

Vet. App. No. 19-4135

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

JOHNNY R. MARTINEZ
Pro-se Appellant

v.

ROBERT L. WILKIE
Secretary, of Veterans Affairs
Appellee

APPELLANT INFORMAL BRIEF IN SUPPORT OF APPEAL

JOHNNY R. MARTINEZ
16861A W. FM 117
DILLEY, TEXAS 78017

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Did the Board of Veterans Appeals May 17, 2019 Order ERROR in concluding **(1) No CUE** communication in 1980 indicating intent to apply for benefits; where BVA overlooked service DA Form 664 Application for VA benefits dated Feb.1980 [**R.at pg.709**]; resulted in RO incorrectly applied 38 CFR section 3.307 & 3.303(b) in RO March 1980 decision denying Veteran *Right wrist pain and dislocation service connection, because not listed in 38 CFR section 3.309; **(2) No CUE** in RO March, 1980 or February 2009 decision denying Veteran service connection for: *Spondylosis of the thoracic spine without radiculopathy, filed September 2008 determined not entitled to 38 CFR section 3.307 {presumptive service connection}; and contrary to [**R.at pg.598 & pg.600**] VA November 7, 2008 letter on receipt of entry & separation service treatment records; **(3) No CUE** in RO March, 1980 or February 2009 decision denying Veteran service connection for: *Right hip DJD; *Left knee, DJD; *Left ankle, DJD; determined not entitled

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Pertinent Legal Criteria

Board of Veterans Appeals (BVA) had obligation to apply presumption of aggravation, or explain why presumption should not be applied; given the fact that veteran was involved in "war service," presumption of aggravation could only be rebutted by clear and unmistakable evidence that increase in disability was due to natural progress of condition. See, **Browder v. Derwinski**, 1 Vet. App. 204 (1991); Injury or disease incurred during active service is considered to have occurred in the line of duty unless it was result of service members willful misconduct. See, **Manio v. Derwinski**, 1 Vet. App. 140 (1991).

According to **Walker v Shinseki**, 708 F.3d 1331 (Fed. Cir. 2/21/2013), "[t]he natural reading of the 'condition' noted in service is a condition indicative of a chronic disease, but not sufficiently indicative to demonstrate that the chronic disease is 'shown to be chronic.'" *Id.* at 1339. *Walker* also states that "in the situation where the veteran

cannot establish a chronic disease 'shown' in the presumptive period for purposes of section 3.303(b) but can point to a chronic condition that was noted in the presumptive period but the notation was insufficient to support a diagnosis beyond legitimate question ... the veteran can benefit from continuity of symptomatology to establish service connection"

The Federal Circuit recently held that continuity of symptomatology under 3.303(b) applies only to chronic diseases listed in 38 CFR section 3.309. ***Walker v. Shinseki***, 708 F.3d 1331 (Fed. Cir. 2013).

The U.S. Court of Appeals for Veterans Claims (Court) held that VA must inform the claimant of any information and evidence not of record (1) that is necessary to substantiate the claim; (2) that VA will seek to provide; and (3) that the claimant is expected to provide. See, ***Quartuccio v. Principi***, 16 Vet. App. 183 (2002). This notice should have

been provided prior to an initial decision on a claim by the agency of original jurisdiction (AOJ). See, *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006) *Pelegri v. Principi*, 18 Vet. App. 112 (2004) (*Pelegini II*). 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 but were not associated with the claims file when VA first decided the claim, VA will reconsider the claim. 38 CFR section 3.156(c) (2012). 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 requirement of paragraph (c) of this section are met; (ii) Additional service records forwarded by the Department of Defense or the service department to VA any time after VA's original request for service records. 38 CFR Section 3.156(c).

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STATEMENT OF THE CASE

A. Jurisdictional Statement

Appellate jurisdiction is predicated on 38 USC section 7252.

B. Nature of the Case

Did the Board of Veterans Appeals May 17, 2019 Order ERROR in concluding **(1) No CUE** communication in 1980 indicating intent to apply for benefits; where BVA overlooked service DA Form 664 Application for VA benefits dated Feb.1980 [**R.at pg.709**]; resulted in RO incorrectly applied 38 CFR section 3.307 & 3.303(b) resulted in RO March 1980 decision denying Veteran *Right wrist pain and dislocation service connection, because not listed in 38 CFR section 3.309; **(2) No CUE** in RO March, 1980 or February 2009 decision denying Veteran service connection for: *Spondylosis of the thoracic spine without radiculopathy, filed September 2008 determined not entitled to 38 CFR section 3.307 {presumptive service connection}; and contrary to [**R.at pg.598 & pg.600**] VA November 7, 2008 letter on receipt of entry & separation service treatment records; **(3) No CUE** in RO March, 1980 or February 2009 decision denying Veteran service connection for: *Right hip DJD; *Left knee, DJD; *Left ankle, DJD; determined not entitled to

