



Submission of Documents to Department Of Veterans Affairs

**Evidence Intake Center PO Box 4444
PO Box 4444
Janesville WI 53547-4444**

FAX 1-844-822-5246 or 1-844-531-7818

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

Date: 12/02/2020	ATTN: VBA346 Intake ATTN: Veteran is terminally ill.
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From: Gordon A. Graham	Exclusive Contact Requested
Title: Nonattorney Practitioner VA #39029 POA Code E1P	
Address 14910 125 th 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:

<input checked="" type="checkbox"/> VAF 20-0995 Suppl. Claim or VAF-20-0996 Higher Level of Review
<input type="checkbox"/> VAF 21-8940/VAF 21-4192 FOR TDIU
<input type="checkbox"/> VAF 9 APPEAL TO BOARD OF VETERANS' APPEALS (Legacy)
<input type="checkbox"/> VAF 21-526EZ CLAIM FOR COMPENSATION
<input type="checkbox"/> VAF 10182 NOTICE OF DISAGREEMENT (BVA Review)
<input type="checkbox"/> Privacy Act / Freedom of Information Act (VAF 3288)
<input checked="" type="checkbox"/> Other Motion to Revise a prior decision under M 21-1 III.iv.7.B.3. Applicable evidence included.

Number of Pages Submitted (NOT including this cover sheet): Thirteen (13) 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 authorized to do so.

PART III - NEW AND RELEVANT EVIDENCE

14. To complete your application, you must submit new and relevant evidence to VA or tell us about new and relevant evidence that VA can assist you in gathering in support of your supplemental claim. If you have records in your possession, please attach the records to this form. Please list your name and file number on each page. If you would like VA to obtain non-federal records, please review your decision notification letter for the appropriate authorization forms to complete and submit those forms to VA with this request form.

16. DO YOU WANT VA TO GET FEDERAL RECORDS?

LIST BELOW ANY VA MEDICAL CENTER(S) (VAMC), VA TREATMENT FACILITIES, OR FEDERAL DEPARTMENTS OR AGENCIES THAT HAVE NEW AND RELEVANT EVIDENCE THAT YOU ARE AUTHORIZING VA TO OBTAIN IN SUPPORT OF YOUR SUPPLEMENTAL CLAIM: You may attach additional sheets of paper, if necessary. Please list your name and file number on each additional sheet.

15A. NAME AND LOCATION	15B. DATE(S) OF RECORDS

PART IV - CERTIFICATION AND SIGNATURE

NOTE: This section is **MANDATORY** and completion is required to process your claim, any omission may delay claim processing time.

VA AUTHORIZED REPRESENTATIVES ONLY: I certify that the claimant has authorized the undersigned representative to file this supplemental claim on behalf of the claimant and that the claimant is aware and accepts the information provided in this document. I certify that the claimant has authorized the undersigned representative to state that the claimant certifies the truth and completion of the information contained in this document to the best of claimant's knowledge.

NOTE: A POA's signature *will not* be accepted unless at the time of submission of this claim a valid VA Form 21-22, *Appointment of Veterans Service Organization as Claimant's Representative*, or VA Form 21-22a, *Appointment of Individual As Claimant's Representative*, indicating the appropriate POA is of record with VA.

16. I CERTIFY THAT the statements on this form are true and correct to the best of my knowledge and belief.

COMPENSATION BENEFIT CLAIMS ONLY:

5103 NOTICE Acknowledgment - I certify I have received the notice to this application titled, *Notice to Veteran/Service Member of Evidence Necessary to Substantiate a Claim for Veterans Disability Compensation and Related Compensation Benefits* as provided at www.va.gov/disability-evidence. If the box is not checked, VA will send you this information through an electronic communication or written correspondence sent to the address on file with VA if your application is being submitted more than one year after VA provided notice of our decision for any issue listed in item 13.

