Gordon A. Graham VA #39029
14910 125th St. KP N
Gig Harbor, WA 98329

August 24th, 2018

Board of Veterans Appeals
810 Vermont Ave. NW
Washington, D.C. 20420
Re:

Amended Pleading for Motion to Revise

Counsel for appellant/movant wishes to revise and extend remarks and arguments re the 12/21/2017 filing of the instant Motion to Revise or a request for an earlier effective date (EED).

Fugo v. Brown, 6 Vet. App. 40, 44 (1993) held that motions to revise must be pled with great specificity. Towards that end, every possible effort has been made to ensure each and every possible perceived error of case law or lack of evidence before the adjudicator has been discussed for its potential relevance.

Clear and Unmistakable Error

In asserting a claim of CUE, the claimant must show that: (1) either 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 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 v. Principi, 3 Vet. App. 310, 313-314 (1992) (en banc).

Appellant/movant contends that, due to spoliation of the record, the facts, as they were known at the time, were not before the adjudicator. Additionally, movant asserts case law-to wit- the statutory and regulatory provisions of 38 CFR §3.303(d) were incorrectly applied. Hepatitis B incubation generally manifests itself medically from 30 to 90 days after infection.

Mr. _____ was discharged on 7/15/1970. A mere 51 days later, on 9/01/1970, he began to exhibit symptoms of epigastric discomfort and yellow jaundice of the eyes (sclera ictera). On 9/10/1071, he presented to the VAMC with hepatic insufficiency. He was admitted to the San Juan VAMC (hereinafter referred to as the SJVAMC) with diagnosed viral hepatitis (HBV) on 9/15/1970. A liver scan with contrast that day included findings consistent with "an acute inflammatory process of the liver." (See Exhibit 1-nine pages).

Mr. _____, per records, was an inpatient at the SJVAMC until September 29th, 1970 and was discharged to home and bed rest. However, his epigastric symptoms and elevated SGOT/SGPT with elevated bilirubin inexplicably were still elevated on a follow up appointment at the SJVAMC gastroenterology clinic later in January 1971.

Based on that, on 2/22/1971 a new liver scan with contrast was ordered and compared to the 9/15/1971 x- rays. (See Exhibit 2-two pages). The radiologist opined that it appeared "to point to the persistence of the active liver disease."(i.e. the earlier infection of 9/15 to 9/29/1971 presentation). The results revealed Mr. _____ was suffering from chronic persistent Hepatitis B and that the infection was *not* acute, and possibly a rare chronic Hepatitis B variant**. This document is nowhere to be found in the claims file.** Counsel submitted it with the instant filing on 12/21/2017 and the VA blithely annotated it in VBMS as "Medical Treatment Record-Government facility" and further classified it as "duplicate capri records 2/24/1971". Appellant/movant obtained this and other probative documents- both service department records as well as SJVAMC-under a FOIA request on or about 2000 or 2001. He was unaware at the time that these documents were nowhere to be found in the record.

Mr. _____, still suffering symptoms four months later, again presented to the SJVAMC on 6/25/1971 and was admitted once more with "inordinately enlarged liver". (See Exhibit 3). He was given a liver biopsy. The examining physician opined that he suffered "persistent viral hepatitis; repeated liver insult-

i.e. drug addiction." Appellant/movant has never abused drugs intravenously nor had any history of such. Dr. _____, appears to have subjectively inferred anyone with chronic viral hepatitis, as HBV was known in 1971, must have been reinfecting himself via shared needles with other addicts. No evidence of drug abuse was ever documented and Mr. _____ denied it vehemently at the time. (see Exhibit 1 page 6). Appellant/movant was discharged on 6/28/1971-again-still within the one year presumptive period for service connection for a compensable illness or injury incurred in service. Finally, suspecting he had a chronic persistent disease that was compensable, appellant/movant filed a claim-his first of many- for HBV and generalized anxiety disorder on 9/16/1971. While this was not within the window of one year from separation, his date of entitlement would still be the date on which entitlement arose-i.e. 9/16/1971. A 12/22/1971 "general" c&p examination with no confirmatory laboratory tests showed no abdominal condition and no liver stigmata.

Oddly, the 3/23/1972 rating decision official referenced certain documents which were nowhere to be found in the claims file nor the SJVAMC records. (See Exhibit 4). Conversely, the same rater referenced the 6/25/1971 liver biopsy and associated records but pointedly failed to mention the probative liver scan with contrast on 2/22/1971 that explicitly referred to the chronic, persistent nature of the appellant's liver disease. Additionally, the rater averred that the appellant had claimed a "history of viral hepatitis last Sept. 1970". As most know, when a Veteran claims a "history" of a disease or injury, the inference is that it is just that-i.e. a history as relayed by the claimant and unsubstantiated by the evidence of record. However, the record unfailingly supports appellant's averred "history".