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C. Statement of the Facts

Veteran had active duty service From February, 1977 through February, 1980, where a Military Service DA Form 664 dated February 14, 1980 noted [**R.at pg.600**] Veteran filed application for compensation from the Veterans Administration sent to VA Regional Office, 2515 Murworth Drive, Houston, Texas 77054 included: [**R.at pg. 706 & 709**]

*VA Form 21-526e; *Reproduced copy #3
DD Form 214; * Health Records: SF 88
(Report of Medical Examination [entry &
separation]; SF 99 Report of Medical
History [entry]; SF 600 Health Record-
Chronical Report of Medical Care; SF

603 Health Record-Dental; Stamp dated
as received by Houston, R.O. on February
22, 1980 – VA Form 60-4582.

According to Department of Veterans Affairs November 7, 2008 letter reference 362/TRNG/IJB noted rating specialist working on Veteran application that listed: **[R.at pg. 1089]** & **[R.at pg.1092]**

*Erectile dysfunction, *Bilateral Tinnitus; *Asthma;
*Left knee degenerative; *Hearing Loss, bilateral;
*Low back pain; *Right hip, degenerative; *Left
ankle, degenerative; *GERD, Severe stomach;

request stated needed evidence showing conditions existed from military service to present time; noted on page 4 “Your claim for benefits was received on September 23, 2008; YET, also referenced receipt of: Copy of Service treatment records from the Service records department received by Houston VA. on February 1980; AND review of VA Outpatient treatment records; X-rays from Tri-City Comm. Hospital; Copy of DD-214 .{R.at pg.1105 to 1124}]

RO February 23, 2009 decision letter reference 362/21/RC and February 21, 2009 rating decision **{R. at pg.1053-1060}** for claim received September 23, 2008 committed clear and unmistakable error [CUE] incorrectly **applied regulatory and statutory provisions** as defined under 38 CFR section 3.307 {Presumptive Service Connection} denying Veteran presumption of service connection for the following 01/22/2009 C&P claimed CONDITIONS: **[R.at pg. 1061-1081]**

*Erectile dysfunction, *Bilateral Tinnitus;
*Asthma; *Left knee degenerative; *Hearing

Loss, bilateral; *Low back pain {spondylosis
Of the thoracic spine; *Right hip, degenerative;
*Left ankle, degenerative; *GERD, severe
stomach;

where rating specialist conceded in an RO November 7, 2008 letter reference 362/TRNG/IJB on pg. 4 [R.at pg.1092] bold paragraph: **We Have Received The Following:** listed receipt of Service Records Department dated February 1980 DA Form 664 {Service Member 's Statement Concerning Application for Compensation From the Veterans Administration (VA Form 21-526e)} Application for VA Benefits, AND provided service treatment records that included: *Health Records: SF 88 (Report of Medical Examination [entry & separation]; SF 99 Report of Medical History [entry]; SF 600 Health Record-Chronical Report of Medical Care; SF 603 Health Record-Dental; Stamp Dated as Received by Houston, R.O. on February 22, 1980 – VA Form 60-4582

RO February 21, 2009 rating decision conceded the following facts establishing veteran is entitled presumptive service connection for the following claimed conditions: [R.at pg. 1061–1070]

RO wrongfully denied veteran entitled presumptive service connection for condition currently **diagnosed by VA January 22, 2009 as *Spondylosis of the thoracic spine* {claimed as low back pain}; where the following evidence in the record met the required title 38 CFR section 3.303(b) chronicity & continuity provision's applicable, in substantiating a claim: (1) the condition is observed during service, (2) continuity of symptomatology is demonstrated thereafter and, (3) competent evidence relates the present condition to that symptomatology; shown by the following statement of the facts:

RO 2/21/09 rating decision {**R.at pg.1047-1057**} “evidence” section failed to list actual date Veteran file claim for benefits was within the required one year period after separation from service {according to service department records (DA Form 664) dated February, 1980} and confirmed in [**] RO February 2009 Reasons for Decision conceding to have reviewed service department treatment records from February, 1977 through February, 1980, YET, failed to note Service December 17, 1976 Report of Medical History Physician Summary SF-93 listing conditions: **Occasional Leg cramps;* **Occasional low back pain;* AND C&P Orthopedic Evaluation dated January 22, 2009 verifying in service complaint of *back pain* due to slipping off a tank & heavy lifting mechanic work injury dated September 1978; AND rating specialist reason for decision conceded [**] Continued treatment after service for back pain on January 9, 1999 Tri-City Community Hospital Jourdanton, Tx. & Dr. Blair M.D.; treated for back pain on December 27, 2003 to March 12, 2007 by Community General Hospital Dilley, TX.; establish required service connection elements demonstrating RO **wrongfully** denied veteran entitled “presumptive” service connection allegedly because rating specialist concluded: “no permanent residual or chronic disability subject to service connection is shown by the service medical records or demonstrated by evidence;” where VA examiner rational and opinion is not entitled to any weight where it contained only data and conclusions. See, Nieves-Rodriguez, 22 Vet. App. at 304.

RO 2/21/09 rating decision [**R.at pg1050-51**] committed [CUE] clear and unmistakable error wrongfully denied veteran entitled presumptive service connection and secondary service condition aggravation for:

***Left Knee, *Left Ankle, & *Right Hip**
presumptive claimed condition(s) aggravated
due to in-service (Rt & Lft) bilateral toenail
pain and removal treatment from June, 1977
through December 1979.

linked to in service December 17, 1976 Report of Medical History
Physician Summary SF-93 listing injury to left eye, Left ear Infection,
Cavity in teeth; *Occasional Leg cramps; Occasional low back pain;*
December 17, 1976 Report of Medical Exam SF-88 Pain & Discomfort
Right hand Radiating pain to elbow; Right wrist – x-ray WNL may have
joint sprain; March 8, 1977 Record of Medical Care Wedge 5th digit Left
foot, nail Left foot; June 5, 1977 Injury Right hand; July 1, 1977
ingrown toenail left foot, wedged excision to boarder great trunk left
foot; November 22, 1977 Remove toenail left foot; pain Rt. Wrist; April,
1978 follow-up Group A BETA Hemolytic Strep treated with pen.VK;
August 9, 1978 Tow Bar fell on hand pain & swelling (1st & 4th PIP
joint, fracture); December 13, 1978 Bruised toe, blueish skin around toe,
ROM WNL; March 19, 1979 discomfort left great toe – toenail
removed; July 5, 1979 dispense Kaopectate for diarrhea; December 11,
1979 Change dressing on toenail removed right foot; *erroneously*
concluding “ service treatment records show no diagnosis of or
treatment for: DJD, Left Knee, DJD, Left Ankle, & DJD, Right Hip
condition(s); **BUT** failed to weigh {presumptive service-connection}
where Veteran file claim for conditions within the required presumptive
one year period after separation from service, and evidence of record
verified required severity [**] Continued treatment after service for DJD
on January 9, 1999 Tri-City Community Hospital Jourdan, Tx. & Dr.
Blair M.D.; treated for pain on December 27, 2003 to March 12, 2007 by
Community General Hospital Dilley, TX.; establish required service

connection elements demonstrating RO **wrongfully** denied veteran entitled “presumptive” service connection and secondary service aggravation allegedly because rating specialist concluded: “no diagnosis of or treatment of degenerative joint disease(s) within one year of veteran release from military service;” where VA examiner rational and opinion is not entitled to any weight where it contained only data and conclusions. *See, Nieves-Rodriguez, 22 Vet. App. at 304:* AND where the following medical facts of record met the required chronicity provision’s applicable, in substantiating a claim: (1) the condition {in-service **chronic bilateral toe disorder**} & { in-service **Occasional Leg cramps; Occasional low back pain**} is observed during service, (2) continuity of symptomatology and aggravation of {ankle, knee, hip, spine} is secondary condition part of February, 1980 presumptive claim, thereafter and, (3) competent {medical treatment records} relate the present condition to in-service aggravation and symptomatology; shown to result in {ankle, knee, hip, spine} degenerative joint disease aggravation.

RO 2/21/09 rating decision [**R.at pg.1051**] committed [CUE] clear and unmistakable error wrongfully denied veteran entitled presumptive service connection and secondary service condition aggravation for:

- *Gastroesophageal reflux/severe stomach,
- *erectile dysfunction; and *Asthma;

RO wrongfully denied veteran entitled presumptive service connection for condition currently **diagnosed by VA January 22, 2009 as Gastroesophageal reflux {claimed as severe stomach but diagnosed in-service on May 1979 as “gastritis”}; where *erectile dysfunction & *asthma in combination with GERD are also entitled to secondary

aggravation linked to Note#5 thoracolumbar and cervical spine (claimed low back pain) }; where the following evidentiary facts on the record meet the required chronicity provision's applicable, in substantiating a claim showing: (1) the condition is observed during service, (2) continuity of symptomatology is demonstrated thereafter and, (3) competent evidence relates the present condition to that symptomatology; shown by the following statement of the facts:

RO 2/21/09 "evidence" section [R.at pg.1048] failed to list actual date Veteran file claim for benefits was **within the required one year period after separation from service {according to service department records (DA Form 664) dated February, 1980} and confirmed in [**] RO February 2009 Reasons for Decision conceding to have reviewed service department treatment records from February, 1977 through February, 1980, AND

**conceded that on May 1979 was diagnosed with "gastritis" and that **private treatment records from Dr. Ganeshappa M.D. dated June 17, 2004 esophagastro endoscopy diagnosed Gastroesophageal reflux; AND General rating formula for disease and injuries of the spine Note # 5 include gastrointestinal symptoms; breathing limited to diaphragmatic respiration, and neurological symptoms-contributing to erectile dysfunction}; ** met the required chronicity provision's applicable, in substantiating a claim showing: (1) the condition is observed during service or within one year after separation from service, (2) continuity of symptomatology or related dysfunction is demonstrated thereafter and, (3) competent evidence {not opinion} relates the present condition to that symptomatology and/or dysfunction.

RO December 13, 2012 decision letter [R.at pg.844-872] reference 372/CR7/AH and October 2, 2012 rating decision committed clear and unmistakable error [CUE] incorrectly applied regulatory and statutory provisions as defined under 38 CFR section 3.400(b)(2) {effective date} wrongfully assigned Veteran for “**Recurrent Tinnitus**” a February 29, 2012 effective date and maximum 10% percent service connection rating, where record show Veteran filed initial claim in DA Form 664 {Service Member ‘s Statement Concerning Application for Compensation From the Veterans Administration (VA Form 21-526e)} dated February 14, 1980 Application for VA Benefits, and then refiled claim again received by RO on September 23, 2008, according to Houston, R.O. November 7, 2008 reference letter 362/TRNG/IJB.

RO is required to pay Veteran retroactive benefits entitled at a rate of 10% percent effective as of February 14, 1980 date of Department of Veterans Affairs receipt of Veteran claim for compensation benefits, where RO November 7, 2008 letter conceded February 1980 to be the date RO received copy of veteran service treatment records from the Service Records Department.

RO February 23, 2009 decision letter and February 21, 2009 rating decision denied veteran at least 100% percent service connection rating based on a single examination that assigned Veteran a noncompensable service connection rating [R.at pg.1080] for Bilateral Hearing Loss because of a Left ear avg. hearing loss of 55 descibles with word recognition test result of 96 percent; Right ear avg. hearing loss of 44 decibles with word recognition test result of 96; BUT where RO December 19, 2008 VA examination diagnosed veteran with bilateral hearing loss, AND failed to weigh aggravation caused by service connected tinnitus, evidence by the following 2015 ENT examination.

South Texas ENT Consultants [R.at pg.744] June 2, 2015
Audiometric Examination noted Left ear avg. hearing loss of 75 decibels with word recognition test results of 56; Right ear avg. hearing loss 70 decibels with word recognition test results of 52; warrant overall combined Hearing Impairment with bouts of Vertigo {dizziness} with aggravated tinnitus warrant 100% percent rating as defined at Section 4.85(b) both ears, and 4.86(b) for right ear.

SUMMARY OF THE ARGUMENTS

Board [R.at pg.8] unfavorable reasons and bases for findings and conclusions note that "in reviewing all of the evidence on file, the Board found no {CUE} clear and unmistakable error of fact or of law in the rating decisions from March 1980, February 2009, and October 2012; and noted Veteran cannot argue CUE in the December 2017 [SOC] because Board noted there can be no CUE claim AND that [SOC] is not a decision and is not subject to CUE motion; in contradictory to provisions of [SOC] Section 19.29(b) summary of the applicable law and regulations with appropriate citations, & discussion how such laws & regulations effect the determination.

Board [R.at pg.10] state Veteran has not, however, submitted any

documents that show the correct facts were not before the adjudicators on any of claims filed; This is in essence, disagreement with how the RO weighted the evidence, which is not CUE is contradictory to the following Board concession that Veteran did, indeed, file a service connection claim on February 22, 1980, but that the only condition claimed at the time was his right wrist. Board concluded; "He {Veteran} did not claim any of the other conditions at issue in that 1980 claim;" is contradictory with Department of Veterans Affairs [R.at pg. 600] February 22, 1980 receipt of VA Service Department Records envelope linked to February 14, 1980 Military Service DA Form 664 Service Member application for compensation from the Veterans Administration mailed to VA Regional Office, 2515 Murworth Drive, Houston, Texas 77054 [R.at pg. 1207 & 1208] that provided:

*VA Form 21-526e; *Reproduced copy #3
DD Form 214; * Health Records: SF 88
(Report of Medical Examination [entry &
separation]; SF 99 Report of Medical

History [entry]; SF 600 Health Record-
Chronical Report of Medical Care; SF
603 Health Record-Dental;

AND where “Earlier Effective Date” & “Presumption of Service
Connection” is established and confirmed in a Department of Veterans
Affairs Regional Office, Houston Texas VA Form 07-3101 NOTICE
[R.at pg.1200] dated March 4, 1980 Request for Information stated:
Please verify all active military service and furnish any additional
[S.M.R.s] Service Medical Records.

Court attention is directed to record of proceeding [R.at pg.524]
Rating decision dated 01/27/2016 RO “Evidence” section [R.at pg.525],
Listing confirmation by RO of a December 28, 1983 receipt of Veteran
Military personnel records; linked to RO March 4, 1980 request for
Veteran SMR’s; establishing Veteran entitlement to a presumption of
service connection, and earlier effective date.

Board of Veterans Appeals (BVA) decision [R.at pg.11] erred in

concluding "Here, there were no communications from the Veteran in 1980 indicating any intent to apply for benefits other than the right wrist condition. There were NO reasonably raised claims for any other conditions; {contrary to **February 14, 1980** Military Service DA Form 664 Service Member application for compensation from the Veterans Administration}; Board concluded [**not RO**] there was no CUE in the RO's failure to adjudicate any claims other than the wrist in 1980;" overlooked Board had obligation to apply presumption of aggravation, or explain why presumption should not be applied; where [**R.at pg.525**] RO evidence note a **December 28, 1983** receipt of Veteran Military personnel records; linked to an RO **March 4, 1980** request for Veteran SMR's; sent after Veteran **February 22, 1980** initial claim for [***right wrist condition***] benefits; and [**R.at pg.1089**] subsequent **September 23, 2008** claim for [erectile dysfunction, tinnitus, asthma, degenerative left knee, low back pain, right hip degenerative changes, left ankle, DJD changes, GERD, gastroenteritis/diverticulosis, gastritis; right tibia,

deformity;] benefits; where Veteran claims filed were substantiated by the RO **December 28, 1983** receipt of Veteran Military personnel records as follow: Mar. to Dec.1979-77 toenail/pain removal; May, 1979 gastritis/GERD; Sept.,1978 back pain/pulled muscle; Aug.,1977 Left ear Audio Test worst than right ear; March, 1977 left foot, crepitation; March, 1977 possible gonnarhia; Jan.,1976 Right wrist injury; Aug.,1978 Right hand injury 1st&4th PIP joint; July 1979 Dental tooth repair; Mar., 1978 Strep throat; May, 1978 Poss. Appendicitis, etc.; entitled Veteran to a presumption of service connection, and earlier effective date; for any injury or disease incurred during active service & considered to have occurred in the line of duty unless it was result of service members willful misconduct. See, *Manio v. Derwinski*, 1 Vet. App. 140 (1991).

ARGUMENTS

Board May 17, 2019 decision and order [R.at pg.11-19] failed to reference RO reasons and bases for denying Veteran entitlement to

presumption of service connection or credible arguments supporting how RO correctly applied provisions of 38 CFR section 3.307 as follow:

1. RO 12/05/2017 [SOC] reasons and bases for its decision erred in denying any [CUE] clear and unmistakable error in RO initial March 10, 1980 rating decision denying Veteran 10% percent service connection effective February, 22 1980 for "Tinnitus" WHERE on one hand RO state:

On VA examination dated December 19, 2008 you denied having any tinnitus or tinnitus symptoms; in February 2009 rating decision you were denied S/C for tinnitus because condition was not shown in service;

THEN on the other hand rating specialist state: On October 2, 2012 rating decision veteran was granted S/C for "Tinnitus" at 10% percent disabling effective from February 2012 date to reopen claim for S/C tinnitus; because a private treatment record dated March 2012 show complaints of ringing in the ears; and a VA examination dated September 2012 it was noted you had tinnitus and it was reported that your tinnitus was a symptom associated with your hearing loss; where RO in its February 2009 rating decision granted veteran service connection for bilateral hearing loss, **evidence** veteran entitlement to an earlier effective date for "Tinnitus."

