# Melancon, Malcolm 449-41-2402
# VAF 21-0958 Notice of Disagreement

A finding of fact that a disease or injury is service connected requires three elements. The three elements required to prove service connection are:

1) Disease or injury in active service

2) The same disease (or injury) at time of filing or during appeal period

3) A medical nexus between the two if the military service treatment records (STRs) do not clearly show or diagnose the disease or injury.

## Clear and Unmistakable Error in Characterization of Movant's Disease

In the Ratings denial decision dated September 5th, 2017, the VA examiner incorrectly identifies Movant's viral hepatitis B hepatitis as "infectious hepatitis".

The Merriam Webster definition of "Infectious hepatitis" is the Hepatitis A Virus abbreviated as HAV. For the record, counsel wishes to point out that Mr. Melancon filed for what he was diagnosed with while serving in the U.S. Navy-i.e. Hepatitis B virus or HBV. The blood tests obtained at Balboa Naval Hospital San Diego March 26th, 1991 clearly and unmistakably show infection with HBV and a non-reactive (negative result) to the HAV test. This was all evidence of record at the time of the rating decision in 1991. It would be error to purposefully mischaracterize Mr. Melancon's type of Hepatitis disease and severity of residuals.

Movant wholeheartedly agrees with the Veterans Administration that his contemporary blood tests seemed to show the virus had abated in his bloodstream prior to discharge. He would also wish to point out that the VA neglected to examine him when he filed in September 1991. Mr. Melancon certainly met the higher standard of a well-grounded claim in 1991that would normally precipitate a compensation & pension examination to determine his residuals. After all, he was still within the one-year presumptive window for any service connected injury or disease.

The VA examiner in 1991 correctly diagnosed Mr. Melancon's disease as acute and that it had resolved medically. That is a positive finding of fact by the VA and one that cannot be disturbed because it is a beneficial finding of fact that accrues to the Veteran.

Once a finding of fact establishes a certain disease or injury was indeed incurred in active service, the conclusion of law applicable is that service connection is granted- in this case for Hepatitis B (or HBV)- as opposed to the more recently alleged benign "infectious hepatitis" medically defined as HAV.

Movant's service treatment records satisfy element number 1 thus it is undebatable that hepatitis B was incurred in service with resultant disability in the twelve months prior to the December 2, 1991 rating decision.

Element number 2 is met as Mr. Melancon currently shows (and always will) evidence of infection by the Hepatitis B virus. In fact, he will carry that evidence of infection for life. It gives him immunity to reinfection by HBV for life. However, the virus remains transmittable both by bodily secretions and via sexual congress for life as well.

Element number 3 is met because Mr. Melancon's service treatment records are unequivocal that he was infected, diagnosed and healed in the Line of Duty while on active duty which did not involve any willful misconduct.

No other conclusion of law can be reached based on this evidence of record.

# Misapplication of 38 CFR §3.303(b)

It appears the VA examiner, both in 1991 as well as now, is laboring under the misconception that entitlement to service connection for Hepatitis in any form requires a *chronic* active, ongoing disease process that was and is currently compensably disabling. In this regard, there may be some misunderstanding or confusion with 38 CFR §3.303(b) which, remarkably, requires *both* chronicity and continuity of symptoms associated with diseases listed in 38 CFR §3.309 in order to show service connection. As such, 38 CFR §3.303(b) is not for application in this case. Hepatitis is not considered one of the chronic diseases listed in 38 CFR §3.309. Congress, and more especially the VA Secretary, understand that some diseases and injuries wax and wane and require being rerated until they become static. This involves inter alia temporary increases for periods following surgery. After a suitable interval, the VA reexamines the Veteran and rates him once again after symptoms abate or lessen. In fact, there are different ratings that even comprehend total remission and a zero percent rating.

