



**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**

<b>Veteran:</b> [REDACTED]	<b>VSC:</b> VBASEA346
<b>C-File or SSN:</b> CSS [REDACTED]	
<b>Street Address:</b> [REDACTED]	
<b>City, State, Zip:</b> [REDACTED]	

<b>Date:</b> 12/02/2022	<b>ATTN:</b> In Reply to [REDACTED] dated 12/01/2022
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<b>From:</b> Gordon A. Graham	<b>Exclusive Contact Requested</b>
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<b>Type of Document Submitted:</b>
<input 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 (revised copy)
<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 In reply to: Subsequent Development Letter [REDACTED] dated 12/01/2022

<b>Number of Pages Submitted (NOT including this cover sheet):</b> Five (5) pages
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*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.*



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December 2, 2022

Re: [REDACTED]  
In reply to: [REDACTED] dated 12/01/2022  
Attn: Amanda [REDACTED], Jivan [REDACTED], Pietro [REDACTED]

Dear Ms. Filmore,

The Veteran, Mr. Van Ness, now legally referred to as a "Movant" by virtue of his filing a Motion to Revise a prior rating decision, is not a claimant or appellant. By operation of law, normal statutes are inapplicable as this is an adversarial action.

Following the passage of the AMIA, all claims are required to be filed on a specific VA document provided for same. The Under Secretary for Benefits (USB) has not yet created a form specifically to be used for filing Motions to Revise prior claims (CUE). Because of that, the USB has disseminated instructions to VBA personnel and VA representatives to accept any VA form which captures the data needed to correctly identify the Veteran. Both the VA Form 20-0995 and the VA Form 21-526EZ equally accomplish this task. Please review the VA's M 21 Manual for instructions regarding this subject. As the forms mentioned above are insufficient to capture the legal argument describing the alleged error, it requires a legal brief to clarify the error of fact or law and rationale for the belief the decision manifestly changed the outcome to the detriment of the movant.

A review of the documents in the VBMS efolder clearly and unmistakably show the information needed to correctly identify the claimed clear and unmistakable error or errors was filed simultaneously with the Motion to Revise. The EIC filed the Motion as two documents. Please be so kind as to ask Mr. Pietro Nicolosi to review the VBMS efolder for the Veteran and note there is a second document uploaded at the identical same time which is erroneously labeled in Document Title as "Third Party Correspondence." You will note the subject line clearly and unmistakably identifies the document as the legal brief which identifies the factual or legal error the Secretary made in the April 25, 2022, RD and June 7, 2022, HLR RD. To aid Mr. [REDACTED] and you in finding the document, counsel would point to the "thumbs up" VBA user notation for Peer Review located to the left of the entry in the VBMS "Bookmarks" column.

From the language employed in the Subject line- i.e., "CUE argument-restore 70% RUE (right upper extremity), restore 60% LUE (left upper extremity)", it is clear that there can be no ambiguity in the legal or factual error contended per **Fugo vs. Brown**, 6 Vet.App. 40, 44 (1993) (The movant 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.); See also **Bustos v. West**, 179 F.3d 1378, 1380–81 (Fed. Cir. 1999).

Should there still be any confusion as to what is alleged as the error, Movant, through counsel, will illuminate the Secretary's own regulation, §3.344(a), once again for clarification.

§3.344(a) states, inter alia, the following:

" Examinations less full and complete than those on which payments were authorized or continued will not be used as a basis of reduction."

"Moreover, though material improvement in the physical or mental condition is clearly reflected the rating agency will consider whether the evidence makes it reasonably certain that the improvement will be maintained under the ordinary conditions of life."

The Secretary, as well as the VA's M 21 manual, clearly concedes Parkinson's disease (§4.124a DC 8004) to be a progressive disease- i.e., one that becomes progressively worse and not subject to episodic improvement such that it would be reasonably certain the "improvement" could be maintained under ordinary conditions. In addition, any reduction in the rating would, by operation of the regulation (§3.344(a)) require an examination at least as full and complete as the original examination used for the initial rating award.