RO 12/05/2017 [SOC] reasons and bases for its decision concede to [CUE] clear and unmistakable error [February 2012 date to reopen claim] incorrectly applied 38 CFR section 3.400(b)(2) date of entitlement to an award of service connection is the day following

separation from active service [February,22 1980] or date entitlement arose if the claim is received within one year after separation from service; otherwise, date of receipt of claim, or date entitlement arose, whichever is later. In addition RO 12/05/2017 [SOC] erred in denying veteran February 1980 entitlement to service connection on presumptive basis as defined by 38 CFR section 3.307(a)(2) {Separation from service}.

2. RO 12/05/2017 [SOC] reasons and bases for its decision erred in denying any [CUE] clear and unmistakable error in RO initial March 10, 1980 rating decision denying Veteran rating in excess of 0% percent for "Bilateral hearing Loss" granted on February 21, 2009 rating decision WHERE rating specialist concede the following veteran lay statement:

"You indicated that you believe that rating decision dated February 21, 2009 was in error and should have assigned a 100% percent evaluation because you had tinnitus and bouts of vertigo;"

"A review of the private treatment records submitted in support of your claim shows that in March 2012 you reported a 3 day history of ringing in the ears, dizziness, and increased hearing loss. You were noted to have probable Meniere's disease. Met [DC 6205] 100% percent definition.

Director [EIC] 12/5/2017 [SOC] reasons and bases for its decision noted that Rating specialist conceded that:

"VA examination dated July 7, 2015 show Veteran left ear with 88% percent discrimination, with a 51 average decibel hearing loss; AND noted a right ear 94% percent discrimination, with a 45 average decibel hearing loss;

rating specialist conceded 0% percent evaluation was based on objective testing BUT failed to reference or provide regulatory required medical opinion disagreeing with Veteran private physician diagnosis of Veteran probable Meniere's syndrome, hearing impairment that demonstrated a nexus based on diagnosed vertigo/dizziness aggravation noted by VA regulation to be caused by Veteran presumptively claimed hearing loss and/or tinnitus.

3. RO 12/05/2017 [SOC] reasons and bases for its decision **erred** in denying any [CUE] clear and unmistakable error in RO initial March 10, 1980 rating decision denying Veteran {presumptive} service connection effective February, 22 1980 for **"Left Ankle" degenerative joint disease**, AND **"Left knee" degenerative joint disease** where rating specialist concede Veteran claimed filed on February 22, 1980 [eight day] after Veteran February 14, 1980 separation from service WHERE on one hand RO state:

"You were seen for ingrown toenails with toenail removal during service. Rating specialist 12/5/2017 [SOC] reasons and bases concede it reviewed veteran VA Form 21-526e received February 22, 1980 by noting the following relevant fact: "At your separation examination in October 1979, there was no indication of a left ankle disability; Yet failed to

explain why RO did not state this reason in its initial denial of Veteran claim for entitlement to a presumption of service connection in RO's March 1980 rating decision.

"Private treatment records show that in January 1999 you were noted to have left ankle pain and X-Ray of the left ankle revealed degenerative changes; AND noted left knee pain with X-Ray revealed left knee degenerative joint disease.

"By way of history, rating decision dated February 21, 2009 denied service connection for left ankle degenerative joint disease, AND left knee, degenerative joint disease because these condition WERE not incurred in, or caused by your active duty service, and were not diagnosed within one year of discharge from active duty service.

WHERE rating specialist on the other hand fails to provide the required VA initial medical opinion supporting denial of Veteran claim for "left ankle" and "left knee" degenerative joint disease obtained February 1980 prior to RO March 1980 rating decision; WHERE Director {EIC} "EVIDENCE" [SOC page 1] fails to list each and every veteran VA treatment date(s) reviewed by RO dated between February 1980 through January 2008.

4. RO 12/05/2017 [SOC] reasons and bases for its decision erred in denying any [CUE] clear and unmistakable error in RO initial March 10, 1980 rating decision denying Veteran {presumptive} service connection effective February, 22 1980 for "Spondylosis, thoracic spine (claimed as

low back pain) AND secondary Right hip, degenerative joint disease where rating specialist concede Veteran claimed filed on February 22, 1980 [eight day] after Veteran February 14, 1980 separation from service WHERE on one hand RO state:

“Your service treatment records show that prior to your service, at your enlistment examination in December 1976 you reported a history of recurrent back pain and cramps in your legs. During service, you were noted to have a 3 day history of back pain in September 1978, and you were treated for a pulled muscle.

“You indicated that you believe that service connection should have been granted on a presumptive basis because you filed a claim for service connection on February 22, 1980. It was your contention that aggravation of this Disability was not considered.

