**IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

| | | |
|---|---|---|
| **WILLIAM A. WADSWORTH,** | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | |
| | ) | Vet. App. No. 09-3258-WRIT |
| **ERIC K. SHINSEKI,** | ) | |
| Secretary of Veterans Affairs, | ) | |
| | ) | |
| Respondent. | | |

**SECRETARY'S RESPONSE TO THE COURT'S SEPTEMBER 9, 2009 ORDER**

Pursuant to the United States Court of Appeals for Veterans Claims Rule 21(b), and the Order of this Court, dated September 9, 2009, Respondent, Eric K. Shinseki, Secretary of Veterans Affairs (Secretary), hereby responds to Petitioner's September 1, 2009, petition for writ of mandamus (Petition). For the reasons set forth below, the Court should deny the petition.

Petitioner requests the "immediate compliance of the RO [Regional Office] with the Board's referral, and the issuance of a decision; and the subsequent immediate timely consideration of the RO's finding, and issuance of a decision, by the Board, to encompass such issues as have arisen in this cause, including but not limited to CUE [clear and unmistakable error], PTSD [post traumatic stress disorder] and Atrophy …."[1] (Petition at 4). The Court issued an Order on

[1] The Secretary notes that the January 29, 2008 Board decision did not make a decision on atrophy and PTSD so these disabilities are not at issue in the Petition. (*See* Exhibit D).

September 9, 2009 for the Department of Veterans Affairs (VA) to file an answer to the petition. Because the claim based on CUE has previously been denied by the RO, there is no pending claim based on CUE awaiting a decision by the RO, and the Petition should be denied.

**RESPONSE TO PETITION**

It has been firmly established that, in addition to its appellate jurisdiction, this Court possesses jurisdiction to issue extraordinary writs to VA officials. *See, e.g., Erspamer v. Derwinski*, 1 Vet. App. 3, 7 (1990). *See also Cox v. West*, 149 F.3d 1360, 1363 (Fed. Cir. 1998) (holding this Court has jurisdiction to issue writs under All Writs Act, 28 U.S.C. § 1651(a)). However, it is also clear that "'[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.'" *Lane v. West*, 12 Vet. App. 220, 221 (1999) (quoting *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976)). The Court has stressed the need for a Petitioner seeking an extraordinary writ to demonstrate a "clear and indisputable" entitlement and the lack of an adequate alternative means to obtain the requested relief. *Erspamer v. Derwinski*, 1 Vet. App. 3, 9 (1990) (quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953)).

A January 29, 2008 Board of Veterans' Appeals (Board) decision stated that "the issue of CUE in prior rating decisions, particularly June 27, 1947, is referred to the RO for such further development as may be necessary." (Exhibit D, January 29, 2008 Board decision at 3). Petitioner states that, regarding his CUE claim, he "has previously and continuously asserted that the RO has been

unresponsive and the delay is patently unreasonable (and continuing indefinitely)." (Petition at 3). Petitioner has failed to show undue delay in the actions of VA, or that VA has refused to take action on his claim. *See Matter of Cox*, 10 Vet.App. 361, 370 (1997); *Lane*, 12 Vet.App. at 222. In this case, VA has taken no action because there is no pending CUE claim regarding the June 27, 1947, despite Petition's allegation to the contrary.

On December 4, 1998, Petitioner's service representative, the Disabled American Veterans (DAV), filed a memorandum alleging CUE in the rating decisions of June 27, 1947 and November 2, 1973. (Exhibit A, December 2, 1998 Service Representative letter to VA). On June 27, 1947, Petitioner was granted entitlement to service connection for atrophy of the intrinsic muscles of the right hand at a noncompensable evaluation. (*Id*. at 1). The CUE claim was based on the belief that his right hand was initially evaluated under an erroneous diagnostic code and that a 30 percent evaluation for his right hand should have been initially assigned as of May 10, 1946 for atrophy of intrinsic muscles. (*Id*.).

A September 29, 2000 VA rating decision determined that the June 27, 1947 rating was not clearly and unmistakably erroneous. (Exhibit B, October 31, 2000 VA letter to Appellant enclosing the September 29, 2000 VA rating decision at 4). The rating decision stated that "[a]lthough it is not clear what diagnostic code was used in the rating decision of 6-27-47, the condition would normally be rated as a musculature condition which does not have a minimum evaluation requirement." (*Id.*). Petitioner was notified of this decision by a VA letter, dated

October 31, 2000. (*Id.*). Appellant did not appeal the rating decision and it became final on October 31, 2001. *See* 38 C.F.R. § 20.302.

On November 27, 2006, DAV submitted a Notice of Disagreement stating Petitioner disagreed with "the failure to address the claim of Clear and Unmistakable error (CUE) as previously identified." (Exhibit C, November 27, 2006 Notice of Disagreement at 1). The Notice of Disagreement attached a November 19, 2006 letter from Petitioner to DAV stating, again, that his CUE claim was that his right hand was initially evaluated under an erroneous diagnostic code and that a 30 percent evaluation for his right hand should have been initially assigned in the June 27, 1947 VA rating decision. (*Id*. at 3). A copy of the December 2, 1998 DAV letter alleging CUE was attached. (*Id*. at 4). The RO considered this a duplicate CUE claim to the finally decided CUE claim Petitioner raised in December 1998 and did not issue a decision. (Exhibit E, September 23, 2009 VA letter to Appellant); *see Russell v. Principi*, 3 Vet.App. 310, 315 (1992) (once a final decision on the issue of CUE has been made, that same CUE claim may not be raised again).

The instant Petition should be denied because Petitioner's CUE claim based on his June 27, 1947 rating decision was decided in a September 29, 2000 rating decision and became final on October 31, 2001. Petitioner has not brought a new basis for CUE since that decision and has no CUE claim pending. A September 23, 2009 VA letter to Petitioner stated "[a]lthough the Board of Veterans' Appeals, in its January 29, 2008 decision, stated that 'the issue of CUE

in prior rating decisions, particularly June 27, 1947, is referred to the RO for such further development as may be necessary,' we have determined that your CUE claim from November 27, 2006 was a duplicate CUE claim that was addressed in the September 29, 2000 VA rating decision and, as the prior decision was finalized, the issue may not be raised again and we will not be taking any further action." (Exhibit E at 1). The RO added that they normally do not respond to duplicate claims so no correspondence was sent to Appellant until the September 23, 2009 VA letter which was prompted by the filing of this petition. (*Id.*).

Because there is no pending claim related to the request, granting the petition could not lead to a Board decision over which the Court would have jurisdiction. Therefore, the petition must be dismissed for lack of jurisdiction. *See* 28 U.S.C. § 1651(a); *see also In re Fee Agreement of Cox*, 10 Vet.App. 361, 370 (1997), *vacated on other grounds*, 149 F.3d 1360 (Fed. Cir. 1998).

## VI. CONCLUSION

For the foregoing reasons, Respondent urges that the Petitioner has failed to demonstrate a compelling basis for the issuance of an extraordinary writ and the Petition should be denied.