16A. SIGNATURE OF VETERAN OR CLAIMANT OR VA AUTHORIZED REPRESENTATIVE (Sign in ink)	16B. DATE SIGNED 12/02/2020
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16C. NAME OF VA AUTHORIZED REPRESENTATIVE (Please Print)
Gordon A. Graham VA #39029 POA Code E1P

ALTERNATE SIGNER CERTIFICATION AND SIGNATURE

17. I CERTIFY THAT by signing on behalf of the claimant, that I am a court-appointed representative; OR, an attorney in fact or agent authorized to act on behalf of a claimant under a durable power of attorney; OR, a person who is responsible for the care of the claimant, to include but not limited to a spouse or other relative; OR, a manager or principal officer acting on behalf of an institution which is responsible for the care of an individual; AND, that the claimant is under the age of 18; OR, is mentally incompetent to provide substantially accurate information needed to complete the form, or to certify that the statements made on the form are true and complete; OR, is physically unable to sign this form.

I understand that I may be asked to confirm the truthfulness of the answers to the best of my knowledge under penalty of perjury. I also understand that VA may request further documentation or evidence to verify or confirm my authorization to sign or complete an application on behalf of the claimant if necessary. Examples of evidence which VA may request include: Social Security Number (SSN) or Taxpayer Identification Number (TIN); a certificate or order from a court with competent jurisdiction showing your authority to act for the claimant with a judge's signature and a date/time stamp; copy of documentation showing appointment of fiduciary; durable power of attorney showing the name and signature of the claimant and your authority as attorney in fact or agent; health care power of attorney, affidavit or notarized statement from an institution or person responsible for the care of the claimant indicating the capacity or responsibility of care provided; or any other documentation showing such authorization.

17A. SIGNATURE OF ALTERNATE SIGNER (Sign in ink)	17B. DATE SIGNED
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17C. NAME OF ALTERNATE SIGNER (Please Print)

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.



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Evidence Intake Center
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12/02/2020

Re: 9/29/2020 Rating Decision
[REDACTED]

Extra Pages for VA Form 20-0995
Supplemental Claim for CUE

Appellant, through counsel, now files his Motion to Revise the 9/29/2020 rating decision based on a clear and unmistakable error (CUE). While Appellant may have filed his September, 2002 claim on the theory it was related to Project SHAD, his entitlement to benefits under presumptive exposure to herbicides, and any secondary filings under 38 CFR §3.310(a) (2002) must consider all theories of entitlement. Proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to his claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. See §3.103(a)(2020). Towards this end, Appellant now wishes to clarify the specific error, the regulation that was not considered in the adjudication and the resultant outcome based decision. See *Crippen v. Brown*, 9 Vet.App. 412, 421 (1996) (citing *Eddy v. Brown*, 9 Vet.App. 52, 58 (1996)).

Facts

1. 9/17/2002- Original claims filed for heart disease, depression, pernicious anemia, thyroid disorder, diabetes mellitus type II and muscle pain and cramps/back pain and cramps.
2. 12/17/2002- VA Compensation and pension examination (c&p) report by VA psychologist Miles K. Hohenegger, 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.
3. 2/20/2003- Rating Decision denies entitlement to heart disease s/p triple bypass, pernicious anemia, disease process manifested by muscle pain and cramps and back pain and cramps, sleep apnea, hypothyroidism, depressive disorder, asbestosis and diabetes mellitus II with associated complications.
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).
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).

Legal Standard of Review

"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).

A determination that there was CUE must be based upon the record and the law that existed at the time of the prior adjudication in question. **May v. Nicholson**, 19 Vet.App. 310, 313 (2005).

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).

38 CFR 3.310 has been in existence in its present iteration since August 28, 1979. See 44 FR 50340.

At the time the 9/29/2020 decision was made, the Secretary was in constructive possession of the 2/20/2003 rating decision showing a claim was denied for depression secondary to IHD. Additionally, The Secretary was in

constructive possession of the 12/17/2002 VA-conducted c&p examination that held the Appellant's depression was caused solely by his IHD.

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.