38 CFR §3.303(b) deals with presumptive chronic diseases listed in 38 CFR §3.309 and the applicable time limits concerning these diseases as described in 38 CFR §3.307- to wit:

**(b)*Chronicity and continuity.*** With chronic disease shown as such in service (or within the presumptive period under § 3.307) so as to permit a finding of service connection, subsequent manifestations of the same chronic disease at any later date, however remote, are service connected, unless clearly attributable to intercurrent causes. This rule does not mean that any manifestation of joint pain, any abnormality of heart action or heart sounds, any urinary findings of casts, or any cough, in service will permit service connection of arthritis, disease of the heart, nephritis, or pulmonary disease, first shown as a clearcut clinical entity, at some later date. For the showing of chronic disease in service there is required a combination of

manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time, as distinguished from merely isolated findings or a diagnosis including the word "Chronic." When the disease identity is established (leprosy, tuberculosis, multiple sclerosis, etc.), there is no requirement of evidentiary showing of continuity. **Continuity of symptomatology is required only where the condition noted during service (or in the presumptive period) is not, in fact, shown to be chronic or where the diagnosis of chronicity may be legitimately questioned. When the fact of chronicity in service is not adequately supported, then a showing of continuity after discharge is required to support the claim.**

Movant has never characterized his Hepatitis B as chronic nor one of the presumptive diseases listed under 38 CFR §3.309. His contention is very simple and falls within the purview of §3.303(a)- i.e. a disease that was incurred in service and one that continues to be a disabling condition with recognized residuals. Movant is not required to show chronicity or continuity of symptoms.

Congress never intended absurd results to ensue from a Statute regarding service connection. Using the logic employed in the December 2, 1991 rating, the Department of Veterans Affairs appears to demand movant's Hepatitis to be chronic and exhibit continuity of symptoms under §3.303(b). This effectively negates the first section in §3.303(a) making it inoperable. The VA Secretary is the author of Chapter 38, Code of Federal Regulations and is not permitted to revise Congress' Statute. Thus, 38 CFR §3.303(b) cannot be for application.

Movant's entitlement to service connection for his disease is based on 38 USC §1110- to wit:

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

(Pub. L. 85–857, Sept. 2, 1958, 72 Stat. 1119, § 310; Pub. L. 101–508, title VIII, § 8052(a)(2), Nov. 5, 1990, 104 Stat. 1388–351; renumbered § 1110, Pub. L. 102–83, § 5(a), Aug. 6, 1991, 105 Stat. 406; Pub. L. 105–178, title VIII, § 8202(a), June 9, 1998, 112 Stat. 492; Pub. L. 105–206, title IX, § 9014(a), July 22, 1998, 112 Stat. 865.)

The Department of Veterans Affairs attempts to mischaracterize movant's entitlement to his hepatitis disease under 38 USC §1112(a)(1)- to wit:

**(a)**For the purposes of section 1110 of this title, and subject to the provisions of section 1113 of this title, in the case of any veteran who served for ninety days or more during a period of war—

**(1)a chronic disease becoming manifest to a degree of 10 percent or more within one year from the date of separation from such service** shall be considered to have been incurred in or aggravated by such service, notwithstanding there is no record of evidence of such disease during the period of service.

However, 38 USC §1113(b) clearly and unequivocally states:

**(b) Nothing in section 1112 of this title**, subsection (a) of this section, or section 5 of Public Law 98–542 (38 U.S.C. 1154 note) **shall be construed to prevent the granting of service-connection for any disease or disorder otherwise shown by sound judgment to have been incurred in or aggravated by active** military, **naval**, or air **service**.

Movant rests his clear and unmistakable argument solely on a disease or injury incurred while in active service and documented extensively by his STRs. He does not claim entitlement for a chronic disease listed in 38 USC §1112(a)(1).

## Application of 38 CFR §4.31

Once it is determined that a Veteran meets the requirements for service connection, the Agency of Original Jurisdiction (AOJ), in this case the Houston Regional Office, is required to assign a rating that best describes the Veteran's medical degree of disability.

