Department of Veteran's Affairs
ATTN: 318/BDD/LCL

09/28/2019

This is a claim for CUE, Clear and Unmistakable Error, under provisions of 38 USC 5109A Revision of decisions on grounds of clear and unmistakable error for violation of:

38 CFR 4.2 — Interpretation of examination
38 CFR 4.6 — Evaluation of evidence
38 FCR 4.114 Code 7319 — Irritable Bowel Syndrome
38 FCR 4.114 Code 7346 — Hiatal Hernia

Veteran respectfully requests the VA call a clear and unmistakable error on part of the March 23, 2011 rating decision from the Winston Salem VA Regional Office and to correct it. The legal requirements of the laws in effect at that time were not met, the probative evidence contained in the Veteran's service treatment records that warranted the May 23, 2019 recent award of service connection for this same disability not thoroughly and conscientiously studied. This resulted in the erroneous denial in March 23, 2011 for service-connection for Irritable Bowel Syndrome (IBS), also claimed as colon polypectomy and Acid Reflux (GERD). Had the legal requirements of the laws in effect at that time been met and the preponderance of supporting evidence contained in the Veteran's service treatment records considered, it would have manifestly changed the outcome of the decision resulting in the Veteran receiving more years' worth of a higher level of disability.

NOTE: VA Rating Decision dated March 23, 2011 co-mingled IBS and GERD comments and observations. In the C&P report dated 07/31/2010, Dr. Craig Bischoff co-mingled IBS and GERD comments and observations. For the sake of clarity, IBS facts and CUEs will be presented separately from GERD facts and CUEs in this CUE request.

GERD

Exhibit — 1, VA rating decision dated March 23, 2011, page 14, item 19, paragraph 1, sentence 3

- "Service connection for ...acid reflux) is denied since there is no evidence a chronic condition exists."

is disputed by

Exhibit — 1, page 14, item 19, paragraph 2, sentence 2

- "A review of your available service treatment records shows evidence of complaints of esophageal reflux."

and by

Exhibit — 1, page 15, paragraph 1, sentences 1 and 3

- "... symptoms include heartburn, epigastric pain, scapular pain, black-tarry stools, reflux and regurgitation with nausea and vomiting."
- "The examiner noted moderate reflux was shown on upper gastrointestinal series...."

and by

Exhibit — 3, VA contemporaneous Upper GI Series report by Dr. Jack Lowdon, dated 7/23/2010 stating

- "moderately frequent reflux"

and by

Exhibit — 4, C&P Addendum request dated 7/23/2010, page 2, shows diagnosis from Dr. Craig Bischoff

- "moderate reflux"

and by

Exhibit — 5, C & P Report dated 7/31/2010, page 2, paragraph 4, under heading "Specific History For: Acid Reflux", sentences 4 — 8 Dr. Craig Bischoff stated in part

- "Over the past 6 months the claimant has lost 15 pounds.
- "The claimant reports heartburn, epigastric pain, scapular pain, passing black-tarry stools, reflux and regurgitation of stomach contents and nausea and vomiting."
- "He has no dysphagia…" *
- "The symptoms described occur intermittently, as often as 3 times a day, with each occurrence lasting several hours. The number of attacks within the past year was 100."

and by

Exhibit — 5, page 4, paragraph 5, sentences 1, 2 & 4 under heading "Specific History For: Irritable Bowel Syndrome", Dr. Craig Bischoff speaks of GERD

- "The Claimant reports being diagnosed with GERD."
- "The condition has existed since July 2002."
- "The condition affects general body health by weight, appetite, diet."

and by

Exhibit — 14 Service treatment record dated Oct 23, 2003, **diagnosis of GERD made by J.H. Rodriguez, MD, Capt, USPHS, AMO 4407.**

***NOTE:**

Exhibit — 5, page 2, paragraph 4, "Specific History For: Acid Reflux", Dr. Craig Bischoff stated

- "He has no dysphagia…"

is disputed by

Exhibits 3 — 5, 7 — 8, 17— 18, 19, 21, 28, 30, 31 contain multiple instances supporting the Veteran suffered from dysphagia symptoms as described by Mayo Clinic: https://www.mayoclinic.org/diseases-conditions/dysphagia/symptoms-causes/syc-20372028

- "may include having sensation of food getting stuck in your throat or chest or behind your breastbone (sternum), bringing food back up (regurgitation), having frequent heartburn, having food or stomach acid back up into your throat aka reflux."