Respectfully submitted,

**WILL. A. GUNN**
General Counsel

**R. RANDALL CAMPBELL**
Assistant General Counsel

/s/ Leslie C. Rogall
**LESLIE C. ROGALL**
Deputy Assistant General Counsel

/s/ Elizabeth A. Long
**ELIZABETH A. LONG**
Appellate Attorney
Office of the General Counsel (027i)
U.S. Dept. of Veterans Affairs
810 Vermont Avenue NW
Washington, DC 20420
(202) 639-4780/4800

Counsel for the Secretary
of Veterans Affairs

# Exhibit A

**Disabled American Veterans**
**National Service Office**
VA Regional Office • P. O. Box 1437 • St. Petersburg, FL 33731
Telephone: (727) 319-7444 • Toll Free: 1-800-827-1000
Facsimile: (727) 319-7775

December 2, 1998

TO: Rating Specialist Team 75

RE: William A. Wadsworth
5345 Lochmead Terrace
Zephyzhills, FL 33541
[redacted]

Ladies/Gentlemen:

ISSUE

This memorandum serves to declare a clear and unmistakable error in the rating action dated June 27, 1947, and all subsequent rating actions pursuant to 38 C.F.R. § 3.105(a). The Department of Veterans Affairs failed to assign a thirty percent rating for atrophy of the intrinsic muscles right hand from May 10, 1946, and a separate thirty percent evaluation for atrophy of intrinsic muscles left hand from September 6, 1973. Furthermore, regarding the April 6, 1998 rating action, a clear and unmistakable error was committed in not providing reasons and bases for the decision to rate the veteran under diagnostic code 8023 when diagnostic code 8515 was also applicable and was the higher evaluation of the two codes.

FACTS

In the rating action dated June 27, 1947, the veteran received service connection for atrophy interosseus muscles, right hand at a noncompensable evaluation. He reopened this claim for an increased evaluation on October 23, 1970. A rating was promulgated on March 19, 1971. This rating action confirmed and continued the noncompensable evaluation for the veteran's right hand condition and assigned diagnostic code 5308, muscle group VII for rating purposes..

The veteran filed his Notice of Disagreement on March 31, 1971 and submitted an evaluated by Dr. Leibenow conducted on August 27, 1973. The doctor diagnosed the veteran with muscular atrophy of the hands and forearms noting that after review of the veterans past medical history, the veterans left hand condition was acquired during military service. The rating action dated November 2, 1973 granted service connection for atrophy of the left hand and assigned diagnostic code 8023 for rating purposes. The rating specialist wrote, "[t]his appears to be a progressive muscular condition and is rated on par with progressive muscular atrophy. It is believed that the disability present in each hand is twenty percent. The bilateral factor is three point six so that the overall evaluation is forty percent."

On December 31, 1975, the veteran again reopened his claim for an incresed evaluation for his hands. A confirmed rating action was promulgated on March 3, 1976.

The veteran reopened his claim for an increased evaluation on May 31, 1989. A VAE was conducted on September 24, 1989. The doctor diagnosed marked atrophy of the hands and forearms with decreased bilateral hand grip decreased extensor strength both thumbs. A confirmed rating action was promulgated on November 16, 1989.

In a letter to the Department of Veterans Affairs (DVA) dated February 12, 1989, the veteran requested a personal hearing which was conducted on October 24, 1989.

The veteran reopened his claim for an increased evaluation on November 11, 1997. An examination was conducted on March 19, 1998 in conjunction with the claim for increase. An electrodiagnostic study was conducted and the diagnosis was "[s]evere chronic denervation in muscles supplied by the ulnar and median nerves bilaterally." The rating action dated April 6, 1998 confirmed the previous decisions. The rating specialist wrote,

> [a] minimum of thirty percent is assigned for ascertainable residuals. This condition has previously been evaluated with a single combined evaluation for both hands with a separate twenty percent evaluation for each hand and application of a bilateral factor of three point six percent with a combined evaluation of forty percent. Basically, there has been no increase in the specific clinical findings associated with the intrinsic muscles".

## ARGUMENT

In accordance with the 1945 Schedule for Rating Disabilities and 38 C.F.R. § 4.124(a), diagnostic code 8023, progressive muscular atrophy carries a minimum rating of thirty percent. The veteran has been inappropriately evaluated since the June 27, 1947, rating action.

Additionally, the veteran underwent an electrodiagnostic study, in conjunction with his claim for an increased evaluation for his hands, on March 19, 1998, which showed a severe denervation of the ulnar and medial nerves. The rating action dated April 6, 1998, failed to address the possibility of assigning an evaluation under diagnostic code 8515 for paralysis of the median nerve. A fifty percent evaluation is assigned for severe incomplete paralysis of the median nerve. When, on the basis of the evidence of record, two or more provisions of VA's rating schedule are potentially applicable to the evaluation of a particular disability, the Board must provide reasons or bases for its

decision to rate that disability under one such provision rather than another potentially applicable provision. *Lendenmann v. Derwinski*, 3 Vet.App. 345, 349-51 (1992); *Pernorio v. Derwinski*, 2 Vet.App. 625, 629 (1992).

A clear and unmistakable error (CUE) claim is a distinct claim, one with its genesis not in a statute but in a regulation. 38 C.F.R. § 3.105(a). Section 3.105(a) provides that "Previous determinations which are final and binding . . . 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." A CUE claim is a collateral attack on a previous and final RO decision which seeks the revision, nunc pro tunc, of that decision. *Smith v. Brown,* 35 F.3d 1516, 1527 (Fed. Cir. 1994). For the purpose of authorizing benefits, the reversal of an amendment of a prior decision on the grounds of CUE has the same effect as if the corrected decision had been made on the date of the reversed decision. The analysis of a CUE claim focuses on a prior unappealed RO decision in the context of the factors set forth in *Russell*:

> (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*, 6 Vet.App. at 245; (quoting *Russell*, 3 Vet.App. at 313-14). A CUE claim requires "some degree of specificity as to what the alleged error is and, unless it is that 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). In practical terms, a claim that the evidence was improperly weighed or that the decision was wrong does not constitute a § 3.105(a) CUE claim. *Ibid.*

CONCLUSION

This service requests the board correct all ratings applicable to the issue of the veterans atrophy of the hands and give reasons and bases for not applying the most appropriate diagnostic code in the April 6, 1998, rating action. We thank you for your consideration onto this matter.

Sincerely,

Michele Zimbler

Michele Zimbler
National Service Officer

# Exhibit B

**DEPARTMENT OF VETERANS AFFAIRS**
St. Petersburg Regional Office
P. O. Box 1437
St. Petersburg FL 33731

OCT 3 1 2000

WILLIAM A WADSWORTH
5345 LOCHMEAD TERR
ZEPHYRHILLS FL 33541

In Reply Refer To: 317/VSC-T75/LVH
[redacted]
WADSWORTH, W A

Dear Mr. Wadsworth:

We made a decision on your compensation claim.

**What We Decided**

- No revision is warranted in the decision to grant a non compensable evaluation for the atrophy of the intrinsic muscles of the right hand
- No revision is warranted in the decision to grant a 40 percent evaluation for atrophy of the intrinsic muscles of the left hand.
- No revision is warranted in the decision to evaluate the veteran under diagnostic code 8023.

We did ***not*** find the following condition to be service connected:

Osteoarthritis, bilateral hands because there is no secondary relationship to atrophy of the intrinsic muscles of the bilateral hands.

