Submission of Documents to Department Of Veterans Affairs

Board Of Veterans Appeals
Litigation & Support Division
P.O. Box 27063
Washington, D.C 20038

FAX: (844) 678-8979 or (202) 6324628

Veteran: [redacted]	**VSC:** VBASEA346
C-File or SSN: [redacted]	
Street Address: [redacted]	
City, State, Zip: [redacted]	

Date: 3/04/2021	**ATTN:** Litigation and Support Div. Intake ***FLASHED OVER 75/TERMINALLY ILL

From:	**Gordon A. Graham** **Exclusive Contact Requested**
	Title: Nonattorney Practitioner VA #39029 POA Code E1P
	Address 14910 125th Street KP North
	City, State Gig Harbor, WA 98329
Tel: (253)-313- 5377	**Fax (253) 590-0265**
	Email: **gagraham51@gmail.com**

Type of Document Submitted:

- ☐ Request for Board Hearing at VA Central Office in D.C.
- ☐ Request for Advancement of the Docket (Rule 900)
- ☐ Request for Copy of Hearing Transcript
- ☐ Submission of New and Relevant Evidence associated with the instant Appeal
- ☒ VAF 10182 NOTICE OF DISAGREEMENT (BVA Review)
- ☐ Motion for Reconsideration (MFR)
- ☐ Other

Number of Pages Submitted (NOT including this cover sheet): Eleven (11) Pages

VA Directive 6609, NOVEMBER 9, 2007: NOTICE! Access to Veterans records is limited to Authorized Personnel Only. Information may not be disclosed unless permitted pursuant to 38 CFR 1.500-1.599. The Privacy Act contains provisions for criminal penalties for knowingly and willingly disclosing information from the file unless properly author

OMB Approved No. 2900-0674
Respondent Burden: 30 Minutes
Expiration Date: Feb. 28, 2022

Department of Veterans Affairs

DECISION REVIEW REQUEST: BOARD APPEAL (NOTICE OF DISAGREEMENT)

PART I - PERSONAL INFORMATION

1. VETERAN'S NAME *(First, middle initial, last)* [redacted]

2. VETERAN'S SOCIAL SECURITY NUMBER	3. VETERAN'S VA FILE NUMBER *(if different than their SSN)*	4. VETERAN'S DATE OF BIRTH
[redacted]	C/CSS -	[redacted]

5. IF I AM NOT THE VETERAN, MY NAME IS *(First, middle initial, last)*	6. MY DATE OF BIRTH *(If I am not the Veteran)*

7. MY PREFERRED MAILING ADDRESS *(Number and street or rural route, P.O. Box, City, State, ZIP Code and Country)* ☐ I AM HOMELESS

[redacted]

8. MY PREFERRED TELEPHONE NUMBER *(Include Area Code)*	9. MY PREFERRED E-MAIL ADDRESS	10. MY REPRESENTATIVE'S NAME
(253) 313-5377	gagraham51@gmail.com	Gordon A. Graham VA #39029

PART II - BOARD REVIEW OPTION *(Check only one)*

11. A Veterans Law Judge will consider your appeal in the order in which it is received, depending on which of the following review options you select. *(For additional explanation of your options, please see the attached information and instructions.)*

☒ 11A. Direct Review by a Veterans Law Judge: I do not want a Board hearing, and will not submit any additional evidence in support of my appeal. *(Choosing this option often results in the Board issuing its decision most quickly.)*

☐ 11B. Evidence Submission Reviewed by a Veterans Law Judge: I have additional evidence in support of my appeal that I will provide within the next 90 days, but I do not want a Board hearing. *(Choosing this option may add delay to issuance of a Board decision.)*

☐ 11C. Hearing with a Veterans Law Judge: I want a Board hearing and the opportunity to submit additional evidence in support of my appeal that I will provide within 90 days after my hearing. *(Choosing this option may add delay to issuance of a Board decision.)*

PART III - SPECIFIC ISSUE(S) TO BE APPEALED TO A VETERANS LAW JUDGE AT THE BOARD

12. Please list each issue decided by VA that you would like to appeal. Please refer to your decision notice(s) for a list of adjudicated issues. For each issue, please identify the date of VA's decision and the area of disagreement.