On November 10, 2021, VA clinician Doctor [REDACTED], in clear violation of §3.344(a), conducted an Acceptable Clinical Evidence (ACE) review of Mr. [REDACTED] claims file. The eight-page ACE review, one of three conducted, is located in VBMS dated 11/10/2021, labeled as "Document Type" and the Subject is "DBQ Neuro Parkinson's Disease-[REDACTED] M.D. Neurologist". The document title is:

DBQ-(651B9593-5349-4897-866C-e45FF3EA689)-  
DBQ\_NEURO\_Diabetic\_Sensory\_Motor\_Peripheral\_Neuropathy501126366.pdf

The November 10, 2021, ACE review clinician above refused to employ the correct ratings nomenclature of §4.124a DC 8004 by utilizing peripheral nerve diagnostic codes (e.g., DCs 8515 and 8520) stating in haec verba:

"Parkinson's disease is not a condition of the peripheral nerves. Therefore, there is no clinical indication to complete a Peripheral Nerve worksheet, and VBA should not deem this report insufficient for this reason."

This is clear and unmistakable error and renders the ACE review void ab initio for rating purposes. Apparently, Dr. [REDACTED] is unaware of §4.27 and the use of diagnostic codes to rate by analogy. This is error.

In addition, in violation of regulation, Dr. [REDACTED] also conducted an ACE review of Mr. [REDACTED] diabetic neuropathy and concluded he had no upper extremity neuropathy(ies) due to Diabetes Mellitus Type II. How he was able to accomplish this medical feat from 40 miles away in the absence of the Veteran

was not explained in the 26-page DBQ, another 19-page DBQ nor the 8-page Parkinson's DBQ. As the examinations were both less full and complete than the original c&p examination used for the original ratings award, all three are void ab initio. This is error that rises to the level of the definition of a clear and unmistakable error. Reasonable minds can only concur that this is CUE.

Diabetes Mellitus Type II (DC 7913) is also considered a progressive disease process and sustainable improvement documented via an ACE review less full and complete than the original c&p for rating purposes manifestly changed the outcome-i.e., it was an outcome-based decision.

This argument to clarify the averred error and a conclusion this was an outcome-based decision are adequately described in the seven-page legal brief submitted with the VA Form 20-0995 on 6/09/2022. By operation of law, there is no requirement that the document used to identify the Veteran also include the actual legal briefing. In point of fact, the VA's document is actually a supplemental claims document-not a vehicle for a Motion to Revise. Unless, or until, the Secretary promulgates a new VBA document which can be specifically employed to present a Motion to Revise, counsel is hamstrung by the absence of a designated form and forced to employ one of two possible VA forms to capture the Veteran's PII to file with.

Based on this, counsel requests the Motion to Revise the 4/25/2022 Rating Decision, mischaracterized as an EP 040 supplemental claim, be promptly reinstated herewith and decided based on §§3.105, 3.344(a) at the Secretary's earliest convenience to comply with procedural due process.

Counsel for Movant would point out the explicit language employed by the Secretary in his own regulation- §3.105(a)(1)(vii)(A),(B)-to wit:

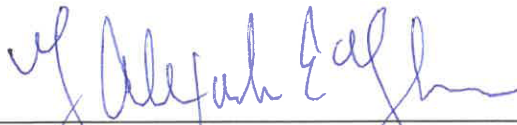
"A request for revision of a decision based on clear and unmistakable error must be in writing, and must be signed by the requesting party or that party's authorized representative. The request must include the name of the claimant; the name of

the requesting party if other than **the claimant**; the applicable Department of Veterans Affairs file number; and the date of the decision to which the request relates. If the applicable decision involved more than one issue, the request must identify the specific issue, or issues, to which the request pertains.

Nowhere in the four corners of the Secretary's regulation is there mention of a specific CUE form to employ (e.g., VAF 21-526EZ or 20-0995) nor that the form itself identify the specific issue, or issues, to which the request pertains. It is more than clear to reasonable minds that the document in question (VA Form 20-0995) is not a legal vehicle to request to reopen a prior denied claim. Again. If there is any ambiguity locally at the Station of Jurisdiction (AOJ) regarding this matter, we recommend submitting it to Central Office for clarification of the VBA's error in interpreting the M 21 using III.i.2.D.1.c and X.ii.5.A.2.b as the predicate for declining to adjudicate a reasonably raised error of fact or law.

If the VA Examiner is still convinced s/he is correct, counsel asks that the matter be referred to regional VA Counsel for clarification of statute and regulation and an official determination or rating decision be issued and provided to the Movant and counsel under 38 USC §§5104; 7104. (All questions in a matter which under section 511(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary.)

Verry Respectfully,



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Gordon A. Graham  
Counsel for [REDACTED]