Your overall or combined evaluation is 40%. The percentages of your individual disabilities may not add up to your overall evaluation. We use a "combined rating table" to decide how disabled you are. The percentages in this table are set by regulation.

**How We Made Our Decision**

We carefully considered all the evidence we received including De Novo review, Memorandum from DAV concerning Clear and unmistakable error, a statement from Dr. William Ruiz, 2-18-99 and Nerve condition studies, Dr. Christopher L. Valencia, 9-28-98. The attached copy of the Rating Decision shows the evidence we used and the reasons for our decision.

**Your Monthly Compensation**

Your monthly compensation is shown below. Please understand that the law (38 U.S.C. 5305) says payments must begin the first day of the month after you've become entitled to the benefit.

Starting April 1, 2000, you're entitled to $459.00 monthly ***because*** of legislative change.

C 10 130 175
Wadsworth, W A

We're paying you additional benefits for your . Let us know right away if there is any change in the status of your dependents.

**If You Think We're Wrong**

If you think our decision is wrong, you should write and tell us why. The enclosed VA Form 4107 explains your right to appeal.

We've also attached a VA Form 21-8764, Disability Compensation Award Attachment--Important Information, which explains certain factors concerning your benefits.

**Direct Deposit**

Your money may be deposited directly into your checking or savings account. This is the safest and most reliable way to get your money. To get more information about Direct Deposit, please call us at the toll free number below.

**If You have Questions**

If you have any questions, call us toll-free by dialing 1-800-827-1000. Our TDD number for the hearing impaired is 1-800-829-4833. *If you call, please have this letter with you.*

Sincerely yours,

*B. J. Harker*

B. J. HARKER
Veterans Service Center Manager

Enclosure(s): Rating Decision
VA Form 21-8764
VA Form 4107

cc: DAV

OCT - 2 2000

| Rating Decision | Department of Veterans Affairs<br>St. Petersburg Regional Office | | | Page 1<br>09/29/00 |
|---|---|---|---|---|
| NAME OF VETERAN<br>WILLIAM A. WADSWORTH | VA FILE NUMBER<br>[redacted] | SOCIAL SECURITY NR<br>[redacted] | DAV | POA |

**ISSUE:**

1. Whether the decision to grant a non compensable evaluation for atrophy of the intrinsic muscles of the right hand was clearly and unmistakably erroneous.
2. Whether the decision to grant a 40 percent evaluation for atrophy of the intrinsic muscles of the bilateral hands was clearly and unmistakably erroneous.
3. Whether the decision to evaluate the veteran under diagnostic code 8023 was clearly and unmistakably erroneous.
4. Service connection for osteoarthritis, bilateral hands as secondary to the service-connected disability of atrophy of the intrinsic muscles of the bilateral hands.

**EVIDENCE:**

De Novo review
Memorandum from DAV concerning Clear and unmistakable error
Statement from Dr. William Ruiz, 2-18-99
Nerve conduction studies, Dr. Christopher L. Valencia, 9-28-98

**DECISION:**

1. No revision is warranted in the decision to grant a non compensable evaluation for atrophy of the intrinsic muscles of the right hand.
2. No revision is warranted in the decision to grant a 40 percent evaluation for atrophy of the intrinsic muscles of the left hand.
3. No revision is warranted in the decision to evaluate the veteran under diagnostic code 8023.
4. Service connection for osteoarthritis, bilateral hands is denied.

**REASONS AND BASES:**

1. Clear and unmistakable errors are errors that are undebatable, so that it can be said that reasonable minds could only conclude that the previous decision was fatally flawed at the time it was made. A determination that there was clear and unmistakable error must be based on the record and the law that existed at the time of the prior decision. Once a determination is made that there was a clear and unmistakable error in a prior decision that would change the outcome, then that decision must be revised to conform to what the decision should have been.

The decision to grant a non compensable evaluation for atrophy of the intrinsic muscles of the right hand is alleged to have been clearly and unmistakably erroneous because it was initially evaluated under an erroneous diagnostic code and than was incorrectly applied when a 30 percent evaluation was not applied. The decision was properly based on the available evidence of record at the time and the rules then in effect.

The memorandum from DAV concerning Clear and unmistakable error indicates that a clear and unmistakable error was committed in our rating dated 6-27-47. The contention is that a different diagnostic code should have been used initially that would grant the veteran a minimum 30% evaluation for the right hand.

A review of the Rating Decision dated 6-27-47 does not clarify what diagnostic code was used. A non-compensable evaluation was assigned based on a separation examination dated 4-13-46 which noted a history of treatment for right hand atrophy but noted no current residual symptoms. The only abnormality noted on that examination concerning bones, muscles, and joints was the existence of slight swelling in the right ankle. It should be further noted that this initial evaluation was not appealed and remained in effect until the veteran submitted a claim for increased compensation in 1970.

The decision to initially grant a non-compensable evaluation for atrophy of the intrinsic muscles of the right hand was not clearly and unmistakably erroneous. Although it is not clear what diagnostic code was used in the rating decision of 6-27-47, the condition would normally be rated as a musculature condition which does not have a minimum evaluation requirement.

2. Clear and unmistakable errors are errors that are undebatable, so that it can be said that reasonable minds could only conclude that the previous decision was fatally flawed at the time it was made. A determination that there was clear and unmistakable error must be based on the record and the law that existed at the time of the prior decision. Once a determination is made that there was a clear and unmistakable error in a prior decision that would change the outcome, then that decision must be revised to conform to what the decision should have been.

The decision to grant a 40 percent evaluation for atrophy of the intrinsic muscles of the bilateral hands is alleged to have been clearly and unmistakably erroneous because a 30 percent evaluation was not applied to each hand. The decision was properly based on the available evidence of record at the time and the rules then in effect.
Memorandum from DAV concerning Clear and unmistakable error indicates that a clear and unmistakable error was committed in our rating dated 11-2-73. The contention is that an error occurred in the rating of 11-2-73 when service connection was granted for atrophy of the intrinsic muscles of the left hand and a separate evaluation of 30 percent was not awarded for each hand.

Our rating decision dated 11-2-73 found that the veteran's left hand was also affected and related it back to his active duty service. A 40% evaluation was granted for atrophy of the intrinsic muscles of the bilateral hands.

The diagnostic code was changed in our rating decision dated 11-2-73 to an analogous code. Analogous codes are used when the disability at issue does not have its own evaluation criteria assigned in VA

regulations, so a closely related disease or injury is used. A 40% evaluation was granted for atrophy of the intrinsic muscles of the bilateral hands in our rating decision dated 11-2-73. The diagnostic code used has a minimum rating evaluation of 30 percent, however, there are no provisions in the rating schedule to indicate that each hand has to be broken out and granted a separate 30 percent evaluation. Therefore, the evaluation of 40 percent was based on the severity of the disability in both hands.

3. Clear and unmistakable errors are errors that are undebatable, so that it can be said that reasonable minds could only conclude that the previous decision was fatally flawed at the time it was made. A determination that there was clear and unmistakable error must be based on the record and the law that existed at the time of the prior decision. Once a determination is made that there was a clear and unmistakable error in a prior decision that would change the outcome, then that decision must be revised to conform to what the decision should have been.

The decision to evaluate the veteran under diagnostic code 8023 is alleged to have been clearly and unmistakably erroneous because an evaluation under diagnostic code 8515 provides a higher evaluation. The alleged error involved an exercise of judgment which cannot be characterized as undebatably erroneous.

