February 2-, 2004

Board of Veterans' Appeals
810 Vermont Avenue, NW
Washington, D.C. 20420.

re: Veteran: [veteran name].
C-file: [vet ssn]

MOTION FOR RECONSIDERATION
or, in the alternative,
CLAIM OF CLEAR AND UNMISTAKABLE ERROR

Dear Sir/Madam:

Enclosed is a copy of the VA Form 22a, signed by the above veteran appointing me as his representative in connection with VA matters. Enclosed you will find a disk for your convenience. On it you will find the veteran's 1135 page C-file, a rough index of the C-file, and a copy of this Motion, with exhibits. These documents may be viewed using an Adobe Acrobat reader. It should save the time you might otherwise spend sending to the St. Petersburg VA Regional Office for the C-file.

This letter relates to a reduction in the veteran's VA benefits which occurred on March 1, 1982, following a letter addressed to him dated Jan 05, 1981 (Exhibit 1). Prior to that time the veteran had been rated at 90% disabled, with individual unemployability, resulting in a 100% disabled total rating. As the result of this action in 1981, the veteran's compensation was reduced from $1220 (approximately) to $740 per month. Mr. [last name] has remained at the 90% rating from that day forward, with the exception of a few times when he received a total rating due to hospitalizations.

The reduction of benefits was finally upheld in a decision of the BVA dated January 17, 1984. That is the decision for which the veteran seeks reconsideration. In the alternative, that is the decision that the veteran contends contains clear and unmistakable error.

FACTS

The veteran is a combat Marine veteran of the Tet offensive in Vietnam in 1968. After 14 months hospitalization on the hospital ship Repose, in Guam, and at the Oakland Naval Hospital, the veteran was finally medically discharged with a diagnosis

of dissociative disorder. The record is clear that this condition was attributed to his combat experiences. (Exhibit 2). He is also recorded as having received numerous shrapnel wounds and an injury to his pelvic area arising from having been hit by sandbags during an shell burst on his bunker.

Following his hospitalization, but before discharge, the veteran was involved in an automobile accident in Mississippi in which he received additional injuries to his pelvic area and hips. On August 13, 1970, the veteran was accorded a 10% rating for anxiety, and a 10% rating for his hip condition (Exhibit 3).

After extensive treatment for his various conditions, and multiple claims and ratings, the veteran was accorded a rating on September 20, 1978, in which he was determined to be 90% disabled, with entitlement to IU plus special monthly compensation for lost of use of lower left extremity at the (k) rate. The effective date for the IU was Nov. 13, 1972. (Exhibit 4).

On November 29, 1978, the Veteran discovered his wife was having an affair with her gynecologist and in a fit of rage he stabbed her to death. On November 21, 1979, after stating that he had no recollection of the incident and having entered a general plea of guilt, he was sentenced to life in prison by a Florida court. (Exhibit 5).

The January 5, 1981, letter taking away the veteran's IU rating was the first that he heard about the VA's decision to take away part of his compensation. (Exhibit 1). The reduction was to take place immediately. The veteran was provided appeal rights. The letter says the basis of taking away the IU rating was that he had been removed from the "possible work environment." This letter followed a VA Rating Decision dated December 19, 1980, which stated, "*Veteran has been imprisoned for life for slaying his wife. This happened in 1979 with the sentencing occurring apparently i n early November 1979. Per M21-24,07, the Board has determined that veteran is not entitled to Code 18 in view of his removal from the work possible environment*." (Exhibit 6).

The veteran was never provided prior notice that this action was going to be taking place, nor an opportunity to comment on the action before it was finalized.

On or about January 14, 1981, the veteran filed a notice of disagreement with this action of the Regional Office. He also asserted a claim for PTSD. On February 11, 1981, the Regional Office issued a Statement of the Case (Exhibit 7), once again basing the decision on the "removal from work possible environment" theory. On July 29, 1981, the veteran sent the Regional Office the reasons why he should not have been considered removed from the work possible environment (Exhibit 8, page 1). A handwritten note on this document indicated that the VA accepted it as a 1-9 (VA Form 1-9, substantive appeal). On August 12, 1981, a Veterans Service Officer also submitted argument as to why the veteran should not lose his IU benefits on the theory utilized by the VARO (Exhibit 8, page 2).