In the event a disease or injury doesn't have a zero percent (0%) rating, VA permits a rating of noncompensible (0%). This permits service connection for the disease or injury in the event the condition worsens over time. Most, but not all conditions listed in Part 4 of the VA Schedule of Rating Disabilities (VASRD) comprehend healed, asymptomatic diseases. (see 38 CFR §4 1991)

VA provided for movant's very same contingency in the then-current 1991version of the VASRD, to wit: Part 4, §4.114 Diagnostic Code 7345. Contemplating the habit of Hepatitis, in any form, to suddenly reappear years later, VA thoughtfully included a rating for Hepatitis- to wit: healed, nonsymptomatic [sic] -----0 (zero) percent. 38 CFR §4.114 DC 7345 (1991)

Entitlement to Service connection for any disease is based solely on evidence that proves it happened in the service and was disabling. The mere fact that the Hepatitis B virus was in remission and appeared to be resolved is not a disqualifier for entitlement. Only a showing on VA's part of fraud, willful misconduct or other malfeasance listed in 38 CFR §3.105(a) would be sufficient to deny service connection for movant's disease and residuals incurred in the Line of Duty.

In comparison, there are numerous diseases and injuries that occur in service and, upon discharge, are duly noted and rated at a noncompensible level as they do not rise to a compensable, minimum rating of 10%. One of the most frequently granted injuries in VA compensation is hearing loss. As most know, it requires a substantial loss of hearing to advance from 0% to 10%; so too, tinnitus. DC 6260 is more frequently granted at 0% for "intermittent" ringing than for constant (10 %). The examples are endless and clearly show the VA Secretary's intent for a nonadversarial environment where every entitlement possible is granted by law-even a zero percent rating for healed, non-symptomatic hepatitis.

As Mr. Melancon did not have legal counsel capable of understanding clear and unmistakable errors of law in 1991 and later, he was unable to articulate in prior BVA decisions the precise reason for believing the 1991 decision was deficient purely on case law. Mr. Melancon contested the legal sufficiency of whether he had a *current, active case of hepatitis*- something the VA mistakenly insisted was the legal standard of review for service connection.

38 CFR §4.31 states the following:

## § 4.31 Zero percent evaluations.

In every instance where the schedule does not provide a zero percent evaluation for a diagnostic code, a zero percent evaluation shall be assigned when the requirements for a compensable evaluation are not met.

In the last sentence, the regulation informs the reader that "a zero percent evaluation shall be assigned when the requirements for a compensable evaluation are not met." The regulation obviously was written to comprehend that there would be instances where a finding of service connection would be made- but the degree of disability might fall below a compensable level. Movant met the diagnostic code requirements of DC 7345 and was "healed; nonsymptomatic thereby entitling him to a zero percent rating for his disease.

## Prior BVA Decision (Docket # 06-04 207) dated April 17th, 2009

In the recent REASONS FOR DECISION section of the September 5th, 2017 denial rating letter, the VA examiner states:

"The Board of Veterans Appeals confirmed that there was no Clear and unmistakable error (CUE) committed in the rating decision dated December 2, 1991on April 17, 2009."

However, counsel for movant wishes to point out the April 17th, 2009 decision authored by Veterans Law Judge Keith W. Allen declares on page two the following:

**"During a recent February 2009 hearing at the RO before the undersigned Veterans Law Judge of the Board (Travel Board hearing), the Veteran withdrew his claim for HBV." (**emphasis added).

From the evidence of record and the above BVA decision, it is clearly and unequivocally evident that movant withdrew any CUE claim in February 2009 concerning Hepatitis B entitlement in 1991. Thus, Mr. Melancon's Motion for Revision remains legally valid and there is no later subsuming Board of Veterans Appeals adjudication denying CUE and forbidding refiling of this Request for Revision based on the same grounds.

