Continuation of VAF 21-526EZ Motion to Revise

Melancon – C XXX-XX- 2402

Mr. Malcolm H. Melancon, the movant, through counsel, now files a Motion for Revision of the December 2nd, 1991 rating on the grounds of clear and unmistakable error (CUE) under 38 CFR §3.105(a) and §20.1403.

§20.1403 defines the requirements for error in a prior decision as follows:

General. 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. Generally, either the correct facts, as they were known at the time, were not before the Board, or the statutory and regulatory provisions extant at the time were incorrectly applied.

In sum, Mr. Melancon must prove that his contemporary military records support a finding that infectious hepatitis under Part 4.114 of Chapter 38, Code of Federal Regulations was incurred in service, or that 38 CFR §3.1(k); §3.4(b)(1); §3.303(a) and §4.1were incorrectly applied. The evidence must also prove that a manifestly different outcome would have ensued but for the error, or errors of fact, and misapplication of statute and regulation.

Evidence of Record on 12/19/1991

The evidence of record in 1991 regarding Mr. Melancon's Hepatitis B (HBV) Infection and subsequent hospitalization are extremely well documented. His Service Treatment Records (STRs) are complete and reveal many tests for both HBV and Hepatitis A (HAV)-including proof of Hepatitis B infection. Nowhere to be found, however, is any evidence of Hepatitis C (HCV) testing. A Hepatitis B Core antibody test request on March 26th, 1991 during admission to the Balboa Naval hospital for fulminant hepatitis inadvertently omitted the letter "B" such that the doctor's entry appears as "HCAb" instead of "HBCAb".

There was never, nor is there currently, a blood test called a Hepatitis antibody test or any test for Hepatitis C abbreviated as HCAg. However, §20.1403(d)(3) does not permit a review based on a disagreement as to how the facts were weighed or evaluated. Therefore Mr. Melancon will not dispute the medical evidence of record but rely entirely on the second prong of proving clear and unmistakable error-to wit: that the statutory and regulatory provisions then extant at the time were incorrectly applied.

Nevertheless, Mr. Melancon would point out that the medical testing revealed in the STRs is indisputable. Mr. Melancon did have Hepatitis B as described in 38 CFR §4.114 Diagnostic Code 7345, VA Schedule of Rating Disabilities (VASRD) (1991) :

Hepatitis, infectious

Healed, nonsymptomatic----------0%

Demonstrable liver damage with mild gastrointestinal disturbances-----10%

Minimal liver damage with associated fatigue, anxiety, and

gastrointestinal disturbance of lesser degree and frequency but

necessitating dietary restriction or other therapeutic measures----------30%

With moderate liver damage and disabling recurrent episodes of

gastrointestinal disturbance, fatigue, and mental depression ----------60%

With marked liver damage manifest by liver function test and marked gastrointestinal symptoms, or with episodes of several weeks duration aggregating three or more a year and accompanied by disabling symptoms requiring bed rest----------100%

Please note there was no requirement for Hepatitis to be chronic or acute in the 1991regulation. The rating decision, dated December 2nd, 1991, states:

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

In fact, on page two of the confirmed rating decision, listed under NSC (nonservice connected), it clearly is entered as a finding of fact that Hepatitis, under Diagnostic Code 7345, was "cured". This is a finding of fact. As such, it cannot be overturned without an admission on VA's part that the decision to deny service connection was **not** based on Mr. Melancon's contraction of infectious hepatitis, but that it was "acute and resolved". That is the wrong legal standard. "Nonsymptomatic" is synonymous with "resolved". It is indisputable that Mr. Melancon contracted Hepatitis B in service. **Please see Exhibit A**

The VA Examiner contended Mr. Melancon's infectious hepatitis was "acute and resolved" but the legal standard is that he merely had to contract the disease in service for entitlement. Thus, the statutory and regulatory provisions extant at the time were incorrectly applied. Whether Mr. Melancon's Hepatitis was acute or chronic is immaterial to entitlement.

