date of the Veteran's Judicial Review Act with regard to the particular issue. Thus, our precedent recognizes that multiple NODs may be filed by a veteran concerning the claim for benefits. The NOD which must serve to confer jurisdiction on the Court of Veterans Appeals is the first one filed with respect to a given issue, *i.e.*, the NOD which initiates judicial review of the issue on which the veteran has received an unfavorable administrative determination. That a pre-Act NOD may have been filed, thus initiating appellate review with respect to a particular issue, does not defeat jurisdiction in the Court

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> of Veterans Appeals over a *different* issue on which a NOD has been filed after the effective date of the Act. In a nutshell, *Grantham* overrules *West v. Brown*.

See Barrera v. Brown, 122 F.3d 1030, 1032 (Fed.Cir.1997).

DOES NOD ENCOMPASS ISSUE ON APPEAL

§ "It is true that the Board must liberally construe all submissions." *Velez v. West*, 11 Vet.App. 148, 157 (1998) citing *EF v. Derwinski*, 1 Vet.App. 324, 326 (1991). "However, this Court's appellate jurisdiction derives exclusively from the statutory grant of authority provided by Congress and may not be extended beyond that permitted by law. *Velez, supra*, citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988); *see also Prenzler v. Derwinski*, 928 F.2d 392, 393-94 (Fed.Cir.1991); *Skinner v. Derwinski*, 1 Vet.App. 2, 3 (1990). "The Court has no jurisdiction over an issue absent a post-November 18, 1988, NOD, expressing disagreement with an RO's decision on that issue or with an RO's failure to adjudicate that claim. *Velez, supra*, citing Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687 § 402, 102 Stat. 4105, 4122 (1988) (found at 38 U.S.C. § 7251 note); *Slater v. Brown*, 9 Vet.App. 240, 244-45 (1996); *Isenbart v. Brown*, 7 Vet.App. 537, 540-41 (1995); *see also Barrera v. Gober*, 122 F.3d 1030, 1032 (Fed.Cir.1997) ("veteran's overall claim, or case, for benefits is comprised of separate issues, and . . . Court of Veterans Appeals has jurisdiction to consider an appeal concerning one or more of those issues, provided a[n] NOD has been filed after the effective date of the [VJRA] with regard to the particular issue"); *Grantham v. Brown*, 114 F.3d 1156, 1158-59 (Fed.Cir.1997); *see also Johnston v. Brown*, 10 Vet.App. 80, 89-91 (1997) (Steinberg, J., concurring) ("absent a valid NOD as to the . . . claim in this case, the Court lacks jurisdiction to remand that claim to the BVA"). "Because the Court can find no jurisdiction-conferring NOD in the record as to the RO's failure to adjudicate a secondary-service-connection claim for a gastrointestinal disorder, such a claim is not properly before the Court." *Velez. supra*, citing *compare Ledford v. West*, 136 F.3d 776, 781, (Fed.Cir.1998) (Court lacked jurisdiction over constitutional challenge as to denial of claim for total disability based on individual unemployability (TDIU)

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because veteran had never filed NOD as to TDIU claim), *with Collaro v. West*, 136 F.3d 1304, 1309 (Fed.Cir.1998) ("vague NOD" expressed disagreement with denial of TDIU and constitutional challenge to that denial, even though those challenges were not specifically articulated in NOD). "Moreover, the Court notes that a secondary-service-connection claim is well grounded only if there is medical evidence to connect the asserted secondary condition to the service-connected disability." *Velez, supra*, citing *Locher v. Brown*, 9 Vet.App. 535, 538-39 (1996) (citing *Reiber v. Brown*, 7 Vet.App. 513, 516-17 (1995), for proposition that lay evidence linking a fall to a service-connected weakened leg sufficed on that point as long as there was "medical evidence connecting a currently diagnosed back disability to the fall"); *Jones (Wayne) v. Brown*, 7 Vet.App. 134, 136-37 (1994) (lay testimony that one condition was caused by service-connected condition was insufficient to well ground claim).

DISAGREEMENT WITH ASSIGNED EVALUATION IS NOT CLAIM FOR INCREASED RATING

§ "[A]s a matter of law, original claims that were placed in appellate status by NODs expressing disagreement with initial rating awards and never ultimately resolved until the Board decision on appeal[]" are not claims for an increased rating. *Fenderson v. West*, 12 Vet.App. 119, 125 (1999). "In light of the above, the Court holds that when a claimant is awarded service connection for a disability and subsequently appeals the RO's initial assignment of a rating for that disability, the claim continues to be well grounded as long as the rating schedule provides for a higher rating and the claim remains open." *Shipwash v. Brown*, 8 Vet.App. 218 (1995); *cf. Cohen v. Brown*, 10 Vet.App. 128, 137 (1997) (finding that the claim on appeal was not a claim to reopen as characterized by the VA regional office, but stemmed from an appeal of a premature adjudication of the original claim). "[O]n a claim for an original ***or*** an increased rating, the claimant will generally be presumed to be seeking the maximum benefit allowed by law and regulation, and it ***follows that such a claim remains in controversy where less than the maximum available benefit is awarded***",

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Fenderson v. West, 12 Vet.App. 119, 126 (1999) quoting *AB v. Brown*, 6 Vet.App. 35, 38 (1993) (emphasis added).

NOD CAN BE FILED FOR FAILURE TO ADJUDICATE

§ The Court has jurisdiction over a NOD regarding "RO's failure to adjudicate [a] claim". *Velez v. West*, 11 Vet.App. 149, 157 (1998) citing Veterans' Judicial Review Act, Pub.L. No. 100-687 §402, 102 Stat. 4105, 4122 (1988) (found at 38 U.S.C. § 7251 note); *Slater v. Brown*, 9 Vet.App. 240, 244-45 (1996); *Isenbart v. Brown*, 7 Vet.App. 537, 540-41 (1995) (Court considered totality of communications before and after NOD in concluding that its expression of disagreement "encompassed the RO's failure to adjudicate the [particular]claim" and remanded for Board review of the unadjudicated claim); *see also Barrera v. Gober*, 122 F.3d 1030, 1032 (Fed.Cir.1997) ("veteran's overall claim, or case, for benefits is comprised of separate issues, and . . . Court of Veterans Appeals has jurisdiction to consider an appeal concerning one or more of those issues, provided a[n] NOD has been filed after the effective date of the [VJRA] with regard to that particular issue").

NOD - - FIVE STATUTORY ELEMENTS

§ (That part of the decision invalidating 38 C.F.R. § 20.201 requiring an NOD to include language which could be construed to be an expressed desire for BVA review was overturned by *Gallegos v. Principi*, 283 F.3d 1309, 1314 (Fed.Cir.2002).)

"The statute specifies the five elements for[] an NOD: That it must (1) express disagreement with a specific determination of the agency of original jurisdiction (generally a decision by an RO [hereinafter referred to as 'RO decision']) (38 U.S.C. § 7105(d)(2)) (*Cf. Fenderson v. v. West*, 12 Vet.App. 119, 128 (1999) (NOD sustained that included statement "[p]lease send me a statement of the case", i.e., reference to appeal process) (*Buckley v. West*, 12 Vet.App. 76, 79 (NOD sustained that stated "please accept this as a Notice of disagreement", i.e., called itself NOD); (2) be filed in writing (§ 7105(b)(1), (b)(2)); (3) be filed with the RO (§ 7105 (b) (1)); (4) be filed within one year after the date of mailing of notice of the RO decision (§ 7105(b)(1)); and (5) be filed by the claimant or the claimant's authorized

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representative (§ 7105(b)(2)). The only content requirement is an expression of 'disagreement' with the decision of the RO." *Gallegos v. Gober*, 14 Vet.App. 50, 54 (2000) (Board found veteran had not filed NOD although he had disagreed with the decision because he did not express a desire for appellate review as required by 38 C.F.R. § 20.201) citing *Tomlin v. Brown*, 5 Vet.App. 355, 357 (1993) (referring to 38 C.F.R. § 20.201, which requires the appellant express a "desire for appellate review.", limiting application of that regulation to the legal requirements); *Lee (Raymond) v. West*, 13 Vet.App. 388, 394 (2000) (quoting *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 209 (1993) ("The starting point in interpreting a statute is its language."). "To permit the Secretary – by adding via regulation (§ 20.201) to the statutory requirements for an NOD – to insulate from the Court review adjudicative decisions made on his behalf would fly in the face of the remedial nature of the VJRA in providing judicial review to veterans and other claimants." *Gallegos*, *supra*, at 57 (referring to the statutorily established Court jurisdictional requirement for a valid NOD filed after November 18, 1988).

§ On appeal to the Court of Appeals Federal Circuit, a notice of disagreement is required by 38 C.F.R. § 20.201 to contain language which can be construed to express a desire for review by the Board of Veterans' Appeals. Though the regulation requires more than 38 U.S.C. § 7105, it was found to be an appropriate exercise of the VA's rulemaking authority. *Gallegos v. Principi*, 283 F.3d 1309, 1314 (Fed.Cir.2002).

NOD CAN BE IN SUBSTANTIVE APPEAL

§ The *Manlincon v. West* court held that a NOD can be in the substantive appeal. *Manlincon*, 12 Vet.App. 238, 240 (1999) citing *Archbold v. Brown*, 9 Vet.App. 124, 131 (1996) (substantive appeal can constitute NOD where no prior NOD has been filed as to an issue).

NOD, ONLY ONE PER CLAIM (CASE)

§ "[T]he Federal Circuit in *Hamilton v. Brown*, 39 F.3d 1574 (Fed.Cir.1994) considered whether there can be more than one NOD relating to the same claim. The Federal Circuit essentially affirmed this Court's opinion holding that there can only be one

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NOD relating to the same case.... In appellant Hamilton's case, the Federal Circuit found that the June 1986 NOD initiated appellate review, not the 1989 Form 1-9, and it affirmed this Court's dismissal for lack of jurisdiction." *See West v. Brown*, 7 Vet.App. 329, 331 (1995) (citing *Hamilton v. Brown*, 39 F.3d 1574, 1586 (Fed.Cir.1994)).

"We note that the statute uses the word 'case' rather than 'claim'. However, because the only 'cases' over which this Court has jurisdiction are administrative claims appealed to the BVA, the words 'case' and 'claim' may be used interchangeably, and have been used interchangeably by both this Court and the Federal Circuit. Significantly, Congress did not use, as it could have, the word 'issue' in defining a jurisdiction-creating NOD. Thus, any interpretation, as for example the dissent, that would split a single claim, like an amoeba, into separate and distinct claims as to each element for jurisdictional purposes, would run afoul of the clear statutory language. This does not mean that NODs which are filed in response to adjudications of subissues are without legal effect. Obviously, they do trigger a further appeal of the case to the BVA. It does mean, however, that the NOD that initiated the original appeal of the case is the one that does, or does not, create jurisdiction in this Court. This interpretation also accords with common sense since it precludes an interpretation which would give this Court jurisdiction over only part of a case." *Ibid*. *Cf. Grantham v. Brown*, 114 F.3d 1156 (Fed.Cir.1997) (*Grantham, supra*, overturned that portion of *West v. Brown*, 7 Vet.App. 329 (1995) (en banc) which considered *all* issues flowing from an appealed decision to be part of the original NOD.)[34]; *Barrera v. Gober*, 122 F.3d 1030, 1032 (Fed.Cir.1997) ("[A] veteran's overall claim, or case, for benefits is comprised of separate issues, and that the Court of Veterans Appeals has jurisdiction to consider an appeal concerning one or more of those issues, provided a NOD has been filed after the effective date of the Veteran's Judicial Review Act with regard to the particular issue.").

[34] Prior to the Federal Circuit decision in *Grantham, supra*, the CVA en banc decision in *West, supra*, denied CVA jurisdiction of *all* issues arising from an appeal if the first NOD in the appeal was filed before November 18, 1988. The CVA decision in *West, supra*, was based on CVA's incorrect analysis of *Hamilton, supra*.

The Federal Circuit decision in *Grantham* also built on *Hamilton* but reached a different conclusion than that found in *West, supra*. The Federal Circuit found that while the initial NOD regarding the veteran's claim may have been filed before November 18, 1988, thus, denying CVA jurisdiction regarding the appeal of the initial claim, a jurisdictionally conferring NOD could be filed subsequent to the Board decision *regarding questions not considered* in that Board decision but which flowed from that decision.

PAIN CONSIDERATION IN RATING

LIMITATION OF MOTION DUE TO PAIN APPLY 38 C.F.R. § 4.40

§ The Court has held that when the VA evaluates a disability which causes limitation of motion due to pain, the additional factors involved in a disability evaluation, as described by 38 C.F.R. § 4.40 (1995), are also required "to be considered and portrayed in the rating examination as to functional loss on use or due to flare-ups." *DeLuca v. Brown*, 8 Vet.App. 202 (1995).

MAXIMUM EVALUATION, INCREASE DUE TO PAIN (*DELUCA)* NOT AVAILABLE.

§ The Court has ruled that with the assignment of maximum evaluation, remand for consideration of increased evaluation due to functional loss under *DeLuca v. Brown*, 8 Vet.App. 202, 205 (1995) is not appropriate. *See Johnstown v. Brown*, 10 Vet.App. 80, 85 (1997) citing *DeLuca, supra*; 38 C.F.R. § 4.40 (1996); *Schafrath v. Derwinski*, 1 Vet.App. 589, 592 (1991); *see also* 38 C.F.R. §§ 4.40, 4.59 (1996).

PAIN ON MOTION REQUIRES "EXPLICIT CONSIDERATION"

§ "[E]vidence of pain on movement and functional disability due to pain . . . requires explicit consideration under 38 C.F.R. §§ 4.40 and 4.45 [(1998)]". *Fenderson v. West*, 12 Vet.App. 119, 128 (1999) (citing, inter alia, *Deluca v. Brown*, 8 Vet.App. 202, 207 (1995))("under regulations, the functional loss due to pain is to be rated at the same level as the functional loss where [motion] is impeded").

PHILIPPINE CLAIM

BUREAU OF THE CONSTABULARY

§ The VA viewed the Bureau of the Constabulary (BC) as a part of the Japanese military occupation force. Any person shown to by evidence satisfactory to the Secretary to be guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or of its allies shall forfeit all accrued or future gratuitous benefits under laws administered by the Secretary. *See* 38 U.S.C.A. § 6104(a) (West

PIECEMEAL OR SEQUENTIAL LITIGATION

1995). There fore, under § 6104(a) the VA has the authority to decide if the actions of the veteran were treasonable because of his participation in the BC. *See Tulingan v. Brown*, U.S. Vet.App. No. 95-59, (Oct. 24, 1996), slip op. at 6.

PHILIPPINE COMMONWEALTH MILITARY PERSONNEL AND RECOGNIZED GUERILLA SERVICE MAY QUALIFY FOR CERTAIN VA BENEFITS (38 U.S.C. § 107; 38 C.F.R. § 3.8)

§ Philippine Commonwealth military personnel inducted into the U.S. armed forces or Filipinos who serve in the recognized guerilla service are eligible to receive certain VA benefits, *see* 38 U.S.C.A. § 107 (West 1995); 38 C.F.R. § 3.8(c) (1995).

SERVICE DEPARTMENT CERTIFICATION OF PHILIPPINE SERVICE (38 C.F.R. §§ 3.8 AND 3.9)

§ The U.S. armed forces must certify veteran's qualifying service for the VA to consider that service toward eligibility determination, *see* 38 C.F.R. §§ 3.8, 3.9 (1995); *Duro v. Derwinski*, 2 Vet.App. 530, 532 (1992).

PIECEMEAL OR SEQUENTIAL LITIGATION

§ "[W]e note here . . . that both this Court and the Federal Circuit have repeatedly discouraged appellants from raising arguments to this Court that have not been presented to the BVA and/or that were not argued in the appellant's initial brief to this Court. *See e.g., Carbino v. West*, 168 F.3d 32, 34 (Fed.Cir.1999) (*Carbino II*) ("improper or late presentation of an issue or argument [i.e., raised in the reply brief for the first time] . . . ordinarily should not be considered" *aff'g Carbino v. Gober*, 10 Vet.App. 507, 511 (1997) (*Carbino I*) (declining to review argument first raised in appellant's reply brief); *Ledford v. West*, 136, F.3d 776, 781 (Fed.Cir.1998) (stressing importance of raising arguments to BVA pursuant to "doctrine of exhaustion of administrative remedies"); *Savage v. Gober*, 10 Vet.App. 488, 498 (1997) (Court declines to review matter first raised by amicus curiae subsequent to appellant's motion for a panel review); *Horowitz v. Brown*, 5 Vet.App. 217, 225 (1993) (holding that because veteran had never before submitted "due process" issue to BVA he had he had not exhausted his administrative remedies, and Court declined to address

POST HOC RATIONALIZATION

merits of that claim); *Tubianosa v. Derwinski*, 3 Vet.App. 181, 184 (1993) (appellant "should have developed and presented *all* of his arguments in his initial pleading"); *Fugere v. Derwinski*, 1 Vet.App. 103, 105 (1990) ("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."), *aff'd*, 972 F.2d 331 (Fed.Cir.(1992); *cf. Ford v. Gober*, 10 Vet.App. 531, 535-36 (1997) (Court considers appellant to have abandoned claims properly appealed to this Court when appellant fails to "address [those claims] in his formal pleadings"). *But cf. Patton v. West*, 12 Vet.App. 272, 283 (1999) ("Court believes that substantial interests of justice dictate that the Court require the Secretary to adhere to his own regulatory provisions," even though appellant had not raised to Court the Secretary's failure to do so); *but see id*. at 284 (Holdaway, J., dissenting). *But also cf. Maggitt v. West*, 202 F.3d 1370 (Fed.Cir.2000) (All arguments and remedies do not necessarily have to be exhausted for the Court to accept jurisdiction. In fact, there are three tests the Court must apply before deciding the question of whether or not administrative remedies have been exhausted.)

POST HOC RATIONALIZATION

§ "The court may not accept appellate counsel's post hoc rationalizations for agency action; *SEC v. Chenery Corp*., 332 U.S. 194, 196 (1947) requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself:

> [A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action . . . .

Ibid.

"For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962); *see also Alaniz v. OPM*, 728 F.2d 1460, 1465 (Fed Cir.1984) ("fashioned for the purpose of litigation") and *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("'Litigating positions' are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action, advanced for the first time in the reviewing court.").

PRECEDENT

BOARD OF VETERANS' APPEALS

COURT OF VETERANS APPEALS

BINDING PRECEDENT

§ "[P]anel or single judge may not render a decision which conflicts materially with [] earlier panel or en banc opinion . . . ." *See Bethea v. Derwinski*, 2 Vet.App. 252, 254 (1992).

PRECEDENT DECISIONS, PANEL AND EN BANC DECISIONS

§ "[A] panel . . . may not render a decision which conflicts materially with [an] earlier panel or en banc opinion. It is in this way we assure consistency of our decisions." *Bethea v. Derwinski*, 2 Vet.App. 252, 254 (1992) citing *Tobler v. Derwinski*, 2 Vet.App. 8 (1991); *see also* U.S. Vet.App. R. 35(c); *see, e.g., Johnston v. Ivac Corp.*, 885 F.2d 1574, 1579 (Fed.Cir.1989).

COURT OF APPEALS , FEDERAL CIRCUIT

PREJUDICIAL DECISION

BVA ADDRESSES A QUESTION NOT ADDRESSED BY THE RO

§ The Court has held that when the BVA addresses a question in its decision that has not been addressed by the RO, "it must consider whether the claimant has been given adequate notice of the need to submit evidence or argument on that question and an

PREJUDICIAL DECISION

opportunity to submit such evidence and argument and to address that question at a hearing, and if not, whether the claimant has been prejudiced thereby." A determination by the Board that an appellant has not been prejudiced "must be supported by an adequate statement of reasons and bases." *Bernard v. Brown*, 4 Vet.App. 384, 394 (1993) (referring to the VA Office of General Counsel Precedential Opinion 16-92).

EVIDENCE DEVELOPED OR OBTAINED AFTER THE MOST RECENT SOC OR SSOC

§ The Court has held "that before the BVA relies, in rendering a decision on a claim, on any evidence developed or obtained by it subsequent to the issuance of the most recent SOC or SSOC with respect to such claim, the BVA must provide a claimant with reasonable notice of such evidence and of the reliance proposed to be placed on it, and a reasonable opportunity for the claimant to respond to it." *Thurber v. Brown*, 5 Vet.App. 119, 126 (1993). *See Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 901, 47 L.Ed.2d 18 (1976); *Walters v. National Assoc. of Radiation Survivors*, 473 U.S. 305, 333, 105 S.Ct. 3180, 3195-96, 87 L.Ed.2d 220 (1985).

INDEPENDENT MEDICAL EVIDENCE, IMPARTIAL PROCESS TO OBTAIN, "FAIR PROCESS PRINCIPLE"

§ "We hold that basic fair play requires that evidence be procured by the agency in an impartial, unbiased, and neutral manner." *Austin v. Brown*, 6 Vet.App. 547, 552 (1994) citing *Thurber v. Brown*, 5 Vet.App. 119 (1993).

"The Supreme Court case of *Gonzales v. United States*, 348 U.S. 407, 75 S.Ct. 409, 99 L.Ed. 467 (1955), referenced in *Thurber*, is perhaps most aptly illustrative of this fair process principle. In *Gonzales* the Supreme Court held that despite the silence of the applicable statute and regulations as to a particular procedural requirement, such requirement was implicit in the statute and regulation when 'viewed against our underlying concepts of procedural regularity and *basic fair play.*'" *Austin*, 6 Vet.App. at 551-52 citing *Thurber*, 5 Vet.App. at 123 quoting *Gonzales*, 348 U.S. at 412, 75 S.Ct. at 412 (emphasis added). "[A]lthough the combination of investigative and adjudicative functions does not necessarily create an unconstitutional 'bias or the

risk of bias or prejudgment' in the administrative adjudication, the Supreme Court cautioned that we should be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice'[.]" *Austin*, 6 Vet.App. at 552 citing *Withrow v. Larkin*, 421 U.S. 35, 47, 54, 95 S.Ct. 1456, 1464, 1468, 43 L.Ed.2d 712 (1975). "'[I]n order to establish improper prejudgment of a case, it must appear to 'a disinterested observer ... that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it'." *Austin*, 6 Vet.App. at 552 citing *City of Charlottesville v. FERC*, 774 F.2d 1205, 1212 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1108, 106 S.Ct. 1515, 89 L.Ed.2d 914 (1986).

PREJUDICIAL ERROR (*SEE* ERROR, HARMLESS VIS A VIS PREJUDICIAL ERROR)

PRESERVATION OF DISABILITY RATINGS (38 U.S.C. § 110; 38 C.F.R. § 3.951(b) (1996))

§ "A disability which has been continuously rated at or above any evaluation for twenty or more years for compensation purposes ... shall not thereafter be rated at less than such evaluation, except upon a showing that such rating was based on fraud." 38 U.S.C.A. § 110 (West 1995); *see also* 38 C.F.R. § 3.951(b) (1996).

PRESUMPTION IN FAVOR OF LINE OF DUTY (38 U.S.C. § 105)

§

> [I]n all cases [38 U.S.C.] section 105 [Line of duty and misconduct] establishes a presumption in favor of a finding of line of duty. If the BVA finds that an exception does apply, and denies the claim solely on the basis of such exception, the Board must establish that denial of the claim is justified by a preponderance of the evidence.