For discussion purposes, there is ample evidence of this "history" as relayed by the appellant/movant. In point of fact, he obtained the records of the 9-15-1971 to 9/29/1971 inpatient SJVAMC records via the above mentioned 2000-01 FOIA request- albeit twenty eight years later. As there were new and material service department records contained in that FOIA request as well, 38 CFR §3.156(c) was implicated although the pertinent regulation was contained in §3.400(q) at that time. The recent DRO review/SOC issued in this matter erroneously tries to imply §3.156(c) did not exist at the time ipso facto reconsideration would be inapplicable. But that is not the end of the matter.

The 3/23/1972 Rating decision is clearly and unmistakably erroneous and essentially confirms spoliation of the c-file at that time. The rater *stated in haec verba:*

"F. **Examination [for claimed conditions] at induction is negative.**

1. **There are no service medical records in file**

2. **At separation, veteran claimed in SF 89 nervous troubles, cramps in legs and broken bones, however separation exam was also negative.**

3. Veteran was hospitalized from 6-25-71to 6-28-71 because of viral hepatitis [Hepatitis B], persistent, veteran claiming history of viral hepatitis last Sept. 1970

4. VA Gen. Med exam of 12-22-71 looks normal, no abdominal condition and no liver stigmata.

5. The VA Psychiatric exam reveals veteran suffers from anxiety neurosis mild to moderate". (emphasis added)

Nowhere in the four corners of the contemporary 1971 VA claims file are there *any* service department records of induction or separation physical exam files to be found. In point of fact, these probative documents did not surface, by VA's own admission, until their inclusion in the claims file (now VBMS) on 3/19/2015 after the PIES request to the NPRC. (See Exhibit 5). By the rater's very admission that he had reviewed the SF 89 induction and separation documents (and indeed, the tacit admission referencing their content), it is patently evident that probative documents in existence in 1971-1972 disappeared and were nowhere to be found again until the PIES request in 2015. Reasonable minds can only conclude that this, in addition to the absence of the probative liver scan dated 2/22/1971, are ample evidence of spoliation of appellant's claims file.

The Presumption of Regularity

While a Motion to Revise can only be based on the record and law that existed at the time of the prior adjudication in question (See Damrel v. Brown, 6 Vet. App. 242, 245 (1994), quoting Russell v. Principi, 3 Vet. App. 310, 313-314 (1992) (en banc), the legislative history of the Presumption of Regularity did not manifest with Miley. (See Miley v. Principi, 366 F.3d 1343, 1347 (Fed. Cir. 2004);

cf. Rizzo v. Shinseki, 580 F.3d 1288, 1290–91 (Fed. Cir. 2009) ("what appears regular is regular and what appears irregular is irregular- the burden of proof of irregularity falling on the appellant to rebut."

Examples of contemporary case law prior to 1972 expounding on the presumption of regularity are below:

-Turberville v. U.S. 303 F.2d 411 (D.C. Cir. **1962**) (Applying the presumption of regularity where government offered evidence in form of detective's testimony that appellant was advised of his right to silence, contrary to Tuberville's assertions)

-U.S. v. Baker 416 F.2d 202 (9th Cir. **1969**) (Applying the presumption of regularity where the Government need not affirmatively prove that a Selective Service registrant was irregularly selected out of order but may rely upon the presumption of regularity surrounding official proceedings to establish that fact). See also Greer v. United States, 378 F.2d 931 (5th Cir. **1967**); Yates v. United States, 404 F.2d 462 (1st Cir. **1968**).

-Citizens to Preserve Overton Park v. Volpe 401 U.S. 402 (**1971**) (Applying the presumption of regularity where Government (Secretary of Transportation) decision to route a federal highway through a park was entitled to a presumption of regularity but that the presumption did not shield his action from a thorough, probing, in-depth review). See also Pacific States Box Basket Co. v. White, 296 U.S. 176, 185 (**1935);** United States v. Chemical Foundation, 272 U.S. 1, 14-15 **(1926).**

Just as the CAVC was forced to cite to Federal Circuit decisions in its early, formative years in order to fashion Veterans law, so too does appellant/movant rely on similar case law here that was precedential case law at the time. Hence, the presumption of regularity must be similarly applicable to Veterans Law just as Gilbert v. Derwinski (1991) relied on the CUE standard in United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); cf. Anderson v. City of Bessemer City, 470 U.S. 564 (1985).

"Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous". United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949). In the instant case, the 1972, rater refers to documents specifically identified but which are absent from the evidence of record.

Strangely, the same rater refers to other probative documents currently contained in the claims file but **none** that appellant received subsequent to a FOIA request twenty eight years later. Even more disturbing is the revelation of the separation examination (i.e. the SF 89s mentioned in the 3/23/1972 rating decision) finally surfacing with the association of appellant's STRs and military records fully forty four years later.

Applicability of Bell v. Derwinski

Bell v. Derwinski is on point inasmuch as it refers to documents constructively in the VA's possession after July 21st, 1992. (See Bell v. Derwinski, 2 Vet. App. 611, 613 (1992); see also VA OGC Precedent 12-1995). However, the Bell decision did not contemplate spoliation of the records being the causative factor for the absence or lack of the records in the instant adjudication. As such, Bell is not on point and its application would be inapposite here due to the above enumerated facts-or-until appellant's 2009 reopening.

Application of 38 CFR §3.156(c)(1)(i), (3)(4)

Appellant/movant also presents an alternative theory which is now far more applicable to the appeal. As this is not specifically an implication of CUE, it is addressed last so as not to be included in the above discussions in the substantive appeal of the Motion to Revise.

Counsel for appellant/movant was only granted access to VBMS this February 2018. At this time, he discovered VA filed a Personal Information Exchange System (PIES) query with the National Personnel Records Center (NPRC) on 3/15/2015. This is the first indication VA *ever* made an effort to associate these highly probative service department records with the claims file. On 3/19/2015, the NPRC replied to the PIES request and associated all of appellant/movant's military information with the VBMS file.

Appellant/movant presumes the Board is amply acquainted with the tenets of 38 CFR §3.156(c)(1)(i). Nevertheless, he wishes to be explicit in investigating every facet of the appeal to leave no stone unturned. Toward that end, appellant wishes to recite the applicable regulation.

38 CFR §3.156(c)(1)(i) holds:

(c)*Service department records.*

(1) Notwithstanding any other section in this part**, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding paragraph (a)of this section.** Such records include, but are not limited to:

(i) Service records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name, as long as the other requirements of paragraph (c) of this section are met;

Furthermore, in the event this rare situation arises, it is understood the following apply as well:

(3) An award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim.

(4) A retroactive evaluation of disability resulting from disease or injury subsequently service connected on the basis of the new evidence from the service department must be supported adequately by medical evidence. Where such records clearly support the assignment of a specific rating over a part or the entire period of time involved, a retroactive evaluation will be assigned accordingly, except as it may be affected by the filing date of the original claim.

While 38 CFR §3.156(a) permits a reopening of a finally decided claim, the introduction of new service department military or medical records permits not just reopening, but indeed, **reconsideration of the original decision**. In the instant claims stream, appellant filed not one, but multiple reopenings for the same diseases/injuries in 1975, 2009, 2015 and 2016.

His latest claim, from which this appeal and Motion to Revise was taken, is his *fifth* attempt to attain justice. It took extensive legal help from the National Organization of Veterans Advocates (NOVA) to obtain service connection for just his Hepatitis C (claimed in 1971 as viral hepatitis). In the interim, his three chemotherapy attempts were unsuccessful. The hepatocellular carcinoma is incurable and he is on palliative care. Appellant is terminally ill and wishes to set matters aright before he passes. Toward this end, he has doggedly pursued entitlement, essentially pro se, in spite of extreme adversity and illness, with little or no legal help from qualified advocates. See Comer v. Peake, 552 F. 3d 1362, 1367 (Fed. Cir 2009). Until now. Counsel was unable to obtain the claims file due to the haste to file as soon as possible. Had he known the STRs and military records were associated with the file at the time, this would not have been characterized as a Motion to Revise but rather, an appeal based on §3.156(c).

Sadly, this didn't need to happen. Had the rater in 1972 been acquainted with §§3.303(d), this miscarriage of justice would not have occurred. Even more so, with the proven spoliation of the claims file, whether by misfeasance or inadvertent agency actions, a grave miscarriage of justice has finally been identified. Appellant begs the Board to intercede and right this wrong.