“Examiner indicated that there was no medical evidence Indicating that you continued to have symptoms following the treatment for low back pain during service until the injury in December 2007; overlooked the following relevant fact: Director {EIC} “EVIDENCE” [SOC page 1] fails to list each and every veteran VA treatment date(s) reviewed by RO dated between February 1980 through January 2008.

Then on the other hand rating specialist state: By way of history on February 21, 2009 rating decision denied service connection for: VA

January 22, 2009 diagnosis of: Spondylosis of the thoracic spine (claimed as low back pain) degenerative disc disease, and disc bulging; AND secondary Right hip degenerative joint disease; because these condition(s) were not shown ["to be chronic"] from military service to the present; [***indirectly concede nexus***] and then [***erroneously concluded***] there was no evidence of a link between your current back disability and the treatment received for your back during service.

5. RO 12/05/2017 [SOC] reasons and bases for its decision **erred** in denying any [CUE] clear and unmistakable error in RO initial March 10, 1980 rating decision denying Veteran {presumptive} service connection effective February, 22 1980 for **"Right wrist pain, and dislocation"** where rating specialist concede Veteran claimed filed on February 22, 1980 [eight day] after Veteran February 14, 1980 separation from service WHERE on one hand RO state:

"By way of history, rating decision dated March 10, 1980 denied service connection for right wrist pain and dislocation because this condition was not shown to be chronic and there was NO evidence of a right wrist dislocation;

"Your service treatment records show that prior to your active duty service, at your enlistment examination in December 1976, you had right hand pain radiating up to your elbow; In January 1977 it was noted that you injured your right wrist two months ago. An X-Ray of the right wrist was normal; however the examiner indicated that

your active duty service should be delayed. During active duty service, on November 1977 you reported having right wrist pain.

"There are no records showing treatment for a right wrist condition since your discharge from active duty service; WHERE Director [EIC] reasons and bases overlooked the following relevant fact: Director {EIC} "EVIDENCE" [SOC page 1] fails to list each and every veteran VA treatment date(s) reviewed by RO dated between February 1980 through January 2008.

6. RO 12/05/2017 [SOC] reasons and bases for its decision **erred** in denying any [CUE] clear and unmistakable error in RO initial March 10, 1980 rating decision denying Veteran {presumptive} service connection effective February, 22 1980 for **"Gastrosophageal reflux, with severe stomach (claimed as gastritis)"** where rating specialist concede Veteran claimed filed on February 22, 1980 [eight day] after Veteran February 14, 1980 separation from service WHERE on one hand RO state:

"Your service treatment records show that in May 1979 you were seen for gastritis. There are no further records showing treatment for a gastrointestinal condition throughout the remainder of your active duty service."

"Private treatment records show that in June 2004 you were noted to have gastritis. In March 2007 you were provided with a diagnosis of gastroesophageal reflux disease (GERD); By way of history, rating decision dated

February 21, 2009 denied service connection for [GERD] with severe stomach, because there was no link between your current disability and the treatment received for gastritis during your active duty service.

Then on the other hand rating specialist state: Gastroesophageal reflux with severe stomach is not a disease subject to presumptive service connection **contradictory** to the following: The chronicity provision of 38 CFR section 3.303(b) is applicable where evidence, regardless of the date, shows that a veteran had a chronic condition in service and still has such condition, [in June 2004].

RO 12/05/2017 [SOC] reasons and bases for its decision **erred** in denying any [CUE] clear and unmistakable error in RO initial March 10, 1980 rating decision denying Veteran {presumptive} service connection effective February, 22 1980 for **"Erectile dysfunction"** where rating specialist concede Veteran claimed filed on February 22, 1980 [eight day] after Veteran February 14, 1980 separation from service WHERE on one hand RO state:

"Private treatment records show that in August 1988 you were noted to have erectile dysfunction."

"By way of history, rating decision dated February 21, 2009 denied service connection for erectile dysfunction because this condition was not incurred in or caused by your active duty service."

Then on the other hand rating specialist state: Erectile dysfunction is not a disability subject to presumptive service connection under 38 CFR 3.309a WHERE erectile dysfunction is ratable under DC-7522 Penis, loss of erectile power; WHERE in addition Director [EIC] 12/05/2017 [SOC] is contradictory with chronicity provision of 38 CFR section 3.303(b) is applicable where evidence, regardless of the date, shows that a veteran had a chronic condition in service [or claimed within the presumptive period after separation from service] and still has such condition, [in August 1988].

8. RO 12/05/2017 [SOC] reasons and bases for its decision erred in denying any [CUE] clear and unmistakable error in RO initial March 10, 1980 rating decision denying Veteran {presumptive} service connection effective February, 22 1980 for **"Mandibular/maxilla pain, due to wire left in #3 tooth root canal"** where rating specialist concede Veteran claimed filed on February 22, 1980 [eight day] after Veteran February 14, 1980 separation from service WHERE on one hand RO state:

"Your service treatment records show that in December 1976 you reported a history of cavities. During service you had several dental procedures.