See Smith (Cynthia) v. Derwinski, 2 Vet.App. 241, 244 (1992).

PRESUMPTION OF REGULARITY OF THE ADMINISTRATIVE PROCESS

PRESUMPTION OF REGULARITY OF THE ADMINISTRATIVE PROCESS

RATING DECISIONS BEFORE FEBRUARY 1990

§ "It was not until February 1990 that ROs were required by statute to include the reasons for denying a claim in their decisions." *Dolan v. Brown*, 9 Vet.App. 358, 362 (1996) citing 38 U.S.C. § 5104(b); Veterans Benefits Amendments of 1989, Pub.L. No. 101-237, § 115(a)(1), 103 Stat. 2062, 2065-66 (1989). "The requirements that the ROs list 'a summary of the evidence considered' was first imposed by the Veteran's Benefits Amendments of 1989, ..." *Ibid.*; *see also Eddy v. Brown*, 9 Vet.App. 52, 58 (1996). "Therefore, for the Court to reopen this claim solely because the RO did not specifically mention the presumptions of sound condition and aggravation in its 1955 decision and did not clearly articulate the reasons why each presumption did not attach would require the Court to presume that the RO did not properly discharge its official duties." *Ibid.* citing *Ashley v. Derwinski*, 2 Vet.App. 62, 64 (1992) (Court must apply the "presumption of regularity" to "'the official acts of public officers, and in the absence of clear evidence to the contrary, [must] presume that they have properly discharged their official duties.'") (quoting *United States v. Chemical Foundation Inc.*, 272 U.S. 1, 14-15, 47 S.Ct. 1, 6, 71 L.Ed. 131 (1926)). "As the appellant has offered no 'clear' evidence that the RO did not consider the presumption of sound condition and aggravation, the Court concludes that the RO considered all the relevant law and evidence." *Dolan, supra*.

MAILING

PRESUMPTION OF REGULARITY

§ Regarding the official acts of public officials there is a presumption of regularity. "'[I]n the absence of *clear evidence to the contrary*, courts presume that [these officials] have properly discharged their official duties.'" *Ashley v. Derwinski*, 2 Vet.App. 62, 64-65 (1992) (*Ashley I*) (quoting *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). This Court has applied this legal principle to mailing of documents by the VA. *See Moffitt v. Brown*, 10 Vet.App. 214, 223 (1997) (holding that presumption applies to mailing of BVA decisions); *YT v. Brown*, 9

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Vet.App. 195, 199 (1996) (holding that presumption applies to mailing of SOC); *Mason (Sangernetta) v. Brown*, 8 Vet.App. 44, 55 (1995) (presumption applies to mailing of RO decisions. The mere assertion of nonreceipt standing alone is insufficient to rebut this presumption of regularity). *See Ashley v. Derwinski*, 2 Vet.App. 307, 309 (1992) (*Ashley II*); *cf. Chute v. Derwinski*, 1 Vet.App. 352, 353 (1991) (presumption of regularity in mailing overcome by combination of evidence of veteran's nonreceipt of documents and multiple inquiries to VA as well as VA's failure to submit proof of mailing).

§ "[T]he law presumes the regularity of the administrative process 'in the absence of clear evidence to the contrary.'" *Crain v. Principi*, 17 Vet.App. 182, 186 (2003) citing *Mindenhall v. Brown*, 7 Vet.App. 271, 274 (1994) (quoting *Ashley v. Derwinski*, 2 Vet.App. 62, 64-65 (1992) [hereinafter *Ashley I*]); *see Mason (Sangernetta) v. Brown*, 8 Vet.App. 44, 53 (1995). The presumption of regularity applies the same to the VA's mailing of an SOC as to the mailing of a Board decision. *See YT v. Brown*, 9 Vet.App. 195, 1999 (1996). For "the presumption to attach the VA must mail to the latest address of record." *Crain, supra*; citing *Ashley v. Derwinski*, 2 Vet.App. 307, 309 (1992) [hereinafter *Ashley II*]; *see also Schoolman v. West*, 12 Vet.App. 307, 310 (1999)(as to mailing of VA notice informing appellant of possible entitlement to DIC); *Saylock v. Derwinski*, 3 Vet.App. 394, 395 (1992) (as to mailing of RO decision).

REBUTTAL OF PRESUMPTION OF REGULARITY

§ Clear evidence that the agencies mailing practices are not "regular" or if they are "regular", were not followed rebuts the entitlement to regularity and the burden shifts to the agency to prove the information was mailed. *See Crain v. Principi*, 17 Vet.App. 182, 186 (2003) citing *Ashley v. Derwinski*, 2 Vet.App. 307, 309 (1992) [*Ashley II*]; *See also Ashley v. Derwinski*, 2 Vet.App. 62, 64-65 (1992) [*Ashley I*] (quoting *United States v. Roses*, 706 F.2d 1563, 1576 (Fed.Cir.1983)) ("'The presumption [of official regularity may also] operate[] in reverse. If [a mailing]

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appears irregular, it is irregular, and the burden shifts to the proponent to show the contrary'").

CLEAR EVIDENCE REBUTS PRESUMPTION

§ Non receipt of the information does not constitute "clear evidence" necessary to rebut the presumption of regularity. *Crain v. Principi*, 17 Vet.App. 182, 186-87 (1991) *Ashley v. Derwinski*, 2 Vet.App. 307, 309; *cf. Chute v. Derwinski*, 1 Vet.App. 352, 353 (1991) (per curiam order) ("holding that presumption of regularity was rebutted where Secretary could not show that VA had mailed notice of BVA decision and appellant's letter appeared to reflect that he was seeking information regarding status of BVA review, thus, indicating that he had not received that notice") .

Use of an incorrect address constitutes clear evidence to rebut the presumption of regularity in mailing. """" *Crain, supra* at 187 citing *Fluker v. Brown*, 5 Vet.App. 296, 298 (1993); *Piano v. Brown*, 5 Vet.App. 25, 26-27 (1993) (per curiam).

The presumption of regularity in mailing is also rebutted if the mail is (1) returned as undeliverable and (2) there are other possible and plausible addresses in the file. *Crain, supra*, citing *Cross v. Brown*, 9 Vet.App. 18, 19-20 (1996) (per curiam order); *see also Davis v. Principi*, 17 Vet.App. 29, 37 (2003).

The *Crain* court found that an incorrect zip code with the appellant's assertion that she did not receive the notice was sufficient to rebut the presumption of regularity. *Crain* at 189; *cf. Santoro v. Principi*, 274 F.3d 1366, 68-70 (Fed.Cir.2001) (Appellant *Santoro* mailed a NOA to the Court using the zip code of the VA General Counsel's office. The mail was delivered to the VA General Counsel's office and forwarded to the Court after the 120 day statute of limitations. The CAVC held that the NOA was misaddressed and held that jurisdiction was denied because the correspondence arrived after the 120 day statute of limitations. The Federal Circuit reversed and remanded the case back finding that if the item reached the correct address, it was properly addressed and the date of mailing was the date of filing of the NOA and therefore was timely. The *Crain* court found that the *Santoro* case was different in that the VA was obligated by statute to mail the information to the last known address, the VA relationship to its claimants is nonadversarial and proclaimant, the

PRESUMPTION OF SOUNDNESS (SEE ALSO CLAIM, TYPES AND STATUS, AGGRAVATION OF A PREEXISTING CONDITION)

appellant asserted that the mail was not received (in contrast to *Santoro* where the Court did receive the mail)).

CONSTRUCTIVE NOTICE OF ADDRESS CHANGE

§ Notification to the VA Regional Office is constructive notice to the Board that the veteran's address has changed. *See Cross v. Brown*, 9 Vet.App. 18, 20 (1996) citing *Bell v. Derwinski*, 2 Vet.App. 611, 613 (1992) (per curiam order) (where documents proffered by appellant are within the Secretary's control, as far as the law is concerned, they are before the Secretary and the Board) and *Hulsey v. Principi*, 3 Vet.App. 486, 487 (1992) (per curiam order) (the same). If there is clear evidence that the mailing was to any other address, the presumption of regularity is rebutted and the burden "shifts to the Secretary to establish that the BVA decision was mailed to the veteran and the veteran's representative, if any, as required by 38 U.S.C. § 7104(e). *Davis v. Brown*, 7 Vet.App. 298, 300 (1994) quoting *Ashley v. Derwinski*, 2 Vet.App. 307, 308-09 (1992) and citing *cf. Chute v. Derwinski*, 1 Vet.App. 352 (1991) (per curiam order) (presumption of regularity was rebutted where veteran claimed not to have received BVA decision and had made inquiries to VA after decision was mailed and VA did not show evidence of mailing of decision). The *Trammel* court held that the presumption of regularity was rebutted when it was established that the BVA used "internal/private contractor/U.S. Postal Service distribution procedure ('flat mail')" to distribute copies of the Board decision to the veteran's representative. *Davis supra* citing *Trammel v. Brown*, 6 Vet.App. 181, 183 (1994).

PRESUMPTION OF SOUNDNESS (*SEE ALSO* CLAIM, TYPES AND STATUS, AGGRAVATION OF A PREEXISTING CONDITION)

LAY MEDICAL STATEMENTS CANNOT BE USED TO ESTABLISH PRESERVICE INCURRENCE

§ Just as a lay person's account of what a physician may or may not have diagnosed is insufficient to render a claim well grounded, similarly, such a statement does not

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constitute the type of evidence that would serve as the basis for the Board's finding that the psychiatric condition preexisted service. *See Paulson v. Brown*, 7 Vet.App. 466 (1995).

PROCEDURAL DUE PROCESS

PROCEDURAL DUE PROCESS AND APPELLATE RIGHTS 38 C.F.R. § 3.103 (1992)

§ Subsection (d) of 38 C.F.R. § 3.103, which is entitled "Procedural due process and appellate rights," states:

> (d) Submission of evidence. Any evidence whether documentary, testimonial, or in other form, offered by the claimant in support of a claim and any issue a claimant may raise and any contention or argument a claimant may offer with respect thereto are to be included in the records.

This subsection requires that all evidence, issues, contentions, and arguments advanced by a claimant must be "included in the records." *Id.* For the provision to have meaningful effect necessitates that there must be reasonable notice of the right to advance, and a reasonable opportunity to so advance, such evidence, issues, contentions, and arguments.

FINALITY OF DECISION VITIATED BY DUE PROCESS VIOLATIONS

§ "[T]he agency of original jurisdiction must provide, along with the mailing of the decision, a notification to the appellant of his or her procedural due process and appellate rights." *See Mindenhall v. Brown*, 7 Vet.App. 271, 274 (1994); 38 U.S.C. § 7105(d)(1); 38 C.F.R. §§ 3.103, 19.25 (1999). "[W]here VA has failed to procedurally comply with statutorily mandated requirements, a claim does not become final for purposes of appeal to the Court." *See Lanao v. Brown*, 8 Vet.App. 361, 365 (1995).

§ The veteran, while in service, in a civil criminal proceeding was found not guilty by reason of insanity, admitted to St. Elizabeth's Hospital in Washington, D.C. and

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diagnosed with schizophrenia. The veteran placed on TDRL at 30 percent later to be increased to 100 percent.

In 1967, attorney Rosen, on his letterhead, transmitted an application for veterans benefits. The cover letter identified the veteran as attorney Rosen's client. In 1968, the veteran was granted 100 percent service connection for schizophrenia and, along with his attorney, was notified of his need to elect to receive either compensation or retirement pay. Following receipt of a report from St. Elizabeth's hospital, the VA notified the veteran, but not attorney Rosen, that his 100 percent rating was being continued and he was notified of the need to elect payment of veterans benefits.

In October 1995 the veteran requested information from the VA regarding the status of his benefits. The veteran's request was treated as a reopen of a previously denied claim and granted benefits from February 1996. The veteran argued for an earlier effective date which was granted back to November 1995. The veteran wanted to know why he was not being paid back to 1967, the year of his original claim.

A December 30, 1999 Board decision found the veteran had not filed a claim prior to October 1995 nor submitted an election to receive benefits between August 1968 and January 1996. Although the record establishes that the VA did not notify the veteran's attorney of the 1968 continued rating and improperly addressed the veteran's notice of the rating, the Board found that the presumption of regularity applied.

The *Svehla* court found that the attorney had identified himself as the veteran's representative and asked to be kept informed of the "future processing" of the veteran's claim for benefits and that the VA had provided some information to the attorney. The Court noted that there was no record that the veteran had ever indicated Mr. Rosen was not his representative. The Court found that Mr. Rosen had been treated as the veteran's representative and would be his representative under 38 C.F.R. § 1.524 (1967) if the veteran was found incompetent. The Court found that because of the medical reports in the claims folder, the VA was on notice as to the severity of the veteran's mental disabilities. The Court noted 38 C.F.R. § 3.851 required the VA to provide special handling for patients in St. Elizabeth's hospital and the M21-1 provisions which, in some cases, directs that special considerations be

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provided in consideration of a veterans disabilities when processing the veteran's claim.

The Court found that Mr. Rosen was the veteran's representative and the VA was obligated to provide copies of all correspondence to Mr. Svehla regarding the processing of his claim to Mr. Rosen. The Court found that the failure to provide such notice to the veteran's representative vitiated the effectiveness of any notice to the veteran.

FAILURE TO APPLY RULES KEEPS CLAIM ALIVE FOR APPEAL TO THE COURT

§ Two months after the veterans discharge he filed for service connection of a back condition. He served from January 1956 to December 1957 and received treatment in service for a condition diagnosed as a congenital back condition, found unfit for duty and discharged.

The veteran's claim was denied in an April 1958 decision. Within a year of the notice of decision the veteran wrote a letter essentially disagreeing with the RO decision. He indicating he wanted to "reopen" his claim because of errors in the prior decision. He requested a copy of the prior decision so he could proceed.

The RO treated the veteran's correspondence as a claim to reopen, advised him to submit evidence and confirmed and continued the prior decision. In October 1986 and April 1988 the RO refused to reopen the veteran's claim because he had not submitted new and material evidence.

The veteran filed another claim in February 1994 which was again denied by the RO. The veteran appealed to the Board. The Board reopened the veteran's claim and remanded the matter to the RO who, in June 1997, service connected the veteran's back condition effective January 28, 1994.

In June 1997, the veteran asked why his back wasn't service connected back to 1958 since that was when he first appealed. An earlier effective date was denied at the RO and the Board and the veteran appealed to the Court. In October 1999, the Court vacated and remanded the Board decision for reasons and bases.

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On remand the Board decided that the veteran's 1959 letter met all the standards of an appeal but the veteran ". . . expressed specifically and without qualification an intent for some other course of action." *Myers v. Principi*, 16 Vet.App. 228, 228-30 (2002). The Board continued by indicating that if the veteran had intended to appeal the 1958 by his 1959 correspondence, he would have appealed the 1960 decision confirming and continuing the prior denial.

Citing *Nolen v. Gober*, 222 F.3d 1356, 1360 (Fed.Cir.2000) (holding that the Court of Appeals for Veterans Claims erred in reconsidering and overturning a favorable finding by the Board that a claim was well grounded), the Court did not alter the Board's conclusion that the veteran's letter met the requirements of an appeal, thus, the question of the VA's discretionary authority regarding the requirement for language which could be construed to request a Board appeal did not arise. The Court found the Board's reasoning flawed as to whether or not the veteran would have appealed later decisions if he intended to appeal the 1958 decision. *Myers*, *supra* at 232-34.

The Court found that the Board had erred by not applying the rule of liberal construction (citing 38 C.F.R. 3.63 (1956)) and, in failing to apply that rule failed to find the veteran's 1959 letter was an appeal. The VA failed to provide the veteran an SOC, he was unable to file a formal appeal to the Board, thus, the 1958 RO decision never became final. Applying *Tablazon*, the Court concluded that the VA's failure to comply with statutorily mandated requirements kept the claim from becoming final for purposes of appeal to the Court. *Tablazon v. Brown*, 8 Vet.App. 359, 361 (1995). Citing *Fenderson*, the Court found, as "a matter of law" that the matter on appeal was an original claim. *Fenderson v. West*, 12 Vet.App. 119, 125 (1999) (An original claim placed on appeal by an NOD are not "ultimately resolved until the Board decision on appeal.").

CLAIM STILL OPEN IF PROPER NOTICE OF DECISION NOT SENT TO VETERAN

§ A veteran's claim was denied in 1969. The VA avers that a notice of decision was not sent to the veteran. In 1982, the veteran sought to reopen his claim. A September 1982 RO decision found the claim had been previously denied. The VA sent a letter only advising the veteran that his claim had previously been denied in 1969. The

PYRAMIDING (38 U.S.C.A. § 1155; 38 C.F.R. 4.25)

veteran did not appeal the decision. In 1998 the veteran, through counsel, indicated that he had never been notified of the 1969 denial and requested a formal decision on that claim. The VA's 1998 response acknowledged failure to notify the veteran of the 1969 decision but found that the 1982 letter informing the veteran that his 1969 claim had been denied finalized the issue and that his appeal rights had expired.

In 1998 the veteran appealed to the Board. The Board denied the veteran's claim concluding that the back condition had been denied in 1969, that the September 1982 RO decision confirmed and continued the 1969 decision denying the claim and that the notice of the 1982 decision notified the veteran of his continued denial of service connection and included appellate rights information.

On appeal, the Court found the 1982 notice inadequate because it did not provide a reason for the denial in 1969 as required at 38 C.F.R. § 3.103. *Ruffin v. Principi*, 16 Vet.App. 12, 15 (2002).

PYRAMIDING (38 U.S.C.A. § 1155; 38 C.F.R. 4.25)

§ In *Brady*, "[t]he Court interpreted 38 U.S.C. § 1155 as implicitly containing the concept that 'the rating schedule may not be employed as a vehicle for compensating a claimant twice (or more) for the same symptomatology; such a result would overcompensate the claimant for the actual impairment of his earning capacity' and would constitute pyramiding." *Esteban v. Brown*, 6 Vet.App. 259, 261 (1994) citing *Brady v. Brown*, 4 Vet.App. 203 (1993). However, the Court has also ruled "that it is possible for a veteran to have separate and distinct manifestations from the same injury permitting two different disability ratings ... ." *Esteban, supra*, citing *Fanning v. Brown*, 4 Vet.App. 225 (1993); *See* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). Thus, "pursuant to 38 C.F.R. § 4.25, appellant's conditions are to be rated separately unless they constitute the 'same disability' or the 'same manifestation' under 38 C.F.R. § 4.14." *Esteban, supra.*

RATINGS

PRESERVATION

§ The protection afforded by 38 U.S.C.A. § 110 (West 1995) applies to ratings for compensation purposes, whether or not a veteran elects to receive a monetary award. *See Salgado v. Brown*, 4 Vet.App. 316, 320 (1993).

VA MAY NOT DENY CLAIM BASED ON FACTORS OUTSIDE RATING CRITERIA

§ VA may not rely on factors from outside the rating criteria to deny a claim. *Otero-Castro v. Principi*, 16 Vet. App. 375 (2002); *see also Droskey v. Brown*, 10 Vet.App. 251, 255 (1997) (finding that Board conclusions based on criteria outside applicable DC were "legally erroneous").

REASONS AND BASES

BOARD CANNOT ADOPT INADEQUATE REASONS AND BASES OF A PRIOR DECISION, REOPEN CLAIM

§ In *Oppenheimer v. Derwinski*, 1 Vet.App. 370, 371 (1991), the Court ruled

> [t]his case presents a slightly new twist; namely, whether a reopened decision can simply adopt the findings of a prior decision which contained inadequate reasons or bases.... The Court holds that where a claim has been reopened, the BVA must supply reasons and bases for its findings. This obligation is not satisfied by adopting findings which are based upon inadequate reasons or bases.

BOARD REQUIRED TO STATE FINDINGS AND CONCLUSIONS

§ In order for a claimant to understand a decision and the reasons behind it, as well as to assist in judicial review, the BVA is required to include in its decisions a written statement of its findings and conclusions. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990); *Sammarco v. Derwinski*, 1 Vet.App. 111, 112-114 (1991).

REASONS AND BASES

BURNED RECORDS

§ "Where the service medical records are presumed destroyed ... the BVA's obligation to explain its findings and conclusions ... is heightened." *O'Hare v. Derwinski*, 1 Vet.App. 365, 367 (1991).

"PARTICULARLY ACUTE" REGARDING DEGREE OF DISABILITY IN MENTAL HEALTH CASE (CITE 1)

§ "The need for a statement of reasons or bases is particularly acute when BVA findings and conclusions pertain to the degree of disability resulting from mental disorders such as PTSD." *See Mitchem v. Brown*, 9 Vet.App. 138, 140 (1996) citing *Fletcher v. Derwinski*, 1 Vet.App. 394, 396 (1991) (matter remanded because BVA failed to give reasons or bases why veteran did not qualify for 70% rating); *Wilson v. Derwinski*, 1 Vet.App. 139, 140 (1991) (matter remanded due to BVA's failure to provide "adequate explanation for the apparent dismissal of evidence favorable to appellant's claim and its conclusion that appellant's impairment is not more than considerable in degree").

"PARTICULARLY ACUTE" REGARDING DEGREE OF DISABILITY IN MENTAL HEALTH CASE (CITE 2)

§ The need for a statement of reasons or bases is particularly acute when BVA findings and conclusions pertain to the degree of disability resulting from mental disorders . . . . " *Mitchem v. Brown*, 9 Vet.App. 138, 140 (1996).

"The Board's consideration of factors which are wholly outside the rating criteria provided by the regulation is error as a matter of law." *Massey v. Brown*, 7 Vet.App. 204, 208 (1994) (citing *Pernorio v. Derwinski*, 2 Vet.App. 625, 628 (1992)).

"The term 'definite' ... is qualitative in nature. To say that a veteran has 'definite' impairment of social and industrial adaptability is to say that the veteran is unmistakably impaired. It does not describe the degree of the impairment .... For example, a veteran who is "mildly" or "totally" impaired is also "definitely" impaired, because the characteristics which constitute a psychotic disorder are, without doubt, present." *Hood v. Brown*, 4 Vet.App. 301, 303 (1993).

REASONS AND BASES

REASONS OR BASES INADEQUATE

§

> In view of the mandate of [38 U.S.C.] § 4004(d)(1) that the BVA articulate with reasonable clarity its 'reasons or bases' for decisions, and in order to facilitate effective judicial review . . . . These decisions must contain clear analysis and succinct but complete explanations. A bare conclusory statement, without both supporting analysis and explanation, is neither helpful to the veteran, nor 'clear enough to permit effective judicial review', nor in compliance with the statutory requirements.

Gilbert v. Derwinski, 1 Vet.App. 49, 57 (1990); *see also Browder v. Derwinski*, 1 Vet.App. 204, 208 (1991) ("Integrated with the 'reasons or bases' requirements of [38 C.F.R.] § 4004(d)(1) is the requirement that the BVA decision include a 'written statement of the Board's findings and conclusions . . . on *all material issues* of fact and law presented on the record. . . .'" citing *Sammarco v. Derwinski*, 1 Vet.App. 111, 112 (1991)); *Cf. Bone v. Brown*, 9 Vet.App. 446, 450 (1996).