The memorandum from DAV concerning a clear and unmistakable error indicates that the veteran should have been evaluated under diagnostic code 8515 as opposed to diagnostic code 8023. The memorandum refers to an electrodiagnositic study dated 3-19-98 which showed severe bilateral ulnar and median nerve compression at the bilateral wrist.

A review of the evidence used in that decision notes that the electrodiagnositic study dated 3-19-98 was a part of a VA examination dated 3-21-98. The rating decision was based on the entire VA examination and not just the electrodiagnositic study dated 3-19-98. The rating decision carried the previous diagnostic code of 8099-8023 forward based on the description of the veteran's disabilities by the examiner. In actuality, the examiner diagnosed osteoarthritis of the bilateral hands, a disability which has been denied in the past.

The decision to evaluate the veteran under diagnostic code 8023 was not clearly and unmistakably erroneous as it involved an exercise of judgment which cannot be characterized as undebatably erroneous.

4. The law provides that a person who submits a claim for VA benefits must submit evidence sufficient to justify a belief that the claim is well grounded. A well-grounded claim is a plausible claim, one which has merit on its own, or is capable of substantiation. Such a claim need not be conclusive, but it must be accompanied by evidence which shows that the claimed condition exists and is possibly related to service.

Evidence received in connection with this claim fails to establish any relationship between osteoarthritis, bilateral hands and atrophy of the intrinsic muscles of the bilateral hands. It is therefore not a well-grounded claim which can be resolved. In order to establish a well-grounded claim, it is necessary to provide evidence which demonstrates a plausible relationship.

The statement from Dr. William Ruiz, 2-18-99 indicates that it is his opinion that a possibility exists which indicates that the veteran's osteoarthritis of the bilateral hands is the result of his muscle atrophy which has left the joints of his hands unexercised and a prime target for the onset of arthritis. He points to the fact that the veteran does not have arthritis in any other joint of his body. He further goes on to state that the arthritis is of unknown origin and that the arthritis *could* have resulted from the existing atrophy in the veteran's hands.

Service connection for osteoarthritis, bilateral hands as secondary to the service-connected disability of atrophy of the intrinsic muscles of the bilateral hands is denied as this claim is not well grounded. Evidence of record fails to indicate that the veteran's osteoarthritis in the bilateral hands is a result of his muscle atrophy. The evidence submitted by the veteran consisted of an opinion by Dr. Ruiz which states that the veteran's osteoarthritis could have been caused by muscle atrophy. This opinion is speculative and does not justify a belief by a fair and impartial individual that the claim is well grounded.

| **Rating Decision** | *Department of Veterans Affairs*<br>*St. Petersburg Regional Office* | Page 5<br>09/29/00 |
|---|---|---|

| NAME OF VETERAN | VA FILE NUMBER | SOCIAL SECURITY NR | POA |
|---|---|---|---|
| WILLIAM A. WADSWORTH | [redacted] | [redacted] | |

| ACTIVE DUTY *(Month/Day/Year)* | | | | ADDITIONAL SERVICE CODE | COMBAT STATUS | SPECIAL PROVISION CODE | FUTURE EXAM *(Month/Year)* |
|---|---|---|---|---|---|---|---|
| EOD | RAD | EOD | RAD | | | | None |

| COPY TO: | | EFFECTIVE DATE | BASIC | HOSPITAL | LOSS OF USE | ANAT. LOSS | OTHER LOSS |
|---|---|---|---|---|---|---|---|
| | S | | | | | | |
| | M | | | | | | |
| | C | | | | | | |

**JURISDICTION:** 020;1 Clear and Unmistakable Error Claim 12-4-98

1. SC (WWII INC)

8099-8023 ATROPHY, INTRINSIC MUSCLES, BILATERAL HANDS
40% from 9-6-73

9400 ANXIETY NEUROSIS
0% from 5-10-46

7299-7203 PARITONSILLAR ABSCESS
0% from 5-10-46

8. NSC (WWII)
8023-5010 OSTEOARTHRITIS, BILATERAL HANDS (NWG No secondary relationship to atrophy of the intrinsic muscles of the bilateral hands)

COMB SC: 40% from 9-6-73

John m Hindrichs
John Hindrichs

010130175-000929.RTG

# Exhibit C

# Disabled American Veterans
## National Service Office

VA Regional Office • P.O. Box 1437 • St. Petersburg, FL 33731
Phone (727) 319-7444 • Fax (727) 319-7775 • Toll Free 1-800-827-1000
Email davstpete@vba.va.gov
www.dav.org


November 27, 2006

TO: TRIAGE

RE: Mr. William Wadsworth
5345 Lochmead Ter
Zephyrhills, FL 33541

[redacted]

## NOTICE OF DISAGREEMENT

The above referenced claimant disagrees with the Department of Veterans Affairs (VA) decision dated November 03, 2006. The issue(s) in disagreement is/are as follows:

Denial of an ealier effective date for the granting of Special Monthly Compensation (SMC) "M" and the failure to address the claim of Clear and Unmistakeable error (CUE) as previously identified.

The above identiofied veteran has expressed his desire that these issues continue in the "appeals" arean.

We also request a de novo review by a Decision Review Officer (DRO).

It is noted that the veteran is an octogenarian (aver "80 years of age"), therefore expeditious handling of the instant claim is requested due to his advanced age.

FILE
EP 171 PEND
EP FINAL
ADJ. INT. MM 11-30-06

Once all necessary adjudicative actions have been completed, please advise the claimant and this Organization accordingly. Thank you for your consideration.

Sincerely,

G. Raymond Raulerson
National Service Officer

gr

Attachment(s):
Letter from the veteran with attachments

cc: William Wadsworth

November 19, 2006

Ray Raulerson
National Service Officer
Disabled American Veterans
PO Box 1437
St. Petersburg, FL 33731

Claim #[redacted]

Dear Mr. Raulerson:

Pursuant to our conversation of November 13, 2006, I am submitting my disagreement with the Veterans Administration entitlement of November 3, 2006. However, it must be known that I am very grateful for the classification "M" which I have now been given. My disagreements are as follows:

1. The entitlement to special monthly compensation was determined as follows, "entitlement to special compensation is warranted in this case because criteria regarding the loss of use of both hands were met from the April 7, 2001 date of examination". The rating decision promulgated on November 21, 2001 was dated November 15, 2001, stated "classification of 100% based on the VA exam of April 7, 2001 which made it 100%, and retroactive to November 1997". There was submitted a notice of disagreement from your office prepared by Dennis Wisnoski and dated January 17, 2002. A copy of this notice is enclosed. It follows that if the examination of April 7, 2001 was used to qualify me for Class M as of that date, and that same exam was used to qualify me for 100% back to November 1997, then the M classification should have been issued retroactive to November 1997.
2. The rating decision does not address the matter of the "clear and unmistakable error" in my original diagnosis of June 27, 1947. I am enclosing a copy of an order to DRO team 75, dated December 22, 1998 from your representative , Michelle Zimbler, and a copy of a letter of statement of accredited representative in appealed case dated October 16, 2003 from your representative John T. Paul. What I consider as conclusive evidence is given that the original diagnosis as of June 27, 1947 should properly have been atrophy of the hands. This provides a minimum rating of 30% for each hand. I don't understand when the VA was given a choice of 2 diagnosis at that time, and they didn't give me the one which was more advantageous to me. I thought that was their ruling. As a matter of interest, at my last VA exam done in April of this year, the examining doctor looked at the sheaf of papers given to him by the VA with

my medical history and declared to me without question and off the record, " as far as I am concerned the VA should have given you this rating 50 years ago". Of course, he wouldn't say this officially because he doesn't make the decisions about ratings.

