

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

WILFRED D. BEAN,)	
Petitioner,)	
)	
v.)	Vet. App. No. 20-1518
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
Respondent.)	

**SECRETARY'S RESPONSE TO PETITION
FOR EXTRAORDINARY RELIEF**

Pursuant to U.S. Vet. App. R. 21(b), and the Court's March 10, 2020, Order, Respondent, Robert L. Wilkie, Secretary of Veterans Affairs (Secretary), hereby answers the petition for extraordinary relief filed on March 2, 2020. For the reasons set forth below, the Court should dismiss the petition as moot.

RELEVANT FACTS

On July 11, 1997, a VA Regional Office (RO) denied Petitioner's claims for service connection for Post-Traumatic Stress Disorder (PTSD), chloracne, and sarcoma. Petitioner did not file a Notice of Disagreement as to this decision, and it became final.

On August 14, 2006, Petitioner made an informal claim for service connection for an acquired psychiatric disorder to include major depression and generalized anxiety disorder and/or PTSD. On October 4, 2007, the RO granted Petitioner service connection for PTSD, at 30%, effective August 14, 2006. Petitioner appealed the rating and the effective date assigned and on June 11,

2008, VA issued a Statement of the Case (SOC), denying Petitioner a higher rating and an earlier effective date for service connection for PTSD. Petitioner appealed and, on May 31, 2012, the Board of Veterans Appeals (Board) granted entitlement to a disability rating of 70 percent for service-connected PTSD from August 14, 2006, and denied entitlement to an effective date earlier than August 14, 2006, for entitlement to service connection for PTSD. The Board stated in the May 31, 2012, decision that previous determinations which are final and binding will be accepted as correct in the absence of clear and unmistakable error (CUE) and that if the Veteran believes that the RO made a mistake in its decision, he can file a claim alleging CUE in the July 1997 RO decision.

On July 26, 2012, Petitioner submitted a Motion for Revision Based on CUE and on September 13, 2013, the VA RO denied entitlement to an earlier effective date for service-connected PTSD. Petitioner appealed that decision and on May 10, 2019, the Board dismissed his appeal for an earlier effective date for service connection for PTSD. Petitioner appealed that decision to this Court and has asked for a stay in that case, pending the issuance of a decision in this case. See *Bean v. Wilkie*, docket no. 19-4116. Petitioner alleges that VA has unnecessarily delayed adjudicating his claim and requests that the Court order the Secretary to issue a decision on claims for service connection for depression and anxiety, which he alleges having been pending and unadjudicated since 1997. See Petition.

RESPONSE TO PETITION

The Court has the authority to issue writs in aid of its jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). See *Ramsey v. Nicholson*, 20 Vet.App. 16, 21 (2006); see also *Cox v. West*, 149 F.3d 1360 (Fed. Cir. 1998). However, “[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.” *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976). The Court should not issue a writ unless: (1) the petitioner has no other adequate means to attain the relief he desires; (2) the petitioner can demonstrate a clear and indisputable right to the issuance of the writ; and (3) the court is convinced that the circumstances warrant issuance of the writ. *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004). In addition, this Court has adopted the case-or-controversy jurisdictional requirements imposed by Article III of the U.S. Constitution. *Aronson v. Brown*, 7 Vet.App. 153, 155 (1994). Where the particular relief sought by a petitioner has been afforded, the petition is moot. See *Chandler v. Brown*, 10 Vet.App. 175, 177 (1997) (citing *Mokal v. Derwinski*, 1 Vet.App. 12 (1990)).

On April 4, 2020, VA issued a decision in Petitioner’s case, determining that the rating decision dated July 11, 1997, did not contain CUE and that the decision did not leave adjudicated any claims of service connection for generalized anxiety disorder and major depression because neither of those conditions were ever claimed. Exhibit 1. On April 7, 2020, VA sent Petitioner a copy of the April 4, 2020, decision along with a notification letter containing information on what the Petitioner should do if he disagrees with the April 4,

2020, decision. Exhibit 2 at 2. Petitioner has one year from the date of the letter to appeal the RO's determination that the July 1997 RO decision was not the product of CUE.