REJECTION OF CLAIMANTS TESTIMONY AND EVIDENCE REQUIRES REASONS AND BASES

§ A claimant's sworn testimony is evidence which the Board must consider, and the Board must "provide adequate reasons or bases for its rejection of the appellant's testimonial evidence," and the evidence of record. *See Pruitt v. Derwinski*, 2 Vet.App. 83, 85 (1992); s*ee also Suttman v. Brown*, 5 Vet.App. 127, 132 (1993); *EF v. Derwinski*, 1 Vet.App. 324 (1991).

TWO OR MORE PROVISIONS APPLY, BVA MUST PROVIDE REASONS AND BASES FOR DECISION

§ When, on the basis of the evidence of record, two or more provisions of VA's rating schedule are potentially applicable to the evaluation of a particular disability, the Board must provide reasons or bases for its decisions to rate that disability under one such provision rather than another potentially applicable provision. *See Lendenman v. Principi*, 3 Vet.App. 345, 349-51 (1992); *Pernorio v. Brown*, 2 Vet.App. 625, 629 (1992).

RES JUDICATA (SEE IAW OF THE CASE)

REVISIONS OF DECISIONS (CUE)

ANALYSIS OF CUE CLAIM

§ "A claim of CUE is a collateral attack on a final RO decision." *Norris V. West,* 11 Vet.App. 219, 223 (1998) citing *Smith v. Brown,* 35 F.3d 1516, 1521 (Fed. Cir 1994); *Crippen v. Brown,* 9 Vet.App. 412, 417-18 (1996); *Duran v. Brown,* 7 Vet.App. 216, 224 (1994); Pub.L. No. 105-111, 111 Stat. 2271 (1997) (found at 38 U.S.C. § 7111) (allowing for claims of CUE in prior BVA decisions). "The Court has defined CUE as follows:

> Either the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions extant at the time were incorrectly applied . . . . [CUE] is the sort of error which, had it not been made, would have manifestly changed the outcome . . . [, an error that is] undebatable, so that it can be said that reasonable minds could only conclude that the original decision was fatally flawed.

Norris, 11 Vet.App. 223-24 (1998) quoting *Crippen,* 9 Vet.App. at 418; *see also Russell v. Principi*, 3 Vet.App. 310, 313 (1992) (en banc).

> In *Fugo v. Brown,* 6 Vet.App. 40, 43-44 (1993), this Court stated that, 'even where the premise of error is accepted, if it is not absolutely clear that a different result would have ensued, the error complained of cannot be, ipso facto, clear and unmistakable.'

Norris, 11 Vet.App. at 224 quoting *Fugo*, 6 Vet.App. at 43-44; *see also Russell, supra*. "Furthermore, a claim of CUE on the basis that previous adjudications had improperly weighed the evidence can never meet the stringent definition of CUE. " *Norris*, 11 Vet.App. at 224 (1998) citing *Russell, supra*; *see also Eddy v. Brown,* 9 Vet.App. 52, 57 (1996).

§ (For additional information the following *non-precedential* decision is included for clarification only)

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In a single judge, non-precedential decision, *Spencer v. West*, U.S. Vet. App. No. 96-555, slip op. at 2-4 (April 8, 1998), Judge Steinberg provided a digested recitation of the analysis that the Court has followed when considering a CUE claim. The following is drawn almost intact from that opinion: [The Court has defined CUE as follows:

> Either the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions extant at the time were incorrectly applied. . . . [CUE is] the sort of error which, had it not been made, would have manifestly change the outcome . . . [, an error that is] undebatable, so that it can be said that reasonable minds could only conclude that the original decision was fatally flawed at the time it was made."

Russell v. Principi, 3 Vet.App. 310, 313-14 (en banc) (1992). "In order for there to be a valid claim of [CUE], . . . [t]he claimant, in short, must assert more than a disagreement as to how the facts were weighed or evaluated." *Ibid.* The Court has held that "merely to aver that there was CUE in a case is not sufficient to raise the issue . . . if it is not absolutely clear that a different result would have ensued." *Fugo v. Brown*, 6 Vet.App. 40, 43-44 (1993). "If a claimant-appellant wishes to reasonably raise CUE there must be some degree of specificity as to what the alleged error is and, unless it is the kind of error . . . that, if true would be CUE on its face, persuasive reasons must be given as to why the result would have been *meaningfully* different but for the alleged error." *Id*. at 44.

Russell also established that as a threshold matter, a CUE claim cannot be raised for the first time before the Court, but that the claim must have been the subject of a final prior BVA adjudication. *Russell*, 3 Vet.App. at 314-15. "A determination that there was a '[CUE]' must be based on the record and the law that existed at the time of the prior . . . decision." *Id* at 314. On appeal of a BVA determination that there was no CUE in a prior RO decision, the Court's review is limited to determining whether the Board's conclusion is" arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (38 U.S.C. § 7261(a)(3)(A)), and whether it is supported by an adequate statement of "reasons or bases" under 38 U.S.C. § 7104(d)(1) . *See Damrel v. Brown*, 6 Vet.App. 242, 246 (1994); *Lizaso v. Brown*, 5 Vet.App. 380, 385 (1993); *Russell*, 3 Vet.App. at 315. Of course, the Court must also determine whether it has jurisdiction to review the BVA decision. *See Sondel v. Brown*, 6 Vet.App. 218,

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219-20 (1994); *see also Barnett v. Brown*, 83 F.3d 1380, 1383 (Fed.Cir.1996) (Court always has jurisdiction to determine its own jurisdiction).

As noted above, before this Court may review a CUE issue, it must first have been adjudicated below. *See Russell*, 3 Vet.App. at 314-15; *see also Sondel*, 6 Vet.App. at 219-20 ("necessary jurisdictional 'hook' for this Court to act is a decision of the BVA on the *specific issue* of [CUE]") (internal citations omitted). Thus, if the "appellant has failed to raise the specific issue before the Board, the appeal must be dismissed as to that issue because it is improperly and improvidently raised for the first time before this Court". *Id*. at 220. Moreover. it is an "unassailable proposition" that merely to aver that there was CUE in a decision is insufficient to raise it adequately. *Phillips v. Brown*, 10 Vet.App. 25, 31 (1997) (quoting *Fugo*, 6 Vet.App. at 44) (internal quotation marks omitted). Thus, "[b]road-brush allegations and general, non-specific claim[s] of error are insufficient to satisfy the requirement that CUE claims be pled with some specificity". *Ibid*. The Court notes that a claimant's Substantive Appeal generally frames the issues to be considered. *See Myers v. Derwinski*, 1 Vet.App. 127, 129 (1991).]

COLLATERAL ATTACK[35], THREE PART TEST

§ A claim for clear and unmistakable error (CUE) is a collateral attack on a final VARO decision. *Smith (William) v. Brown*, 35 F.3d. 1516, 1527 (Fed. Cir. 1994). In *Russell v. Principi*, 3 Vet.App. 310, 313-14 (1992) (en banc), the Court defined a three-part test for CUE analysis. A determination that CUE exists in a prior decision means that:

(1) "[e]ither the correct facts, as they were known at the time, were not before the adjudicator (i.e., more than a simple disagreement as to how the facts were weighed

[35] **Collateral Attack.** "An attack on a judgment in any manner other than by action or proceeding, whose very purpose is to impeach or overturn the judgment; or, stated affirmatively, a collateral attack on a judgment is an attack made by or in an action or proceeding that has an independent purpose other than impeaching or overturning the judgment." *Black's Law Dictionary* 261 (6th ed. 1990) citing *Travis v. Travis' Estate*, 79 Wyo. 329, 334 P.2d 508, 510.

In essence, the appeals process, a well defined process set out in statutes, rules of practice and precedential law, is the generally accepted method used to overturn a judgment. Title 38 U.S.C. § 5109(A), *Revisions of decisions on grounds of clear and unmistakable error*, provide veterans an additional method to overturn a prior decision, however, because this method is a "collateral attack", outside the normal appeals procedure, it is far more difficult to prevail.

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or evaluated) or the statutory or regulatory provisions extant at the time were incorrectly applied," (2) the error must be "undebatable" and of the sort "which, had it not been made, would have manifestly changed the outcome at the time it was made," and (3) a determination that there was CUE must be based on the record and law that existed at the time of the prior adjudication in question. *Damrel v. Brown*, 6 Vet.App. 242, 245 (1994) (quoting *Russell, supra*). In addition, a failure to address a specific regulatory provision involves error only if the outcome would have been manifestly different. *Fugo v, Brown*, 6 Vet.App. 40, 44 (1993).

The question of whether the BVA erred in determining that a prior VARO decision did not contain CUE is reviewed by the Court under the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard of review in 38 U.S.C.A. § 7261(a)(3)(A) (West 1995). *See Damrel v. Brown*, 6 Vet.App. 242, 246 (1994); *Russell v. Principi*, 3 Vet.App. 310, 315 (1992) (en banc); *Wamhoff v. Brown*, U.S. CVA No. 94-561, (Jan. 30, 1996), slip op at 4.

ERROR MUST BE PREJUDICIAL AND UNDEBATABLE TO BE CUE

§ (5) In order for an error to be "clear and unmistakable", it must be "prejudicial" and appear "undebatably." *Akins v. Derwinski*, 1 Vet.App. 228, 231 (1991). "The words 'clear and unmistakable error' are self defining. They are errors that are undebatable, so that it can be said that reasonable minds could only conclude that the original decision was fatally flawed at the time it was made." *Russell v. Principi*, 3 Vet.App. 310, 313 (1992) (en banc).

CUE IN A BOARD DECISION

BEFORE PUBLIC LAW 105-111 (ENACTED NOVEMBER 21, 1997)

§ The *Smith* Court found that the law, as of the date of that decision (August 12, 1994), did not apply the CUE regulations to Board decisions. In essence, until November 21, 1997, the date of passage of Pub.L. 105-111, CUE could not be found in a Board decision. *Smith v. Brown*, 35 F.3d 1516, 1527 (Fed.Cir. 1994).

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ON OR AFTER PUBLIC LAW 105-111 WAS ENACTED (NOVEMBER 21, 1997)

§ "… Pub.L. 105-111 provides that a decision of the Board may be reviewed for 'clear and unmistakable error' …." *Donovan v. West*, 158 F.3d 1377, 1383 (Fed.Cir. 1998) (Pub.L. 105-111 § "5109A. Revision of decisions on grounds of clear and unmistakable error."

> (b) BVA Decisions.--(1) Chapter 71 of such title is amended by adding at the end the following new section:
>
> Sec. 7111. Revision of decisions on grounds of clear and unmistakable error
>
> (a) A decision by the Board is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.)

§ "Pursuant to [38 U.S.C.] section 7111, this Court has jurisdiction to review a BVA decision that considered a claim asserting CUE in a previous BVA decision if that claim was pending or was filed on or after November 21, 1997[36]." *Jordan v. Principi*, 17 Vet.App. 261, 266 (2003) citing *see Swanson v. West*, 12 Vet.App. 442, 452 (1999); *Lane v. West*, 11 Vet.App. 412, 413 (1998) (per curiam order); *Wilson (Richard) v. West*, 11 Vet.App. 253, 254 (1998) (per curiam order).

[36] Public Law 105-111 was enacted November 21, 1997, "To amend title 38, United States Code, to allow revision of veterans benefits decisions based on clear and unmistakable error. (NOTE: Nov. 21, 1997 - [H.R. 1090]). *See* Appendix C – Public Laws and Explanations.

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CUE FOUND

COURT REVIEW OF DECISIONS FINAL PRECEDING THE VJRA[37] ENACTMENT

1947 VA REGIONAL OFFICE DECISION CONTAINED CUE

§ The Court found CUE in a 1947 RO decision which found that the veteran's condition was not aggravated in service without a regulatorily mandated "**specific finding** that that the increase in disability is due to the natural progression of the disease." *See Sondel v. West*, 13 Vet.App. 213, 219 (1999) citing VR 1(a), Part I, para. 1(d) (emphasis added); *see also Akins v. Derwinski*, 1 Vet.App. 228, 232 (1991) (setting forth text of VR 1(a), Part I, para. 1(d)).

CUE IN A CLAIM TO REOPEN DECIDED BEFORE 1990

§ In *Crippen v. Brown*, 9 Vet.App. 412, 420-21 (1996) the Court noted that Regional Office decisions rendered before February 1990 did not always provide a full discussion of the evidence considered in reaching a decision. Thus, it may be impossible to determine the basis of the denial of a claim to reopen, that is, did the

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[37] These decision are remarkable because the Court addressed CUE in claims although the appeal rights to the final decisions in question had long since expired, the decisions were final before the date of enactment of the statute creating the Court, there was no appeal initiating NOD regarding the decision on appeal on or after November 18, 1988 (which was required for Court jurisdiction at the time of these Court decisions), and the legal proposition of a presumption of regularity to cases decided before 1990 did not deter the Court from accepting jurisdiction of these cases. "It was not until February 1990 that ROs were required by statute to include the reasons for denying a claim in their decisions." *Dolan v. Brown*, 9 Vet.App. 358, 362 (1996) citing 38 U.S.C. § 5104(b); Veterans Benefits Amendments of 1989, Pub.L. No. 101-237, § 115(a)(1), 103 Stat. 2062, 2065-66 (1989). "The requirements that the ROs list 'a summary of the evidence considered' was first imposed by the Veteran's Benefits Amendments of 1989, ..." *Ibid.*; *see also Eddy v. Brown*, 9 Vet.App. 52, 58 (1996).

The *Cook Court* overruled that part of the *Hayre v. West*, 188 F.3d 1327 (Fed.Cir.1999) decision that had provided for a third method for vitiating the finality of a VA decision, "grave procedural error", the *Cook* court found that "[t]he statutory scheme provides only two exceptions to the rule of finality. . . .", CUE and reopening of a previously denied claim based on new and material evidence. *Cook v. Principi*, 318 F.3d 1334, 1339 (Fed.Cir.20002) (en banc).

However, the *Cook* court recognized that in some cases *a decision may never become final*, obviating the need to vitiate the decision, because the veteran may not be able to proceed with an appeal pending the VA's compliance with their statutory obligation to provide ". . . information or material critical to the appellate process. . . ." *Id* at 1340 citing *Tablazon v. Brown*, 8 Vet.App. 359 (1995) (the RO rating did not become final when the VA failed to provide the statutorily required statement of the case thereby denying the veteran the right to appeal); *Hauck v. Brown*, 6 Vet.App. 518 (1994) (failure to notify the veteran of the denial of his claim tolled the one year appeal period); *Kuo v. Derwinski*, 2 Vet.App. 662 (1992) (the RO rating did not become final when the VA failed to provide the statutorily required statement of the case thereby denying the veteran the right to appeal); and *Ashley v. Derwinski*, 2 Vet.App. 307 (1992) (because the Board failed to mail their decision in accordance with the statutes, the 120-day statute of limitations to appeal to the Court was tolled).

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RO refuse to reopen the claim or was the claim reopened and then denied on the merits. However, the *Crippen* court concluded that "it does not matter whether a particular RO decision was or was not a merits adjudication, because the disposition of the CUE claim would ultimately turn on the same question." *Simmons v. Brown*, 17 Vet.App. 104, 106 (2003) quoting *Crippen supra*.

REDUCTION IN 5 YEAR OLD RATING IS CUE IF 38 C.F.R. § 3.344 NOT APPLIED

§ In this case, the Board decision finding no CUE was reversed by the Court. The VA reduced the veteran's rating without consideration of 38 C.F.R. § 3.344 which requires special consideration of ratings at the same evaluation for five years or more. The rating which reduced the veteran's evaluation was promulgated 17 years after the rating which assigned a compensable rating. The Court concluded that the medical examination relied on to reduce the veteran's evaluation to noncompensable in the 1977 rating was essentially the same as the 1958 examination used to grant the veteran's compensable rating. However, the Board decision being appealed did not consider § 3.344. The Court found the failure to apply §3.344 was arbitrary, capricious, and an abuse of discretion. *Sorakubo v. Principi*, 16 Vet.App. 120, 123-24 (2002); citing *see also Kitchens v. Brown*, 7 Vet.App. 320, 325 (1995) (holding that when a VARO reduces a veteran's disability rating without observing the applicable VA regulations, the reduction is *void ab initio*).

NOT CUE

DUTY TO ASSIST FAILURE NOT CUE

§

> [A] breach in the duty to assist cannot constitute CUE….First, in order to constitute CUE, the alleged error must have been outcome determinative, *see Bustos v. West*; 179 F.3d 1378, 1381 (Fed.Cir.1999); second, the error must have been based upon the evidence of record at the time of the original decision, *see Pierce v. Principi*, 240 F.3d 1348, 1354 (2001).

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Cook v. Principi, 318 F.3d 1334, 1344 (Fed.Cir.2002).

PAYMENT OF RETROACTIVE AWARD

RETROACTIVE PAYMENT IS NOT SUBJECT TO INFLATION ADJUSTMENT

§ When a benefit is granted as the result of a CUE claim, the award is intended to have the "same effect" as if the award had been made on the same date as the decision found to be mistaken. 38 U.S.C. § 5109A(b); 38 C.F.R. §3.105(a). The retroactive payment of back benefits may not be adjusted for inflation. *Sandstrom v. Principi*, 16 Vet. App. 481, 484 (2002).

PETITION FOR REVISION OF DECISION

DISMISS, NOT DENY, FOR FAILURE TO MEET PLEADING REQUIREMENTS (38 C.F.R. § 20.1404(B))

§ The *Simmons v. Principi* court held that the failure to meet the pleading requirements in *Fugo* in attempting to file a motion for a revision of a decision based on CUE cannot be denied but must be dismissed without prejudice to refiling. *Simmons*, 17 Vet.App. 104, 114 (2003) citing *Disabled American Veterans v. Gober*, 234 F.3d 682, 699, 704 (Fed.Cir.2001) (denial of a CUE claim that does not meet pleading requirements precludes the CUE claim from being decided on the merits in violation of 38 U.S.C. § 7111(e) which requires a CUE claim be decided on the merits); *Fugo v. Brown*, 6 Vet.App. 40, 43-44 (1993) (requiring that to file a CUE claim the allegations of "the kind of error that could be considered CUE" must be raised with "some degree of specificity as to what the alleged error is and … persuasive reasons … as to why the result would have been *manifestly* different but for the alleged error.") (emphasis in text).

EACH CUE THEORY IS A SEPARATE CUE CLAIM

§ "[E]ach [CUE] theory alleged necessarily constitutes a separate claim…." *Jordan v. Principi*, 17 Vet.App. 261, 270 (2003) quoting *Bradley v. Principi*, 14 Vet.App. 255, 256-257 (2001) (per curiam order).

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"PARTICULAR (CUE) CLAIM" RAISED AND DECIDED ONLY ONCE.

§ "Once there is a final decision *on a particular claim* of CUE, *that particular claim* of CUE may not be raised again; it is res judicata." *Norris v. West*, 11 Vet.App. 219, 224 (1998) quoting *Olson v. Brown*, 5 Vet.App. 430 (1993); *see also Schmidt v. Brown*, 5 Vet.App. 27, 29 (1993); *Russell v. Principi*, 3 Vet.App. 310, 315 (1992). In considering this case, this Court cited the CUE law change in Pub.L. No. 105-111, 111 Stat. 2271 (1997) (found at 38 U.S.C. § 7111) which provided for the adjudication of CUE claims in prior Board decisions. *Norris*, 11 Vet.App. at 223.

PLEADING DOES NOT REQUIRE "EXACTITUDE" (DEGREE OF SPECIFITY)

§ For Court jurisdiction to consider a particular CUE argument, the argument does not have to be precisely the same language as argued at the Board. In some cases it is enough that the Board addressed the essence of the argument now raised at the Court.

> "[T]he Court stresses that its holding is based [in part] on [these] factors: … (2) the Court's recognition of the unique character of CUE claims as collateral attacks on prior final adjudications; and (3) the Court's recognition that the liberal construction of a VA claimant's pleadings must be tempered somewhat in CUE cases because of the special nature of CUE claims (although, nonetheless, *Fugo [v. Brown*, 6 Vet.App. 40, 44 (1993)] does not require pleading with ***exactitude***, only with some degree of specificity). To hold otherwise would shackle appellants, who are generally unrepresented by counsel before the Board, with the verbatim text in Court proceedings of whatever words they used in their arguments to the Board."

Jordan v. Principi, 17 Vet.App. 261, 270-71 (2003) citing *Fugo, supra*.

The *Jordan* Court cited *Maggitt v. West*, 202 F.3d 1370 (Fed.Cir.2000) to conclude that *Fugo*, in light of *Maggitt*, allowed appellants to flesh out and rephrase their basic CUE arguments before the Board at the Court. *Jordan, supra*, at 271.

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OBVIOUS ERROR CLAIM VIS A VIS CUE CLAIM, EQUIVALENT

§ "A CUE claim and an obvious error claim are essentially equivalent." *Hazan v. Gober*, 10 Vet.App. 511, 522 (1997); citing *Dinsay v. Brown*, 9 Vet.App. 79, 88 (1996); *see also Smith (William) v. Brown*, 35 F.3d 1516, 1526 (Fed.Cir.1994); *Russell v. Principi*, 3 Vet.App. 310, 314 (1992) (en banc).

SUBSUMPTION OF PRIOR DECISION

ISSUES NOT ADDRESSED IN BOARD DECISION ARE NOT SUBSUMED

§ When the Board denies a claim, the VARO may not reopen the claim on the same factual basis. *See* 38 U.S.C. § 7104(b). This rule recognizes the legal principle that a lower adjudicative body cannot review the decision of a higher adjudicative body. *See Spencer v. Brown*, 17 F.3d 368, 371-72 (Fed.Cir. 1994); *Smith v. Brown*, 35 F.3d 1516, 1526 (Fed.Cir. 1994). (the *Smith* Court made the analogy that the statutorily created structure of the VA provided for the AOJs to be trial level adjudicators and the Board to be an appellate level adjudicator). "Thus, when a veteran timely appeals an RO determination to the Board, and the Board affirms that determination, the RO determination is regarded as subsumed by the Board's decision." *Brown v. West*, 203 F.3d 1378, 1381 (Fed.Cir. 2000) citing *see* 38 U.S.C. § 201104)

The *Brown* Court held that a Board decision only subsumes an issue decided by the RO when it rules on the same issue. If Board decisions promulgated after an RO decision do not address issues decided by the RO then those issues are not subsumed in the Board decisions and are ripe for a collateral attack (CUE) at the RO. *Brown, supra*.

SUBSUMPTION OF PRIOR DECISION, MISSTATEMENT OF ISSUE VIS A VIS CONTENT OF DECISION

§ The *Johnston v. West* court found that the issue addressed in a prior decision was subsumed in a following decision although the second decision misstated the issue on appeal. The *Johnston* court held that, although the Board decision misstated the issue on appeal, the content of the second decision addressed the right questions.

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"The misstatement of the issue by the BVA … does not negate the content of the decision …." *Johnston*, 11 Vet.App. 240, 241-42 (1998).

VCAA APPLICABILITY TO REVISION OF DECISIONS

VCAA § 3 INAPPLICABLE TO MOTIONS TO REVISE BASED ON CUE

§ The VCAA does not apply to motions for revision of a decision based on CUE. *Livesay v. Principi*, 15 Vet. App. 165 (2001)(en banc) (the VCAA added § 5100 to title 38 defining "claimant" as "any individual applying for, or submitting a claim for any benefit under the laws administered by the Secretary." The *Livesay* court ruled that a motion to revise a previously denied claim is not a claim and therefore the VCAA § 3 provisions amending the 38 U.S.C. obligations of the Secretary to "notify" and "assist" "claimants" in the development of their claims); *Juarez v. Principi*, 16 Vet. App. 518 (2002) (per curiam order).