☒ Check here if you attached additional sheets. Include the Veteran's last name and last 4-digits of the Social Security number. 10 Pages

Check the SOC/SSOC Opt in box if any issue listed below is being withdrawn from the legacy appeals process. ☐ **Opt In from SOC/SSOC**

A. Specific Issue(s)	B. Date of Decision
Earlier effective date for entitlement to §4.130 DC 9434 Major Depressive Disorder based on §§3.816(c)(2);3.310(a)	2/25/2021
ATTENTION: Appellant is over 75 years old and diagnosed as terminally ill due to heart condition.	

PART IV - CERTIFICATION AND SIGNATURE

I CERTIFY THAT THE STATEMENTS ON THIS FORM ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

13. SIGNATURE *(Appellant or appointed representative) (Ink signature)*	14. DATE SIGNED
Gordon A. Graham VA #39029 POA Code E1P	3/04/2021

PENALTY: THE LAW PROVIDES SEVERE PENALTIES WHICH INCLUDE A FINE, IMPRISONMENT, OR BOTH, FOR THE WILLFUL SUBMISSION OF ANY STATEMENT OR EVIDENCE OF A MATERIAL FACT, KNOWING IT TO BE FALSE.

Gordon A. Graham #39029
14910 125th St. NW
Gig Harbor, WA 98329
(253) 313-5377

Dept. Of Veterans Affairs
Board of Veterans Appeals
Litigation and Support Group
P.O. Box 27063
Washington DC 20038

3/04/2021

Re: [redacted]

Extra Pages for VA Form 10182

Appellant/Movant, through counsel, now files his Notice of Disagreement with the 2/25/2021 rating decision awarding 50% under §4.130 Diagnostic Code (DC) 9435- Unspecified Depressive Disorder with an effective date of 12/02/2020. A brief recital of the facts of the claim is in order to better comprehend the case and controversy *infra*.

Facts

1. 9/17/2002- Original claims filed for, inter alia, heart disease, depression, and diabetes mellitus type II.

1. 2. 12/17/2002- VA Compensation and pension examination (c&p) report by VA psychologist [redacted], Ph.D. diagnoses Veteran with depression "mild to moderate severity" under ICD 293.83 secondary to his 1986 heart attack with coronary artery disease and triple bypass.
2. 3. 2/20/2003- Rating Decision denies entitlement to, inter alia, heart disease s/p triple bypass, depressive disorder, and diabetes mellitus II with associated complications.
3. 4. 3/12/2020- Veteran files supplemental claims for, inter alia, IHD, Diabetes Mellitus II (DM II) with complications, myelodysplastic syndrome, and total disability due to individual unemployment (TDIU).
4. 5. 9/29/2020 rating decision grants entitlement to a staged rating for IHD, entitlement to DM II, entitlement to associated (secondary) complications of bilateral lower extremity peripheral neuropathy and entitlement to chest scar s/p coronary artery bypass graft- all effective on the date of the earlier 9/17/2002 filing. Noticeably absent is any rating for depression, filed as secondary to the IHD on 9/17/2002 under 38 CFR §3.310(a)(2020).
5. 12/02/2020- Veteran files Motion to Revise the 9/29/2020 Rating decision due to failure to adjudicate the inextricably intertwined claim of an unspecified depressive disorder diagnosed as secondary to Ischemic Heart Disease (IHD).
6. 1/11/2021- EP 040 Motion to Revise claim filed 12/02/2020 cancelled. No explanation in VBMS notes.
7. 2/22/2021- New claim established for a major depressive disorder without any filing by Veteran.
8. 2/22/2021- Motion to Revise claim reviewed as EP 960 for Administrative Error.
9. 2/23/2021- Nehmer Subject Matter Expert Natasha B. Hines, RVSR (VBA 346) declares no CUE; no Nehmer issues were denied. EP 960 closed.
10. 2/25/2021-Rating Decision grants entitlement to depressive disorder secondary to IHD at 50% with effective date of filing of CUE on 12/02/2020.

Legal Standard of Review

CUE

"Clear and unmistakable evidence", as used in the governing statutes, has been interpreted to mean evidence that 'cannot be misinterpreted and misunderstood, i.e., it is undebatable.'" Quirin v. Shinseki, 22 Vet.App. 390, 396 (2009) (citing ***Vanerson v. West***, 12 Vet.App. 254, 258-59 (1999))

A motion to revise based on CUE is a collateral attack on a final decision by an RO or the Board. See ***Disabled Am. Veterans v. Gober***, 234 F.3d 682, 696–98 (Fed. Cir. 2000); ***Hillyard v. Shinseki***, 24 Vet.App. 343 (2011).