Dr. M.A. Nunez, MC (Medical Corps) USNR opined on May 29th, 1991, well over two months after the inception of the hepatitis:

*"Patient instructed that he should avoid sexual contact (or use condoms) X 6 months. Advised re the availability of hepatitis vax [*vaccine] *for future spouse (patient currently sexually inactive). Informed re service connected nature of illness-patient eligible for VA benefits/follow up. Patient given chit for LFTs* [Liver Function Tests]. *Hep panel to be drawn in three months @ Randolph AFB* [Texas]. *Will contact patient if today's labs have worsened."*

The clear and unmistakable meaning of the admonition to remain sexually abstinent or use adequate protection can only imply that Mr. Melancon was still contagious and the infectious hepatitis would be present for life. Suggesting Mr. Melancon should have a future spouse obtain a Hepatitis B vaccine to protect her against it can only imply the danger of transmission later and a permanent carrier state. Mr. Melancon, himself would never need a Hepatitis B vaccine because he now carried the antibodies to protect against reinfection.

In fact, Dr. Nunez also admonished Mr. Melancon earlier on April 4th, 1991 in another chart note:

"Pt. counseled re parenteral transmission rate & counseled re use of condoms, blood donation. Counseled re future sexual contact & HB vaccine".

38 CFR Regulations (1991) Affecting Service Connection

To prove CUE, Mr. Melancon must show that the regulations extant on September 17th, 1991, the day he filed his VAF 21-526 for service connection for infectious hepatitis under 38 CFR §4.114 Diagnostic Code 7345 were incorrectly applied. Mr. Melancon will rely on the following regulations to prove the clear and unmistakable error of the December 2nd, 1991 rating decision.

Application of 38 CFR §3.1 (k)(l) (1991)

38 CFR §3.1 (k) states the following:

(k)Service-connected means, with respect to disability or death, that such disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in line of duty in the active military, naval, or air service.

Mr. Melancon clearly and unmistakably qualifies for the definition of "service connected in the line of duty (LOD) as the disease (infectious hepatitis) occurred on March 26th, 1991 while he was still on active duty in the U.S. Navy aboard the USS Reasoner (FF-1063) in the Pacific Ocean. This is an unrebuttable finding of fact.

Application of 38 CFR §3.4(b)(1) (1991)

38 CFR §3.4(b) Disability Compensation section (1) reiterates the same language as 38 CFR §3.1 (k):

(1) Basic entitlement for a veteran exists if the veteran is disabled as the result of a personal injury or disease (including aggravation of a condition existing prior to service) while in active service if the injury or the disease was incurred or aggravated in line of duty.

As mentioned above, basic entitlement arose on March 26th, 1991 (or possibly earlier while still aboard the USS Reasoner). Military Service Treatment Records (STRs) are unequivocal that the infectious hepatitis was contracted on or by this date. As such, the Presumption of Regularity attaches to them and they are considered credible evidence of record. 38 CFR §3.156(c) defines service department records for VA purposes and Mr. Melancon's records thus fall into this category. **See Exhibit A**

Application of 38 CFR §3.105(a) (1991)

38 CFR §3.105(a) states the following:

(a)Error. Previous determinations which are final and binding, including decisions of service connection, degree of disability, age, marriage, relationship, service, dependency, line of duty, and other issues, will be accepted as correct in the absence of clear and unmistakable error. Where evidence establishes such error, the prior decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of clear and unmistakable error has the same effect as if the corrected decision had been made on the date of the reversed decision.

The US Navy made a decision on March 26th, 1991 that Mr. Melancon's contraction of infectious hepatitis occurred while on active service in the line of duty and did not involve willful misconduct. This finding of fact must be accepted as correct in the absence of clear and unmistakable error on the part of the US Navy. Service Department records are securely kept and are regarded as credible evidence of disease or injury incurred in service. As such, they are unimpeachable records the Veterans Administration uses to determine service connection.

Application of 38 CFR §3.303(a) (1991)

38 CFR § 3.303(a) clearly and unequivocally sets the parameters for service connection if the regulation or regulations discussed above were unclear:

(a)General. Service connection connotes many factors but basically it means that the facts, **shown by evidence**, establish that a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces, or if preexisting such service, was aggravated therein. This may be accomplished by affirmatively showing inception or aggravation during service or through the application of statutory presumptions. Each disabling condition shown by a veteran's service records, or for which he seeks a service connection must be considered 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 medical and lay evidence. Determinations as to service connection will be based on review of the entire evidence of record, with due consideration to the policy of the Department of Veterans Affairs to administer the law under a broad and liberal interpretation consistent with the facts in each individual case.