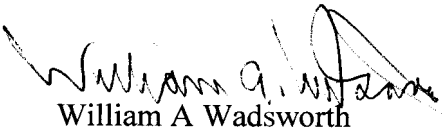
3. I am asking for special advancement because I am age 85.
4. The VA letter of November 3, 2006 gives entitlement amounts with no amount indicated for the year 2006. I have had no compilation as to how the amount placed in my account was determined.

Would you please prepare the proper forms and to submit the disagreements to the Veterans Administration.

I want to take this opportunity to thank you and members of your team for your valuable assistance both in the past and in the present time.

Thank you very much.

Sincerely,



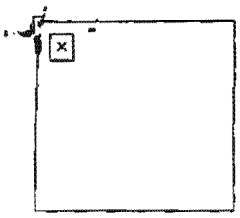
William A Wadsworth
5345 Lochmead Terrace
Zephyrhills, FL 33541
813-780-8745

Enc.

1. Notice of December 2, 1998 from Michelle Zimbler
2. Notice of disagreement of January 17, 2002 from Dennis Wisnoski of your office
3. Statement of October 16, 2003 from John T. Paul
4. VA letter of November 3, 2006 that gives entitlement amounts
5. Copies of service records

P.S. Finally, I would appreciate it if someone at the VA would correct the of dates my service records. The enclosed copies of my service records show my enlisted time from March 1943 to July 1945 and officer time from July 1945 until May of 1946. Somehow this has never been straightened this out although, I have tried many times

# Exhibit D



# BOARD OF VETERANS' APPEALS

**DEPARTMENT OF VETERANS AFFAIRS**
**WASHINGTON, DC 20420**

IN THE APPEAL OF
WILLIAM A. WADSWORTH

[redacted]

DOCKET NO. 07-23 492 ) DATE 29 JAN 08 PAT
)
)

On appeal from the
Department of Veterans Affairs Regional Office in St. Petersburg, Florida

## THE ISSUES

1. Entitlement to a 100 percent disability evaluation for loss of use of both hands prior to April 7, 2001.

4. Entitlement to a date earlier than April 7, 2001, for the grant of entitlement to special monthly compensation (SMC) at the "m" rate.

## REPRESENTATION

Appellant represented by: Disabled American Veterans

## ATTORNEY FOR THE BOARD

Michael Holincheck, Counsel

IN THE APPEAL OF [redacted]
WILLIAM A. WADSWORTH

INTRODUCTION

The veteran served on active duty from March 1943 to May 1946.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from April 1998 and June 2006 rating decisions by the Department of Veterans Affairs (VA) Regional Office (RO) in St. Petersburg, Florida.

The Board notes that the veteran has stated that he believes there was clear and unmistakable error (CUE) in prior decisions in regard to the disability evaluation assigned for his service-connected atrophy of the right hand and, later, both hands. The veteran made such an assertion in a statement received on June 29, 2006.

He again asserted CUE in prior rating decisions with his notice of disagreement of November 2006. He stated that he believed there was CUE in a rating decision of June 27, 1947, in that he should have received a disability evaluation for each hand. He included a copy of a submission from his representative that was dated in December 1998.

The December 1998 submission was a prior allegation of CUE in VA rating decisions involving the disability evaluations assigned to the veteran's service-connected hand disability. The submission specifically referenced the June 27, 1947, rating decision, and included other rating decisions that evaluated the veteran's disability evaluation.

The RO adjudicated the December 1998 CUE claim by way of a rating decision dated in September 2000. The RO found no evidence of CUE in the challenged decisions. Notice of the rating action was provided in October 2000. There is no evidence of record to show that the veteran expressed disagreement with the rating decision.

The Board notes that once there is a final denial of a CUE claim, the same claim cannot be raised again. *See Link v. West*, 12 Vet. App. 39, 44 (1998) ("Under the principle of res judicata 'once there is a final decision on the issue of [CUE] … that

particular claim of CUE may not be raised again.'"(quoting *Russell,* 3 Vet. App. at 315)). However, the veteran may submit a different theory of CUE from the one previously considered in September 2000. *See Andre v. Prinicipi*, 301 F.3d. 1354, 1361 (Fed. Cir. 2002) (each theory of CUE must be adjudicated as a separate and distinct request so that the preclusive effect of res judicata bars refilling only as to that particular assertion of CUE); *see also Disabled Am. Veterans v. Gober*, 234 F.3d 682, 694 (Fed. Cir. 2002) ("[A]llowing a claimant to seek CUE review of a specific issue in a Board decision leaves other issues in that decision subject to their own CUE review.")

The Board expresses no judgment on the veteran's assertion of CUE in the referenced statements in regard to whether they raise a different theory or whether the rating decision of September 2000 is now final. The issue of CUE in prior rating decisions, particularly June 27, 1947, is referred to the RO for such further development as may be necessary.

The veteran previously requested that he be afforded a video conference hearing. The veteran's representative submitted a statement withdrawing the veteran's request for a hearing in January 2008.

The veteran's representative submitted a motion to advance the veteran's case on the docket in October 2007. The motion was granted in December 2007.

## FINDINGS OF FACT

1. The veteran submitted his current claim for increased evaluations on November 13, 1997.

2. The RO increased the veteran's disability evaluation to the maximum schedular rating available for complete paralysis of the median nerve in each hand in May 2001. The rating was effective from November 13, 1997.

3. The RO granted a 100 percent evaluation for loss of use of the hands and entitlement to SMC at the "m" level in June 2006. The effective date for both awards was April 7, 2001.

4. The evidence of record supports a grant of loss of use of both hands, and entitlement to SMC at the "m" level from the date of claim, November 13, 1997.

## CONCLUSIONS OF LAW

1. The criteria for the grant of a 100 percent disability evaluation for loss of use of both hands from November 13, 1997, have been met. 38 U.S.C.A. §§ 1155, 5110 (West 2002); 38 C.F.R. §§ 3.400, 4.71a, 4.124a, Diagnostic Codes 5109, 8023, 8515 (2007).

2. The criteria for the grant of entitlement to SMC at the "m" level from November 13, 1997, have been met. 38 U.S.C.A. §§ 1114, 1155, 5110; 38 C.F.R. §§ 3.350, 3.400 (2007).

## REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

### I. Background

The veteran served on active duty from March 1943 to May 1946. He served as an enlisted man, with combat service in the European Theater, from March 1943 to July 1945. He was then commissioned as an officer in July 1945 and served until his discharge in May 1946.

The veteran was initially granted service connection for atrophy of the interosseous of the right hand in May 1946. He was assigned a noncompensable disability evaluation.