To establish CUE in a final decision of the Board, a claimant must show that (1) either the facts known at the time were not before the adjudicator or that the law then in effect was incorrectly applied, and (2) had the error not been made the outcome would have been manifestly different. ***Grover v. West***, 12 Vet.App. 109, 112 (1999).

The claimant must provide "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 manifestly different but for the alleged error." ***Fugo v. Brown***, 6 Vet.App. 40, 44 (1993); see also ***Bustos v. West***, 179 F.3d 1378, 1380–81 (Fed. Cir. 1999).

CUE is the sort of 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. Derwinski***, 3 Vet.App. 310, 313–14 (1992).

Application of §3.310

38 CFR §3.310 has been in existence in its present iteration since August 28, 1979. See 44 FR 50340. 38 CFR §3.310(a) states:

§ 3.310 Disabilities that are proximately due to, or aggravated by, service-connected disease or injury.

(a) *General.* Except as provided in § 3.300(c), 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 condition.** (emphasis added)

Service connection may also be established on a secondary basis for a disability that is proximately due to, the result of, or aggravated by a service-connected disease or injury. 38 CFR §3.310(a). Establishing service connection on a secondary basis requires: (1) competent evidence of current disability; (2) evidence of a service-connected disability; and (3) competent evidence that the current disability was either (a) caused by; or (b) aggravated by a service-connected disability. See ***Allen v. Brown***, 7 Vet. App. at 439 (Thus, secondary service connection under §3.310 entails "any additional impairment of earning capacity resulting from an already service-connected condition, regardless of whether or not the additional impairment is itself a separate disease or injury caused by the service-connected condition".) ***Id***. at 448.

VA Office of General Counsel Precedent 3-2019 most recently held:

3. The Nehmer stipulation operates to void a final decision on a veteran's or survivor's benefits claim only when the Secretary of Veterans Affairs establishes a new presumption of service connection pursuant to the Agent Orange Act of 1991, Pub. L. 102-4, codified at 38 U.S.C. §1116(b). §3.816(c)(2)(i) (2020).

Inextricably Intertwined Claims

Henderson v. West, 12 Vet. App. 11, 20 (1998) held "that when a claim is inextricably intertwined with another claim, the claims must be adjudicated together in order to enter a final decision on the matter". (quoting ***Harris v. Derwinski***, 1 Vet.App. 180, 183 (1991)).

VA is to give "due consideration" to "all pertinent medical and lay evidence" in evaluating a claim for disability benefits. 38 U.S.C. § 1154(a). Thus, there is no categorical rule that medical evidence is required when the determinative issue is either medical etiology or a medical nexus. ***Davidson v. Shinseki***, 581 F.3d 1313, 1316 (Fed. Cir. 2009).

Constructive Possession

VA is considered to be in constructive receipt of all relevant and reasonably connected VA records, even if those records are not physically a part of the Veteran's claim file. See ***Bell v. Derwinski***, 2 Vet. App. 611 (1992). In other words, any records created by VA are constructively part of the record and presumed to be in VA's possession. This rule applies to VA records created after a rating decision. ***Lang v. Wilkie***, 971 F.3d 1348 (Fed. Cir. 2020). Thus, evidence is constructively received by the AOJ post-decision if it (1) was generated by VA or was submitted to VA and (2) can reasonably be expected to be connected to the veteran's claim. ***Id.*** at 1349(citing ***Monzingo v. Shinseki***, 26 Vet. App. 97, 101-102 (2012). See also ***Turner v. Shulkin***, 29 Vet. App. 207 (2018).

Discussion

On 2/25/2021, after filing a Motion to Revise the 9/29/2020 decision on the grounds of clear and unmistakable error on 12/02/2020, the Secretary belatedly awarded entitlement to service connection for the Appellant's unspecified depressive disorder. This is a favorable finding of fact and may not be disturbed unless the Veteran obtained the rating by an act of omission or commission. See

Medrano v. Nicholson, 21 Vet. App. 165, 170 (2007) (The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority).