The Secretary contends that Petitioner has not demonstrated a clear and indisputable right to the writ. See *Cheney*, 542 U.S. 367, 380-81. Because VA has issued a decision in Petitioner's case, the relief that he requests has been granted. If he disagrees with the decision, he may avail himself of VA's appeals process. See *Lamb v. Principi*, 284 F.3d 1378, 1384 (Fed. Cir. 2002) (holding that writs "cannot be used as substitutes for appeals" (quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953))). Accordingly, the issuance of an extraordinary writ is not warranted, and the Court should dismiss the petition as moot.

WHEREFORE, the Secretary responds to the petition for extraordinary relief and the Court's Order, and for the foregoing reasons, respectfully requests that the Court dismiss the petition.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Selket N. Cottle
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Deputy Chief Counsel (027I)

/s/ Matthew Gaw
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For the Secretary of Veterans Affairs

EXHIBIT 1



**DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Regional Office**

WILFRED BEAN

**Represented By:
AMERICAN LEGION
Rating Decision
04/04/2020**

INTRODUCTION

The records reflect that you are a veteran of the Vietnam Era. You served in the Army from November 16, 1966 to November 14, 1969. A special review of your file was mandated on May 10, 2019. Based on the review and the evidence listed below, we have made the following decision(s).

DECISION

Rating decision approved July 11, 1997 does not contain a clear and unmistakable error.

EVIDENCE

- Facts contained in BVA decisions dated May 31, 2012 and May 10, 2019 are hereby incorporated by reference.
- VA Form 21-4238 received September 6, 2012
- VA Form 21-526 received February 24, 1997
- Service treatment records received February 5, 2014



- Appellate Brief received March 6, 2019

REASONS FOR DECISION

Whether rating decision approved July 11, 1997 contained a clear and unmistakable error by not applying 38 CFR 3.106 (c).

A clear and unmistakable error is a very specific and rare kind of error. It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. If it is not absolutely clear that a different result would have ensued, the error complained of cannot be clear and unmistakable. Generally, either the correct facts, as they were known at the time, were not before VA, or the statutory and regulatory provisions extant at the time were incorrectly applied.

We cannot find that rating decision approved July 11, 1997 contained a clear and unmistakable error because there is no evidence showing that the decision maker failed to apply or incorrectly applied the appropriate laws or regulations. (Note: These legal errors commonly involve pre-reduction due process or the failure to apply a statutory or regulatory presumption), the decision maker overlooked material facts of record, or the decision maker failed to follow a procedural directive that involved a substantive rule (a rule that regulates a right).

In his appellate brief, your representative indicated that VA erred by not addressing the issue of service connection for generalized anxiety disorder and major depression when your original claim was for service connection for PTSD. He further contended that rating decision approved July 11, 1997 failed to consider 38 CFR 3.160 (c). That regulation defined a pending claim as an application for formal or informal, which has not been finally adjudicated.

The records show that on February 24, 1997, you submitted a VA Form 21-526 requesting service connection for post-traumatic stress disorder. Rating decision dated July 11, 1997 denied service connection for PTSD, and you were notified by letter dated July 18, 1997. You did not claim service connection for generalized anxiety disorder or major depression; therefore, a decision did not include them as issue. In the absence of a timely filed notice of disagreement, that decision became final by operation of law on July 18, 1998.

VA regulation 38 CFR 3.160 (b) defines an original claim as an initial formal application on a form prescribed by the Administrator, and 38 CFR 3.160(d) defines a finally adjudicated claim as one where an application has been allowed or disallowed by the agency of original jurisdiction, the action having become final by the expiration of 1 year after the date of notice of an award or disallowance, whichever is earlier.

Based on the above, we find that rating decision dated July 11, 1997 did not contain a clear and unmistakable error and that decision did not leave any unadjudicated claims of service connection for generalized anxiety disorder and major depression because neither of these conditions were ever claimed.



WILFRED BEAN

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REFERENCES:

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our website, www.va.gov.



EXHIBIT 2



April 7, 2020

WILFRED D BEAN
555 LIVINGSTON CT
DISCOVERY BAY CA 94505

We made a decision on your VA benefits.

Dear Wilfred Bean:

This letter will guide you through the information you should know and steps you may take now that VA has made a decision about your benefits.

A special review was mandated on May 10, 2019. The decision that was made was:

Rating decision approved July 11, 1997 does not contain a clear and unmistakable error.

Your Benefit Information:

The payment table below is for historical purposes only. Your compensation payments will remain unchanged.