The veteran submitted a claim for an increased evaluation in August 1973. Based on the results of a VA examination from October 1973, the veteran was assigned a separate 20 percent disability for each hand by way of a rating decision dated in November 1973. The disability was characterized as atrophy of intrinsic muscles of both hands and evaluated under Diagnostic Codes 8099-8023 as analogous to multiple sclerosis. 38 C.F.R. § 4.124a. The RO also noted that the veteran was not service connected for arthritis but concluded that the degree of disability due to arthritis could not be determined. The veteran's combined disability evaluation was 40 percent.

The veteran sought an increased evaluation in December 1975. The RO denied the claim for an increased evaluation in March 1976. He submitted a new claim for an increased evaluation in July 1989 but it was denied in November 1989.

The veteran requested a hearing in his case. The veteran's representative noted on the record that no notice of disagreement had been submitted and that the veteran wanted to testify about his disability. The veteran testified that he was left-handed. He testified that he could barely function in cold weather. The veteran demonstrated difficulty in picking up a paper clip. He also testified about the problems with his fingers and his inability to hold them straight.

The hearing officer issued a decision, denying an increase, in June 1990.

The veteran submitted his current claim for an increased evaluation in November 1997. The veteran said that there was no physician that was aware of the changes in his disability but he would show the increase in the loss of use of his hands. The veteran also reported that he had had no treatment for his disability in February 1998. He also said at that time that his condition had worsened to the point he was almost unable to use his hands at all.

The veteran was afforded a VA examination in March 1998. The veteran reported that he had decreased functional capacity and severe disability related to his hands in that he could not write or button a shirt. He did have good preserved grip in his hands with normal wrists and forearms. The veteran said his symptoms were worse

in the cold and that he would have an increase in the contracture of his hands and loss of range of motion of approximately 60 percent. He said he could not use his hands at all during such times. He was still employed in the insurance industry. The veteran reported his symptoms were worse in his left hand but they were similar in both hands.

The examiner reported that there was some bilateral thenar atrophy but normal musculature of the forearms. There was a 5/5 symmetrical grip in both hands. There was decreased strength of the intrinsic muscles of both hands, described as 3+/5, with decreased adduction and abduction of both hands. The examiner stated that there were significant contractures of the distal interphalangeal (DIP) joints of the index, middle, right, and small fingers of both hands with approximately 10 to 30 degrees of chronic flexion in distal interphalangeal joints bilaterally. The veteran's hands and joints were nontender to palpation. The veteran was able to oppose his thumb to all fingers, with some difficulty in reaching the little finger, with both hands. There was a decreased pinch of 3+/5 bilaterally. The examiner said that the veteran had some good strength in terms of pulling, pushing, and twisting, although he had some very grip strength [sic] but difficulty with fine motor such as adjusting buttons and writing. The examiner said there was a normal range of motion of the metatarsophalangeal [sic] joints and proximate interphalangeal (PIP) joints and wrists with extension to 0 degrees and greater than 90 degrees of flexion.

X-rays of the hands were said to show advanced osteoarthritis of the interphalangeal joints in both hands, worse than [sic] distal interphalangeal joints bilaterally. There was joint space loss with subchondral sclerosis and prominent osteophyte formation involving the interphalangeal joints as described. The assessment was severe osteoarthritis of both hands, associated with significant decreased function of pinch and fine motor movements of the hand with preserved grip. The examiner said there was no associated pain in the described periods of flare-up with further loss of range of motion and decreased coordination which limited daily activities in times of cold weather. The examiner said that the veteran had two periods of this during the winter in Florida.

The Board notes that the veteran had electrodiagnostic studies done in March 1998. These included nerve conduction velocity (NCV) and electromyography (EMG). The results of the studies were not mentioned in the previously discussed VA examination report. The NCV study said there absent sensory nerve action potentials of the median and ulnar nerves. The EMG study summary was that there was evidence of chronic denervation in muscles supplied by the ulnar and median nerves bilaterally. The interpretation was that there was electrodiagnostic evidence of a severe bilateral median and ulnar nerve compression at the wrist.

The RO denied the veteran's claim for an increased evaluation in April 1998. The RO held that all symptoms that were directly attributed to the arthritis must be excluded from consideration of the veteran's disability.

The veteran submitted his notice of disagreement (NOD) in April 1998. He specifically disagreed with the lack of consideration of arthritis as part of his disability. He perfected his appeal of his increased evaluation claim in August 1998.

The veteran submitted a statement from his physician, W. Ruiz, M.D., in March 1999. The focal point of the statement was to relate a causal relationship between the veteran's service-connected atrophy of his hands and the osteoarthritis of his fingers. He also noted that he had referred the veteran for NCV/EMG studies and he included the report from the studies done in September 1998. The report concluded, in pertinent part, that there was severe chronic inactive bilateral median mononeuropathy across the wrist (carpal tunnel syndrome (CTS)), with mixed axonal (predominantly) and demyelinating changes. There was also moderately severe chronic inactive bilateral, worse on the left, ulnar mononeuropathy across the wrist (type IV in the Palmaris brevis muscle) with mixed axonal (predominantly) and demyelinating changes.

The RO continued to deny the veteran's claim in September 2000. This included a specific denial of service connection for osteoarthritis of the hands.

evaluations were effective from the date of claim, November 13, 1997. The combined total disability evaluation was 100 percent as of that date. The Board notes that the rating decision incorrectly listed the veteran's major hand as his right hand.

The Board notes that Diagnostic Code 8515 pertains to evaluating disabilities involving the median nerve. The 70 and 60 percent evaluations represent the respective maximum schedular evaluations for the major and minor hands. *See* 38 C.F.R. ~4.124a. Such evaluations are for complete paralysis of the nerve.

The veteran submitted a NOD in July 200 I. He said that he disagreed with the "rate assigned" for his service connected bilateral hand condition. He said that he should have been granted entitlement to SMC at the "m" level for bilateral loss of use of his hands. *See* 38 V.S.C.A. ~ 1114(m); 38 C.F.R. ~3.350.

The RO denied the veteran's claim for SMC in November 2001. He submitted his NOD as to that denial in January 2002. He perfected his appeal in September 2003.

The veteran submitted a report ofNVCIEMG studies done in August 2004. The veteran's upper extremities were tested, particularly his median and ulnar nerves. The report said that the veteran had severe diffuse neuropathic disorder.

The veteran submitted a statement in October 2004. He contended that he no longer had effective use of his hands, even with normal temperatures.

The veteran submitted treatment records from A. K. Reddy, M.D., dated in February and March 2005. The records included NCVIEMG studies. Dr. Reddy's test results showed evidence to support a diffuse poly axonal sensory motor neuropathy and evidence of a marked to profound bilateral CTS syndrome and evidence of ulnar neuropathy in the canal of Guyon.

The veteran was afforded a VA neurology examination in June 2005. The examiner stated that the veteran "clearly demonstrates" evidence for very severe damage of the peripheral nerves involving both of his hands, namely the median and ulnar

nerves. The examiner stated that the condition was irreversible and that the muscle atrophy was severe. The examiner also said the disability was severe as to the veteran's inability to use his hands in his regular daily activities, such as taking care of himself. There was no evidence for motor neuron disease, namely ALS.