Nevertheless, the effective date remains in contention. The Court has confirmed that raising a pending claim theory in connection with a challenge to the effective-date decision is procedurally proper. ***Ingram v. Nicholson***, 21 Vet. App. 232, 249, 255 (2007). Here, in the instant Motion to Revise on appeal, the Appellant has alleged error in the 9/29/2020 (pending claim theory for a depressive disorder) rating decision and requested service connection for his depressive disorder under §3.310 (2003). The Secretary responds inappropriately there is no CUE in the 2/25/2021 rating decision and cites to §3.114 for his legal authority. Appellant is unsure how to respond. He has never filed Nehmer claims for his dependents. The Secretary's Nehmer subject matter expert held "there have been no Nehmer conditions that have been denied." See VBMS notes dated 2/23/2021. These are both incorrect legal standards of review. ***Harris, Allen*** *supra*. The Veteran has never contended such. Nevertheless, in the same rating decision, the Secretary arbitrarily and inexplicably construed the Motion to Revise as a supplemental claim for entitlement to a disease the Appellant filed for over 18 years ago-albeit with a more recent effective date of filing for the CUE on 12/02/2020. The Secretary concedes the unspecified depressive disorder is indeed secondary to the Veteran's service connected IHD under §3.310 but ignores guiding CAVC Nehmer precedence and his very own regulation.

Appellant benefits from the simplicity of his argument. He relies on the plain meaning of §3.310(a)-i.e., "When service connection is thus established for a secondary condition, the secondary condition shall be considered a part of the original condition." See ***Malone v. Gober***, 10 Vet. App. 539, 544 (1997) (holding that the statutory use of the word "may" conveys discretion, while the use of the word "shall" does not). Similarly, Appellant relies on the plain meaning of §3.816(c)(2)(i) (2020) for the contention the 9/29/2020 rating decision failure to grant entitlement to residuals of an unspecified depressive disorder is void ab initio and entitlement to service connection arose on the date of the prior claims filing.

In his CUE discussion in the 2/25/2021 ratings decision, the Secretary avers the Appellant/Movant is asking for a Motion to Revise the 2/20/2003 rating decision. The decision states:

"The decision to deny compensation, dated February 20, 2003, for unspecified depressive disorder (claimed as depression) is not considered to have been clearly and unmistakably erroneous because the decision was properly based on the available evidence of record at the time and the rules in effect."

The Veteran has never contended there was error in the 2/20/2003 ratings decision. The Secretary misconstrues his Motion to Revise. From a plain reading of the 12/02/2020 Motion to Revise, Appellant/Movant sought a revision of the erroneous 9/29/2020 rating decision which, inter alia, omitted including service connection for the depressive disorder.

By operation of law, if service connection, under any theory for IHD was denied in the 2/20/2003 decision, it follows any conditions claimed as secondary to it must fail. However, subsequent to the change in law (§§3.307(a); 3.309(e); PL 116-23), entitlement to service connection for his secondary condition under §§3.310; 3.8116(c)(2)(i) has now arisen on 9/17/2002- the day of the original filing. See ***Procopio v. Wilkie***, WL 2017-1821 (en banc) (Fed. Cir. Jan. 29, 2019) The instant 2/25/2021 denial of a clear and unmistakable error in the 9/29/2020 rating decision- incorrectly alleged as the 2/20/2003 rating decision- can only be read as no more than what it appears on its face- a flawed post hoc rationalization for the failure to award the correct effective date for entitlement to a depressive disorder. See ***In re Lee***, 277 F.3d 1338, 1345-46 (Fed. Cir. 2002) ("'[C]ourts may not accept appellate counsel's post hoc rationalization for agency action.'" (quoting ***Burlington Truck Lines, Inc. v. United States***, 371 U.S. 156, 168 (1962))); ***Smith v. Nicholson***, 19 Vet.App. 63, 73 (2015) ("[I]t is not the task of the Secretary to rewrite the Board's decision through his pleadings filed in this Court.").

As discussed above, the Secretary was in constructive possession of the 2003 rating decision. ***Bell*** *supra*. Thus, he was put on notice there was a medical

 [redacted]

nexus established between the Appellant's IHD and his unspecified depressive disorder in the prior 2002 claim. ***Davidson*** *supra.*

By operation of law, readjudication under the Nehmer stipulations voids prior denials-including all secondarily connected claims filed in conjunction with the now-conceded IHD under §§3.310(a); 3.816(c)(2)(i) (2020); VA OGC Prec. 3-2019. The claims were, and still are, inextricably intertwined such that adjudication of the one directly impacted the outcome of the other-both in 2002 and the present 9/29/2020 rating decision. ***Harris*** *supra.*