Your monthly entitlement amount is shown below:

Monthly Entitlement Amount	Payment Start Date	Reason
\$2,528.00	Sep 1, 2006	Original Award
\$2,610.00	Dec 1, 2006	Cost of Living Adjustment
\$2,669.00	Dec 1, 2007	Cost of Living Adjustment
\$2,823.00	Dec 1, 2008	Cost of Living Adjustment
\$2,924.00	Dec 1, 2011	Cost of Living Adjustment
\$2,973.00	Dec 1, 2012	Cost of Living Adjustment
\$3,017.60	Dec 1, 2013	Cost of Living Adjustment

We have included with this letter:

1. Explanation of Payment
2. Additional Benefits
3. Where to Send Written Correspondence
4. VA Form 20-0998
5. Rating Decision - Narrative (04/04/2020)

Contact information:

Web: www.vets.gov
Phone: 1-800-827-1000
TDD: 711
To send questions online: visit <https://iris.custhelp.com/>

Social Media:

Twitter: @VAVetBenefits
Facebook: www.facebook.com/VeteransBenefits

Your representative:

You appointed AMERICAN LEGION as your accredited representative. They have also received a copy of this letter.

They can help you with any questions you have about your claim.

If you or someone you know is in crisis, call the *Veterans Crisis Line* at 1-800-273-8255 and press 1.



Monthly Entitlement Amount	Payment Start Date	Reason
\$3,017.60	Jan 1, 2014	Cost of Living Adjustment
\$3,068.90	Dec 1, 2014	Cost of Living Adjustment
\$3,078.11	Dec 1, 2016	Cost of Living Adjustment
\$3,139.67	Dec 1, 2017	Cost of Living Adjustment
\$3,227.58	Dec 1, 2018	Cost of Living Adjustment
\$3,279.22	Dec 1, 2019	Cost of Living Adjustment

We are currently paying you as a Veteran with one dependent. *Let us know right away if there is any change in the status of your dependents.*

If payments are due, you should receive your first payment, if not already in receipt of payments, within 7-10 days of this notice.

See **Explanation of Payment** for more details about your payment.

Your payment will be directed to the financial institution and account number that you specified. To confirm when your payment was deposited, please contact your financial institution.

If this account is no longer open,

please notify us immediately.

What You Should Do If You Disagree With Our Decision

If you do not agree with our decision, you have one year from the date of this letter to select a review option in order to protect your initial filing date for effective date purposes. You must file your request on the required application form for the review option desired. The table below represents the review options and their respective required application form.

Review Option	Required Application Form
Supplemental Claim	VA Form 20-0995, <i>Decision Review Request: Supplemental Claim</i>
Higher-Level Review	VA Form 20-0996, <i>Decision Review Request: Higher-Level Review</i>



Review Option	Required Application Form
Appeal to the Board of Veterans' Appeals	VA Form 10182, <i>Decision Review Request: Board Appeal (Notice of Disagreement)</i>

Please note: You may not request a higher-level review of a higher-level review decision issued by VA.

The enclosed VA Form 20-0998, *Your Rights To Seek Further Review Of Our Decision*, explains your options in greater detail and provides instructions on how to request further review. You may download a copy of any of the required application forms noted above by visiting www.va.gov/vaforms/ or you may contact us by telephone at 1-800-827-1000 and we will mail you any form you need.

You can visit www.va.gov/decision-reviews to learn more about how the disagreement process works.

If you would like to obtain or access evidence used in making this decision, please contact us by telephone, email, or letter as noted below letting us know what you would like to obtain. Some evidence may be obtained online by visiting www.va.gov.

Thank you for your service,

Regional Office Director

cc: AMERICAN LEGION



Explanation of Payment

Your monthly entitlement amount includes payment for the following dependent(s):

Payment Start Date	Award Dependent(s)
Sep 1, 2006	Maria
Dec 1, 2006	Maria
Dec 1, 2007	Maria
Dec 1, 2008	Maria
Dec 1, 2011	Maria
Dec 1, 2012	Maria
Dec 1, 2013	Maria
Jan 1, 2014	Maria
Dec 1, 2014	Maria
Dec 1, 2016	Maria
Dec 1, 2017	Maria
Dec 1, 2018	Maria
Dec 1, 2019	Maria

Let us know right away if there is any change in the status of your dependent(s).

Please Take Action: What Things Affect Your Right to Payment?