Mr. Melancon's claims file is replete with numerous mentions of his infectious disease so there can be no doubt that the disease originated in service. Hepatitis B is known to materialize from 30 to 90 days from exposure which still falls within Mr. Melancon's time in service.

Mr. Melancon's subsequent attempts to obtain service connection in following years resulted in two separate findings of fact that his Hepatitis B (HBV) was incurred in service. A conflicting finding held that he never had HBV whatsoever and that his Hepatitis C (HCV) was incurred during active service. Mr. Melancon does not dispute these positive findings of fact for the purposes of this clear and unmistakable error adjudication as they further substantiate his claim. As they were not evidence of record in 1991, they are not probative evidence that can be considered in this CUE claim.

The above cited regulations clearly and unequivocally confirm that any disease or injury, absent willful misconduct, is service connected with the proviso that it occurred in the line of duty. Nowhere in the evidence of record is there any document or record to rebut Mr. Melancon's or the US Navy's contention that he contracted hepatitis, acute or otherwise while on active duty. This evidence and the pertinent 38 CFR regulations compels the conclusion, to which reasonable minds cannot differ, that the December 2nd, 1991 decision would have been manifestly different but for the statutory or regulatory error.

Proof of a Manifestly Different Outcome

In Russell v. Derwinski 3 Vet. App. 310, 313-14 (1992), the Court of Veterans Appeals or COVA (now the Court of Appeals for Veterans Claims or CAVC) held the following:

"By its express terms, 38 C.F.R. § 3.105(a) refers to "determinations on which an action was predicated." **Therefore, it necessarily follows that a "clear and unmistakable error" under § 3.105(a) must be the sort of error which, had it not been made, would have manifestly changed the outcome at the time it was made.** Errors that would not have changed the outcome are harmless; by definition, such errors do not give rise to the need for revising the previous decision.

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. A determination that there was a "clear and unmistakable error" must be based on the record and the law that existed at the time of the prior AOJ or BVA decision. Russell v. Derwinski (1991)

As the COVA pointed out, errors that would not have changed the outcome are harmless. Mr. Melancon's decision was clearly and unmistakably in error and far from harmless. To begin with, had Mr. Melancon been properly service connected for his injury/ disease, he would have been entitled to one or more of the following benefits.

Application of 38 CFR §3.324 (1991)

38 CFR §3.324 (1991) authorizes the following

§ 3.324 Multiple noncompensable service-connected disabilities.

Whenever a veteran is suffering from two or more separate permanent service-connected disabilities of such character as clearly to interfere with normal employability, even though none of the disabilities may be of compensable degree under the 1945 Schedule for Rating Disabilities the rating agency is authorized to apply a 10-percent rating, but not in combination with any other rating.

An award of a 0% disability for healed, nonsymptomatic infectious hepatitis under Diagnostic Code 7345, as well as the award for the small finger of the left hand under Diagnostic Code 5299-5227 on December 2nd, 1991 would have entitled Mr. Melancon to a 10% disability. As such, this would have manifestly changed the outcome-hardly a "harmless" error.

In fact, the December 2nd,1991 decision notably did not grant entitlement to 38 CFR §3.324 at the 10% rate in spite of Mr. Melancon's additional award of "Corneal Abrasion Left Eye" under Diagnostic Code 6099-6006 in the same rating decision. This, too, is clear and unmistakable error which quite obviously would have manifestly changed the outcome for Mr. Melancon.

Application of 38 CFR §4.28 (1991)

38 CFR §4.28 (1991) applies to Veterans who are discharged from active service with an existing, ongoing injury or disability which is unresolved:

§4.28 Convalescent Ratings from date of discharge (1991)

The following ratings may be assigned under the conditions stated for disability from any disease or injury, in the absence of, or in lieu of, ratings prescribed elsewhere in the schedule for the disability.