## Would The Error(s) Manifestly Change The Outcome?

Any declaration of CUE requires a showing of a violation of statute or regulation. In the alternative, if the evidence, as it was known, was not before the adjudicator, this too constitutes error. However, If one (or both) are held to exist, CUE still demands a manifest change of outcome must occur to be a valid CUE. Here, movant contends denial of service connection continued until 2004 when VA finally ignored the Hepatitis B evidence of record and granted zero percent (0%) for Hepatitis C in its stead.

Further, the 1991 STRs purport to show Mr. Melancon had a Hepatitis C test and it was non-reactive as well. On August 5th, 2015, counsel had Movant's blood tested for evidence of prior Hepatitis B infection (Hepatitis B Surface antibody test or HB Sab). The telltale signs are still there in spite of VA's contentions otherwise in 2004 that Mr. Melancon "has no antibodies to Hepatitis B in his system currently".

Had Mr. Melancon been granted service connection in 1991 as required by statute and regulation, his chronic hepatitis in the form of Hepatitis C might have been treated sooner and lessened his liver damage.

## Summary of Findings

In summary, the December 2nd, 1991 rating decision denying entitlement to Hepatitis B, acute and resolved, was fatally flawed. Mr. Melancon's disease was incorrectly classified as "chronic". In spite of STRs clearly and unequivocally showing inception and disability while still on active service, the VA examiner denied the claim. Reasonable minds cannot differ in recognizing that Hepatitis B (HBV) is nowhere listed as a chronic disease in 38 CFR §3.309 under any presumptive scenario. This constitutes error.

On the other hand, in violation of 38 CFR §3.303(a), the VA examiner denied movant's claim for hepatitis holding that it was acute and resolved- in spite of evidence of contraction of the disease in service.

## The September 2nd, 1991 Ratings Decision

Counsel for Mr. Melancon finds it incredible that the VA Rating Board on September 2nd, 1991 managed to come to three different conclusions regarding service connection for items movant filed for.

On the VA Form 21-6796(a) and (b), under section D, dated 12/02/1991, the following findings of fact are enumerated on the confirmed ratings statement.

>"Service connection of hepatitis is **not** established because this condition was considered acute, was treated and **resolved without residual disability**."

> "Service connection for sinusitis is **not** established because this condition was **not diagnosed in service nor was there continuity of treatment in service**."

> "A zero percent evaluation will be assigned for fracture of the fifth digit left hand because **this condition was treated with rehabilitation therapy with no residual disability resulting."**

> "A zero percent evaluation will be assigned for corneal abrasion of the left eye because **this two [sic] was treated and does not affect the veteran's visual acuity."**

In this decision, service connection for Hepatitis was denied based on it being "resolved without residual disability". Yet, in the same paragraph, service connection for fifth digit left hand was granted in spite of "no residual disability resulting". In addition to this dichotomy, service connection for corneal abrasion of left eye was granted service connection in spite of the fact that the injury "does not affect visual acuity". Lastly, sinusitis was denied because there was no "continuity of treatment in service".

As mentioned above in the discussion on the misapplication of 38 CFR §3.303(b) (1991), the term "continuity of treatment" is a determination and requirement needed to show chronicity and continuity of a presumptive disease ***after*** service. Nowhere in 38 CFR §3.309 (1991) is there any listing for sinusitis as a chronic disease.

The September 2nd, 1991 rating decision compels later reviewers to acknowledge the clear and unmistakable errors. Reasonable minds can agree the rating for hepatitis was an error of law and was held to be a chronic, presumptive disease when it should have been rated as service connected. Counsel for Movant doesn't question the legal validity of the sinusitis rating pro or con. We merely point out the incongruity (and error) of the decision based on the wrong legal standard of review.

Attachments:

Blood test performed August 5th, 2015 showing presence of Hepatitis B infection.

April 17th, 2009 BVA Appeals decision showing withdrawal of claim for service connection for HBV.