Please notify VA *immediately* if there is a change in any condition affecting your right to continued payments. If you don't notify us of these changes immediately, you may have to return any overpayments. Those changes include:

Evidence received shows a change is warranted.
<p>Military Pay or Worker's Compensation: Your payments may be affected by the following, which you must bring to our attention:</p> <ul style="list-style-type: none">• Reentrance into active military or naval service.• Receipt of armed forces service retirement pay, unless your retirement pay has already been reduced because of award of disability compensation.• Receipt of benefits from the Office of Federal Employees Compensation.• Receipt of active duty or drill pay as a reservist or member of the National Guard.



Evidence received shows a change is warranted.
Dependents: If you have a disability rating of 30 percent or more, you must advise VA of any change with your spouse or children.
Hospitalization: If your award includes Aid and Attendance benefits, we may reduce this additional allowance if you are admitted to a hospital, nursing home, or domiciliary care at VA expense.
Incarceration: Benefits will be reduced if you are incarcerated in a federal, state, or local penal institution for more than 60 days for conviction of a felony.
Lack of Cooperation: We may stop monthly payments if you: <ul style="list-style-type: none"> • fail to submit evidence we requested, • fail to attend a VA examination when requested, or • Submit false or fraudulent evidence to VA, or cause false or fraudulent evidence to be submitted to VA.
Fraud/Lying to Government: The law provides severe penalties, which include fines, imprisonment, or both, for the fraudulent acceptance of any payment to which you are not entitled. We may verify information you submit through computer-matching programs with other agencies.

Additional Benefits

Medical Care and Treatment: <ul style="list-style-type: none"> • <u>Mental Health Counseling:</u> For more information, please visit www.myhealth.va.gov/mhv-portal-web/. • <u>Blind Rehabilitation:</u> For more information, please visit www.va.gov/blindrehab/.
Home Adaptations/Loans, Automobile Benefits, and Life Insurance: <ul style="list-style-type: none"> • <u>Loans:</u> For more information, please visit www.benefits.va.gov/homeloans/. • <u>Funding Fee Refund:</u> If you paid a funding fee at the closing of a VA guaranteed home loan and your VA compensation award provides an effective rating date that was prior to your loan closing date, then you may be eligible for a funding fee refund. Please contact either your current mortgage servicer or a VA Regional Loan Center at (877) 827-3702 to begin the refund process.



Where to Send Your Written Correspondence

The time it takes your response to reach VA affects how long it takes us to process your claim. We recommend responding electronically whenever possible. Only claimants or representatives can upload responses electronically currently. If you are not a claimant or representative, we recommend faxing so VA can receive your responses without wasting the time and money required to mail your documents.

The **fastest** way to respond to VA is to upload your response electronically through VA.gov.

Visit <https://www.va.gov> and under **Disability** click “Upload evidence to support your claim”

VA.gov provides one easy location to upload correspondence as well as learn about filing claims, check claim status, find out how much money you have left to pay for school or training, or refill prescriptions and communicate with your health care team among many items.

If you need to fax or mail your correspondence, identify the benefit type; then, use the corresponding fax number or mailing address below:

Faxing:

<u>Compensation Claims</u> Toll Free: 1-844-531-7818	<u>Pension & Survivors Benefit Claims</u> Toll Free: 1-844-655-1604
<u>Board of Veterans’ Appeals</u> Toll Free: 1-844-678-8979	<u>Fiduciary</u> Toll Free: 1-888-581-6826

Mailing Addresses:

<u>Compensation Claims</u> Department of Veterans Affairs Compensation Intake Center P.O. Box 4444 Janesville, WI 53547-4444	<u>Pension & Survivors Benefit Claims</u> Department of Veterans Affairs Pension Intake Center P.O. Box 5365 Janesville, WI 53547-5365
<u>Board of Veterans’ Appeals</u> Department of Veterans Affairs Board of Veterans’ Appeals P.O. Box 27063 Washington, DC 20038	<u>Fiduciary</u> Department of Veterans Affairs Fiduciary Intake Center P.O. Box 5211 Janesville, WI 53547-5211

These addresses serve **all United States and foreign locations.**



You can also send a text message to 838255 to receive confidential support 24 hours a day, 7 days a week, 365 days a year. For more information, visit www.veteranscrisisline.net