On January 5, 1982, the Board of Veterans Appeals considered the veteran's

appeal, but characterized the claim as, “Entitlement to a total evaluation based on individual unemployability due to service-connected disabilities.” It remanded the veteran’s case. Without addressing the law applying to termination of a veteran’s IU benefits, or even the fact that the veteran was appealing a termination, it treated the case as an original claim for IU. It ordered that additional evidence be developed relating to the PTSD claim that also was being appealed. (Exhibit 9).

The last sentence of the remand stated, “No action is required by the appellant until he receives further notice.” The BVA then returned the case to the VARO with the specific instruction that the issue in the case was, “Entitlement to a total evaluation based on individual unemployability due to service-connected disabilities.” (Exhibit 10).

On October 29, 1982, the VARO issued another rating decision. It listed the issues as, “Increased evaluation for SC left hip condition, individual unemployability, SC for post traumatic stress disorder, increased evaluation for SC anxiety.” (Exhibit 11).

Approximately two weeks later (November 12, 1982), the VARO issued a Supplemental Statement of the Case (SSOC), denying the veteran’s claim for PTSD and IU. The reason given for denying the IU claim was that, “Evidence establishes that the veteran is unemployable because of removal from the labor market and not because service connected disabilities are so severe as to preclude employment even though he is in a wheelchair.” (Exhibit 12). Thus the VARO continued to act pursuant to its “removal from work possible environment” theory. No law regarding individual unemployability, or the termination of benefits, was cited in the SSOC.

There is no record that either the October 29, 1982, rating decision, or the November 12, 1982, SSOC were ever sent to the veteran or his service representative. The SSOC does state that the BVA decision was sent to the veteran.

Notably, neither the special orthopedic, nor the special psychiatric, examinations required in the 1982 BVA remand were accomplished by the VARO at any time during its post-remand development of the case. There is no record that either were even attempted. There is no indication in the file that the VARO ever attempted to comply with the M-1 VA Health Care Adjudications Manual, Part I, Section VII, (Examination and Treatment of Veterans Confined in or Paroled from Penal Institutions (Change 83, August 2, 1965))(Exhibit 13). The VARO was aware of this policy, because a copy of it is contained in the veteran’s C - file.

There is a March 9, 1983, VARO document that states that the prison volunteered to provide orthopedic and psychiatric records to the VA on the veteran . The same exhibit goes on to make an amazing statement to the RB (rating board) saying, “Per Mr. Chamberlain - when reports are received from prison - rate, SSOC or whatever & re-certify to BVA on that evidence.” (Exhibit 13).

A deferred rating decision dated March 25, 1983, acknowledged that the veteran had provided a PhD psychologist’s diagnosis of PTSD, but denied the veteran’s claim

for that condition because (of all things) there was no definitive diagnosis by a clinical psychiatrist to corroborate. It stated that the evidence warranted no change in the denial of total evaluation due to individual unemployability (Exhibit 14). On March 29, 1983, the VARO issued an SSOC, reiterating the deferred rating decision (Exhibit 15).

On May 9, 1983, the veteran's service representative wrote, pointing out that the VA had failed to follow the remand instruction to GET a psychiatric evaluation, and arguing that no rating could be issued without it (Exhibit 15). On June 7, 1983, the National American Legion representative once again pointed out that the veteran had not received a psychiatric examination as had been required for PTSD.

On October 4, 1983, the BVA prepared a letter, first repeating language from a hostile, unsolicited letter which the VA had received from a doctor in 1979. The BVA letter also noted, without comment, a recent diagnosis of PTSD. The BVA sent this letter, along with the claims file to a BVA doctor, asking for a "correct diagnoses of the appellant's psychiatric disorders, whether he has a true posttraumatic stress disorder, and what the primary psychiatric diagnosis is currently." (Exhibit 16).