Exhibit — 6, Triggers and exacerbators for IBS and GERD: Stress. Anxiety. Depression. Side effects of medication: NSAIDs, Prevacid, Nexium, Celexa, Wellbutrin, Celebrex, Vioxx, Gabapentin.

Exhibits — 7, 8, 15, 17, 19, 20, 21, 26, 27, 28, 29, 30, 31, 33, 35 Service treatment records 1983 — 2010 support a chronic process for GERD, show continuous treatment to include prescriptions for GERD, through retirement and support the medical issues and medications named in Exhibit 6 as exacerbators and triggers for GERD.

Regarding "Productive of considerable impairment of health":
Exhibits 7, 8, 15, 17, 19, 20, 21, 26, 27, 28, 29, 30, 31 support GERD was chronic and severe with frequent severe IBS symptoms experienced concurrently, beginning in 1983, through retirement 2010. Veteran had 21 Medical visits between 1983 – 2010 with severe GERD and IBS symptoms. Veteran had 2 ER visits in 2002 for GERD and IBS. Veteran had 2 ER visits in 2010 for GERD.

The legal requirements of 38 CFR 4.2 and 38 CFR 4.3 were not met.

38 FCR 4.114 Code 7346 — Hiatal Hernia contains the conditions corresponding to the 30% rating analogously represented in Exhibit — 5, page 2, paragraph 4, Exhibit — 5, page 4, paragraph 5, sentences 1 — 2 & 4, and Exhibits — 7, 8, 15, 17, 19, 20, 21, 26, 27, 28, 29, 30, 31, Service treatment records 1983 — 2010.

IBS

Exhibit — 1, VA rating decision dated March 23, 2011, page 14, item 19, paragraph 1, sentence 3

- "Service connection for Irritable Bowel Syndrome (IBS)... is denied since there is no evidence a chronic condition exists."

is disputed by

Exhibit — 2, service treatment record dated July 10, 2002, diagnosis of IBS made by J.K. Stehn, PA-C LTJG, USCG

and by

Exhibit— 5, C&P exam report, dated 7/31/2010, pages 4, 5 under heading "Specific History For: Irritable Bowel Syndrome", Dr. Craig Bischoff stated in part

- "...bouts of **diarrhea** gas, lower GI pressure"
- "It occurs **more than 2/3 of the year**."
- "The abdominal pain has the characteristic of **distress**."
- "The symptoms described occur **constantly**."

and by

Exhibits — 2, 9, 10, 11, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 30, 32, 33, Service treatment records 1983 — 2010, support a chronic process for IBS, rule out other causes and show treatment to include prescriptions for IBS through retirement. Veteran had 2 ER visits for GERD and IBS symptoms in 2002

and had 8 visits to Medical with severe IBS symptoms between 1983 and 2002. Thereafter, IBS was monitored along with Anxiety and GERD.

Exhibit — 1, page 15, first paragraph, sentences 4 — 5 decision states

- "There was no objective evidence of irritable bowel syndrome (IBS).
- "The examiner did not provide a diagnosis because there was no current pathology to render a diagnosis."

is disputed by

Exhibit — 33, References supporting the fact there is no objective or pathological evidence to confirm a diagnosis for IBS; How IBS is diagnosed.

Exhibit — 6, Triggers and exacerbators for IBS and GERD: Stress. Anxiety. Depression. Side effects of medication.

Exhibits — 18, 20, 33, 35 support medical issues and medication prescriptions named in Exhibit 6 as exacerbators and triggers for IBS and GERD, namely NSAIDs, Prevacid, Nexium, Celexa, Wellbutrin, Celebrex, Vioxx, Gabapentin.

The legal requirements of 38 CFR 4.2 and 38 CFR 4.3 were not met.

38 FCR 4.114 Code 7319 Irritable Bowel Syndrome contains the conditions required for the 30% rating represented in Exhibit 5, page 4, last paragraph, sentences 6 — 12 and Exhibit 7, under heading "SO Text Note Written by Hernandex-Aponte, Humberto @17 May 2010 0804 EDT, sentence 3 "...nausea, epigastric pain, and feeling of having the food stuck on the esophagus".

This CUE review request is based on the records and law that existed at the time of the adjudication on March 23, 2011.