The veteran also had a VA orthopedic examination in June 2005. The impression was degenerative arthritis, bilateral of the hands, and medial/ulnar neuropathy, bilateral hands. The examiner said that the veteran showed a significant amount of disability that was secondary to his disorder. The range of motion was quite limited in the PIP and DIP joints. His strength was also significantly diminished. The examiner said that, after repetitive exercise, as well as the veteran's history of cold intolerance, the veteran showed severe amounts of increasing incoordination, fatigability, and loss of strength that resulted in almost no motion in the PIP and DIP joints. The examiner said the veteran also had an additional 30 degrees of motion in the metacarpal joints at those times. The examiner stated that the veteran did not have complete loss of use of his hands on good days; however, with repetitive use or cold days he did have complete functional impairment of both of the hands.

The veteran submitted records from R. E. Rydell, M.D., dated in July and December 2005, respectively. Dr. Rydell evaluated the veteran for numbness and tingling of the hands in July 2005. The veteran was said to have probable CTS that caused a paresthesias in the hands. He also had longstanding weakness and atrophy in the hands that involved muscles in the C8-T1 distribution. He also had markedly impaired vibratory sensation. The report from December 2005 noted that the veteran had undergone right median nerve decompression with no success. Dr. Rydell stated that the veteran's hands were essentially nonfunctional.

The veteran was afforded VA examinations in March 2006. The orthopedic examiner found that the veteran had pure ulnar motor neuropathy, most likely at the canal of Guyon, both upper extremities, and incidental median nerve neuropathy, on physical examination, that was secondary to age. The examiner said that the veteran had significant weakened movement with all the muscles supplied by the ulnar nerves. There was excess fatigability with use as well as clawing of both

hands. The examiner said there was incoordination in that the veteran would be unable to functionally lift any small or medium sized objects, and if he were able to lift them, he would have functionally disabling weakness. There was painful motion and pain with use of the PIP and DIP joints of finger two through five of each hand. The examiner said that, at the time of the examination, the veteran's hands were considered to be functionally useless as there was a temperature of 60 degrees. The examiner said he agreed with the veteran's assertion that he should be considered as unable to perform his usual activities of daily living at home. The examiner added that the veteran had a "100 percent functional range of motion loss after repetitive exercise in regards [sic] to bilateral hands and his ulnar neuropathy." He provided degrees of limitation of motion of the joints of the fingers.

The VA neurology examiner provided an impression of bilateral ulnar neuropathy. He said the clinical representation of the veteran's hand abnormalities was consistent with a claw-hand deformity. This was said to be consistent with an ulnar neuropathy lesion. The examiner said there was no evidence of a joint deformity. The examiner provided a further assessment regarding possible cubital tunnel syndrome. The examiner said that the veteran had all muscles of the upper extremity intact, excluding specifically the muscles innervated by the ulnar nerve and sensory loss from this lesion. He listed the several muscles involved. The examiner opined that the veteran did not meet the definition for complete loss of use of both hands.

The RO re-adjudicated the veteran's claim in June 2006. He was granted a 100 percent evaluation for loss of use of both hands, effective from April 7, 2001. The evaluation was assigned under Diagnostic Codes 8515-5109. As noted, *supra*, Diagnostic Code 8515 relates to disabilities involving the median nerve. Diagnostic Code 5109 is used to evaluate a combination of disabilities, in this case the loss of use of both hands. 38 C.F.R. § 4.71a. The veteran was granted entitlement to SMC at the "m" level for loss of use of both hands. This was also effective from April 7, 2001. The RO relied on the results of the VA examination of April 7, 2001, as the first medical evidence to factually show that he had loss of use of both hands.

The veteran submitted his NOD with the effective date of his SMC in November 2006. He contended that, if he was in receipt of a 100 percent disability evaluation as of November 13, 1997, his SMC for loss of use of both hands should be effective from that date. He said that he believed VA made an error in the starting date of his SMC at the time of his substantive appeal in July 2007.

## II. Analysis

Disability ratings are determined by the application of a schedule of ratings, which is based on the average impairment of earning capacity. Individual disabilities are assigned separate diagnostic codes. 38 U.S.C.A. § 1155 (West 2002); 38 C.F.R. § 4.1 (2007). Where entitlement to compensation has already been established and an increase in the assigned evaluation is at issue, it is the present level of disability that is of primary concern. *Francisco v. Brown*, 7. Vet. App. 55, 58 (1994). Although the recorded history of a particular disability should be reviewed in order to make an accurate assessment under the applicable criteria, the regulations do not give past medical reports precedence over current findings. *Id.* Where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7 (2007).

The Board notes that Diagnostic Code 5109 provides for a 100 percent disability evaluation for loss of use of both hands. 38 C.F.R. § 4.71a. A disability evaluation under this diagnostic code also establishes an entitlement to special monthly compensation.

Special monthly compensation is payable at a statutorily specified rate if the veteran, as the result of service-connected disability, has suffered the anatomical loss or loss of use of both hands. 38 U.S.C.A. § 1114(m) (West 2002); 38 C.F.R. § 3.350 (2007).

Loss of use of a hand, for the purpose of special monthly compensation, will be held to exist when no effective function remains other than that which would be

the years wherein he spoke of his disability as increasingly affecting his ability to use his hands, especially in cold weather.

In the current claim, the veteran had relocated from Michigan to Florida for a number of years. However, the cold weather he experienced, even in Florida, still had a dramatic debilitating affect on his hands. He also had daily problems with his hands, even with warmer weather.

The March 1998 VA examiner found that the veteran had severe osteoarthritis of both hands and significant decreased function of pinch and fine motor movements of the hand with preserved grip. The March 1998 NCV/EMG study reported that the veteran had severe bilateral median and ulnar nerve compression at the wrist.

The main reason the veteran's disability evaluation was not increased at the time of the 1998 examination, was that the arthritis was not considered to be part of the service-connected disability. The results of the NCV/EMG also were not mentioned in the rating decision of April 1998. The February 1999 statement from Dr. Ruiz noted that the veteran had pronounced arthritis of both hands. He also provided the results of a September 1998 NCV/EMG report that noted the veteran as having severe chronic inactive bilateral median mononeuropathy across the wrist.

The April 2001 orthopedic examiner removed any doubts about the connection between the veteran's atrophy of his hands and his arthritis. The examiner also stated the veteran would have a 100 percent loss of function of his hands in cold weather and a minimum of an 80 percent decrease in functioning in weather above 60 degrees. The RO then issued the rating decision of May 2001 that increased the veteran's disability evaluations to the maximum for each hand for complete paralysis of the median nerve. This report was also used by the RO to establish entitlement to loss of use of the hands and SMC in the rating decision of June 2006.

The medical evidence of record dated after April 2001 only confirms the severity of the veteran's bilateral hand disability, and his loss of use of both hands.

The Board has reviewed the medical evidence of record, along with the statements from the veteran, and the statement provided by his employees. The Board finds that the evidence is at least in relative equipoise that the veteran's disability rose to the level of effective loss of use of his hands at the time his claim was received on November 13, 1997. The evidence need not demonstrate a total loss of all function before loss of use is considered. *See Tucker*, *supra*.

The veteran is entitled to a 100 percent disability evaluation for loss of use of his hands, under Diagnostic Code 5109 from the date of claim, November 13, 1997. He is also entitled to SMC at the "m" level from that date. The Board has considered whether an earlier date could be established. *See* 38 U.S.C.A. § 5110(b)(2) (West 2002); 38 C.F.R. § 3.400(o)(2) (2007). However, as the veteran has stated on a number of occasions, he receives no treatment for his bilateral hand disability. He did not provide any competent evidence, dated prior to his claim, to show an increase in his disability. Thus, there is no basis for the increased evaluation and award of SMC to be any earlier than his date of claim. *See* 38 C.F.R. § 3.157 (2007).