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SUBSTANTIAL DEFERENCE IS GIVEN TO THE STATUTORY INTERPRETATION OF THE AGENCY

§ Whether the Board . . . has properly interpreted a law or regulation is a matter which [CAVC] reviews de novo. However, in doing so, [s]ubstantial deference is given to the statutory interpretation of the agency authorized to administer the statute. *Bellezza v. Principi*, 16 Vet. App. 145, 148 (2002) (quotation marks and citations omitted).

DEFINITIONS, NOT OPERATIVE PROVISIONS OF LAW

§ "Definitions, whether statutory or regulatory, are not themselves operative provisions of law." *Hamilton v. Brown*, 4 Vet.App. 528, 536 citing Sutherland Stat. Const. § 27.02, at 459 (1985).

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REGULATIONS INCONSISTENT WITH STATUTE

§ In the *Gardner* decision, the U.S. Supreme Court addressed a number of questions regarding regulations and their consistency with the statutes.

> The Government contends that Congress ratified the VA's practice of requiring a showing of fault when it reenacted the predecessor of §1151 in 1934, or, alternatively, that Congress's legislative silence as to the VA's regulatory practice over the last 60 years serves as an implicit endorsement of its fault based policy. There is an obvious trump to the reenactment argument, however, in the rule that '[w]here the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction.'

Demarest v. *Manspeaker*, 498 U.S. 184, 190 (1991), s*ee also Massachusetts Trustees of Easter Gas & Fuel Associates* v. *United States*, 377 U.S. 235, 241-242 (1964) (congressional reenactment has no interpretive effect where regulations clearly contradict requirements of statute). But even without this sensible rule, the reenactment would not carry the day. Setting aside the disputed question whether the VA used a fault rule in 1934, [n.4] the record of congressional discussion preceding reenactment makes no reference to the VA regulation, and there is no other evidence to suggest that Congress was even aware of the VA's interpretive position. "In such circumstances we consider the . . . re enactment to be without significance." *United States* v. *Calamaro*, 354 U.S. 351, 359 (1957).

> Congress's post-1934 legislative silence on the VA's fault approach to § 1151 is likewise unavailing to the Government. As we have recently made clear, congressional silence "'lacks persuasive significance,'" *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver*, 511 U. S. ___, ___ (1994) (slip op., at 22-23) (quoting *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990)), particularly where administrative regulations are inconsistent with the controlling statute, see *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 175, n. 1 (1989) ("Congressional inaction cannot amend a duly enacted statute"). See also *Zuber* v. *Allen*, 396 U.S. 168, 185-186, n. 21 (1969) ("The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible. . . .

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> Congressional inaction frequently betokens unawareness, preoccupation, or paralysis").
>
> Finally, we dispose of the Government's argument that the VA's regulatory interpretation of §1151 deserves judicial deference due to its undisturbed endurance for 60 years. A regulation's age is no antidote to clear inconsistency with a statute, and the fact, again, that §3.358(c)(3) flies against the plain language of the statutory text, exempts courts from any obligation to defer to it. *Dole* v. *United Steelworkers of America*, 494 U.S. 26, 42-43 (1990); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc., supra*, at 842-843. But even if this were a close case, where consistent application and age can enhance the force of administrative interpretation, see *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978), the Government's position would suffer from the further factual embarrassment that Congress established no judicial review for VA decisions until 1988, only then removing the VA from what one congressional Report spoke of as the agency's "splendid isolation." H. R. Rep. No. 100-963, pt. 1, p. 10 (1988). As the Court of Appeals for the Federal Circuit aptly stated, "[m]any VA regulations have aged nicely simply because Congress took so long to provide for judicial review. The length of such regulations' unscrutinized and unscrutinizable existence" could not alone, therefore, enhance any claim to deference. 5 F. 3d, at 1463-1464.
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> [4] At the time of the 1934 reenactment, the regulation in effect precluded compensation for the " 'usual after[ ]results of approved medical care and treatment properly administered.' " See Brief for Respondent 31.

Brown v. Gardner, 115 S. Ct. 552, 130 L. Ed. 2d 462 (1994).

RULES INVALID WHEN MORE RESTRICTIVE THAN STATUTE

§ Regulation is invalid if it limits eligibility for benefit more strictly than the statute. *Kilpatrick v. Principi*, 16 Vet. App. 1, 7 (2002); *see also Gallegos v. Gober*, 14 Vet.App.50, 57-58 (2000) (invalidating C.F.R. § 20.201 insofar as it required the NOD to request BVA review.); *but see Gallegos v. Principi*, 283 F.3d 1309, 1314 (Fed.Cir.2002) (on appeal to the Federal Circuit, that part of the decision in *Gallegos*

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v. Principi, 14 Vet.App. 50, 57 (2000) which invalidated that part of 38 C.F.R. § 20.201 requiring an NOD to include language which could be construed to be an expressed desire for BVA review was overturned. The Federal Circuit, found that "[s]ection 20.201 is a reasonable and permissible construction of section 7105").

RULES INVALIDATED

INVALIDATION OF 38 C.F.R. § 20.1302 AND SECOND SENTENCE OF § 20.611

§ The Court in *Smith (Irma) v. Brown*, 10 Vet.App. 330, 335-36 (1997), invalidated 38 C.F.R. § 20.1302 and the second sentence in § 20.611. These sections of the regulations provided for the BOARD OF VETERANS' APPEALS to finally adjudicate an appealed claim of a veteran although the veteran had died before the decision was rendered. In *Smith (I)*at 335, the Court found that § 20.1302 was invalid because "The effect of this regulation is to allow the claim to survive the claimant's death, and permit the Board to proceed to adjudicate the merits of the claim without a claimant." Citing *Landicho*, "the Court considered the statutory scheme and the specific provisions in chapters 1, 13, and 51 of title 38, U.S. Code, and concluded that such scheme 'creates a chapter 11 disability[-]compensation benefit that does not survive the eligible veteran's death.'" *VDA de Landicho v. Brown*, 7 Vet.App. 42, 47 (1994); *see Hudgins v. v. Brown*, 8 Vet.App. 365, 368 (1995) (per curiam order), *aff'd*, No. 96-7025 (Fed.Cir. Apr. 7, 1997) (order). .... "Accordingly, pursuant to the Court's authority under 38 U.S.C. § 7261(a)(3)(C) and for the foregoing reasons and in light of applicable precedent, the court holds that § 20.1302 is invalid because it is not 'in accordance with law', specifically the provisions in chapters 11, 13, and 51 of title 38, U.S. Code, as interpreted by the Court in *Landicho* and upheld by the Federal Circuit in *Zevalkink v. Brown*, 6 Vet.App. 483, 488 (1994), *aff'd*, 102 F3.d 1236, 1243-44 (Fed.Cir.1996)." *Smith (I), supra*, at 335.

"For the same reasons set forth above with respect to § 2101302 and on the same basis, the Court holds that so much of § 20.611 (the second sentence thereof) ...must also be, and is hereby, invalidated." *Id* at 335-36.

RULES, REGULATIONS AND GUIDELINES

SUBSTANTIVE VERSUS INTERPRETIVE RULE

§ "In *Fugere v. Derwinski*, 1 Vet.App. 103, 107 (1990), *aff'd*, 972 F.2d 331 (Fed.Cir.1992), the Court held that a rule was substantive, despite its placement in a VA procedural manual, where it had the force of law and narrowly limited administrative action." *Parker v. Brown*, 9 Vet.App. 476, 480 (1996); s*ee also Buzinski v. Brown*, 6 Vet.App. 360, 369 (1994) citing *Rank v. Nimmo*, 677 F.2d 692, 698 (9th Cir.), *cert. Denied*, 459 U.S. 907 (1982) for proposition that VA handbooks, circulars, and manuals have force and effect of law where they prescribe substantive, rather than interpretive, rules.

§

> '[S]ubstantive rules' [are] those that effect a change in existing law or policy which affect individual rights and obligations. 'Interpretive rules,' on the other hand, clarify or explain existing law or regulation and are exempt from notice and comment under section 553(b)(A). . . . [A]n interpretive statement simply indicates an agency's reading of a statute or a rule. It does not intend to create new rights or duties, but only reminds affected parties of existing duties.

Paralyzed Veterans of America v. West, 138 F.3d 1434, 1436 (Fed. Cir 1998) (quoting *Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993) (other citations omitted).

§ The U. S. Supreme Court in *Shalala v. Guernsey*, 514 U.S. 87 (1995) citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, n. 31 (1979) found that Medicare reimbursement guidelines were valid although they had been adopted without notice and comment because the guideline was simply advising "the public of the agency's construction of the statutes and rules which it administers." *See Splane, et al v. West*, 216 F.3d 1058, 1064 (Fed.Cir.2000). The *Splane* Court quoted the *Guernsey* decision, "[I]nterpretive rules do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Id* quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 86, 99 115 S.Ct. 1232, 131 L.Ed.2d 106 (1995).

RULES, REGULATIONS AND GUIDELINES

The *Splane* Court quoted the U. S. Supreme Court decision in *Chrysler*:

> It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the 'force and effect of law.' This doctrine is so well established that agency regulations implementing federal statutes have been held to preempt state law under the Supremacy Clause.

Splane, supra, at 9 quoting Chrysler, supra, at 295-96.

> It is clear from *Chrysler* and *Guernsey* that the Court's reference to a regulation having the 'force and effect of law' is to the binding effect of that regulation on tribunals *outside* the agency, not on the agency itself. (emphasis in text)

Id, citing *Animal Legal Defense Fund v. Quigg*, 932 F.2d 920, 929-30 (Fed.Cir.1991) ("A limitation of [agency] discretion, by itself, does not make an agency action 'substantive.'").

MANUAL M21-1 *VIS A VIS* REGULATIONS

§ "Where the M21-1 imposes requirements not in the regulations that are unfavorable to a claimant, those additional requirements may not be applied against the claimant." *See Cohen v. Brown*, 10 Vet.App. 128, 139 (1997) citing *Hayes v. Brown*, 5 Vet.App. 60, 66 (1993) (refers to application of 38 U.S.C. § 1154(b);38 C.F.R. § 3.304(d) (1996) to "satisfactory lay" or other evidence when disability incurred in combat.); *Austin v. Brown*, 6 Vet.App.547, 554-55 (1994) ("discussing 38 C.F.R. § 1.551(c)'s prohibition against **adversely** affecting anyone by matter not published in Federal Register") (emphasis in text); *see Cohen, supra,* at 14.); *Karnas v. Derwinski*, 1 Vet.App. 308, 312-13 (1991) (when law or regulation changes during appeal, the most favorable must be applied); *Fugere v. Derwinski*, 1 Vet.App. 103, 109 (1990) ("without adherence to Administrative Procedure Act notice-and-comment process and specific notice to the public of intent to revoke Manual M21-1 provision protecting benefit entitlement, Secretary cannot revoke that provision" *see Cohen, supra,* at 138-39.). "They are not for further consideration and should not be used. Where the Manual M21-1 and the regulation overlap, the Manual M21-1 is irrelevant." *Cohen, supra*, at 139.

SERVICE CONNECTION (38 U.S.C. § 1131; 38 C.F.R. § 3.303)

SERVICE CONNECTION (38 U.S.C. § 1131; 38 C.F.R. § 3.303)

DIRECT SERVICE CONNECTION (38 U.S.C. § 1110; 38 C.F.R. § 3.303(A))

§ Service connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. Presumptive periods are not intended to limit service connection to diseases so diagnosed when the evidence warrants direct service connection. *See* 38 U.S.C.A. § 1110 (West 1995); 38 C.F.R. § 3.303(a) (1995); *Godfrey v. Derwinski*, 2 Vet.App. 352, 356 (1992) (claimant may establish the required nexus between a current condition and military service if he can show that the condition resulted from personal injury suffered in line of duty); *see Douglas v. Derwinski*, 2 Vet.App. 103, 108-09 (1992), *reaffirmed en banc and vacated in part on other grounds*, 2 Vet.App. 435 (1992). Therefore, the lack of in-service diagnoses or manifestations is not determinative.

DISABILITY YEARS AFTER SERVICE, DOES NOT FRUSTRATE SC (38 U.S.C. § 1110; 38 C.F.R. § 3.303(A))

§ The development of a disabling condition years after service does not eradicate the veteran's potential recovery under 38 U.S.C. § 1110 and 38 C.F.R. § 3.303(a). *See Douglas v. Derwinski*. 2 Vet.App. 103, 109 (1992).

LAY EVIDENCE CAN ESTABLISH SERVICE CONNECTION (38 C.F.R. § 3.303(A))

§ Clinical records are not the only proof of service connection. *See* 38 C.F.R. § 3.303(a) (VA must consider a claim for disability "on the basis of the places, types, and circumstances of his service as shown by service records, the official history of each organization in which he served, his medical records and all pertinent and lay evidence"); *Cartright v. Derwinski*, 2 Vet. App. 24, 25 (1991). A lay witness can testify as to the visible symptoms or manifestations of a disease or disability. *See Espiritu v. Derwinski*, 2 Vet.App. 492, 494 (1992); *Caldwell v. Derwinski*, 1 Vet.App. 466, 469 (1991). Once a witness has so testified, the BVA must make findings as to the probative value and credibility of that evidence and "must do more than simply

SERVICE CONNECTION (38 U.S.C. § 1131; 38 C.F.R. § 3.303)

point to an absence of medical evidence." *Rowell v. Principi*, 4 Vet.App. 9, 19 (1991).

SERVICE CONNECTION GRANTED UPON PROOF OF SERVICE INCURRENCE (38 C.F.R. § 3.303(D))

§ Under 38 C.F.R. § 3.303(d) (1995),

> [s]ervice connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. Presumptive periods are not intended to limit service connection to diseases so diagnosed when the evidence warrants direct service connection. The presumptive provisions of the statute and Department of Veterans Affairs regulations implementing them are intended as liberalizations applicable when the evidence would not warrant service connection without their aid.

Douglas v. Derwinski, 2 Vet.App. 103, 108-09 (1992), *reaffirmed upon an en banc review*, 2 Vet.App. 435, 437 (1992) (development of skin cancer years after service "does not eradicate the veteran's potential for recovery" under 38 U.S.C.A. § 1110 (West 1991) and 38 C.F.R. § 3.303(a); *cf. Horowitz v. Brown*, 5 Vet.App. 217, 221-23 (1991) (BVA should have provided reasons or bases regarding post-service diagnosis of Meniere's syndrome and symptoms consistent with that disease).

SERVICE CONNECTION -- CURRENT DISABILITY AND NEXUS TO INSERVICE INJURY OR DISEASE

§ A determination of service -connection requires a finding of the existence of a current disability and a determination of a relationship between that disability and an injury or disease in service. *See* 38 U.S.C.A. § 1131 (West 1995); 38 C.F.R. § 3.303 (1995); *Rabideau v. Derwinski*, 2 Vet.App. 141, 143 (1992).

SEVERANCE OF SERVICE CONNECTION

§

> [S]ervice connection will be severed only where evidence establishes that it is clearly and unmistakably erroneous (the burden of proof being upon the Government)....A change in

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> diagnosis may be accepted as a basis for severance action if the examining physician or physicians or other proper medical authority certifies that , in the light of all accumulated evidence, the diagnosis on which service connection was predicated is clearly erroneous. This certification must be accompanied by a summary of the facts, findings, and reasons supporting the conclusion.

See 38 C.F.R. § 3.105(d) (1996).

§ "Once service connection has been granted, section 3.105(d) provides that it may be withdrawn only after VA has complied with specific procedures and the Secretary meets his high burden of proof." *Wilson (Merritte) v. West*, 11 Vet.App. 383, 386 (1998) citing *Baughman v. Derwinski*, 1 Vet.App. 563, 566 (1991) ("In effect, § 3.105(d) places at least as high a burden on the VA when it seeks to sever service connection as § 3.105(a) places upon an appellant seeking to have an unfavorable previous determination overturned.").

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QUESTION OF APPLICATION OF LAW TO THE FACTS SUBJECT TO ARBITRARY [OR] CAPRICIOUS STANDARD OF REVIEW (38 U.S.C. § 7261(A)(3)(A))

BOARD ERRED IN RO CUE DECISION

§ "[T]he question whether the Board erred, under 38 C.F.R. § 3.105(a), in determining that a prior regional office or BVA decision did not contain "clear and unmistakable error"[] ..." is a question of application of law to the facts (arbitrary [or] capricious) (38 U.S.C. § 7261(a)(3)(A)). *See Eddy v. Brown*, 9 Vet.App. 52, 57 (1996); *Kronberg v. Brown*, 4 Vet.App. 399, 401 (1993); *Russell v. Principi*, 3 Vet.App. 310, 315 (1992) (*en banc*). Under the "arbitrary and capricious" standard of Court review, "[i]f the Board articulates a satisfactory explanation for its decision, including a rational connection between the facts found and the choice made, the Court must affirm." *Parker v. Brown*, 9 Vet.App. 476, 481 (1996) (citing *Kaplan v. Brown*, 9 Vet.App. 116, 119, (1996); *Smith (Barbara) v. Derwinski*, 1 Vet.App. 267, 279 (1991)). The scope of review under this standard is narrow and a Court is not to

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substitute its judgment for that of the agency, *Wamhoff v. Brown*, 8 Vet.App. 517 (1996). The Board's decision is arbitrary and capricious if the Board fails to consider an important aspect of the problem or if the decision is so implausible that it could not be ascribed to a mere difference in view. *Marlow v. Brown*, 5 Vet.App. 146, 151 (1993) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

BOARD FINDING REGARDING "CLEAR AND CONVINCING" EVIDENCE TO REBUT ENTITLEMENT TO § 1154(B)

§ "As to the Court's review of the Board's application of the "clear and convincing" standard as part of step 3 (of the *Collette v. Brown*, 82 F.2d 389, 392-93 (Fed.Cir.1996) 38 U.S.C. § 1154(b) analysis), *Caluza* suggested in dictum that the Court should apply the standard for reviewing a mixed question of law and fact -- that is, whether the determination is "arbitrary and capricious" — a standard that is highly deferential to the Board. *Velez v. West*, 11 Vet.App. 148,154 (1998) citing *Caluza v. Brown*, 7 Vet.App. 498, 509 (1995) (dictum), *aff'd per curiam*, 78 F.3d 604 (Fed.Cir.1996) (table); 38 U.S.C. § 7261(a)(3)(A) (Court shall set aside BVA conclusions "found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *Butts v. Brown*, 5 Vet.App. 532, 539 (1993) (en banc); *cf. id.* at 545-47 (Steinberg, J., concurring). "However, the Court's decision in *Bagby v. Derwinski* might suggest that this is a question of law subject to nondeferential de novo review by the Court. *Velez*, *supra*, citing *Bagby v. Derwinski*, 1 Vet.App. 225, 227 (1991) (question whether, under 38 U.S.C. § 1111, there is sufficient evidence to rebut presumption of soundness upon entry into service is question of law subject to de novo review by Court).

CLASSIFYING A DISEASE (38 U.S.C. § 1112(B))

§ "[T]he question whether the Board erred, under 38 U.S.C. § 1112(b), in classifying a particular disease (type of arthritis)[] ..." is a question of application of law to the facts (arbitrary [or] capricious). Under the "arbitrary and capricious" standard of Court review, "[i]f the Board articulates a satisfactory explanation for its decision, including a rational connection between the facts found and the choice made, the

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Court must affirm." *Parker v. Brown*, 9 Vet.App. 476, 481 (1996) citing *Kaplan v. Brown*, 9 Vet.App. 116, 119, (1996); *Smith (Barbara) v. Derwinski*, 1 Vet.App. 267, 279 (1991). The scope of review under this standard is narrow and a Court is not to substitute its judgment for that of the agency. Wamhoff v. Brown, 8 Vet.App. 517 (1996). The Board's decision is arbitrary and capricious if the Board fails to consider an important aspect of the problem or if the decision is so implausible that it could not be ascribed to a mere difference in view. *Marlow v. Brown*, 5 Vet.App. 146, 151 (1993) citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

CLEAR AND UNMISTAKABLE ERROR (38 C.F.R. § 3.105(A))

§ "[T]he question whether the Board erred, under 38 C.F.R. § 3.105(a), in determining that a prior regional office or BVA decision did not contain "clear and unmistakable error"[] ..." is a question of application of law to the facts (arbitrary [or] capricious). *Kronberg v. Brown*, 4 Vet.App. 399, 401 (1993); *Russell v. Principi*, 3 Vet.App. 310, 315 (1992) (en banc). Under the "arbitrary and capricious" standard of Court review, "[i]f the Board articulates a satisfactory explanation for its decision, including a rational connection between the facts found and the choice made, the Court must affirm." *Parker v. Brown*, 9 Vet.App. 476, 481 (1996) citing *Kaplan v. Brown*, 9 Vet.App. 116, 119, (1996); *Smith (Barbara) v. Derwinski*, 1 Vet.App. 267, 279 (1991). The scope of review under this standard is narrow and a Court is not to substitute its judgment for that of the agency. Wamhoff v. Brown, 8 Vet.App. 517 (1996). The Board's decision is arbitrary and capricious if the Board fails to consider an important aspect of the problem or if the decision is so implausible that it could not be ascribed to a mere difference in view. *Marlow v. Brown*, 5 Vet.App. 146, 151 (1993) citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

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DIAGNOSTIC CODE ASSIGNMENT

§ "[T]he question whether the Board erred in assigning a particular diagnostic code[] ..." is a question of application of law to the facts (arbitrary [or] capricious). Under the "arbitrary and capricious" standard of Court review, "[i]f the Board articulates a satisfactory explanation for its decision, including a rational connection between the facts found and the choice made, the Court must affirm." *Parker v. Brown*, 9 Vet.App. 476, 481 (1996) citing *Kaplan v. Brown*, 9 Vet.App. 116, 119, (1996); *Smith (Barbara) v. Derwinski*, 1 Vet.App. 267, 279 (1991). The scope of review under this standard is narrow and a Court is not to substitute its judgment for that of the agency. Wamhoff v. Brown, 8 Vet.App. 517 (1996). The Board's decision is arbitrary and capricious if the Board fails to consider an important aspect of the problem or if the decision is so implausible that it could not be ascribed to a mere difference in view. *Marlow v. Brown*, 5 Vet.App. 146, 151 (1993) citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

EVIDENCE IN EQUIPOISE ON A QUESTION OF MATERIAL FACT (38 U.S.C. § 5107(B))

§ "The question whether the Board erred, under 38 U.S.C. § 5107(b), in determining that evidence was not in equipoise on a question of material fact[] ..." is question of application of law to the facts (arbitrary [or] capricious). Under the "arbitrary and capricious" standard of Court review, "[i]f the Board articulates a satisfactory explanation for its decision, including a rational connection between the facts found and the choice made, the Court must affirm." *Parker v. Brown*, 9 Vet.App. 476, 481 (1996) citing *Kaplan v. Brown*, 9 Vet.App. 116, 119, (1996); *Smith (Barbara) v. Derwinski*, 1 Vet.App. 267, 279 (1991). The scope of review under this standard is narrow and a Court is not to substitute its judgment for that of the agency. Wamhoff v. Brown, 8 Vet.App. 517 (1996). The Board's decision is arbitrary and capricious if the Board fails to consider an important aspect of the problem or if the decision is so implausible that it could not be ascribed to a mere difference in view. *Marlow v. Brown*, 5 Vet.App. 146, 151 (1993) citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