Equal Application of §3.310 to Nehmer Claims

The Secretary's 9/29/2020 decision granted service connection for bilateral peripheral neuropathy of both lower extremities secondary to Diabetes Mellitus II (see 2/25/2021 Code Sheet in VBMS). Interestingly, nowhere in the four corners of Appellant's VA Form 21-526, accepted on 9/17/2002, can there be found any mention of a claim, formal or informal, for peripheral neuropathy of the lower extremities secondary to his claim for Diabetes Mellitus II. Incongruously, the Secretary has arbitrarily chosen to retroactively extend secondary service condition under the aegis of §3.310(a) and §3.8116(c)(2)(i) to a disease which is not found in §3.309(e). ***Medrano*** *supra.* In the same breath, under color of law, he baldly denies an earlier effective date for service connection of another claimed secondary disease equally based on its absence in §3.309(e); this, in spite of the disorder having been diagnosed and connected by medical nexus over eighteen years prior. The 9/29/2020 and 2/25/2021decisions can only be seen as arbitrary, capricious, an abuse of discretion and not in accordance of law on its face and void ab initio. As for the Secretary's reliance on §3.114 or 38 U.S.C. §18 for the proposition that an earlier effective date to entitlement to an unspecified depressive disorder is not for application, this, too, is clear and unmistakable error.

Relief Sought

Appellant/Movant seeks entitlement to service connection with an appropriate, initial, compensable rating for his unspecified depressive disorder under §4.130 Diagnostic Code 9435 with an effective date of October 8, 2002- the earliest date it can be ascertained that the Veteran indicated he evinced a desire to file for depression-formal or informal. (§§3.1; 3.155)(2002). See email correspondence dated 10/08/2002 in VBMS.

Conclusion

Allen v. Brown *supra* is on point. ***Id.*** *at* 448.

"Thus, secondary service connection under §3.310 entails "any additional impairment of earning capacity resulting from an already service-connected condition, regardless of whether or not the additional impairment is itself a separate disease or injury caused by the service-connected condition." As the Court has spoken to this conundrum, that is the end of the matter.

Appellant/Movant has, by a preponderance of the evidence of record and by operation of law, shown the 9/29/2020 rating decision, and not the 2/20/2003 rating decision, which failed to ascertain entitlement to an unspecified depressive disorder, was clearly and unmistakably erroneous. Reasonable minds can only conclude the decision was in error and that it resulted in an outcome determinative decision which manifestly changed the outcome to the detriment of the Veteran. By "manifestly changed", the Veteran points to the entitlement to Concurrent Receipt of Disability Pay (CRDP). With the addition of the compensable entitlement to his unspecified depressive disorder of even 10%, by operation of law, he then qualifies for the CRDP retroactive to the 9/17/2002 filing. §4.25(2021). The confirmed ratings on the Code sheet dated 9/29/2020 states the Veteran was rated at 44% combined, rounded down to 40% by law. However, the addition of even 10% for the compensable depressive disorder would combine to equal 50% and concurrent entitlement to his disability compensation.

The Secretary conceded entitlement to IHD was due retroactively under the Procopio precedence to the Veteran's 9/17/2002 filing by granting service connection for the disease on 9/29/2020. See ***McWhorter v. Derwinski,*** 2 Vet.App. 133, 136 (1991). "Yet, [w]here [an] appellant has presented a legally plausible position . . . and the Secretary has failed to respond appropriately, the Court deems itself free to assume . . . the points raised by [the] appellant, and ignored by [VA], to be conceded." A compensable rating for a depressive disorder in 2002 met the threshold of an "additional impairment in earning capacity".

Extrapolating from the 9/29/2020 rating decision, using §4.25 and ***Allen*** precedence, the Appellant/Movant was 44 percent disabled and 56 percent efficient at the time of the 9/17/2002 filing. Proceeding from this 56 percent efficiency, the effect of a further 10 percent disability is to leave only 50 percent of the efficiency remaining after consideration of the other disabilities.

Alternatively, if the trier of fact concludes there is no clear and unmistakable error, the fact remains that the clear and unmistakable meaning of §3.310 conjoins the Veteran's depressive disorder to his IHD just as much as the regulation conjoins his peripheral neuropathy to his Diabetes Mellitus II disorder. Either entitlement to <u>both</u> conditions (depressive disorder and bilateral peripheral neuropathy of the lower extremities) arose on 9/17/2002 – or neither did. The Secretary cannot have his cake and eat it too. See ***Mitchell v. McDonald,*** 27 Vet App. 431,440 (2015) (Cases "must be decided on the law as we find it, not on the law as we would devise it")

Respectfully submitted,

Gordon A. Graham
Counsel for Appellant/Movant [redacted]