Based on the holding in *Allen* *supra*, by operation of law, Mr. Snodgrass is entitled to an effective date for depression at a compensable rate from September 17, 2002. *Procopio v. Wilkie*, docket no. 2017-1821 (en banc) (Fed. Cir. Jan. 29, 2019) reversed the finding of *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008) that presumptive exposure extended to a twelve-mile limit into the territorial waters of the South China Sea. By granting presumptive exposure pursuant to VA OGC Precedent 3-2019, A Veteran is entitled to the earliest date it can be ascertained that he filed for any herbicide presumptive disease listed in §3.309(e). VAOPGCPREC 3-2019 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).

The term "void" in the OGC opinion, necessarily means to void the denial of service connection for Appellant's IHD and DM II. Because the Appellant also had his depression, secondary to his IHD heart attack denied in the same

2/20/2002 decision, it, too, must be revised to reflect that entitlement to service connection arose on 9/17/2002. §3.310(a) is unequivocal in its phraseology:

“When service connection is thus established for a secondary condition, the secondary condition **shall be** considered a part of the original condition.”

As Dr. Miles K. Hohenegger, a licensed VA examiner, held the disease (depression) was secondary to the IHD during the pendency of the original 9/17/2002 claim, this secondary condition shall be a part of the original IHD 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). As the disease (depression) involves a different bodily system, it is ratable under a different VA Schedule of Rating Disabilities (VASRD) diagnostic code, DC 9411. The entitlement at a compensable rate under §4.130 doesn't constitute pyramiding under §4.14 (2020).

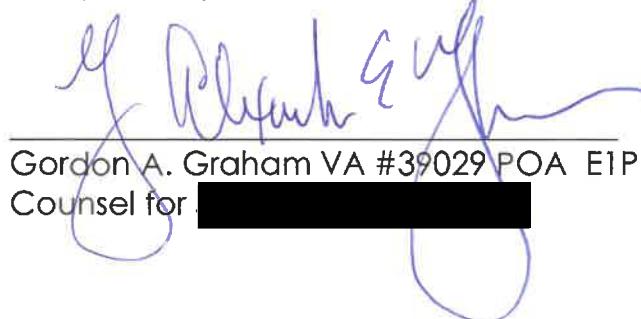
Reasonable minds can only concur that the readjudication under the Nehmer stipulations that void prior denials includes all secondary claims filed in conjunction with now-recognized IHD under §§3.310(a); 3.816(c)(2)(i) (2020); VA OGC Prec. 3-2019. The claims were, and still are, inextricably intertwined such that adjudication of the one directly impacts the outcome of the other-both in 2002 and the present 9/29/2020 rating decision. See **Harris v. Derwinski**, 1 Vet. App. 180, 183 (1991) (stating 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). Ignoring the denial of entitlement to depression in the 2002 rating decision provoked an outcome determinative decision of the 9/29/2020 decision.

Appellant requests the record be revised to reflect entitlement to depression, secondary to IHD, arose on 9/17/2020 with the filing of his original claims. As the rating decision is not “final” and appealable, and an obvious error has occurred, M 21-1, pt. III, subpt. iv, ch. 7, sec. B(3)(a) is for application- (the RO “must . . . correct the Narrative section of a rating decision if after the claimant has been notified of the decision it is discovered that inaccurate information was provided such as service dates or entitlements)); id., sec. B(3)(b)

(requiring correction of errors on the rating codesheet); id., sec. B(3)(c) (requiring referral of an erroneous decision "to a decision maker to issue a new decision" once an error has been identified); fixing it III.iv.7. B.3.c. See also **Rosinski v Wilkie**, WL CAVC 2018 -0678.

Appellant attaches a copy of the 12/17/2002 c&p examination (five pages), marked 'duplicate', clearly and unmistakably attributing Appellant's depression to his 1986 heart attack and subsequent surgery for a triple bypass of the coronary artery.

Respectfully submitted,


Gordon A. Graham VA #39029 POA E1P
Counsel for: [REDACTED]