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FAILURE TO CONSIDER APPLICABLE LAW

§ "Once a veteran raises a well grounded claim to which a regulation could reasonably apply, the BVA must apply that regulation or give reasons and bases explaining why it is not applicable." *Payne v. Derwinski*, 1 Vet.App. 85, 87 (1990) citing *Gilbert v. Derwinski*, 1 Vet.App. 49 (1990). Failure to consider applicable law is a question of application of law to the facts (arbitrary [or] capricious) (38 U.S.C. § 7261(a)(3)(A)). *See Id.*; *see also Eddy v. Brown*, 9 Vet.App. 52, 57 (1996); *Kronberg v. Brown*, 4 Vet.App. 399, 401 (1993); *Russell v. Principi*, 3 Vet.App. 310, 315 (1992) (*en banc*). Under the "arbitrary and capricious" standard of Court review, "[i]f the Board articulates a satisfactory explanation for its decision, including a rational connection between the facts found and the choice made, the Court must affirm." *Parker v. Brown*, 9 Vet.App. 476, 481 (1996) (citing *Kaplan v. Brown*, 9 Vet.App. 116, 119, (1996); *Smith (Barbara) v. Derwinski*, 1 Vet.App. 267, 279 (1991)). The scope of review under this standard is narrow and a Court is not to substitute its judgment for that of the agency, *Wamhoff v. Brown*, 8 Vet.App. 517 (1996). The Board's decision is arbitrary and capricious if the Board fails to consider an important aspect of the problem or if the decision is so implausible that it could not be ascribed to a mere difference in view. *Marlow v. Brown*, 5 Vet.App. 146, 151 (1993) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

INDIVIDUAL UNEMPLOYABILITY (38 C.F.R. § 4.16(C))

§ "[T]he question whether the Board erred in determining that a regulation governing individual unemployability (38 C.F.R. § 4.16(c)) is not applicable[] ..." is question of application of law to the facts (arbitrary [or] capricious). Under the "arbitrary and capricious" standard of Court review, "[i]f the Board articulates a satisfactory explanation for its decision, including a rational connection between the facts found and the choice made, the Court must affirm." *Parker v. Brown*, 9 Vet.App. 476, 481 (1996) citing *Kaplan v. Brown*, 9 Vet.App. 116, 119, (1996); *Smith (Barbara) v. Derwinski*, 1 Vet.App. 267, 279 (1991). The scope of review under this standard is narrow and a Court is not to substitute its judgment for that of the agency. Wamhoff v. Brown, 8 Vet.App. 517 (1996). The Board's decision is arbitrary and capricious if

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the Board fails to consider an important aspect of the problem or if the decision is so implausible that it could not be ascribed to a mere difference in view. *Marlow v. Brown*, 5 Vet.App. 146, 151 (1993) citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

POW STATUS UNDER 38 U.S.C. § 101(32)(B) AND 38 C.F.R. § 3.1(Y) (1995)

(*SEE ALSO* POW STATUS UNDER 38 U.S.C. § 101(32)(A), FACTUAL FINDING, CLEARLY ERRONEOUS STANDARD)

§ "Under the facts in the instant case, the appellant was held by a *foreign* government, and [38 U.S.C.] section 101(32)(B) applies, thereby affording the Secretary discretion to find the circumstances comparable to those under section 101(32)(A). Thus the Court must apply the 'arbitrary and capricious' standard of review as prescribed by 38 U.S.C. § 7261(a)(3)(A)." *Young v. Brown*, 9 Vet.App. 141, 143 (1996). Under the "arbitrary and capricious" standard of Court review, "[i]f the Board articulates a satisfactory explanation for its decision, including a rational connection between the facts found and the choice made, the Court must affirm." *Parker v. Brown*, 9 Vet.App. 476, 481 (1996) (citing *Kaplan v. Brown*, 9 Vet.App. 116, 119, (1996); *Smith (Barbara) v. Derwinski*, 1 Vet.App. 267, 279 (1991)). The scope of review under this standard is narrow and a Court is not to substitute its judgment for that of the agency, *Wamhoff v. Brown*, 8 Vet.App. 517 (1996). The Board's decision is arbitrary and capricious if the Board fails to consider an important aspect of the problem or if the decision is so implausible that it could not be ascribed to a mere difference in view. *Marlow v. Brown*, 5 Vet.App. 146, 151 (1993) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

TEMPORARY TOTAL CONVALESCENCE RATING (38 C.F.R. § 4.30(B))

§ "[T]he question whether the Board erred, under 38 C.F.R. § 4.30(b), in making a discretionary, adverse determination as to a veteran's entitlement to a temporary total convalescence rating[] ..." is a question of application of law to the facts (arbitrary [or] capricious). Under the "arbitrary and capricious" standard of Court review, "[i]f

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the Board articulates a satisfactory explanation for its decision, including a rational connection between the facts found and the choice made, the Court must affirm." *Parker v. Brown*, 9 Vet.App. 476, 481 (1996) citing *Kaplan v. Brown*, 9 Vet.App. 116, 119, (1996); *Smith (Barbara) v. Derwinski*, 1 Vet.App. 267, 279 (1991). The scope of review under this standard is narrow and a Court is not to substitute its judgment for that of the agency. Wamhoff v. Brown, 8 Vet.App. 517 (1996). The Board's decision is arbitrary and capricious if the Board fails to consider an important aspect of the problem or if the decision is so implausible that it could not be ascribed to a mere difference in view. *Marlow v. Brown*, 5 Vet.App. 146, 151 (1993) citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

WAIVER OF INDEBTEDNESS TO A VA DEBTOR (38 U.S.C. § 5302(b); 38 C.F.R. § 1.964(a))

§ "[T]he question whether the Board erred, under 38 U.S.C. § 5302(b) and 38 C.F.R. § 1.964(a), in making a discretionary determination on an application for a waiver of indebtedness to a VA debtor[] ..." is question of application of law to the facts (arbitrary [or] capricious). Under the "arbitrary and capricious" standard of Court review, "[i]f the Board articulates a satisfactory explanation for its decision, including a rational connection between the facts found and the choice made, the Court must affirm." *Parker v. Brown*, 9 Vet.App. 476, 481 (1996) citing *Kaplan v. Brown*, 9 Vet.App. 116, 119, (1996); *Smith (Barbara) v. Derwinski*, 1 Vet.App. 267, 279 (1991). The scope of review under this standard is narrow and a Court is not to substitute its judgment for that of the agency. Wamhoff v. Brown, 8 Vet.App. 517 (1996). The Board's decision is arbitrary and capricious if the Board fails to consider an important aspect of the problem or if the decision is so implausible that it could not be ascribed to a mere difference in view. *Marlow v. Brown*, 5 Vet.App. 146, 151 (1993) citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

WHETHER OR NOT THERE IS CUE

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§ The question whether the Board erred in determining that a prior RO decision did not contain CUE is reviewed by this Court under the standard prescribed by 38 U.S.C. § 7261(a)(3)(A), i.e., whether the Board decision is "arbitrary , capricious, an abuse of discretion, or otherwise not in accordance with law", i.e., a question of application of law to the facts. *See Damrel v. Brown*, 6 Vet.App. 242, 246 (1994). Under the "arbitrary and capricious" standard of Court review, "[i]f the Board articulates a satisfactory explanation for its decision, including a rational connection between the facts found and the choice made, the Court must affirm." *Parker v. Brown*, 9 Vet.App. 476, 481 (1996) citing *Kaplan v. Brown*, 9 Vet.App. 116, 119, (1996); *Smith (Barbara) v. Derwinski*, 1 Vet.App. 267, 279 (1991). The scope of review under this standard is narrow and a Court is not to substitute its judgment for that of the agency. *Wamhoff v. Brown*, 8 Vet.App. 517 (1996). The Board's decision is arbitrary and capricious if the Board fails to consider an important aspect of the problem or if the decision is so implausible that it could not be ascribed to a mere difference in view. *Marlow v. Brown*, 5 Vet.App. 146, 151 (1993) citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

QUESTION OF FACT SUBJECT TO "CLEARLY ERRONEOUS" STANDARD OF REVIEW (38 U.S.C. § 7261(A)(4))

ADULT CHILD INCAPABLE OF SELF SUPPORT (38 U.S.C. § 101(4)(A)(II))

§ "[T]he question whether, under 38 U.S.C. § 101(4)(a)(ii), a veteran's adult child was incapable of self-support[] ..." is a question of fact subject to the "clearly erroneous" standard of Court review. *See* 38 U.S.C. § 7261(a)(4); *Butts v. Brown*, 5 Vet.App. 532, 542 (1993) (Steinberg, J., concurring) citing *Bledsoe v. Derwinski*, 1 Vet.App. 32, 33 (1990). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). "The Court shall 'in the case of a finding of material fact made in reaching a decision

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in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." See Butts, supra, note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra*.

APPEAL OF FAILURE TO LIFT INCOMPETENCY DETERMINATION IS NEW CLAIM

§ An appeal of the Board's decision not to lift an incompetency determination is considered to be a new claim; the Court's "task is to determine whether the Board's decision is clearly erroneous." *Sanders v. Brown*, 9 Vet.App. 525, 529 (1996). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." *See Butts, supra*, note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra.*

BAD FAITH IN CREATING DEBT

§ The question as to whether a debtor has acted in bad faith is a question of fact subject to the "clearly erroneous" standard of Court review. *See East v. Brown*, 8 Vet.App. 34, 40 (1995); *see also* 38 U.S.C. § 7261(a)(4); *Butts v. Brown*, 5 Vet.App. 532, 542 (1993) (Steinberg, J., concurring) (citing *Santiago v. Brown*, 5 Vet.App. 288, 292 (1993)); 38 C.F.R. § 1.965(b) (1996) ("This term generally describes unfair or deceptive dealing by one who seeks to gain thereby at another's expense."). A factual finding is clearly erroneous when "although there is evidence to support it, the

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reviewing Court is left with the definite and firm conviction that a mistake has been made." *See United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." *See Butts, supra*, note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra.*

CHRONIC DISEASE, "UNREASONABLE" TIME BETWEEN MANIFESTATION AND DIAGNOSIS (38 C.F.R. § 3.307(C))

§ "[T]he question whether, under 38 C.F.R. § 3.307(c), a time lapse between the manifestations of a chronic disease and definite diagnosis of that disease was 'unreasonable'[] ..." is a question of fact subject to the "clearly erroneous" standard of Court review. *See* 38 U.S.C. § 7261(a)(4); *Butts v. Brown*, 5 Vet.App. 532, 542 (1993) (Steinberg, J., concurring) citing *Cook v. Brown*, 4 Vet.App. 231, 238 (1993). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." *See Butts, supra*, note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra.*

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DEGREE OF IMPAIRMENT ATTRIBUTABLE TO A DISABILITY

§ The degree of impairment attributable to disability is a question of fact which the Court reviews under the clearly erroneous standard. *Fleshman v. Brown*, 9 Vet.App. 548, 552. (1996). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." *See Butts, supra*, note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra.*

DENIAL OF SERVICE CONNECTION FOR CAUSE OF DEATH

§ Citing *Swann v. Brown*, 5 Vet.App. 229, 232 (1993), the Court in *Turner v. Brown*, 6 Vet.App. 256, 257 (1994) found a Board determination regarding service connection for cause of death is a factual finding. A finding of fact is subject to the "clearly erroneous" standard of Court review. *See* 38 U.S.C. § 7261(a)(4); *Butts v. Brown*, 5 Vet.App. 532, 542 (1993) (Steinberg, J., concurring) (citing *Santiago v. Brown*, 5 Vet.App. 288, 292 (1993)). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." *See Butts, supra*, note 4. The Court is not permitted to

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substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra.*

DETERMINATION OF CREDIBILITY

§ "The determination of credibility is a finding of fact." *See Caluza v. Brown*, 7 Vet.App. 498, 510 (1995) (citing *Smith (Brady) v. Derwinski*, 1 Vet.App. 235, 237-38 (1991)). A finding of fact is subject to the "clearly erroneous" standard of Court review. *See* 38 U.S.C. § 7261(a)(4); *Butts v. Brown*, 5 Vet.App. 532, 542 (1993) (Steinberg, J., concurring) (citing *Santiago v. Brown*, 5 Vet.App. 288, 292 (1993)). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." *See Butts, supra,* note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra.*

DISABILITY, DEGREE OF IMPAIRMENT

§ "[T]he question of the degree of impairment resulting from a disability, that is, its rating under the VA schedule for rating disabilities[] ..." is a question of fact subject to the "clearly erroneous" standard of Court review. *See* 38 U.S.C. § 7261(a)(4); *Butts v. Brown*, 5 Vet.App. 532, 542 (1993) (Steinberg, J., concurring) citing *Lovelace v. Derwinski*, 1 Vet.App. 73, 74 (1990). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left

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with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." *See Butts, supra*, note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra.*

DISABILITY INCURRED IN SERVICE (38 U.S.C. § 1110)

§ "[T]he question whether, 38 U.S.C. § 1110, a disability was incurred in service[] ..." is a question of fact subject to the "clearly erroneous" standard of Court review. *See* 38 U.S.C. § 7261(a)(4); *Butts v. Brown*, 5 Vet.App. 532, 542 (1993) (Steinberg, J., concurring) citing *Hoag v. Brown*, 4 Vet.App.209, 212 (1993). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." *See Butts, supra*, note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra.*

DISABILITY, IS IT PERMANENT AND TOTAL (38 U.S.C. § 1521(A) AND 38 C.F.R. § 4.17))

§ "[T]he question whether, under 38 U.S.C. § 1521(a) and 38 C.F.R. § 4.17, a disability is permanent and total[] ..." is a question of fact subject to the "clearly erroneous" standard of Court review. *See* 38 U.S.C. § 7261(a)(4); *Butts v. Brown*, 5 Vet.App. 532, 542 (1993) (Steinberg, J., concurring) citing *Wilson v. Brown*, 5 Vet.App. 103,

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107 (1993). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." *See Butts, supra*, note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra.*

DISABILITY, WHEN INCURRED

§ "The question as to when a disability was incurred[]..." is a question of fact subject to the "clearly erroneous" standard of Court review. *See* 38 U.S.C. § 7261(a)(4); *Butts v. Brown*, 5 Vet.App. 532, 542 (1993) (Steinberg, J., concurring) citing *Santiago v. Brown*, 5 Vet.App. 288, 292 (1993)). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *See United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." *See Butts, supra*, note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert supra.*

EFFECTIVE DATE OF AWARD (38 U.S.C. § 5110; 38 C.F.R. § 3.400)

§ The question whether, under 38 U.S.C. § 5110 promulgated at 38 C.F.R. § 3.400, a veteran has been assigned the correct effective date of award of benefits is a question

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of fact subject to the "clearly erroneous" standard of Court review. *See* 38 U.S.C. § 7261(a)(4); *Hanson v. Brown*, 9 Vet.App. 29, 32 (1996); *Scott v. Brown*, 7 Vet.App. 184, 188 (1994) A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." See Butts, supra, note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra.*

INCREASED RATING

§ The determination as to when, on the basis of the evidence of record, the veteran became entitled to an increased rating is a determination of fact, to which the Court applies the "clearly erroneous" standard. *Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." See Butts, supra, note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra.*

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UNEMPLOYABILITY DUE TO DISABILITY (38 C.F.R. § 4.16)

§ "[T]he question whether, under 38 C.F.R. § 4.16, a veteran is unemployable for purposes of service connected disability compensation[] ..." is a question of fact subject to the "clearly erroneous" standard of Court review. *See* 38 U.S.C. § 7261(a)(4); *Butts v. Brown*, 5 Vet.App. 532, 542 (1993) (Steinberg, J., concurring) citing *Pratt v. Derwinski*, 3 Vet.App. 269, 270 (1992). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." See Butts, supra, note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra.*

DISABILITY, WAS IT AGGRAVATED IN SERVICE (38 U.S.C. § 1153; 38 C.F.R. § 3.306)

§ "[T]he question whether, under 38 U.S.C. § 1153 and 38 C.F.R. § 3.306, a preexisting disability was aggravated during service[] ..." is a question of fact subject to the "clearly erroneous" standard of Court review. *See* 38 U.S.C. § 7261(a)(4); *Butts v. Brown*, 5 Vet.App. 532, 542 (1993) (Steinberg, J., concurring) citing *Corry v. Derwinski*, 3 Vet.App. 231, 234 (1992). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." *See Butts, supra*, note 4. The Court is not permitted

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to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert supra.*

DISABILITY, IS IT SERVICE CONNECTED (38 U.S.C. § 1110; 38 C.F.R. § 3.303(A), (B), AND (D))

§ "[T]he question whether, under 38 U.S.C. § 1110 and 38 C.F.R. § 3.303(a), (b), and (d), a disability is service connected[] ..." is a question of fact subject to the "clearly erroneous" standard of Court review. *See* 38 U.S.C. § 7261(a)(4); *Butts v. Brown,* 5 Vet.App. 532, 542 (1993) (Steinberg, J., concurring) citing *Horowitz v. Brown,* 5 Vet.App. 217, 221-22; *Mense v. Derwinski,* 1 Vet.App. 354, 356 (1991); *See also Wray v. Brown,* 7 Vet.App. 488, 492 (1995). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." *See Butts, supra,* note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert supra.*

DISABILITY, WHEN INCURRED

§ The question as to whether a veteran's discharge was the result of willful and persistent misconduct under 38 C.F.R. § 3.12 is a question of fact subject to the "clearly erroneous" standard of Court review. *See Struck v. Brown,* 9 Vet.App. 145, 153 (1996); *see also* 38 U.S.C. § 7261(a)(4); *Butts v. Brown*, 5 Vet.App. 532, 542 (1993) (Steinberg, J., concurring) (citing *Santiago v. Brown,* 5 Vet.App. 288, 292 (1993)). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *See United States v. United States Gypsum Co.,* 333 U.S.

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364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." *See Butts, supra*, note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra*.

FINDING'S OF FACT REGARDING NEW CLAIM

§ The Court reviews the Board's findings of fact regarding new claims under the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *Zink v. Brown*, 10 Vet.App. 258 (197); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52, 53 (1990). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert, supra*. "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." *See Butts, supra*, note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra*.

FORFEITURE OF BENEFITS DUE TO FRAUD

§ The Court reviews the Board's findings regarding forfeiture as a question of fact which the Court reviews under the clearly erroneous standard. *Villaruz v. Brown*, 7 Vet.App. 561, 565 (1995); *Wood v. Derwinski*, 1 Vet.App. 190, 192 (1991); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *United States v. United States*

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Gypsum Co., 333 U.S. 364 (1948); *see Gilbert, supra*. "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." *See Butts, supra*, note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra*.

FRAUD GUILT BY VA DEBTOR (38 U.S.C. § 5302(C))

§ "[T]he question whether, under 38 U.S.C. § 5302(c), a VA debtor was guilty of fraud[] ..." is a question of fact subject to the "clearly erroneous" standard of Court review. *See* 38 U.S.C. § 7261(a)(4); *Butts v. Brown*, 5 Vet.App. 532, 542 (1993) (Steinberg, J., concurring) citing *Farless v. Derwinski*, 2 Vet.App. 555, 556 (1992). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." See Butts, supra, note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra*.

FRAUDULENT CONDUCT PREVENTING A WAIVER OF INDEBTEDNESS

§ The question as to whether a veteran's conduct was fraudulent, thus, preventing a waiver of indebtedness is a question of fact subject to the "clearly erroneous" standard of Court review. *See Brown v. Brown*, 8 Vet.App. 40 (1995); *see also* 38

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U.S.C. § 7261(a)(4); *Butts v. Brown*, 5 Vet.App. 532, 542 (1993) (Steinberg, J., concurring) (citing *Santiago v. Brown*, 5 Vet.App. 288, 292 (1993)). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *See United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." *See Butts, supra*, note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra.*

POW STATUS UNDER 38 U.S.C. § 101(32)(A) AND 38 C.F.R. § 3.1(Y) (1995)

FACTUAL FINDING, CLEARLY ERRONEOUS STANDARD

(*SEE ALSO* POW STATUS UNDER 38 U.S.C. § 101(32)(B), ARBITRARY AND CAPRICIOUS STANDARD)

§ "In *Manibog v. Brown*, 8 Vet.App. 465 (1996), this Court held that although POW status is a legal determination, 'it fall[s] so clearly within the area of the BVA's expertise [for fact finding] that deference to that expertise requires that the conclusion be characterized as factual.'" *Young v. Brown*, 9 Vet.App. 141, 143 (1996) citing *Manibog*, 8 Vet.App. at 468 (quoting *Bagby v. Derwinski*, 1 Vet.App. 225, 227 (1991)). "In the *Manibog* decision, the Court treated POW status as a factual determination and applied a 'clearly erroneous' standard of review rather than the 'arbitrary and capricious' standard acknowledged in *Young*." *Id* citing *Manibog*, 8 Vet.App at 468. A finding of fact is subject to the "clearly erroneous" standard of Court review. *See* 38 U.S.C. § 7261(a)(4); *Butts v. Brown*, 5 Vet.App. 532, 542 (1993) (Steinberg, J., concurring) (citing *Santiago v. Brown*, 5 Vet.App. 288, 292

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(1993)). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." *See Butts, supra*, note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra.*

NEW AND MATERIAL EVIDENCE DETERMINATIONS

§ "We conclude that new and material evidence determinations by the BVA pursuant to [38 U.S.C.] section 5108 should be reviewed by the CAVC under the statutory clear error standard of review as a factual determination." *Prillman v. Principi*, 346 F.3d 1362, 1368 (Fed. Cir. 2003) .

WHETHER "GOOD CAUSE" HAS BEEN SHOWN REGARDING MISSED VA EXAMINATION

§ The question as to whether "good cause" has been shown regarding the failure to appear for an examination for an increased rating is a question of fact subject to the "clearly erroneous" standard of Court review. *See Engelke v. Brown*, 10 Vet.App. 396, 399 (1997); *see also* 38 U.S.C. § 7261(a)(4); *Butts v. Brown*, 5 Vet.App. 532, 542 (1993) (Steinberg, J., concurring) (citing *Santiago v. Brown*, 5 Vet.App. 288, 292 (1993)); *cf Struck v. Brown*, 9 Vet.App. 145, 153 (1996) (Board's determination that a veteran's discharge was result of persistent and willful misconduct, pursuant to 38 C.F.R. § 3.12, is a factual finding); *Brown v. Brown*, 8 Vet.App. 40 (1995) (Board determination that veteran's conduct was fraudulent and prevented a waiver of indebtedness is a factual finding). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *See United States v. United*

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States Gypsum Co., 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." *See Butts, supra,* note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra.*

WHETHER VETERAN SIGNED AND MAILED CHANGE OF BENEFICIARY FORM FOR NSLI

§ The question as to whether or not the veteran signed and mailed a change of beneficiary is a question of fact. *See* 38 U.S.C. § 7261(a)(4); see also *Young v. Derwinski*, 59, 61 (1992). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." *See Butts, supra,* note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra.*

WILLFUL MISCONDUCT (38 U.S.C. §§ 105, 1521; 38 C.F.R. § 3.301)

§ "The BVA's determination of whether willful misconduct occurred is a determination of fact." *Myore v. Brown*, 9 Vet.App. 498, 502 (1996); *see* 38 U.S.C. § 7261(a)(4); *Zang v. Brown*, 8 Vet.App. 246, 250, 254 (1995). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *United States v.*

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United States Gypsum Co., 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." *See Butts, supra,* note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra.*

PROPER EFFECTIVE DATE IS A FINDING OF FACT

§ A Board determination of the proper effective date is a finding of fact. *See* 38 U.S.C. § 7261(a)(4); *Hanson v. Brown*, 9 Vet.App. 29, 32 (1996); *Scott v. Brown*, 7 Vet.App. 184, 188(1994). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (19991). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." *See Butts, supra,* note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra*.