Spoliation and the Cure

The CAVC initially dealt with the anomaly of the July 13th, 1973 fire at the NPRC in Cromer v. Nicholson, 455 F.3d 1346, 1347-49 (Fed.Cir.2006). The Court had previously addressed the issue of lost or destroyed records held by the Government. In O'Hare v. Derwinski, 1 Vet.App. 365, 367 (1991), the Court held that when SMRs are presumed destroyed, "the BVA's obligation to explain its findings and conclusions and to consider carefully the benefit-of-the-doubt rule is heightened." This rule has become well entrenched in case law. Stewart v. Brown, 10 Vet.App. 15, 19 (1997); Ussery v. Brown, 8 Vet.App. 64, 68 (1995); Doran v. Brown, 6 Vet.App. 283, 286 (1994); Gobber v. Derwinski, 2 Vet.App. 470, 472 (1992); Moore v. Derwinski, 1 Vet.App. 401, 406 (1991). Notably, the Court clarified this rule in Russo, where an appellant argued that he was entitled to a

heightened "benefit of the doubt" because of the destruction of his SMRs. The Court in Russo stated that established case law does "not establish a heightened 'benefit of the doubt,' only a heightened duty of the Board to consider applicability of the benefit of the doubt rule, to assist the claimant in developing the claim, and to explain its decision when the veteran's medical records have been destroyed." Russo v. Brown, 9 Vet. App. 46, 50 (1996). Appellant/movant doesn't ask for a heightened benefit of the doubt consideration but submits he may well be entitled to this in light of the circumstances.

By operation of law, appellant/movant is not entitled to the benefit of the doubt under a Motion to Revise (see Caffrey v. Brown, 6 Vet. App. 377 (1994)). He wishes to append his theory of entitlement for a reconsideration under §3.156(c) to the current appeal, which, incidentally, is a far easier path to obtain service connection for what appears to be clear error.

Spoliation of the record was discussed in great length in Robinson v. McDonald, No. 15-7029 (Fed. Cir. 2015). Robinson is not quite on point as it deals specifically with the Secretary attempting to destroy the paper files constituting the claims file *after* the record before the agency was established electronically in the VBMS.

Indeed, to reach a more perfect understanding of how the Courts determine and address spoliation, counsel would point to United Medical Supply Co. Inc. v. United States, 77 Fed. Cl. 257, 268 (2007). While it might not be perfectly on point in the instant appeal at hand, and while the appellant makes no accusation of *willful* spoliation, it is, nevertheless, instructive of how the Court addresses the violation. Appellant makes no implied accusation as to whether there has been willful destruction, withholding or secreting of documents in its possession, abuses of due process, or failure in the duty to assist over the ensuing forty seven years. Appellant would prefer the Trier of fact judge the incredible confluence of events leading up to this unfortunate appeal. Should this give rise to extreme doubt as to whether this was far more than an unfortunate collision of circumstances, he asks the Board to then consider and weigh the

incontrovertible evidence of record contained in the exhibits appended to the brief. There simply cannot be two equally compelling views of how to weigh the evidence. Credibility and internal consistency from the outset weighed in the Appellant/movant's favor.

In United Medical Supply, the Court held:

"Guided by logic and considerable and growing precedent**, the court concludes that an injured party need not demonstrate bad faith in order for the court to impose, under its inherent authority, spoliation sanctions.** Several reasons lead to this conclusion. For one thing, it makes little sense to talk of a general duty to preserve evidence if, in fact, the breach of that duty carries no real legal ramifications. Requiring a showing of bad faith as a precondition to the imposition of spoliation sanctions means that evidence may be destroyed willfully, or through gross negligence or even reckless disregard, without any true consequences." *United Medical Supply Co. Inc supra*

The Court further opined:

"Spoliation is the destruction or significant alteration of evidence, or failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." West v. Goodyear Tire Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999) (citing Black's Law Dictionary 1401 (6th ed. 1990)); see also Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc., 473 F.3d 450, 457 (2d Cir. 2007). It has long been the rule that spoliators should not benefit from their wrongdoing, as illustrated by "that favourite maxim of the law, omnia presumuntur contra spoliatorem," 1 Sir T. Willes Chitty, et al., Smith's Leading Cases, 404 (13th ed. 1929). **Spoliation may result in a variety of sanctions, with "the oldest and most venerable remedy" being an "adverse inference," under which the finder of fact may infer that the destroyed evidence would have been favorable to the opposing side.** Jonathan Judge, "Reconsidering Spoliation: Common-Sense Alternatives to the Spoliation Tort," 2001 Wis. L.Rev. 441, 444 (2001); see also Jamie S. Gorelick, Stephen Marzen Lawrence Solum, Destruction of Evidence § 1.3 (1989) (hereinafter "Gorelick"). (emphasis added). *United Medical supra*