"By way of history, rating decision dated October 13, 2015 denied service connection for #3 tooth (inner piece wire left in root canal) because rating specialist determined "not an actually disabling condition."

Then on the other hand rating specialist state: The decision to deny

compensation for #3 tooth (inner piece wire left in root canal) is not considered to have been CUE because the decision was properly based on the available evidence of record at the time and the rules then in effect; **is erroneous** based on the following undisputed fact: Director {EIC} "EVIDENCE" [SOC page 1] fails to list each and every veteran VA treatment date(s) reviewed by RO dated between February 1980 through January 2008; WHERE in addition Director [EIC] 12/05/2017 [SOC] is contradictory with chronicity provision of 38 CFR section 3.303(b) is applicable where evidence, regardless of the date, shows that a veteran had a chronic condition [***dental procedure***] in service [or claimed within the presumptive period after separation from service] wire left in root canal; and still has such condition see [June 2015 ENT].

9. RO 12/05/2017 [SOC] reasons and bases for its decision **erred** in denying any [CUE] clear and unmistakable error in RO initial March 10, 1980 rating decision denying Veteran {presumptive} service connection effective February, 22 1980 for "***Asthma***" where rating specialist concede Veteran claimed filed on February 22, 1980 [eight day] after Veteran February 14, 1980 separation from service WHERE on one hand RO state:

"Your service treatment records do not show a diagnosis complaint, or treatment for asthma at any time during your active duty service;

There is no records showing evidence of asthma since your discharge from active duty service.

By way of history, rating decision dated February 21, 2009 denied service connection for asthma because this condition was not incurred in or caused by your active duty service;

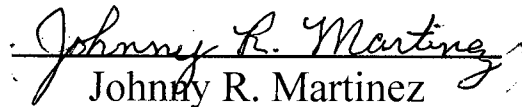
Then on the other hand rating specialist state: Asthma is not a disability subject to presumptive service connection under 38 CFR 3.309a **is erroneous** based on the chronicity provision of 38 CFR section 3.303(b) is applicable where evidence, regardless of the date, shows that a veteran had a chronic condition [respiratory condition] in service [or claimed within the presumptive period after separation from service] for Asthma, and still has such condition.

CONCLUSION

WHEREFORE based on the evidence and argument presented above by the Veteran, demonstrate that the Board failed to review all the evidence of record; failed to provide a defense related to Director Evidence Intake Center December 5, 2017 [SOC] reasons and bases for denying Veteran entitlement to service connection and prior presumption of service connection; demonstrating that the Director Evidence Intake Center reasons for decision correctly applied Title 38

Regulations, did not fail to correct any errors of fact and law, prior to appeal to the Board of Veterans Appeals.

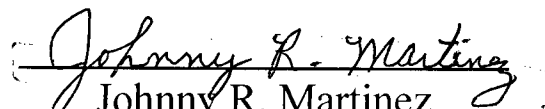
Respectfully Submitted


Johnny R. Martinez
16861 W. FM 117, Unit A
Dilley, TX. 78017

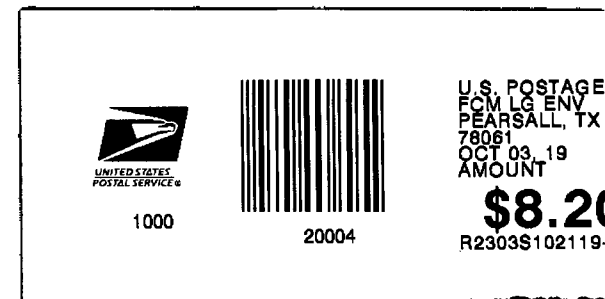
CERTIFICATE OF SERVICE

I certify that on this 4th day of October 2019 Veteran file the following Informal Brief in Support of Appeal with the U.S. Court of Appeals for Veterans Claims, 625 Indiana Avenue, N.W., Suite 900, Washing, D.C. 20004, with copy to the Office of the General Counsel, 810 Vermont Avenue, N.W., Washington, D.C. 20420 sent by certified mail.

Respectfully Submitted


Johnny R. Martinez
16861 W. FM 117, Unit A
Dilley, TX. 78017

Johnny R. Martinez
16861A W. FM 117
Dilley, Tx. 78017



U. S. Court of Appeals for Veterans Claims
625 Indiana Avenue, Suite 900
Washington, D.C. 20004