SMC DUE TO NEED FOR REGULAR AID AND ATTENDANCE OR HOUSEBOUND

§ The Board's determination regarding whether a veteran is entitled to SMC due to the need for regular aid and attendance or housebound status is a finding of fact. *See Turco v. Brown*, 9 Vet.App. 222, 224 (1996). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing Court is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49,

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52-53 (19991). "The Court shall 'in the case of a finding of material fact made in reaching a decision in a case before the Department [of Veterans Affairs] with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous." *See Butts, supra,* note 4. The Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a plausible basis in the record for the factual determinations of the BVA, the Court cannot overturn them. *See Gilbert, supra*.

QUESTION OF LAW SUBJECT TO "DE NOVO" STANDARD OF REVIEW (38 U.S.C. § 7261(A)(1))

BOARD ERROR IN DETERMINING VALIDITY OF CREATION OF DEBT

§ "[T]he question whether the BVA erred in determining the validity of a creation of debt is a question of law, which this Court reviews de novo[38]." *Jordan v. Brown,* 10 Vet.App. 171, 174 (1997) citing 38 U.S.C. § 7261(a)(1); *cf. Buzinski v. Brown,* 6 Vet.App. 360, 364 (1994) (determining de novo[39] review to a statutory provision which permitted a release from liability obtained by a veteran-debtor; 'Our review of how the release provision of [the statute] was applied or how it should be applied falls into the category of permissible actions under [38 U.S.C. § 7261(a)(1)].')."

[38] **De novo trial** Trying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered. *Black's Law Dictionary* 435 (6th ed. 1990) citing *Farmingdale Supermarket, Inc. v. U.. S.*, D.C.N.J., 336 F.SUPP. 534, 536; *cf. Hensley v. West*, 212 F.3d 1255, 1263 (2000) ("[t]he phrase '*de novo* review,' although occasionally used by both this court and the [CAVC], may in certain contexts be misunderstood. Appellate courts can 'review' only that which has happened in the past, while the term '*de novo*' may be understood to mean anew, without reference to what has gone before. To the extent that '*de novo*' connotes judicial review anew and without reference to what has gone before, the term fails to accurately describe the appellate process, and particularly is this so when it is applied to review of issues upon which any measure of deference is accorded to the decision on review.").

[39] **De novo trial** Trying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered. *Black's Law Dictionary* 435 (6th ed. 1990) citing *Farmingdale Supermarket, Inc. v. U.. S.*, D.C.N.J., 336 F.SUPP. 534, 536; *cf. Hensley v. West*, 212 F.3d 1255, 1263 (2000) ("[t]he phrase '*de novo* review,' although occasionally used by both this court and the [CAVC], may in certain contexts be misunderstood. Appellate courts can 'review' only that which has happened in the past, while the term '*de novo*' may be understood to mean anew, without reference to what has gone before. To the extent that '*de novo*' connotes judicial review anew and without reference to what has gone before, the term fails to accurately describe the appellate process, and particularly is this so when it is applied to review of issues upon which any measure of deference is accorded to the decision on review.").

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BOARD JURISDICTION DETERMINATION

§ Whether the Board has jurisdiction is a question of statutory and regulatory interpretation, see 38 U.S.C. §§ 511(a), 7104 (defining jurisdiction of the Board); 38 C.F.R. § 20.101, that this Court reviews de novo. *See* 38 U.S.C. § 7261(a)(1); *In re Fee Agreement of Cox*, 10 Vet.App. 361, 372-74 (1997) (Court decides that Board had jurisdiction over fee-agreement issue without deference to Board determination that it did not); *cf*. Ledford v. West, 136 F.3d 776 (Fed.Cir.1998) (whether Court of Veterans Appeals has jurisdiction under 38 U.S.C. § 7252 is matter of statutory interpretation which U.S. Court of Appeals for the Federal Circuit reviews de novo). Although courts frequently grant deference to an administrative agency's interpretation of its own regulations, "they are not bound by the administrative agency's construction." *Gardner v. Derwinski*, 1 Vet.App. 584, 588 (1991), aff'd sub nom. *Brown v. Gardner*, 5 F.3d 1456 (Fed.Cir.1993), aff'd, 513 U.S. 115 (1994); *see also Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("interpretive doubt is to be resolved in the veteran's favor"). Such deference is not warranted unless the interpretation "'sensibly conforms to the purpose and wording of the regulation[].'" *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 151 (1991) (quoting *Northern Indiana Pub. Serv. Co. v. Porter County Chapter of Izaak Walton League of American, Inc.*, 423 U.S. 12, 15 (1975)); *DeLuca v. Brown*, 8 Vet.App. 202, 207 (1995) (interpretation of regulation by VA that conflicted with plain meaning of regulation not entitled to deference) (citing *Combee v. Principi*, 4 Vet.App. 78, 91 (1993) (quoting *Martin*, 499 U.S. at 151), rev'd on other grounds sub. nom. *Combee v. Brown*, 34 F.3d 1039 (Fed.Cir.1994)), s*ee Meakin v. West*, 11 Vet.App. 183, 187 (1998).

INTERPRETAION OF LAW OR REGULATION

§ Citing *see, e.g., Jensen v. Brown*, the Federal Circuit in *Lane v. Principi*, 339 F.3d 1331, 1339 (Fed. Cir. 2003), held that because the interpretation of a statute or regulation is a question of law, "…the Veterans Court should review *de novo* the Board's interpretation of a regulation in the setting of a section 7111 CUE claim." *Lane supra*.

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NOTICE OF DISAGREEMENT

§ "Whether a document is an NOD is a question of law for the Court to determine de novo[40] under 38 U.S.C. § 7261(a)(1)." *See Archbold v. Brown*, 9 Vet.App. 124, 131 (1996) (citing *e.g.*, *West v. Brown*, 7 Vet.App. 329, 331-32 (1995) (en banc) (determining whether jurisdictionally valid NOD had been filed with respect to claim without having had such determination made by Board)); *Hamilton v. Brown*, 4 Vet.App. 428, 538-44 (1993).

PRESUMPTION OF AGGRAVATION, BOARD APPLICATION (38 U.S.C. § 1153; 38 C.F.R. § 3.306)

§ "[T]he question whether, under 38 U.S.C. § 1153 and 38 C.F.R. § 3.306, the Board applied correctly, based on the facts found, a statutory and regulatory presumption of aggravation[] ..." is a question of law subject to "de novo"[41]. *See* 38 U.S.C. § 7261(a)(1); *Butts v. Brown*, 5 Vet.App. 532, 542 (1993) (Steinberg, J., concurring) citing *Hunt v. Derwinski*, 1 Vet.App. 292, 293 (1991).

"In *Young v. Brown*, 4 Vet.App. 106, 108 (1993), the Court coalesced the 'question of law' label and the 'arbitrary and capricious' standard of review, in the same way as did the Court in *McGrath[v. Brown]*, 5 Vet.App. [57] at 59, by stating: "Because a decision or finding that a veteran is to be awarded P.O.W. status under 38 U.S.C.A. § 110(32)(B) is a legal determination, the standard of review is defined by 38 U.S.C. § 7261(a)(3)(A).' Because the Court did not cite 38 U.S.C.A. § 7261(a)(1) or refer to de novo review, this case does not really fall into the question-of-law category. *See also Fallo v. Derwinski*, 1 Vet.App. 175, 177 (1991) (Court stated that its review of a 'question of law' (whether, apparently under 38 U.S.C.A. § 1154(b), the Board applied the correct burden of proof) was 'under 38 U.S.C.A. § 4061(a)(3) [now § 7261(a)(3)]')." *See Butts v. Brown*, 5 Vet.App. 532, 542 (1993) (Steinberg, J., concurring) (note 3).

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[40] **De novo trial** Trying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered. *Black's Law Dictionary* 435 (6th ed. 1990) citing *Farmingdale Supermarket, Inc. v. U.. S.*, D.C.N.J., 336 F.SUPP. 534, 536; *cf. Hensley v. West*, 212 F.3d 1255, 1263 (2000) ("[t]he phrase '*de novo* review,' although occasionally used by both this court and the [CAVC], may in certain contexts be misunderstood. Appellate courts can 'review' only that which has happened in the past, while the term '*de novo*' may be understood to mean anew, without reference to what has gone before. To the extent that '*de novo*' connotes judicial review anew and without reference to what has gone before, the term fails to accurately describe the appellate process, and particularly is this so when it is applied to review of issues upon which any measure of deference is accorded to the decision on review.").

[41] **De novo trial** Trying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered. *Black's Law Dictionary* 435 (6th ed. 1990) citing *Farmingdale Supermarket, Inc. v. U.. S.*, D.C.N.J., 336 F,Supp. 534, 536. " review by the Court

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PRESUMPTION OF SOUNDNESS, SUFFICIENT EVIDENCE (38 U.S.C. § 1111)

§ "[T]he question whether, Under 38 U.S.C. § 1111, there is sufficient evidence to rebut a presumption of soundness upon entry into service[] ..." is a question of law subject to "de novo"[42] citing *Farmingdale Supermarket, Inc. v. U.. S.*, D.C.N.J., 336 F,Supp. 534, 536. " review by the Court[43]. *See* 38 U.S.C. § 7261(a)(1); *Butts v. Brown*, 5 Vet.App. 532, 542 (1993) (Steinberg, J., concurring) citing *Bagby v. Derwinski*, 1 Vet.App.225, 227 (1991).

WHETHER OR NOT APPELLANT FILED SUBSTANTIVE APPEAL

§ "Whether or not the appellant has filed a substantive appeal is a question of law for the Court to determine de novo[44] under 38 U.S.C. § 7261(a)(1)." *See Beyrle v. Brown*, 9 Vet.App. 24 (1996).

WHETHER OR NOT CUE CLAIM HAS BEEN PRESENTED

§ The question of whether or not a CUE claim has been filed is a question of law subject to "de novo"[45] review by the Court[46]. *See* 38 U.S.C. § 7261(a)(1); *Butts v. Brown*, 5 Vet.App. 532,

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[42] **De novo trial** Trying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered. *Black's Law Dictionary* 435 (6th ed. 1990)

[43] "In *Young v. Brown*, 4 Vet.App. 106, 108 (1993), the Court coalesced the 'question of law' label and the 'arbitrary and capricious' standard of review, in the same way as did the Court in *McGrath[v. Brown]*, 5 Vet.App. [57] at 59, by stating: "Because a decision or finding that a veteran is to be awarded P.O.W. status under 38 U.S.C.A. § 110(32)(B) is a legal determination, the standard of review is defined by 38 U.S.C. § 7261(a)(3)(A).' Because the Court did not cite 38 U.S.C.A. § 7261(a)(1) or refer to de novo review, this case does not really fall into the question-of-law category. *See also Fallo v. Derwinski*, 1 Vet.App. 175, 177 (1991) (Court stated that its review of a 'question of law' (whether, apparently under 38 U.S.C.A. § 1154(b), the Board applied the correct burden of proof) was 'under 38 U.S.C.A. § 4061(a)(3) [now § 7261(a)(3)]')." *See Butts v. Brown*, 5 Vet.App. 532, 542 (1993) (Steinberg, J., concurring) (note 3).

[44] **De novo trial** Trying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered. *Black's Law Dictionary* 435 (6th ed. 1990) citing *Farmingdale Supermarket, Inc. v. U.. S.*, D.C.N.J., 336 F.SUPP. 534, 536; *cf. Hensley v. West*, 212 F.3d 1255, 1263 (2000) ("[t]he phrase '*de novo* review,' although occasionally used by both this court and the [CAVC], may in certain contexts be misunderstood. Appellate courts can 'review' only that which has happened in the past, while the term '*de novo*' may be understood to mean anew, without reference to what has gone before. To the extent that '*de novo*' connotes judicial review anew and without reference to what has gone before, the term fails to accurately describe the appellate process, and particularly is this so when it is applied to review of issues upon which any measure of deference is accorded to the decision on review.").

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542 (1993) (en banc) (Steinberg, J., concurring) (questions of law are reviewed de novo[47] without any deference to BVA's conclusions of law) citing *Masors v. Derwinski*, 2 Vet.App. 181, 185 (1992) (regarding questions of whether claim is well grounded); *Colvin v. Derwinski*, 1 Vet.App. 171, 174 (1991); *see also Beyrle v. Brown*, 9 Vet.App. 24, 28 (1996) (regarding question of whether new and material evidence was submitted).

MIXED CASE REVIEW

CLEAR AND UNMISTAKABLE EVIDENCE (DE NOVO REVIEW OF FACTS) (ARBITRARY AND CAPRICIOUS STANDARD OF REVIEW OF BOARD FACTUAL FINDINGS)

§ The determination of whether the facts found by the Board amount to clear and unmistakable evidence is a mixed question of law and facts. The Court conducts an independent de novo[48] review of the evidence to determine if the facts found by the Board rebuts the presumption of soundness. *See Vanerson v. West*, 12 Vet.App. 254, 261 (1999) (Nebeker, F., concurring in part and dissenting in part regarding other issues) citing *Miller v. West*, 11 Vet.App. 345, 347 (1998) citing *Bagby v. Derwinski*, 1 Vet.App. 225, 227 (1991); *see also Junstrom v. Brown*, 6 Vet.App. 264, 266 (1991) (Court independently determines whether the facts rebut the presumption of soundness).

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anew, without reference to what has gone before. To the extent that '*de novo*' connotes judicial review anew and without reference to what has gone before, the term fails to accurately describe the appellate process, and particularly is this so when it is applied to review of issues upon which any measure of deference is accorded to the decision on review.").

[46] "In *Young v. Brown*, 4 Vet.App. 106, 108 (1993), the Court coalesced the 'question of law' label and the 'arbitrary and capricious' standard of review, in the same way as did the Court in *McGrath[v. Brown]*, 5 Vet.App. [57] at 59, by stating: "Because a decision or finding that a veteran is to be awarded P.O.W. status under 38 U.S.C.A. § 110(32)(B) is a legal determination, the standard of review is defined by 38 U.S.C. § 7261(a)(3)(A).' Because the Court did not cite 38 U.S.C.A. § 7261(a)(1) or refer to de novo review, this case does not really fall into the question-of-law category. *See also Fallo v. Derwinski*, 1 Vet.App. 175, 177 (1991) (Court stated that its review of a 'question of law' (whether, apparently under 38 U.S.C.A. § 1154(b), the Board applied the correct burden of proof) was 'under 38 U.S.C.A. § 4061(a)(3) [now § 7261(a)(3)]')." *See Butts v. Brown*, 5 Vet.App. 532, 542 (1993) (Steinberg, J., concurring) (note 3).

[47] **De novo trial** Trying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered. *Black's Law Dictionary* 435 (6th ed. 1990) citing *Farmingdale Supermarket, Inc. v. U.. S.*, D.C.N.J., 336 F.SUPP. 534, 536; *cf. Hensley v. West*, 212 F.3d 1255, 1263 (2000) ("[t]he phrase '*de novo* review,' although occasionally used by both this court and the [CAVC], may in certain contexts be misunderstood. Appellate courts can 'review' only that which has happened in the past, while the term '*de novo*' may be understood to mean anew, without reference to what has gone before. To the extent that '*de novo*' connotes judicial review anew and without reference to what has gone before, the term fails to accurately describe the appellate process, and particularly is this so when it is applied to review of issues upon which any measure of deference is accorded to the decision on review.").

[48] **De novo trial** Trying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered. *Black's Law Dictionary* 435 (6th ed. 1990) citing *Farmingdale Supermarket, Inc. v. U.. S.*, D.C.N.J., 336 F.SUPP. 534, 536.

STATUTORY INTERPRETATION

However, the Court reviews the factual findings of the Board under the more deferential arbitrary , capricious, an abuse of discretion, or not in accordance with law standard. Under the "arbitrary and capricious" standard of Court review, "[i]f the Board articulates a satisfactory explanation for its decision, including a rational connection between the facts found and the choice made, the Court must affirm." *Parker v. Brown*, 9 Vet.App. 476, 481 (1996) (citing *Kaplan v. Brown*, 9 Vet.App. 116, 119, (1996); *Smith (Barbara) v. Derwinski*, 1 Vet.App. 267, 279 (1991)). The scope of review under this standard is narrow and a Court is not to substitute its judgment for that of the agency, *Wamhoff v. Brown*, 8 Vet.App. 517 (1996). The Board's decision is arbitrary and capricious if the Board fails to consider an important aspect of the problem or if the decision is so implausible that it could not be ascribed to a mere difference in view. *Marlow v. Brown*, 5 Vet.App. 146, 151 (1993) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

COURT REVIEW OF BENEFIT OF DOUBT DOCTINE

§ 38 U.S.C. § 7261 sets out the Court's "Scope of Review" of appealed Board decisions. The "Veterans Benefits Act of 2002", Pub.L. No. 107-330, § 401, 116 Stat.2820, 2832 (2002) amended § 7261(b) by adding (1) requiring the Court to "take due account of the Secretary's application of section 5107(b) of this title …" *Roberson v. Principi*, 17 Vet.App. 135, 138-146, provides an extensive analysis of the legislative history of the "benefit of the doubt" principle and Congressional intent regarding the Court's application of the "benefit of the doubt" principle.

The Court concluded that "(b)ecause the Court is precluded from finding facts, it is not authorized to make the determination as to whether the evidence is in equipoise and apply the benefit of the doubt doctrine; the Court is empowered only to ensure that the Secretary's determination in that regard is not clearly erroneous." *Roberson, supra*, at 146.

STATUTORY INTERPRETATION

LEGISLATIVE INTENT

§ "'The starting point in interpreting a statute is its language.'" *Roberson v. Principi*, 17 Vet.App. 135, 139 (2003) quoting *Lee v. West*, 13 Vet.App. 388, 394 (2000)

STATUTORY INTERPRETATION

(quoting *Good Samaritan Hosp. V. Shalala*, 508 U.S. 402, 409, 113 S.Ct. 2151, 124 L.Ed.2d 368 (1993)). "The 'plain meaning [of a statute] must be given effect unless a 'literal application of [the] statute will produce a result demonstrably at odds with the intention of its drafters.'" *Roberson, supra* quoting *Gardner v. Derwinski*, 1 Vet.App. 584, 586-87 (1991), *aff'd sub nom. Gardner v. Brown*, 5 f.3d 1456 (Fed.Cir.1993), *aff'd* 513 U.S. 115, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994). "'if the intent of Congress is clear, that is the end of the matter.'" *Roberson, supra* quoting *Skinner v. Brown*, 27 F.3d 1571, 1572 (Fed.Cir.1994) (quoting *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

If the statute is unclear as to the intent of Congress, the legislative history must be examined. *Roberson, supra* at 140 (in attempting to determine the Court's standard of review for a Board decision, the Court analyzed the Veterans Benefits Act of 2002 (VBA), Pub.L. No. 107-330, § 401, 116 Stat. 2820, 2832 (2002), and concluded that the statute could not be interpreted to determine its meaning and a review of the legislative history was necessary).

"'A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation.'" *Ibid* quoting *Zuber v. Allen*, 396 U.S. 168, 186, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969) citing *see also Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 122 S.Ct. 941, 945, 151 L.Ed.2d 908 (2002) ("The floor statements of two Senators … cannot amend the unambiguous language of the statute. There is no reason to give greater weight to a Senator's floor statement than to the collective votes of both houses, which are memoralized in the unambiguous statutory text.") *and Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 390, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000) (Scalia J., concurring) ("statements of individual Members of Congress (ordinarily addressed to a virtually empty floor) … [are not] a reliable indication of what a majority of both Houses of Congress intended when they voted for the statute before us") (other cites omitted).

§ "Statutory interpretation begins with the language of the statute." *Texas Instruments v. U.S. Int'l Trade Comm'n*, 988 F.2d 1165, 1180 (Fed. Cir. 1993); *see M.A. Mortenson Co. V. United States*, 996 F.2d 1177, 1181 (Fed. Cir.1993).

§ "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842 (1948).

§ Statutory interpretation may end with the with the statutory language when the language is clear and unambiguous on its face. *See Gardner v. Derwinski*, 1 Vet.App. 584 (1991), *aff'd*, 5 F.3d 1456 (Fed. Cir. 1993), *aff'd*, 115 S. Ct. 552 (1994).

TESTIMONY (*See* Evidence)

WILLFUL MISCONDUCT (38 C.F.R. § 3.1(n))

REGULATION 38 C.F.R. § 3.1(N) (1996)

§ "*Willful misconduct* means an act involving conscious wrongdoing or known prohibited action (malum in se or malum prohibitum). A service department finding that injury, disease or death was not due to misconduct will be binding on the Department of Veterans Affairs unless it is patently inconsistent with the facts and the requirements of laws administered by the Department of Veterans Affairs." *See* 38 C.F.R. § 3.1(n) (1996).

"(1) It involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences." *See* 38 C.F.R. § 3.1(n)(1) (1996).

"(2) Mere technical violation of police regulations or ordinances will not per se constitute willful misconduct." *See* 38 C.F.R. § 3.1(n)(2) (1996).

"(3) Willful misconduct will not be determinative unless it is the proximate cause of injury, disease or death. (*See* §§3.301, 3.302)." *See* 38 C.F.R. § 3.1(n)(3) (1996).

DELIBERATE OR INTENTIONAL WRONGDOING WITH KNOWLEDGE OF OR WANTON AND RECKLESS DISREGARD OF ITS PROBABLE CONSEQUENCES

§

WILLFUL MISCONDUCT (38 C.F.R. § 3.1(n))

> In order to justify a conclusion of willful misconduct, the Board must point to the specific conscious wrong doing or known prohibited action. Moreover, the Board must explain the relationship of these first two alternative definitions of willful misconduct (in the first sentence of [38 C.F.R.] § 3.1(n)) to the apparent requirement in subparagraph (1) that willful misconduct 'involves deliberate or intentional wrongdoing with knowledge of wanton and reckless disregard of its probable consequences.' If the latter phrase is the determinative one, then in order to find willful misconduct the Board must specify the 'deliberate or intentional wrongdoing' and explain how it occurred 'with knowledge of or wanton and reckless disregard of its probable consequences'.

Myore v. Brown, 9 Vet.App. 498, 503-04 (1996).

SERVICE CONNECTION FOR MENTAL UNSOUNDNESS IN SUICIDE (38 C.F.R. § 3.302 (1996))

§ "(a) *General*. (1) In order for suicide to constitute willful misconduct, the act of self-destruction must be intentional.

(2) A person of unsound mind is incapable of forming an intent (mens rea, or guilty mind, which is an essential element of crime or willful misconduct).

(3) It is a constant requirement for favorable action that the precipitating mental unsoundness be service connected. *See* 38 C.F.R. § 3.302 (1996).