As provided for by the Veterans Claims Assistance Act of 2000 (VCAA), the United States Department of Veterans Affairs (VA) has a duty to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2002 & Supp. 2007); 38 C.F.R. § 3.159 (2007). In this case, the Board is granting in full the benefit sought on appeal. Accordingly, assuming, without deciding, that any error was committed with respect to either the duty to notify or the duty to assist, such error was harmless and will not be further discussed.

(CONTINUED ON NEXT PAGE)

IN THE APPEAL OF [redacted]
WILLIAM A. WADSWORTH

ORDER

Entitlement to a 100 percent disability evaluation, for loss of use of both hands, as of November 13, 1997, is granted subject to the laws and regulations governing the payment of monetary benefits.

Entitlement to SMC at the "m" level, is established from November 13, 1997, subject to the laws and regulations governing the payment of monetary benefits.

S. S. TOTH
Veterans Law Judge, Board of Veterans' Appeals

**Department of Veterans Affairs**

## YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. We will return your file to your local VA office to implement the BVA's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court ***before*** you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

**How long do I have to start my appeal to the Court?** You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the Court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you,* you will then have another 120 days from the date the BVA decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to Court is filed on time.*

**How do I appeal to the United States Court of Appeals for Veterans Claims?** Send your Notice of Appeal to the Court at:

**Clerk, U.S. Court of Appeals for Veterans Claims**
**625 Indiana Avenue, NW, Suite 900**
**Washington, DC 20004-2950**

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's web site on the Internet at **www.vetapp.uscourts.gov,** and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court,** not with the Board, or any other VA office.

**How do I file a motion for reconsideration?** You can file a motion asking the BVA to reconsider any part of this decision by writing a letter to the BVA stating why you believe that the BVA committed an obvious error of fact or law in this decision, or stating that new and material military service records have been discovered that apply to your appeal. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Send your letter to:

**Director, Management and Administration (014)**
**Board of Veterans' Appeals**
**810 Vermont Avenue, NW**
**Washington, DC 20420**

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

**How do I file a motion to vacate?** You can file a motion asking the BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address above for the Director, Management and Administration, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

**How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error?** You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address above for the Director, Management and Administration, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400 -- 20.1411, and *seek help from a qualified representative before filing such a motion.* See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

**How do I reopen my claim?** You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

**Can someone represent me in my appeal?** Yes. You can always represent yourself in any claim before VA, including the BVA, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: **www.va.gov/vso**. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before VA, then you can get information on how to do so by writing directly to the Court. Upon request, the Court will provide you with a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to represent appellants. This information, as well as information about free representation through the Veterans Consortium Pro Bono Program (toll free telephone at: (888) 838-7727), is also provided on the Court's website at **www.vetapp.uscourts.gov.**

**Do I have to pay an attorney or agent to represent me?** An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403 (2006). If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision.

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

VA is in the process of amending its regulations governing representation of claimants for veterans' benefits in order to implement the provisions of the new law. More information concerning the regulation changes and related matters can be obtained at http://www1.va.gov/OGC (click on "Accreditation and Recognition of Service Organizations").

**Fee for VA home and small business loan cases:** An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. For more information, read section 5904, title 38, United States Code.

**Filing of Fee Agreements**: In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to the Secretary at the following address:

**Office of the Chief Counsel for Policy (01C3)**
**Board of Veterans' Appeals**
**810 Vermont Avenue, NW,**
**Washington, DC 20420**
**Facsimile: (202) 565-5643**

(When final regulations are published to implement the requirements of the new law, fee agreements must be filed with the VA Office of the General Counsel and not the Board.)

# Exhibit E

DEPARTMENT OF VETERANS AFFAIRS
St. Petersburg Regional Office
P.O. BOX 1437
St. Petersburg FL 33731

September 23, 2009

WILLIAM A WADSWORTH
5345 LOCHMEAD TERR
ZEPHYRHILLS, FL 33542

In Reply Refer To: 317/VSC/PRE2/PEB
[redacted]
WADSWORTH, William A

Dear Mr. Wadsworth:

We have conducted a thorough review of your claims file. It is shown that your service representative, Disabled American Veterans (DAV), filed a claim on December 4, 1998 for a clear and unmistakable error (CUE) on the rating decisions of June 27, 1947 and November 2, 1973. The claim was based on the belief that a 30 percent evaluation for your right hand should have been assigned as of May 10, 1946 and a combined evaluation of 60 percent assigned as of September 6, 1973.

The VA rating decision of September 29, 2000 found that there was no CUE and a revision was not warranted. You were notified of this decision by our letter to you, dated October 31, 2000. The decision became final on October 31, 2001.

According to the United States Court of Appeals for Veterans Claims, once a final decision on the issue of CUE has been made, that same claim of CUE may not be raised again. *See Russell v. Principi,* 3 Vet.App.310, 315 (1992).

On November 27, 2006, you submitted additional request for a CUE based on the rating decision of June 27, 1947, again, for not assigning a 30 percent evaluation for your right hand condition. In addition, you submitted a copy of the CUE claim, which had previously been submitted by the DAV on December 4, 1998. This was considered a duplicate claim for a CUE and as the prior decision was finalized, the issue may not be raised again.

Although the Board of Veterans' Appeals, in its January 29, 2008 decision, stated that "the issue of CUE in prior rating decisions, particularly June 27, 1947, is referred to the RO for such further development as may be necessary," we have determined that your CUE claim from November 27, 2006 was a duplicate CUE claim that was addressed in the September 29, 2000 VA rating decision. As the prior decision was finalized, the issue may not be raised again and we will not be taking any further action.

Ordinarily we do not provide a response to duplicate CUE claims.

C
Wadsworth, William A

## If You Have Questions or Need Assistance

If you have any questions, you may contact us by telephone, e-mail, or letter.

| If you | Here is what to do. |
|---|---|
| Telephone | Call us at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the number is 1-800-829-4833. |
| Use the Internet | Send electronic inquiries through the Internet at https://iris.va.gov. |
| Write | Put your full name and VA file number on the letter. Please send all correspondence to the address at the top of this letter. |

In all cases, be sure to refer to your VA file number.

If you are looking for general information about benefits and eligibility, you should visit our website at https://www.va.gov, or search the Frequently Asked Questions (FAQs) at https://iris.va.gov.

We sent a copy of this letter to your representative, Disabled American Veterans, whom you can also contact if you have questions or need assistance.

Sincerely yours,

S. L. Smith

S. L. Smith
Veterans Service Center Manager

Contact us on the Internet at: https://iris.va.gov

cc: DAV

**CERTIFICATE OF SERVICE**

I hereby certify, under penalty of perjury under the laws of the United States of America, that on this, the 23rd day of September 2009, a copy of the foregoing was mailed, postage prepaid, to:

William A. Wadsworth
5345 Lochmead Terrace
Zephyrhills, FL 33541

/s/ Elizabeth A. Long
**ELIZABETH A. LONG**
Counsel for the Secretary