YOUR RIGHTS TO SEEK FURTHER REVIEW OF OUR DECISION

After careful and compassionate consideration of the matter(s) before VA, we have reached a decision. This document outlines your rights to seek further review of our decision on any issue with which you are dissatisfied or disagree. This document does not apply to decisions issued by the Board of Veterans' Appeals (Board), which have a separate rights notice. For **most VA benefits**, you must elect one of the review options discussed below within **one year** of the date on your decision notice letter to preserve your right to receive the maximum possible benefit. **Consult your decision notice letter for specific filing time limits.** If you are a party to a **contested claim**, you must file an appeal to the Board within **60 days** of the date on your decision notice letter in order to seek review. All parties to a contested claim will have received notice of the decision. See the section below regarding filing an appeal to the Board. You may select different review options for each issue decided by VA. The options are as follows:

Review Options	VA Benefit Claim	Parties to a Contested Claim	Insurance Claim	Fiduciary Decision
Supplemental Claim		Not Available		Not Available
Higher-Level Review		Not Available		
Appeal to the Board				
U.S. District Court Complaint	Not Available	Not Available		Not Available

VA benefits include Compensation, Pension/Survivors Benefits, Education, Loan Guaranty, Vocational Rehabilitation & Employment, Veterans Health Administration, or National Cemetery Administration.

You **MAY NOT** concurrently file for review of any single issue using more than one option at a time. The following is an overview of each option to help you select the most appropriate course of action. You can also find detailed information on all of the available review options and apply at www.vets.gov.

Descriptions of Review Options

Supplemental Claim	Higher-Level Review	Appeal to the Board	U. S. District Court
<p>Use this option when you have additional evidence that is NEW AND RELEVANT to support granting the benefit(s) sought or you can identify existing relevant records that you would like VA to obtain. (NEW evidence means information not previously submitted to VA, and RELEVANT evidence means information that tends to prove or disprove a matter at issue.)</p> <p>VA will assist you in gathering new and relevant evidence to support a Supplemental Claim.</p>	<p>Use this option when you have NO additional evidence to submit, or that you would like VA to obtain, in support of a previously decided issue.</p> <p>You <i>may not</i> request a Higher-Level Review of a Higher-Level Review decision or a Board decision.</p> <p>The designated reviewer will conduct a brand new review of the issue(s) based on the evidence that was before VA at the time of the prior decision(s). An informal conference is available to you and/or your representative, if you choose to exercise this option. The purpose of this telephonic contact is to point out specific errors in the case. VA will not consider any new evidence.</p>	<p>Use this option to appeal to the Board for consideration by a Veterans Law Judge. You may appeal to the Board from a Supplemental Claim decision or a Higher-Level Review decision.</p> <p>When appealing to the Board, you may request a hearing with a Veterans Law Judge and/or the opportunity to submit additional evidence. You may also choose for the Board to review your claim without any additional evidence or a hearing, which may result in a faster decision. By selecting one of these options, the Board will place your appeal onto a list for consideration in the order it was received.</p> <p>The Board does not have a duty to assist you in obtaining additional evidence, but may review whether VA properly fulfilled its duty to assist you in the original claim process and may remand your claim on that basis.</p>	<p>(INSURANCE CLAIMS ONLY)</p> <p>You may challenge VA's decision on your insurance application or claim by filing a complaint with a United States district court in the jurisdiction in which you reside within six years from when the right of action first accrues.</p> <p>To find a district court, use the map at: www.uscourts.gov/court_locator.aspx.</p>

How do I request review by VA of my decision?

To select a review option, you must submit the appropriate form to the appropriate office for review.

For a **Supplemental Claim**, consult your decision notice letter for the required forms and ways to submit the request.

For a **Higher-Level Review**, complete **VA Form 20-0996, Decision Review Request: Higher-Level Review** (available at www.va.gov/vaforms/), and consult your decision notice letter for the required ways to submit the request.

To **Appeal to the Board**, complete **VA Form 10182 - Decision Review Request: Board Appeal (Notice of Disagreement)** (available at www.va.gov/vaforms/), and send the form to:

Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038
Fax: 844-678-8979

Can someone help me with my request for review?

Yes, VA recognizes and accredits attorneys, claims agents, and Veterans Service Organizations (VSOs) representatives to assist VA claimants with their benefits claims. VSOs and their representatives are not permitted to charge fees or accept gifts for their services. Only VA-accredited attorneys and claims agents may charge you fees for assisting in a claim for VA benefits, and only after VA has issued an initial decision on the claim and the attorney or claims agent has complied with the power-of-attorney and the fee agreement requirements. For more information on the types of representatives available, see www.va.gov/ogc/accreditation.asp.