Injuries, recent, unhealed(specify anatomical classification and nature of traumatism):

With unhealed fractures, continued infection, therapeutic immobilization of joints, effects of shock, operation, bed confinement or weakness, etc., requiring continued hospitalization or such as to prevent the pursuit of a substantially gainful occupation on the part of the average person affected, for six months------100%

Injuries, recent, unhealed, or improving, with definitely disabling manifestations as in this section but of lesser severity, such that resumption of partial employment is feasible and advised, for six months----------50%

Diseases, acute or subacute (specify anatomical and etiological classification):

With continued infection, weakness, constitutional symptoms, limitation of physical activity, etc., necessitating hospitalization or such as to prevent the pursuit of a substantially gainful occupation on the part of an average person affected, for 6 months----------100%

Diseases, acute or subacute, or improving with definitely disabling manifestations as in this section but of lesser severity or improved so that resumption of partial employment is feasible and advised, for 6 months----------50%

§4.28 (continued)

Note (1). The ratings in this section are applicable for a definite period, 6 months from date of discharge from the service; *Provided, however*, that the 100% rating, but not the 50% rating, may be extended upon examination near the expiration of this period disclosing persistence of disabling symptoms of active disease or unhealed injury, for a further period of 6 months only. *Provided, further*, That reduction of discontinuance of ratings authorized in this section will be in order prior to the expiration of the 6-month period, in the event reports of earlier examination or hospitalization disclose material improvement, absence of or recovery from the active disease or injury. Reduction or discontinuance prior to the expiration of the 6-month period will be subject to the provisions of §3.105(e) of this chapter but in no event will the ratings specified in this section be extended beyond the periods cited in this note.

Note (2). Diagnosis of disease, injury or residuals will be cited, with diagnostic code number assigned from this rating schedule for conditions listed.

Note (3). Whenever the ratings in this section are applied the veteran will be specifically notified that his rating is for a limited period not to exceed 6 months, subject to reexamination. When at the end of the 6-month period(or at the end of the second 6-month period during which the total disability may be extended) a high degree of disability remains which cannot be adequately compensated under the rating schedule, reference will be made under §3.321(b) of this chapter.

38 CFR §4.28 (1991) was for application in Mr. Melancon's case as can clearly be ascertained. This further proves the error manifestly changed the outcome of Mr. Melancon's rating decision. Mr. Melancon was not awarded any monetary compensation for any disease or injuries incurred in active military service following the filing of his claim on September 17th, 1991. In fact, even assuming arguendo, that he was not entitled to compensation for infectious hepatitis, a further clear and unmistakable error ensued when he was not awarded a 10% rating for two (or more) separate, permanent disabilities as to clearly interfere with normal employability.

Absent any discussion of this pertinent regulation or some indication that it had been considered and with Mr. Melancon not entitled to it, it too, constitutes a separate clear and unmistakable error in its own right. The mere absence of any discussion of this pertinent regulation deprived Mr. Melancon of the knowledge required to appeal it. As Mr. Melancon had no legal representation, he was essentially oblivious to its existence.

Application of 38 CFR §4.31

38 CFR §4.31 (1991) instructs VA examiners to award a 0% rating where a nonsymptomatic service connected injury has no corresponding 0% rating available:

38 CFR §4.31 A no-percent rating(1991)

In every instance where the minimum schedular evaluation requires residuals and the schedule does not provide a no-percent evaluation, a no-percent evaluation will be assigned when the required residuals are not shown.

While 38 CFR §4.114 DC 7345 does provide for a 0% rating based on healed nonsymptomatic conditions, this section should still have alerted the VA examiner to the possibility that an award was in order.

38 USC §1110 Basic Entitlement is unequivocal in what it grants to its sons of war. 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.

Summary

Mr. Melancon, the movant, through counsel, respectfully submits this Motion for Revision of that certain confirmed rating decision dated December 2nd, 1991 , and further notification from the Houston, Texas VA Regional Office (#362) dated December 19th, 1991 denying entitlement to infectious hepatitis based on the fact that the statutory and regulatory provisions extant at the time were incorrectly applied.

Mr. Melancon also contends an additional clear and unmistakable error occurred with the failure to award a 10% rating for two disparate entitlements under the auspices of 38 CFR §3.324 (1991).

Lastly. Mr. Melancon contends an additional clear and unmistakable error ensued by not granting him a convalescent rating following his discharge under the auspices of 38 CFR §4.28

These errors manifestly changed the outcome of the ratings decisions and have adversely impacted him financially for many, many years. **See Exhibit B**

Attachments

Exhibit A- Proof of Hepatitis B (Infectious Hepatitis) in service.

Exhibit B- Contemporary SSI records showing lack of income due to chronic Hepatitis B and letter from mother (Registered Nurse) discussing Mr. Melancon's health in succeeding years after discharge.