On October 21, 1983, the doctor wrote back to the BVA. Based on the records review, the doctor stated that the veteran had NO psychiatric diagnosis. This letter did not discuss the two psychological diagnoses in the file, nor did it discuss the fact that the veteran current was rated 10% for anxiety based on a medical discharge for dissociative reaction. (Exhibit 17). The veteran's representative objected to a diagnosis based only upon a records review (Exhibit 18).

On January 17, 1984, the BVA issued its second decision on the veteran's claim for, among other things, "Entitlement to a total evaluation based on individual unemployability due to service-connected disabilities." It characterizes the veteran's position as, "It is contended by and on behalf of the veteran that the disabling manifestations of his service-connected disabilities have rendered him unable to perform a substantially gainful occupation."

On page 8 of this BVA decision, for the first time, one finds a tangential reference to the VA regulations on the requirements for termination of benefits. "In reducing a rating of 100 percent service-connected disability based on individual unemployability, caution must be exercised in such a determination that actual employability is established by clear and convincing evidence. (38 C.F.R. 3.314 (c)). It then made findings that:

> *3. The appellant has been reported as capable of tutoring and manual labor jobs that can be accomplished from a wheelchair; in other words, he has been shown to be clearly and convincingly able to work.*
>
> *4. It has not been demonstrated that service-connected disabilities are productive of sufficient impairment so as to render the veteran unable to perform a substantially gainful occupation.*

Based on these findings, the BVA decision was:

> *3. Restoration of the total evaluation based on individual unemployability due to service-connected disabilities is not warranted. (38 U.S.C. 355; 38 C.F.R. 3.321, 3.340, 3.341, 3.343(c), Part 4, 4.16)*.

In arriving at its decision, the BVA failed, neglected or refused to discuss regulatory required findings necessary before a withdrawal of benefits were to finalized. Specifically, the BVA failed to make a finding based on an examination showing material improvement in physical or mental condition. The version of VA regulation 38 C.F.R. § 3.343(a) in effect at the time provided that total disability ratings were not to be reduced or discontinued, in the absence of clear error, unless there was an examination showing material improvement in physical or mental condition. The decision based on that examination should have been whether, upon consideration of all the facts and records, the veteran had attained improvement under the ordinary conditions of life, i.e., while working or actively seeking work or whether the symptoms have been brought under control by prolonged rest, or by following a regimen which precludes work. If the latter, reduction from total disability ratings should not have been considered pending a reexamination after a period of employment (3 to 6 months). (Exhibit 19).

None of this was considered or discussed in the 1984 BVA decision. Instead, the veteran's case was treated much as a new claim for IU. Although the BVA decision acknowledged that the VA carried the burden of proof of showing clear and convincing evidence in its decision, it totally fails to discuss what it was that had to be shown. There is no examination showing improvement in the Veteran's case, nor any mention of improvement. As noted above, what they had the duty to show was that there had been **improvement** in the veteran's condition since he had been previously determined unemployable. A review of the BVA's finding of facts reveals no mention of improvement. It deals entirely with his current condition. The discussion, and the facts of the case, are bereft of any "examination showing material improvement in physical or mental condition."

Even if the 1984 BVA decision had correctly applied the law regarding withdrawal of benefits, there is still the monumental problem that the veteran had NEVER been provided the necessary due process notification and opportunity to be heard on the subject. All the veteran had ever been told regarding the withdrawal of his benefits was that:

a.) It was being done based on the "work environment" theory, as opposed to a finding of material improvement in his condition based on examination showing same, and

b.) The withdrawal was a *fait accompli*, for which the VA was not prepared to consider argument and evidence.

Contrary to the law and regulations, he was never provided an explanation of the law

under which his benefits were being withdrawn. He was not given 60 days, or any days, within which to respond. He was misled as to the law that would eventually be applied to his appeal. And he was instructed by the BVA that, "No action is required by the appellant until he receives further notice." (1982 BVA decision). The only notice he ever received after that was a request that he fill out a work history form. The VA neither wanted, nor was prepared to consider any due process argument or evidence on the issue.