RESPECTFULLY,

LIST OF EXHIBITS

Exhibit — 1 VA rating decision dated March 23, 2011

Exhibit — 2 Service treatment record dated July 10, 2002, IBS diagnosis by J.K. Stehn, PA-C LTJG,

Exhibit — 3 VA Upper GI series report dated 7/26/10, shows Moderately frequent reflux

Exhibit — 4	C&P Addendum request dated 7/23/2010, page 2, shows diagnosis from Dr. Craig Bischoff of "moderate reflux"
Exhibit — 5	C&P exam report, dated 7/31/2010
Exhibit— 6	References regarding triggers and exacerbators for IBS and GERD
Exhibit —7	Service treatment record dated May 17, 2010: follow up ER visit, Esophagitis Chronic Reflux, ...feeling of food stuck in esophagus... new prescription for Zantac added
Exhibit — 8	Service treatment record dated May 14, 2010: ER visit, discharge diagnosis Esophagitis
Exhibit — 9	Service treatment record dated Jan 25, 2010: shows Nexium prescription for GERD and Psyllium prescription for IBS.
Exhibit — 10	Service treatment record dated Feb 06, 2008: advising "can increase fiber and calcium in diet"
Exhibit — 11	Service treatment record dated May 09, 2007: shows prescription for Docusate Calcium 240mg, stool softener; Psych Clinic notes: "...for this member who saw our Dr. Kennedy in 2005." (stress)
Exhibit — 12	Service treatment record dated 07/11/2005: colonoscopy "the colon is normal"
Exhibit — 13	Service treatment record dated Jan 06, 2004: shows prescriptions for Celexa and Prevacid.
Exhibit — 14	Service treatment record dated Oct 23, 2003: **GERD diagnosed by J.H. Rodriguez, MD, CAPT, USPHS, AMO 4407;** shows prescriptions for Paxil, Prevacid, Daypro, Aciphex.
Exhibit — 15	Service treatment record dated Feb 25, 2003: F/U GERD, abdominal pain, weight loss
Exhibit — 16	Colonoscopy Procedure Report dated 08/20/2002: colon polyps, otherwise normal.
Exhibit — 17	Service treatment record dated Jul 23, 2002: ER visit for recurrent GERD and IBS symptoms
Exhibit — 18	Service treatment record dated Jul 10, 2002: **IBS diagnosed by J.K. Stehn PA-C, LTJG, _____**; GERD symptoms, Celexa, Prilosec prescriptions. Notates "stress on ship very high..."
Exhibit — 19	Service treatment record dated 06/26/2002: ER visit GERD, IBS symptoms, tests ruled out any other causes for IBS, such as H-Pylori, Campulobator
Exhibit — 20	Service treatment record dated Mar 16, 2001: stomach upset due to Naproxen use

Exhibit — 21	Service treatment record dated Jan 3, 1994: stomach flu symptoms, diarrhea, upper quad pain
Exhibit — 22	Service treatment record dated Apr 9, 1993: stomach flu symptoms, diarrhea, abdominal distention.
Exhibit — 23	Service treatment record dated Dec 7, 1992: F/U Dec 4, 1992, diagnosed anal fissure
Exhibit — 24	Service treatment record dated Sept 28, 1992: rectal bleeding
Exhibit — 25	Service treatment record dated 04/12/1992: ER visit, constipation, rectal bleeding, diagnosis anal fissure, internal hemorrhoids
Exhibit — 26	Service treatment record dated Nov 29, 1990: stomachache, diarrhea, mid epigastrium pain
Exhibit — 27	Service treatment record dated 9/3/1985: unexplained shoulder pain (no injury)
Exhibit — 28	Service treatment record dated Jun 11, 1984: chest pain, mediastinal pain, epigastric pain
Exhibit — 29	Service treatment record dated Jul 18, 1983: dull pain in left epigastric
Exhibit — 30	Service treatment record dated Jun 27, 1983: persistent vomiting, epigastric pain radiating to back
Exhibit — 31	Service treatment record dated May 27, 1983: nausea, vomiting, tender abdomen,
Exhibit — 32	Service treatment record dated Mar 02, 1983: upset stomach, diarrhea, abdominal cramps
Exhibit — 33	Psychiatric Clinic exam report dated Oct 12, 2007, diagnosis Generalized Anxiety Disorder; states "...history of IBS which may be triggered by increased periods of anxiety." Signed by C. C. Schultheiss LT MC USN / 1-4114, Psychiatry Resident; co-signed by Joseph B Clem, Psychiatrist
Exhibit — 34	References regarding the fact there is No Objective Evidence, No Pathology that will prove Irritable Bowel Syndrome; How Irritable Bowel Syndrome is diagnosed
Exhibit — 35	Thirty-eight (38) Service treatment records between 1986 — 2010 showing prescriptions for NSAIDs and other various drugs that trigger or exacerbate IBS and/or GERD, as named in Exhibit 6.