If you have not already selected a representative, or if you want to change your representative, a searchable database of VA-recognized VSOs and VA-accredited attorneys, claims agents, and VSO representatives is available at www.va.gov/ogc/apps/accreditation/index.asp. Contact your local VA office for assistance with appointing a representative or visit www.ebenefits.va.gov.

What happens if I do not submit my request for review on time?

If you do not request a review option within the required time limit, you may only seek review through the following options:

- File a request for revision of the decision based on a clear and unmistakable error in the decision;
- File a Supplemental Claim along with new and relevant evidence to support your issue(s). Where a Supplemental Claim is filed after the time limit to seek review of a decision, the effective date for any resulting award of benefits generally will be tied to the date that VA receives the Supplemental Claim.

For more information on all the available review options visit: www.va.gov, or www.vets.gov or contact us at 1-800-827-1000.

NOTE: This form supersedes VA Forms 4107, 4107C, 4107VHA, 4107VRE, 4107INS for VA decisions after the publication in the Federal Register of the applicability date on which the *Veterans Appeals Improvement and Modernization Act of 2017* goes into effect.



**DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Regional Office**

WILFRED BEAN

**Represented By:
AMERICAN LEGION
Rating Decision
04/04/2020**

INTRODUCTION

The records reflect that you are a veteran of the Vietnam Era. You served in the Army from November 16, 1966 to November 14, 1969. A special review of your file was mandated on May 10, 2019. Based on the review and the evidence listed below, we have made the following decision(s).

DECISION

Rating decision approved July 11, 1997 does not contain a clear and unmistakable error.

EVIDENCE

- Facts contained in BVA decisions dated May 31, 2012 and May 10, 2019 are hereby incorporated by reference.
- VA Form 21-4238 received September 6, 2012
- VA Form 21-526 received February 24, 1997
- Service treatment records received February 5, 2014



- Appellate Brief received March 6, 2019

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Whether rating decision approved July 11, 1997 contained a clear and unmistakable error by not applying 38 CFR 3.106 (c).

A clear and unmistakable error is a very specific and rare kind of error. It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. If it is not absolutely clear that a different result would have ensued, the error complained of cannot be clear and unmistakable. Generally, either the correct facts, as they were known at the time, were not before VA, or the statutory and regulatory provisions extant at the time were incorrectly applied.

We cannot find that rating decision approved July 11, 1997 contained a clear and unmistakable error because there is no evidence showing that the decision maker failed to apply or incorrectly applied the appropriate laws or regulations. (Note: These legal errors commonly involve pre-reduction due process or the failure to apply a statutory or regulatory presumption), the decision maker overlooked material facts of record, or the decision maker failed to follow a procedural directive that involved a substantive rule (a rule that regulates a right).

In his appellate brief, your representative indicated that VA erred by not addressing the issue of service connection for generalized anxiety disorder and major depression when your original claim was for service connection for PTSD. He further contended that rating decision approved July 11, 1997 failed to consider 38 CFR 3.160 (c). That regulation defined a pending claim as an application for formal or informal, which has not been finally adjudicated.

The records show that on February 24, 1997, you submitted a VA Form 21-526 requesting service connection for post-traumatic stress disorder. Rating decision dated July 11, 1997 denied service connection for PTSD, and you were notified by letter dated July 18, 1997. You did not claim service connection for generalized anxiety disorder or major depression; therefore, a decision did not include them as issue. In the absence of a timely filed notice of disagreement, that decision became final by operation of law on July 18, 1998.

VA regulation 38 CFR 3.160 (b) defines an original claim as an initial formal application on a form prescribed by the Administrator, and 38 CFR 3.160(d) defines a finally adjudicated claim as one where an application has been allowed or disallowed by the agency of original jurisdiction, the action having become final by the expiration of 1 year after the date of notice of an award or disallowance, whichever is earlier.

Based on the above, we find that rating decision dated July 11, 1997 did not contain a clear and unmistakable error and that decision did not leave any adjudicated claims of service connection for generalized anxiety disorder and major depression because neither of these conditions were ever claimed.



REFERENCES:

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our website, www.va.gov.

