

MOTION TO REVISE A PREVIOUS VETERAN'S AFFAIRS REGIONAL OFFICE DECISION ON THE BASIS OF CLEAR AND UNMISTAKABLE ERROR

I am requesting a motion to revise a rating decision made by the St. Petersburg, FL VA Reginal Office on August 11, 2009. The decision in question is for myself, Carol D. Cox, VA File Number [REDACTED], with the Rating Decision date of August 11, 2009.

Specific issue challenged: Service connection for [ECZEMA] was rated at 0% compensable, but under the statutes at that time it should have been rated at 60% compensable because the veteran had been taking continuous systemic medications and continues to do so to date.

In the 2009 rating decision, the following is quoted from REASONS FOR DECISIONS, item #12 (see Attachemnt 1):

"12. Service connection for [ECZEMA].

Service connection for [ECZEMA] has been established as directly related to military service.

A noncompensable evaluation is assigned from May 1, 2009. A noncompensable evaluation is granted if the record shows dermatitis or eczema involving less than 5 percent of exposed areas affected, and ; no more than topical therapy required during the past 12-month period. A higher evaluation of 10 percent is not warranted unless there is evidence of dermatitis or eczema involving at least 5 percent, but less than 20 percent, of the entire body, or at least 5 percent, but less than 20 percent, of exposed areas affected, or; intermittent systemic therapy such as corticosteroids or other immunosuppressive drugs required for a total duration of less than six weeks during the past 12-month period.

Service treatment records show that you were found to have [ECZEMA] in March 1997. Upon VA examination you reported that you continue to take [SYSTEMIC MEDICATION] on a daily basis to reduce flares of the condition, which occur once or twice yearly."

This motion alleges specific errors of fact or law and why the result would have been different were it not for those errors:

Fact: The rating decision of August 11, 2009 recognized I had been diagnosed with [ECZEMA] in 1997 while performing active duty. The rating decision also states I reported I was taking [SYSTEMIC MEDICATION] on a daily basis; this was clearly supported by medical and pharmacy records in possession of the rater. I am providing pharmacy records from a military facility showing I have been taking [SYSTEMIC MEDICATION] since Feb 2004, long before my discharge in 2009 (Attachment 2). In addition, notes in my pharmacy records prior to retirement in 2009, states "pt has been on chronically". Pharmacy records show I continue to take the medication daily. Under the current law in 2009, I should have been rated 60% because I was on daily systemic medication. The VA failed to apply the appropriate procedural directive significantly impacting the outcome of the original claim.

Fact: Diagnostic Code 7806 was revised on August 30, 2002. Under the new criteria for Diagnostic Code 7806, a 10 percent rating is warranted for dermatitis or eczema that is at least 5 percent, but less than 20 percent, of the entire body, or at least 5 percent, but less than 20 percent, of exposed areas affected, or; intermittent systemic therapy such as corticosteroids or other immunosuppressive drugs required for a total duration of less than six weeks during the past 12-month period. A 30 percent rating is

warranted for 20 to 40 percent of the entire body or 20 to 40 percent of exposed areas affected, or; systemic therapy such as corticosteroids or other immunosuppressive drugs required for a total duration of six weeks or more, but not constantly, during the past 12-month period. More than 40 percent of the entire body or more than 40 percent of exposed areas, affected, or; constant or near-constant systemic therapy such as corticosteroids or other immunosuppressive drugs required during the past 12-month period warrants a 60 percent rating.

There are numerous appeal cases prior to 2009 (attached) in which veterans with [ECZEMA] were awarded 10 to 60 percent service-connected disability for taking the drug [SYSTEMIC MEDICATION], also known as [SYSTEMIC MEDICATION], as a systemic therapy (see Attachment 3 for examples). Additionally, the phrase "such as systemic therapy" in Diagnostic Code 7806 was clarified (but not changed) by the United States Court of Appeals for Veterans Claims in Case No. 13-3161, TREMELL L. WARREN, APPELLANT, V. ROBERT A. MCDONALD, SECRETARY OF VETERANS AFFAIRS, APPELLEE (Attachment 4). On Appeal from the Board of Veterans' Appeals (Decided May 10, 2016). In the decision, it was determined the "VA has interpreted the phrase 'systemic therapy such as corticosteroids or other immunosuppressive drugs' in that DC to mean 'any oral or parenteral medication(s) prescribed by a medical professional to treat the underlying skin disorder.'" And in this particular case "the Board provided inadequate reasons or bases for denying a disability evaluation for bilateral onychomycosis in excess of 10% under DC 7806."

In providing a rating as 0% service connected for [ECZEMA] while on daily systemic medications, The Dept of Veteran's Affairs clearly and unmistakably made an error as I should have awarded 60% disability. By only providing 0% compensation, the statutory and regulatory provision extant at the time were incorrectly applied.

Also submitted are copies of my medical records showing when I was first diagnosed with [ECZEMA]. (Attachment 5)

The CUE is requested based on the following:

1. A **clear and unmistakable error** (CUE) exists because all three of the following requirements are met:
 - The statutory or regulatory provisions extant at the time were incorrectly applied,
 - The error was the sort which, had it not been made, would have manifestly changed the outcome at the time it was made, and
 - the determination must be based on the record and the law that existed at the time of the prior adjudication in question.
2. The decision maker failed to apply or incorrectly applied the appropriate laws or regulations. By failure to apply a statutory or regulatory presumption or the decision maker failed to follow a procedural directive that involved a substantive rule.
3. There was an error in the prior adjudication of the claim. Under the rating system in place in 2009, the rating should have been for 60% and not 0% as given.
4. The reviewer had all the facts at the time, including a request for [ECZEMA] to be service connected, a diagnosis of [ECZEMA], and all medical and pharmacy records. A new medical diagnosis has not been made. No new information has been introduced in this request.

The law existed at the time of the prior decision, the full record was before the rating activity at the time of the prior decision (to include medical records in VA's constructive possession), and correction of the error will manifestly change the original rating decision.

Because I did not know the rating system at the time, I did not do a disagreement in 2009, and the claim has been closed, therefor I am requesting a CUE. Under the Title 38 rules for Clear and Unmistakable Error, I am requesting my disability rating for [ECZEMA] be changed from 0% to 60% retroactive to my retirement date of 1 May 2009.

Sincerely,

JustGettingStarted
File [FILE NUMBER]

Attachment 1: August 11, 2009 Rating Decision

Attachment 2: Tricare Online Pharmacy records with [SYSTEMIC MEDICATION] highlighted

Attachment 3: Examples of BVA decisions on [ECZEMA] and [SYSTEMIC MEDICATION] appeals

Attachment 4: United States Court of Appeals for Veterans Claims in Case No. 13-3161, TREMELL L. WARREN, APPELLANT, V. ROBERT A. MCDONALD, SECRETARY OF VETERANS AFFAIRS, APPELLEE

Attachment 5: Medical records showing diagnosis of [ECZEMA]