PRESUMPTION OF MENTAL UNSOUNDNESS NEGATES WILLFUL MISCONDUCT 38 C.F.R. § 3.302

§ "[38 C.F.R.] § 3.302 'establishes presumptions concerning mental unsoundness as a result of the act of suicide or a bona fide attempt that ***negate willful misconduct***'." (Emphasis added in text.); *Myore v. Brown*, 9 Vet.App. 498, 505 (1996)) citing *Elkins v. Brown*, 8 Vet.App. 391, 397-398 (1995);*See also Sheets v. Derwinski*, 2 Vet.App. 512, 516 (1992) (§ 3.302 provides that suicide is evidence of mental unsoundness and, absent a reasonable adequate motive, is considered to be the result of mental unsoundness).

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APPENDIX B – SELECTED GENERAL COUNSEL OPINIONS

VAOPGCPREC 3-2003 (SUBJ: REQUIREMENTS FOR REBUTTING THE PRESUMPTION OF SOUND CONDITION UNDER 38 U.S.C. § 1111 AND 38 C.F.R. § 3.304

Department of Veterans Affairs

Memorandum

Date: July 16, 2003 VAOPGCPREC 3-2003

From: General Counsel (022)

Subj: Requirements for Rebutting the Presumption of Sound Condition Under 38 U.S.C. § 1111 and 38 C.F.R. § 3.304

To: Under Secretary for Benefits (20)
Chairman, Board of Veterans' Appeals (01)

QUESTIONS PRESENTED:

A. Does 38 C.F.R. § 3.304(b), which provides that the presumption of sound condition may be rebutted by clear and unmistakable evidence that an injury or disease existed prior to service, conflict with 38 U.S.C. § 1111, which provides that the presumption of sound condition may be rebutted by clear and unmistakable evidence that an injury or disease existed prior to service "and was not aggravated by such service"?

B. Does 38 C.F.R. § 3.306(b), which provides that the presumption of aggravation under 38 U.S.C. § 1153 does not apply when a preexisting disability did not increase in severity during service, conflict with 38 U.S.C. § 1111?

Comments:

1. Briefs filed by appellants in recent litigation before the United States Court of Appeals for Veterans Claims (CAVC) and the United States Court of Appeals for the Federal Circuit have identified an apparent conflict between 38 U.S.C. § 1111 and 38 C.F.R. § 3.304(b), the Department of Veterans Affairs (VA) regulation implementing that statute. In *Cotant v. Principi*, U.S. Vet. App. No. 00-2382 (June 6, 2003), the CAVC discussed the apparent conflict between those provisions, but declined to rule on the

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validity of VA's regulation. For the reasons stated below, we have concluded that VA's regulation conflicts with the statute and is therefore invalid.

2. Section 1111 provides:

> For the purposes of section 1110 of this title, every veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service.

The plain language of this statute provides that the presumption of soundness is rebutted only if clear and unmistakable evidence establishes both that (1) the condition existed prior to service and (2) the condition was not aggravated by service. VA's implementing regulation, however, omits the second prong of that standard, and states that the presumption may be rebutted solely by clear and unmistakable evidence "that an injury or disease existed prior [to service]." 38 C.F.R. § 3.304(b). VA regulations further provide that VA's duty to show by clear and unmistakable evidence that a condition was not aggravated by service arises only if evidence first establishes that the condition underwent an increase in severity during service. *See* 38 C.F.R. § 3.306(b). Under VA's regulations, therefore, if a condition was not noted at entry but is shown by clear and unmistakable evidence to have existed prior to entry, the burden then shifts to the claimant to show that the condition increased in severity during service. Only if the claimant satisfies this burden will VA incur the burden of refuting aggravation by clear and unmistakable evidence.

3. The interpretation reflected in VA's regulations conflicts with the language of section 1111. Contrary to section 3.304(b), the statute provides that the presumption of soundness is rebutted only where clear and unmistakable evidence shows that the condition existed prior to service and that it was not aggravated by service. Under the language of the statute, VA's burden of showing that the condition was not aggravated by service is conditioned only upon a predicate showing that the condition in question was not noted at entry into service. The statute imposes no additional requirement on the claimant to demonstrate that the condition increased in severity during service. Because the regulation imposes a requirement not authorized by the section 1111, it is inconsistent with the statute. *See Skinner v. Brown*, 27 F.3d 1571, 1574 (Fed.Cir.1994).

4. The phrase "and was not aggravated by such service" in section 1111 is stated as an element of VA's burden of proof in rebutting the presumption of soundness. The conclusion, reflected in sections 3.304(b) and 3.306(b), that the reference to aggravation in section 1111 merely heightens VA's burden in rebutting the presumption of aggravation under a different statute – 38 U.S.C. § 1153 – is not consistent with the plain language of section 1111. We note that 38 U.S.C. § 1153 establishes a rebuttable

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presumption of aggravation applicable only where it is shown that a preexisting disease or injury increased in severity during service. However, we find no basis for concluding that the reference to "aggravation" in section 1111 implicitly incorporates the substantive and procedural requirements governing the presumption of aggravation under section 1153 or shifts the burden of proof from VA to the claimant in a manner not otherwise provided for in section 1111. Sections 1111 and 1153 establish independent factual presumptions, each of which specifies the predicate facts necessary to invoke the presumption and the facts that must be shown to rebut the presumption. Neither of those presumptions expressly, or by necessary implication, incorporates the elements of proof and counter-proof in the other.

5. The legislative history of section 1111 confirms that Congress intended VA to bear the burden of proving that a condition was not aggravated in service. The rebuttal standard in what is now section 1111 was enacted by the Act of July 13, 1943, ch. 233, § 9(b), 57 Stat. 554, 556 (Public Law 78-144), as an amendment to Veterans' Regulation No. 1(a), part I, para. I(b) (Exec. Ord. No. 6,156) (June 6, 1933). Prior to the amendment, paragraph I(b) stated that the presumption of soundness could be rebutted "where evidence or medical judgment is such as to warrant a finding that the injury or disease existed prior to acceptance and enrollment." In 1943, a bill was introduced in the House to make the presumption of soundness irrebuttable. *See* H.R. 2703, 78th Cong., 1st Sess. (1943). That bill apparently was introduced in response to the concern that "a great many men have been turned out of the service after they had served for a long period of time, some of them probably 2 or 3 years, on the theory that they were disabled before they were ever taken into the service." 129 Cong. Rec. 7463 (daily ed. July 7, 1943) (statement of Cong. Rankin). The Administrator of Veterans Affairs recommended that the bill be revised to permit rebuttal of the presumption "where clear and unmistakable evidence demonstrates that the injury or disease existed prior to acceptance and enrollment." S. Rep. No. 403, 78th Cong., 1st Sess. 6 (1943). The Senate thereafter approved an amendment to the bill adopting the Administrator's suggested language, but adding to it the phrase "and was not aggravated by such active military or naval service." That language was approved by the House and was included in the legislation enacted as Public Law 78-144. The provisions of Veterans' Regulation No. 1(a), part I, para. I(b), as amended, were subsequently codified without material change at 38 U.S.C. § 311, later renumbered as section 1111.

6. A Senate Committee Report concerning the 1943 statute stated:

> [T]he amendment . . . is for the purpose of applying a rebuttable presumption under Public, No. 2, Seventy-third Congress, and the Veterans Regulations for war service connection of disability and death, including World War II, similar to that applied for World War I service connection of disability or death under Public, No. 141, Seventy-third Congress, March 28, 1934.
>
> The language added by the committee, "and was not aggravated by such active military or naval service" is to make clear the intention to preserve the

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> right in aggravation cases as was done in Public, No. 141.

S. Rep. No. 403, at 2. This report makes clear that the reference to aggravation in what is now section 1111 was purposefully incorporated into the statutory presumption of soundness, although the report does not clearly indicate the effect of the added language. Public Law 73-141, referenced as the model for the Senate amendment, provided for restoration of service-connected disability awards that had been severed under prior statutes. The act provided that benefits would not be restored in some circumstances:

> The provisions of this section shall not apply . . . to persons as to whom clear and unmistakable evidence discloses that the disease, injury, or disability had inception before or after the period of active military or naval service, unless such disease, injury, or disability is shown to have been aggravated during service . . . and as to all such cases enumerated in this proviso, all reasonable doubts shall be resolved in favor of the veteran, the burden of proof being on the Government.

Act of March 27, 1943, ch. 100, § 27, 48 Stat. 508, 524. Although the 1934 statute is quite different from the presumption of sound condition, the fact that it placed the burden of proof exclusively on VA is consistent with the view that the 1943 statute was intended to place the burden of proof on VA with respect to the issue of aggravation.

7. Statements in floor debates concerning the 1943 amendment also reflect a purpose to place the burden of proof exclusively on VA to refute aggravation. In discussing the Senate amendment to H.R. 2703, the sponsor of that bill stated that the amendment "places the burden of proof on the Veterans' Administration to show by unmistakable evidence that the injury or disease existed prior to service and was not aggravated by such active military or naval service." 129 Cong. Rec. 7463 (daily ed. July 7, 1943) (statement of Cong. Rankin). One House member expressed the view that it would be prohibitively difficult for VA to prove the absence of aggravation, and stated:

> I think the gentleman is right in agreeing to make this bill provide the burden of proof shall be upon the Government to show that the condition did exist previous to entry into service, rather than having the burden of proof on the veteran to show that it did not exist before he entered the service. . . .
>
> But with the word aggravated in there it is going to be almost impossible ever to keep some from getting pensions that ought not to get them.

Id. at 7465 (statement of Cong. Judd). The sponsor of the bill responded that the proposed standard would not be prohibitively difficult because the meaning of the term "aggravated" was well established in VA's practice. Id. (statement of Cong. Rankin). This exchange suggests that legislators understood the nature of the burden the statute would place on VA to prove that a condition was not aggravated by service. Accordingly, we find no evidence of a congressional purpose at odds with the literal

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language of section 1111.

8. Our interpretation of section 1111 is also consistent with a 1944 opinion of the Solicitor of the Veterans' Administration discussing Public Law 78-144. 72 Op. Sol. 298 (Feb. 7, 1944). The Solicitor stated that the statute "may be said to create a rebuttable presumption of soundness with a proviso that, even where rebutted by clear and unmistakable evidence, there is a presumption of aggravation which itself is rebuttable but only by clear and unmistakable evidence." 72 Op. Sol. at 300. The Solicitor further concluded that, under the presumption of sound condition, claimants were not required to make a preliminary showing of an increase in disability during service, as was required under the general presumption of aggravation then contained in paragraph I(d) of Veterans' Regulation No. 1(a), part I, corresponding to current 38 U.S.C. § 1153. The Solicitor contrasted the standards and burdens under the presumption of aggravation with the standards and burdens under the presumption of sound condition as revised by section 9(b) of Pub. L. No. 78-144:

> There are . . . differences between said sub-section (d) [of Veterans' Regulation No. 1(a), part I, para. I] and [section] 9(b) [of Pub. L. No. 78-144], namely, the former requires an increase in service, the latter does not require a showing of increase, but presumes same as to pre-existing defects or disorders. Stated another way, the former presumes aggravation if there be shown an increase beyond natural progress, whereas the latter presumes aggravation subject only to clear and unmistakable proof there was none.

72 Op. Sol. at 301.

9. For the foregoing reasons, we conclude that section 1111 requires VA to bear the burden of showing the absence of aggravation in order to rebut the presumption of sound condition. The CAVC's decision in *Cotant* appears to suggest one possible means of construing section 3.304(b) to contain the "and was not aggravated" requirement of section 1111 even though it contains no language referencing such a requirement. The CAVC stated that VA regulations existing prior to 1961 contained such a requirement and that VA removed that requirement in 1961 in the course of what was characterized as a nonsubstantive reorganization of existing regulations. *Cotant*, slip op. at 18. The CAVC cited *Kilpatrick v. Principi*, 327 F.3d 1375, 1382 (Fed.Cir.2003), for the principle that "it is improper to interpret a codification as making substantive changes in the law absent a clear indication in the legislative history." We construe the CAVC's discussion to raise the possibility that the omission of the relevant language from current section 3.304(b) was unintentional and that section 3.304(b) should be construed as consistent with VA's pre-1961 regulations. For the reasons explained below, we do not believe the analysis suggested by the CAVC supports a conclusion that section 3.304(b) implicitly contains the "and was not aggravated" requirement of section 1111.

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10. Prior to 1961, 38 C.F.R. § 3.63 (1949) (VA Regulation 1063) addressed both the presumption of sound condition and the presumption of aggravation. With respect to the presumption of sound condition, the regulation stated that the presumption could be rebutted where "clear and unmistakable evidence demonstrates that the injury or disease existed prior to acceptance and enrollment and was not aggravated by such service." 38 C.F.R. § 3.63(b) (1949) (emphasis added). Paragraph (d) of the regulation, however, stated that "evidence which makes it obvious or manifest that the injury or disease existed prior to acceptance and enrollment for service will satisfy the requirements of the statute," thus suggesting that evidence of preexistence alone would rebut the presumption of sound condition. Further, paragraphs (d) and (i) of the regulation indicated that VA's burden of showing the absence of aggravation would arise only if it were first established that the condition increased in severity during service. Paragraph (d) stated, in pertinent part that "claims to which the above cited presumptions [of sound condition and aggravation] apply may be denied only on the basis of evidence which clearly and unmistakably demonstrates that the disease did not originate in service, or, if increased in service, was not aggravated thereby." 38 C.F.R. § 3.63(d) (1949) (emphasis added). Paragraph (i) stated, in pertinent part:

> injury or disease . . . noted prior to service or shown by clear and unmistakable evidence, including medical facts and principles, to have had inception prior to enlistment will be conceded to have been aggravated where such disability underwent an increase in severity during service unless such increase in severity is shown by clear and unmistakable evidence, including medical facts and principles, to have been due to the natural progress of the disease. Aggravation of a disability noted prior to service or shown by clear and unmistakable evidence, including medical facts and principles, to have had inception prior to enlistment may not be conceded where the disability underwent no increase in severity during service on the basis of all the evidence of record pertaining to the manifestations of such disability prior to, during and subsequent to service. . . .

38 C.F.R. § 3.63(i) (1949) (emphasis added). Viewed together, paragraphs (d) and (i) may be read to state that the presumption of sound condition could be rebutted solely by evidence that a condition existed prior to service, and that VA's burden of showing that such condition was not aggravated by service would arise only in cases where evidence affirmatively establishes that the condition increased in severity during service. In view of the incongruity between the general statutory standard recited in paragraph (b) of the regulation and the specific principles set forth in paragraphs (d) and (i) of the regulation, we conclude that the pre-1961 regulation was ambiguous regarding the nature of VA's burden of proof in rebutting the presumption of sound condition.

11. In 1961, VA removed former section 3.63 and issued separate regulations at 38 C.F.R. §§ 3.304 and 3.306, in essentially their present form, to govern the presumption of sound condition and the presumption of aggravation. As revised, section 3.304(b)

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omitted the phrase "and was not aggravated by such service" that formerly appeared in 38 C.F.R. § 3.63(b). A VA "Transmittal Sheet" summarizing the revisions indicated that sections 3.304 and 3.306 were merely "restatement[s]" of provisions formerly in section 3.63. VA Compensation and Pension Transmittal Sheet 209 (Feb. 24, 1961).

12. Even if the *Kilpatrick* analysis were relevant to the 1961 regulatory revision, we could not conclude that 38 C.F.R. § 3.304(b) implicitly contains a requirement that VA prove the absence of aggravation in order to rebut the presumption of sound condition. As stated above, the language of the pre-1961 regulation was ambiguous regarding the nature and extent of VA's burden in rebutting the presumption of sound condition. Current section 3.304(b) is consistent with the principles stated in 38 C.F.R. § 3.63(d) and (i) before 1961, which were that clear and unmistakable evidence of preexistence would suffice to rebut the presumption of sound condition and that VA's burden of showing the absence of aggravation would arise only if an in-service increase in disability were first established. The 1961 VA transmittal sheet characterizing the regulatory change as merely technical in nature, even under the *Kilpatrick* analysis, provides no basis for reading section 3.304(b) in a manner contrary to its plain language, because VA reasonably may have viewed the language adopted in section 3.304(b) as reflecting the provisions of the pre-1961 regulation.

13. In *Cotant*, the CAVC also suggested that a literal application of 38 U.S.C. § 1111 could yield potentially absurd results, by requiring disparate treatment of preexisting conditions that were noted at entry into service, as compared to those that were not. The court referenced VA regulations providing the following guidelines in evaluating disabilities aggravated by service:

> In cases involving aggravation by active service, the rating will reflect only the degree of disability over and above the degree of disability existing at the time of entrance into active service, whether the particular condition was noted at the time of entrance into active service, or whether it is determined upon the evidence of record to have existed at that time. It is necessary to deduct from the present evaluation the degree, if ascertainable, of the disability existing at the time of entrance into active service, in terms of the rating schedule except that if the disability is total (100 percent) no deduction will be made. If the degree of disability at the time of entrance into service is not ascertainable in terms of the schedule, no deduction will be made.

38 C.F.R. §§ 3.322(a), 4.22. The CAVC stated that if a veteran's disability were noted at entry into service and found to have been 20 percent disabling at that time, VA would deduct 20 percent from the current disability evaluation in determining the veteran's award. *Cotant*, slip op. at 19. The CAVC contrasted this with the example of a veteran whose disability was not noted at entry into service and stated that in the latter case, VA would make no deduction from the current rating "***unless*** the rating at entry were ascertainable – something that would appear to be a relatively rare phenomenon for a

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not-noted-at-entry condition." *Id*. In our view, the court's examples do not reflect disparate treatment or an absurd distinction sufficient to override the plain meaning of section 1111. The cited VA regulations specify that the same rating criteria apply "whether the particular condition was noted at the time of entrance into active service, or whether it is determined upon the evidence of record to have existed at that time." The determinative factor in the CAVC's two examples is the presence of evidence regarding the level of pre-service disability in one case and the absence of such evidence in the other. The different outcomes in the two examples would be a product of the evidence in each case and not a consequence of section 1111. We note that it may be necessary to reassess the provisions of 38 C.F.R. §§ 3.322(a) and 4.22 in light of the analysis in this opinion. However, we conclude that the concerns referenced by the CAVC do not identify any absurd consequence flowing from 38 U.S.C. § 1111.

14. We note that the logic of section 1111 may be questioned in other respects. A presumption serves to permit the inference of a material fact, and it ordinarily ceases to operate once the contrary of the presumed fact is proven by the requisite degree of proof. *See A.C. Auckerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1037 (Fed.Cir.1992) (a presumption "completely vanishes upon the introduction of evidence sufficient to support a finding of the nonexistence of the presumed fact."). Although section 1111 provides a presumption that a veteran was in sound condition at the time of entry into service, its language compels the seemingly illogical conclusion that the presumption is not rebutted even where VA proves the contrary by showing that the veteran's disease or injury clearly and unmistakably existed prior to service. The additional rebuttal element in section 1111 – a showing that the preexisting condition was not aggravated <u>after</u> entry into service – has no obvious bearing upon the presumed fact of whether the veteran was in sound condition when he or she entered service. Accordingly, there is no obvious correlation between the fact presumed (sound condition at entry) and the facts that must be proven to rebut that presumption (including the absence of aggravation subsequent to entry).

15. The fact that a statute produces arguably illogical results ordinarily does not, in itself, provide a basis for disregarding the literal meaning of the statute. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982); *Denkler v. United State*s, 782 F.2d 1003, 1007 (Fed.Cir.1986). The Supreme Court has explained that, if a statute, properly construed, produces "mischievous, absurd, or otherwise objectionable" results, "the remedy lies with the law making authority." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). Where the literal reading of a statute would produce an odd result, it is appropriate to search for other evidence of congressional intent. *See Public Citizen v. United States Department of Justice*, 491 U.S. 440, 454 (1989). The literal meaning of a statute may, in some instances, be so contrary to the purpose of the statute that Congress clearly could not have intended the result. *See Griffin*, 458 U.S. at 571. Departure from the literal meaning of the statute, however, is permissible only if the history or structure of the statute persuasively shows that Congress did not intend what the statutory language literally requires. *See Crooks*, 282 U.S. at 60 ("there must be something to make plain the intent of Congress that the letter of the statute is not to

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prevail"); *Denkler*, 782 F.2d at 1007 ("the absurd result, as it appears to the judge, of literal construction of a statute, does not justify a reading unsupported by the text, unless it can be shown that the intent of Congress was imperfectly expressed."). As explained above, the relevant legislative history of section 1111 indicates that Congress intended VA to bear the burden of showing the absence of aggravation in order to rebut the presumption of sound condition. Accordingly, concerns regarding the wisdom of that requirement do not permit the statute to be interpreted contrary to its plain meaning.

16. In *Cotant*, the CAVC also questioned whether 38 C.F.R. § 3.306(b) is consistent with 38 U.S.C. § 1111. *See Cotant*, slip op. at 19. Section 3.306(b) provides, in pertinent part:

> *Wartime service; peacetime service after December 31, 1946*. Clear and unmistakable evidence (obvious or manifest) is required to rebut the presumption of aggravation where the preservice disability underwent an increase in severity during service. . . . Aggravation may not be conceded where the disability underwent no increase in severity during service on the basis of all the evidence of record pertaining to the manifestations of the disability prior to, during, and subsequent to service.

This regulation implements 38 U.S.C. § 1153, which provides that, "[a] preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease." In *Cotant*, the CAVC questioned whether the regulatory requirement of an increase in severity would conflict with the provision in section 1111 vesting VA with the burden of providing the absence of aggravation irrespective of whether an increase in severity was first shown.

17. The requirement for an increase in disability in section 3.306(b) merely reflects the provisions of 38 U.S.C. § 1153 requiring such an increase and is clearly valid for that reason. As explained above, that requirement does not apply in the context of determining whether the presumption of sound condition under 38 U.S.C. § 1111 has been rebutted. Section 1111 and section 1153 establish distinct presumptions, each containing different evidentiary requirements and burdens of proof. Section 1153 requires claimants to establish an increase in disability before VA incurs the burden of disproving aggravation in cases governed by the presumption of aggravation, while section 1111 does not impose such a requirement in cases subject to the presumption of sound condition. Section 3.306 is intended to implement the presumption of aggravation under section 1153. Section 3.306(a) reiterates the language of section 1153 and cites that statute as its authority. Accordingly, we conclude that section 3.306(b) is inapplicable to determinations under 38 U.S.C. § 1111.

18. There is no conflict between 38 C.F.R. § 3.306(b) and 38 U.S.C. § 1111 because

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those provisions relate to different presumptions and generally do not apply to the same claims. As stated above, section 1111 establishes its own evidentiary requirements and burdens of proof. If service connection is granted because VA was unable to rebut the presumption of sound condition under section 1111, there is no need to consider whether the veteran is independently entitled to the presumption of aggravation under the distinct provisions of 38 U.S.C. § 1153 and 38 C.F.R. § 3.306(b). We note that, if the presumption of sound condition under section 1111 were rebutted, the provisions of 38 U.S.C. § 1153 and 38 C.F.R. § 3.306(b) would, in theory, become relevant to determining whether the preexisting condition was aggravated by service. As a practical matter, however, section 1153 and 38 C.F.R. § 3.306(b) would have no impact on cases in which the presumption of sound condition had been applied and rebutted. In such cases, VA would have been required under section 1111 to find by clear and unmistakable evidence that the condition was not aggravated by service in order to conclude that there was a preexisting injury or disease. Such a finding would necessarily be sufficient to rebut the presumption of aggravation under 38 U.S.C. § 1153 and 38 C.F.R. § 3.306(b). Accordingly, because the requirement in section 3.306(b) applies only to determinations under 38 U.S.C. § 1153, it does not conflict with 38 U.S.C. § 1111.