Wherefore, appellant/movant asks the Board to draw a negative inference from the inexplicable absence of the probative evidence that would have invariably engendered entitlement to his claims in 1971 regardless of the holding in Bell supra. Furthermore, appellant/movant would ask the Board to opine as to whether the failure until 2015 to associate the appellant's new and material service department records, never before associated with the claims file, and unbeknownst to him was, or was not, a violation of his due process rights under 38 USC §511. (See also Cushman v. Shinseki, 576 F.3d 1290 (Fed. Cir. 2009). Appellant would apologize for once again redundantly deferring to the Rizzo presumption rebuttal and suggesting what appears irregular *is* irregular.

Counsel would ask the Veterans Law Judge to view the failure to address §3.303(d) in the 1972 rating as clear and unmistakable error which manifestly changed the outcome at that time and deprived appellant, under color of law, of his timely entitlement to Hepatitis B.

Appellant's service medical records clearly and unmistakably support his conditions of a nervous condition in service on a direct basis with the concomitant prescriptions of Librium during active duty. See Combee v. Brown,. 34 F.3d 1039, 1043-44 (Fed. Cir. 1994).

Additionally, 38 CFR §4.114 DC 7345 (1971) Schedule of Ratings- Digestive System clearly and unmistakably comprehended his psychiatric symptomology in ratings commensurate with his debility. In point of fact, DC 7345 (1971) stated:

Minimal liver damage with associated fatigue, **anxiety**, and gastrointestinal disturbance of lesser degree and frequency but necessitating dietary restriction or other therapeutic measures…… 30%.

Demonstrable liver damage with mild gastrointestinal disturbance…….10%.

VASRD 38 CFR §4.114 DC 7345 (1971)

Counsel would point out that appellant/movant more than qualified for the latter, and quite possibly the former diagnostic rating, at the outset (late 1971) during the pendency of his claim. About the only rating appellant would most definitely *not* be entitled to was a healed nonsymptomatic rating (i.e. 0%) at any time in the intercurrent period to the present. Ditto his psychiatric illness(es).

Appellant/movant seeks no spoliation sanctions on the Secretary for this unfortunate imbroglio. In fact, sanctions on the Secretary would amount to no more than fining the US taxpayer for his decades-long transgressions and those of his underlings. Mr. _____merely seeks those certain entitlements which arose on September 17th, 1971-to wit: service connection for Hepatitis B and a separate rating for his generalized anxiety disorder, now diagnosed as Schizophrenia, latent type. Appellant/movant contends he would not be expected to opine on which mental disease he suffered. See Clemons v. Shinseki, 23 Vet. App. 1, 5-6 (2009) ("It is generally the province of medical professionals to diagnose or label a mental condition, not the claimant.") See also Espiritu v. Derwinski, 2 Vet. App. 492, 495 (1992) (stating that "opinions of witnesses skilled in that particular science, art or trade to which the question relates are admissible in evidence"), overruled on other grounds by King v. Shinseki, 700 F.3d 1339, 1345 (Fed. Cir. 2012)).

Appropriate sanctions on any Agency for intransigence, spoliation or clear and unmistakable error can neither remunerate Mr. and Mrs. _____ or their children for the forty-eight years of suffering nor those two score years of financial destitution and declining health. His impending demise will stand as a testimonial to what the Fugo Court once characterized as "a rare error". Sadly, with the advent of VBMS, these *rare* errors are becoming all the more frequent and coming to light in numerous other Veterans' claims.

Last, but not least, appellant has noticed the small holes that appear in the c-file records in the enclosed exhibits (highlighted in yellow) at the top or bottom of the pages. The holes clearly and unmistakably show the documents were in the

claims file at some point before it was converted to Virtual VA or scanned into electronic records in VBMS. Appellant is desirous to know why records that are not included in the claims file such as Exhibit 2 have the ***same holes*** as the contemporary records which ***were*** contained in the file at the exact same time in 1970-72. Appellant/movant submits this is further incontrovertible proof of a violation of due process or spoliation. Cushman supra.

Omnia presumuntur contra spoliatorem

Respectfully submitted,

_____

Gordon A. Graham VA #39029 POA E1P
Nonattorney Practitioner Accepted to the CAVC
Counsel for appellant/movant

Attached: Exhibits 1, 2, 3, 4, 5