Held:

A. To rebut the presumption of sound condition under 38 U.S.C. § 1111, the Department of Veterans Affairs (VA) must show by clear and unmistakable evidence both that the disease or injury existed prior to service and that the disease or injury was not aggravated by service. The claimant is not required to show that the disease or injury increased in severity during service before VA's duty under the second prong of this rebuttal standard attaches. The provisions of 38 C.F.R. § 3.304(b) are inconsistent with 38 U.S.C. § 1111 insofar as section 3.304(b) states that the presumption of sound condition may be rebutted solely by clear and unmistakable evidence that a disease or injury existed prior to service. Section 3.304(b) is therefore invalid and should not be followed.

B. The provisions of 38 C.F.R. § 3.306(b) providing that aggravation may not be conceded unless the preexisting condition increased in severity during service, are not inconsistent with 38 U.S.C. § 1111. Section 3.306(b) properly implements 38 U.S.C. § 1153, which provides that a preexisting injury or disease will be presumed to have been aggravated in service in cases where there was an increase in disability during service. The requirement of an increase in disability in 38 C.F.R. § 3.306(b) applies only to determinations concerning the presumption of aggravation under 38 U.S.C. § 1153 and does not apply to determinations concerning the presumption of sound condition under 38 U.S.C. § 1111.

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Tim S. McClain

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APPENDIX C – CITATION STYLES

(In most cases brackets are used to denote placeholder. Do not use brackets in citation if simply used as placeholder.)

MEDICAL TREATISE

American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders [page #] (4th ed. 1994) (hereinafter *DSM-IV*)

Cecil Textbook of Medicine [page #] (17th ed. 1985) (hereinafter *Cecil's*)

Dorland's Illustrated Medical Dictionary [page #] (26th ed. 1981) (hereinafter *Dorland's*).

The Merck Manual [page #] (14th ed. 1982).

Principles of Orthopedic Practice 905 (Roger Dee et al. eds., 2d ed. 1997) (hereinafter *Orthopedic).*

Physician's Desk Reference [page #] (51st ed. 1997) (hereinafter *PDR*)

CITATION FORMS

38 UNITED STATES CODE ANNOTATED
38 U.S.C.A. § [] (West XXXX)

PUBLIC LAW
Veterans' Judicial Review Act, Pub. L. No. 100-687, § 402, 102 Stat.4105, 4122 (1998)

BOARD OF VETERAN'S APPEALS Decision
John J. Doe, BVA 9X-XXXX at [page #] (August XX, 199).

U.S. COURT OF APPEALS FOR VETERANS CLAIMS -- Slip Opinions
(Slip opinions are available on the CAVC's website (http://www.vetapp.uscourts.gov/) but have not yet been published in the *West's* Veterans Appeals Reporter.)
Paulson v. Brown, U.S. Vet. App. No.93-1043, slip op. at 6, (March 21, 1995)

U.S. COURT OF APPEALS, FEDERAL CIRCUIT

:See

PUBLISHED OPINION

Grantham v. Brown, 114 F.3d 1156 (Fed.Cir. 1997)

SLIP OPINION

(Slip opinions are available on the Federal Circuits website http://www.fedcir.gov/index.html) but have not yet been published in the *West's* Veterans Appeals Reporter.)

Berrara v. Brown, __ F.3d __, 95-7045, slip op. at 3 (Fed. Cir. Aug. 8, 1997)

U.S. COURT OF APPEALS FOR VETERANS CLAIMS REFERENCE TO AFFIRMED DECISION BY U.S. COURT OF APPEALS FEDERAL CIRCUIT SLIP OPINION

Zevalkink v. Brown, 6 Vet.App. 483, 491 (1994), *aff'd* __ F.3d __, No.94-7101 (Fed. Cir. Dec. 17, 1996)

PUB.L. 105-111 TO AMEND TITLE 38, UNITED STATES CODE, TO ALLOW REVISION OF VETERANS BENEFITS DECISIONS BASED ON CLEAR AND UNMISTAKABLE ERROR. (NOTE: NOV. 21, 1997 - [H.R. 1090]):See

APPENDIX D – PUBLIC LAWS AND EXPLANATIONS

PUB.L. 105-111 TO AMEND TITLE 38, UNITED STATES CODE, TO ALLOW REVISION OF VETERANS BENEFITS DECISIONS BASED ON CLEAR AND UNMISTAKABLE ERROR. (NOTE: NOV. 21, 1997 - [H.R. 1090])

[DOCID: f:publ111.105]

[[Page 111 STAT. 2271]]

Public Law 105-111
105th Congress

An Act

To amend title 38, United States Code, to allow revision of veterans benefits decisions based on clear and unmistakable error. (NOTE: Nov. 21, 1997 - [H.R. 1090])

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. REVISION OF DECISIONS BASED ON CLEAR AND UNMISTAKABLE ERROR.

(a) Original Decisions.--(1) Chapter 51 of title 38, United States Code, is amended by inserting after section 5109 the following new section:

“Sec. 5109A. Revision of decisions on grounds of clear and unmistakable error

“(a) A decision by the Secretary under this chapter is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.

“(b) For the purposes of authorizing benefits, a rating or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

“(c) Review to determine whether clear and unmistakable error exists in a case may be

instituted by the Secretary on the Secretary's own motion or upon request of the claimant.

"(d) A request for revision of a decision of the Secretary based on clear and unmistakable error may be made at any time after that decision is made.

"(e) Such a request shall be submitted to the Secretary and shall be decided in the same manner as any other claim.".

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 5109 the following new item:

"5109A. Revision of decisions on grounds of clear and unmistakable error.".

(b) BVA Decisions.--(1) Chapter 71 of such title is amended by adding at the end the following new section:

"Sec. 7111. Revision of decisions on grounds of clear and unmistakable error

"(a) A decision by the Board is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.

[[Page 111 STAT. 2272]]

"(b) For the purposes of authorizing benefits, a rating or other adjudicative decision of the Board that constitutes a reversal or revision of a prior decision of the Board on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

"(c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the Board on the Board's own motion or upon request of the claimant.

"(d) A request for revision of a decision of the Board based on clear and unmistakable error may be made at any time after that decision is made.

"(e) Such a request shall be submitted directly to the Board and shall be decided by the Board on the merits, without referral to any adjudicative or hearing official acting on behalf of the Secretary.

"(f) A claim filed with the Secretary that requests reversal or revision of a previous Board decision due to clear and unmistakable error shall be considered to be a request to the Board under this section, and the Secretary shall promptly transmit any such request to the Board for its consideration under this section.".

(2) The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

"7111. Revision of decisions on grounds of clear and unmistakable error.".

(c) Effective Date.--(1) (NOTE: 38 USC 5109 A note.) Sections 5109A and 7111 of title 38, United States Code, as added by this section, apply to any determination made before, on, or after the date of the enactment of this Act.

(2) Notwithstanding (NOTE: Applicability. 38 USC 7251 note. section 402 of the Veterans Judicial Review Act (38 U.S.C. 7251 note)), chapter 72 of title 38, United States Code, shall apply with respect to any decision of the Board of Veterans' Appeals on a claim alleging that a previous determination of the Board was the product of clear and unmistakable error if that claim is filed after, or was pending before the Department of Veterans Affairs, the Court of Veterans Appeals, the Court of Appeals for the Federal Circuit, or the Supreme Court on the date of the enactment of this Act.

Approved November 21, 1997.

LEGISLATIVE HISTORY--H.R. 1090:

HOUSE REPORTS: No. 105-52 (Comm. on Veterans' Affairs).
CONGRESSIONAL RECORD, Vol. 143 (1997):
Apr. 16, considered and passed House.
Nov. 10, considered and passed Senate.

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HOUSE REPORT 105-52 TO ACCOMPANY H.R. 1090 (PL 105-111)

105TH CONGRESS
REPORT
HOUSE OF REPRESENTATIVES

1st Session

105-52

--TO ALLOW REVISION OF VETERANS BENEFITS DECISIONS BASED ON CLEAR AND UNMISTAKABLE ERROR

APRIL 14, 1997- Committed to the Committee of the Whole House on the State of the Union and ordered to be printed
Mr. STUMP, from the Committee on Veterans' Affairs, submitted-the-following

R E P O R T

[To accompany H.R. 1090]
[Including cost estimate of the Congressional Budget Office]

The Committee on Veterans' Affairs, to whom was referred the bill (H.R. 1090) to amend title 38, United States Code, to allow revision of veterans benefits decisions based on

clear and unmistakable error, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

INTRODUCTION

On March 18, 1997, the Ranking Democratic Member of the Committee on Veterans Affairs, the Honorable Lane Evans, along with the Honorable Bob Stump, Chairman of the Committee on Veterans Affairs, the Honorable Bob Filner, Ranking Member of the Subcommittee on Benefits, the Honorable Barney Frank, the Honorable Carolyn Maloney, the Honorable Donald Payne, the Honorable Phil English, and the Honorable William Lipinski introduced H.R. 1090, to allow revision of veterans benefits decisions based on clear and unmistakable error.
The full Committee met on March 20, 1997 and ordered H.R. 1090 reported favorably to the House by unanimous voice vote.

SUMMARY OF THE REPORTED BILL

H.R. 1090 would:
1. Amend chapter 51 of title 38, United States Code, to codify existing regulations which make decisions made by the Secretary at a regional office subject to revision on the grounds of clear and unmistakable error by the Regional Office.
2. AMEND CHAPTER 71 OF TITLE 38, UNITED STATES CODE, TO MAKE DECISIONS MADE BY THE BOARD OF VETERANS' APPEALS SUBJECT TO REVISION ON THE GROUNDS OF CLEAR AND UNMISTAKABLE ERROR.
3. Permit appeal to the Court of Veterans Appeals of any decision made before, on, or after enactment on the grounds of clear and unmistakable error.

BACKGROUND AND DISCUSSION
The VA claim system is unlike any other adjudicative process. It is specifically designed to be claimant friendly. It is non-adversarial; therefore, the VA must provide a substantial amount of assistance to a veteran seeking benefits. When the veteran first files a claim, VA undertakes the obligation of assisting the veteran in the development of all evidence pertinent to that claim. There is no true finality of a decision since the veteran can reopen a claim at any time merely by the presentation of new and material evidence.
Any decision may be appealed within one year. The appeal is initiated by a simple notice of disagreement after which VA is obligated to furnish a detailed statement of the facts and law pertinent to the claim.
The reported bill would make decisions by VA Regional Offices and the Board of Veterans Appeals (BVA) subject to review on the grounds of clear and unmistakable error. Regional office decisions are currently reversible on this basis by regulation, but BVA decisions are not. Smith v. Brown, 35 F. 3d. 1516, 1523 (Fed. Cir. 1994). The bill would effectively codify this regulation, and extend the principle underlying it to BVA decisions.
The BVA is an appellate body located in Washington, DC, responsible for reviewing claims on a de novo basis. Under current law, a veteran may file a motion for reconsideration at the BVA at any time after the decision has been made. If the Chairman of the BVA grants a motion for

reconsideration, the matter is referred to an enlarged panel for a final decision. Reconsideration of the claim is conducted under the law as it existed at the time of the initial decision, and if an allowance on the basis of obvious error is ordered, the veteran receives the benefit retroactive to the date of the initial claim. If the request for reconsideration is denied, the veteran has no right of appeal.

During fiscal years 1991 through 1996, approximately 4,400 motions for reconsideration were filed, and more than 900 (21 percent) of these motions were granted. A panel of at least three Board members rendered a new decision. Of the new decisions 75 percent were allowances or remands. As of February 28, 1997, there were 53,434 appeals pending at the BVA and the average BVA response time was 513 days.

`Since at least 1928, the VA and its predecessors have provided for the revision of decisions which were the product of `clear and unmistakable error'. (citations omitted) The appropriateness of such a provision is manifest.' Russell v. Principi, 3 Vet. App. 310, 313 (1992) (en banc).

Congress has provided the Board of Veterans Appeals (but not the regional office or agency of original jurisdiction) authority to correct obvious errors. 38 U.S.C. Sec. 7103(c). In arguments before the Court of Veterans Appeals and testimony before this Committee, the VA has stated that there is no substantive difference between the Board's authority to correct `obvious error' and the agency of original jurisdiction's authority to correct clear and unmistakable error. `The only real difference is that clear and unmistakable error review can be invoked as of right, whereas review for obvious error is committed to the sound discretion of the Board.' Smith, 1526.

It must always be remembered that clear and unmistakable error is a very specific and rare kind of `error'. It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. Thus even where the premise of error is accepted, if it is not absolutely clear that a different result would have ensued, the error complained of cannot be, ipso facto, clear and unmistakable. Russell v. Principi, 3 Vet. App. 310, 313 (1992) (en banc).

> *Fugo v. Brown, 6 Vet. App. 40, 44 (1993). As the court further stated in Fugo, clear and unmistakable error is a form of collateral attack on an otherwise final decision, and there is a very strong presumption of validity that attaches to such decisions.*

As noted above, this legislation would allow a claimant to raise a claim of clear and unmistakable error with regard to a Board decision. However, it does not follow that by merely averring that such error has occurred, a veteran can successfully attack an otherwise final decision. At least in cases brought before the Court of Veterans Appeals,

while the magic incantation `clear and unmistakable error' need not be recited *in haec verba*, to recite it does not suffice, in and of itself, to reasonably raise the issue . . . [S]imply to claim clear and unmistakable error on the basis that previous adjudications had improperly weighed and evaluated the evidence can never rise to the stringent definition of clear and unmistakable error . . . Similarly, neither can broad-brush allegations of `failure to follow the regulations' or `failure to give due process,' or any other general, non-specific claim of `error'.

> *Fugo v. Brown*, 43-44. Given the Court's clear guidance on this issue, it would seem that the Board could adopt procedural rules consistent with this guidance to make consideration of appeals raising clear and unmistakable error less burdensome.

Finally, the Committee notes that an appellate system which does not allow a claimant to argue that a clear and unmistakable error has occurred in a prior decision would be unique. This bill addresses errors similar to the kinds which are grounds for reopening Social Security claims. Under the Social Security system, a claim may be reopened at any time to correct an error which appears on the face of the evidence used when making the prior decision. That is certainly the intent of the original VA regulation allowing correction of such decisions, no matter when the error occurred or which part of the VA made the error. Given the pro-claimant bias intended by Congress throughout the VA system, the Committee concludes that this legislation is necessary and desirable to ensure a just result in cases where such error has occurred. The Committee directs the BVA to monitor the effect of this legislation and to include the data in its annual report.

STATEMENT OF ADMINISTRATION'S VIEWS

The Committee has not requested the Administration's comment on this bill. However, H.R. 1090 is identical to H.R. 1483 passed by the House during the 104th Congress. In testimony before the Committee on October 12, 1995, the Administration opposed H.R. 1483 on the grounds that authorizing appeals on the grounds of clear and unmistakable error would add to the claims backlog at the Board. The Committee requested the Board to provide data to support its position, but the Board indicated it could not provide such data.

SECTION-BY-SECTION ANALYSIS

Section 1(a) would amend chapter 51 of title 38, United States Code, to codify existing regulations which make decisions made by the Secretary at a regional office subject to revision on the grounds of clear and unmistakable error.

Section 1(b) would amend chapter 71 of title 38, United States Code, to make decisions made by the Board of Veterans' Appeals subject to revision on the grounds of clear and unmistakable error.

Section 1(c) would make the provisions of this bill applicable to any determination made before, on, or after the date of the enactment of this Act.

OVERSIGHT FINDINGS

No oversight findings have been submitted to the Committee by the Committee on Government Reform and Oversight.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The following letter was received from the Congressional Budget Office concerning the cost of the reported bill:

U.S. Congress,

Congressional Budget Office,

Washington, DC, April 10, 1997.

PUB.L. 105-111 TO AMEND TITLE 38, UNITED STATES CODE, TO ALLOW REVISION OF VETERANS BENEFITS DECISIONS BASED ON CLEAR AND UNMISTAKABLE ERROR. (NOTE: NOV. 21, 1997 - [H.R. 1090])

Hon. BOB STUMP,
Chairman, Committee on Veterans' Affairs,
House of Representatives, Washington, DC.
DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1090, a bill to amend title 38, United States Code, to allow revision of veterans benefits decisions based on clear and unmistakable error.
If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mary Helen Petrus, who can be reached at 226-2840.
Sincerely,
June E. O'Neill,
Director
Enclosure

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE
H.R. 1090--A BILL TO AMEND TITLE 38, UNITED STATES CODE, TO ALLOW REVISION OF VETERANS BENEFITS DECSIONS BASED ON CLEAR AND UNMISTAKABLE ERROR.
As ordered reported by the House Committee on Veterans' Affairs on March 20, 1997

CBO estimates that H.R. 1090 would raise administrative costs over the first two or three years after enactment by $1 million to $2 million in total, but in the longer run administrative costs would rise by less than $500,000 a year. In addition, CBO estimates that the bill would have a direct spending impact of less than $500,000 a year through 2002. Because the bill would raise direct spending, it would be subject to pay-as-you-go procedures. H.R. 1090 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 and would not affect the budgets of state, local, or tribal governments.
Section 1(a) would have no budgetary impact because it would codify the current procedure for revising veterans' claims decisions made by regional offices. Other sections of the bill would give certain veterans new rights and opportunities for appeal. Under current law, a veteran may appeal a regional office's decision to the Board of Veterans Appeals (BVA). Once the BVA has rendered a decision, a veteran may appeal directly to the Court of Veterans Appeals (COVA) or move for reconsideration of the Board's decision on the basis of `obvious error.' The Chairman of BVA reviews the motion and at his discretion may allow it, thus referring the matter to a panel of members for reconsideration. Section 1(b) would require BVA to review decisions challenged on the basis of `clear and unmistakable error.' Section 1(c) would make sections 1(a) and 1(b) retroactive and would allow veterans to appeal BVA decisions involving claims of clear and unmistakable error to COVA and other higher courts regardless of a current restriction limiting consideration to cases in which administrative appeals were initiated on or after November 18, 1988.
To obtain revision of a BVA decision under the bill, the claimant must assert `clear and unmistakable error,' which is an error of law or fact in the record at the initial decision that compels the conclusion that the decision would have been different but for the error. The `clear and unmistakable error' standard is roughly the same as the current standard of `obvious error.' The standard of review, therefore, is not the key change that the bill would make in the procedure. Rather, the bill would eliminate the Chairman's discretion in reconsideration and make the review of a BVA decision a matter of right.

The administrative costs of the bill would have two parts--a continuing increase in costs associated with the annual caseload under current law and a larger initial increase that would stem from retroactively extending the right to review. CBO assumes that the longer run increase in caseload resulting from this bill would be a portion of the requests for reconsideration under current law that are denied. From 1991 to 1995, BVA denied reconsideration for about 500 motions a year, including motions that might have been based on clear and unmistakable error. Data from the Department of Veterans Affairs indicate that the average cost per case is about $1,000. Because the marginal cost of each new case would be less than $1,000 and BVA would have to review fewer than 500 new motions a year, the long-run costs of administration would be less than $500,000 annually.

The number of veterans who would demand review of past cases based on clear and unmistakable error is the key uncertainty in estimating the costs of the bill. Whether or not the case involved such error, the demand would still add to BVA's workload and costs because it would at least have to screen the demands and document its conclusions. Nevertheless, the current process for adjudicating veterans claims allows many opportunities for appeal, and it is probable that most veterans having claims pursue them under current law. CBO estimates that up to 2,000 veterans would return to BVA for reconsideration under the bill and add about $1 million to $2 million to BVA's administrative costs, currently about $38 million annually, during the first three years after enactment.

By their nature, claims of clear and unmistakable error, if sustained, are very likely to lead to additional benefits to the claimant. The bill would raise direct spending to the extent that the cases involved such benefits as disability compensation, pension benefits, or survivor benefits. Although the extra administrative costs of the bill would not cumulate from year to year, the additional benefits would be paid for the life of the veteran or surviving beneficiary. How much direct spending would rise depends on the caseload and average award in benefits, both of which are very uncertain. Because veterans have many opportunities under current law to appeal claims decisions, CBO estimates that a small number of additional cases would be successfully appealed under the bill. Also, it is unlikely that the average annual benefit involved in such a case would be more than $1,000 to $2,000. Thus, the bill would probably increase direct spending by less than $500,000 a year in 1998 and the next several years.

The CBO staff contact for this estimate is Mary Helen Petrus, who can be reached at 226-2840. This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

INFLATIONARY IMPACT STATEMENT

The enactment of the reported bill would have no inflationary impact.

APPLICABILITY TO LEGISLATIVE BRANCH

The reported bill would not be applicable to the legislative branch under the Congressional Accountability Act, Public Law 104-1, because the bill would only affect certain Department of Veterans Affairs benefits recipients.

STATEMENT OF FEDERAL MANDATES

The reported bill would not establish a federal mandate under the Unfunded Mandates Reform Act, Public Law 104-4.

STATEMENT OF CONSTITUTIONAL AUTHORITY

Pursuant to Article I, section 8 of the U.S. Constitution, the reported bill would be authorized by Congress' power `{T}o provide for the common Defence and general Welfare of the Untied States.'

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 38, UNITED STATES CODE

* * * * * * *

PART IV--GENERAL ADMINISTRATIVE PROVISIONS

* * * * * * *

CHAPTER 51--CLAIMS, EFFECTIVE DATES, AND PAYMENTS

subchapter i--claims
Sec.
5101. Claims and forms.
5102. Application forms furnished upon request.
* * * * * * *
5109A. Revision of decisions on grounds of clear and unmistakable error.
* * * * * * *

SUBCHAPTER I--CLAIMS

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Sec. 5109A. Revision of decisions on grounds of clear and unmistakable error

(a) A decision by the Secretary under this chapter is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.

(b) For the purposes of authorizing benefits, a rating or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

(c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the Secretary on the Secretary's own motion or upon request of the claimant.

(d) A request for revision of a decision of the Secretary based on clear and unmistakable

error may be made at any time after that decision is made.

(e) Such a request shall be submitted to the Secretary and shall be decided in the same manner as any other claim.

* * * * * * *

PART V--BOARDS, ADMINISTRATIONS, AND SERVICES

CHAPTER 71--BOARD OF VETERANS' APPEALS

Sec. 7111. Revision of decisions on grounds of clear and unmistakable error

(a) A decision by the Board is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.

(b) For the purposes of authorizing benefits, a rating or other adjudicative decision of the Board that constitutes a reversal or revision of a prior decision of the Board on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

(c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the Board on the Board's own motion or upon request of the claimant.

(d) A request for revision of a decision of the Board based on clear and unmistakable error may be made at any time after that decision is made.

(e) Such a request shall be submitted directly to the Board and shall be decided by the Board on the merits, without referral to any adjudicative or hearing official acting on behalf of the Secretary.

(f) A claim filed with the Secretary that requests reversal or revision of a previous Board decision due to clear and unmistakable error shall be considered to be a request to the Board under this section, and the Secretary shall promptly transmit any such request to the Board for its consideration under this section.

* * * * * * *