Quite frankly, it is apparent that, after it had withdrawn the IU benefit, it never regarded the issue on appeal as a question of the propriety of the withdrawal. By all indications, from the date of the withdrawal forward, the veteran's responses and arguments were treated as a new claim for IU.

Not having further avenue of appeal, the veteran's case was over.

ARGUMENTS

It is the veteran's position that the elimination of the rating for individual unemployability was contrary to the law and that the IU rating should be restored, effective March 1, 1981. There are several reasons for this position. They are:

THE REGULATION WHICH THE VA DEPENDED UPON WAS CONTRARY TO ESTABLISHED LAW.

Prior to the 1984 BVA decision in his case, the VA had relied on the provisions of the VA Adjudication Manual, M21-24,07 (sic) to relieve him of his IU rating. Presumably, this is a reference to the Veterans Benefits Administration Adjudication Procedure Manual M21-1 (M21-1) section which addressed the '0.0000 TD(TI)Tj10.8000.52000m TD(

[1] Although the veteran does not have access to the version of this Manual provision which existed in 1981 through 1984, it must be assumed that the language was similar to that discussed above.

Possible Environment.' " That opinion determined that nothing in the legislative history of 38 U.S.C. § 5313 suggests that Congress intended that an extant IU rating be reduced upon a veteran's incarceration for a felony conviction. The theory of loss of IU benefits based solely on incarceration was a fiction developed by the agency contrary to even its own regulations.

The General Counsel opinion noted that to the extent that manual provisions may be interpreted as imposing requirements not in the statute or regulations that are unfavorable to a claimant, those additional requirements may not be applied against the claimant, citing *Cohen v. Brown*, 10 Vet. App. 128 (Vet. App. Mar. 7, 1997). Accordingly, to the extent that these manual provisions were interpreted as requiring discontinuation of an IU rating on the basis that a veteran is not in a "work possible environment", the manual provisions were improperly applied against the veteran.

The VA never had the statutory right to withdraw IU benefits from the veteran on the basis that it did, i.e., his incarceration. The veteran is entitled to reinstatement of his IU benefits, and payment of all IU benefits previously withheld.

DENIAL OF DUE PROCESS AND FAILURE TO COMPLY WITH 38 C.F.R. § 3.105.

Even if it were determined that the VA had not relied upon an illegal manual provision to withdrawn the veteran's IU benefits, the process by which it withdrew them was constitutionally infirm, rendering the resultant deprivation of benefits void.

There is, and was at the time, ample authority stating that if the VA intends to withdraw established benefits from a veteran, it has the obligation to honor his due process rights to be heard on the subject. For instance, the provisions of the version of 38 C.F.R. § 3.343(c) in effect at the time, regarding termination of total disability ratings, as applied to IU ratings, states that the provisions of 38 C.F.R. § 3.105 are for application. 38 CFR § 3.105(e) covers reduction in evaluations in compensation cases. It reads:

> Where the reduction in evaluation of a service-connected disability or employability status is considered warranted and the lower evaluation would result in a reduction or discontinuance of compensation payments currently being made, a rating proposing the reduction or discontinuance will be prepared setting forth all material facts and reasons. The beneficiary will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor, and will be given 60 days for the presentation of additional evidence to show that compensation payments should be continued at their present level. Unless otherwise provided in paragraph (i) of this section, if additional evidence is not received within that period, final rating action will be taken and the award will be reduced or discontinued effective the last day of the month in which a 60-day period from the date of notice to the beneficiary of the final rating action expires. (Authority: 38 U.S.C. 5112(b)(6))

Of course nothing of the kind ever occurred in this veteran's case. The first notification that he ever received that his benefits were going to be reduced was the letter of January 5, 1981. (Exhibit 1). That letter gave him no options other than appeal, which he did. It did not cite the law upon which it purported to act. It did not propose anything. It did not give him any opportunity for the presentation of additional evidence. Since it didn't inform him of the (il)legal basis for the action, there was no way in which he could have known how to respond.

The M21-1 Manual itself sets out details on complying with the due process issues. Part Iv - Authorization Procedures, Chapter 9 - Due Process, Subchapter 1 - Notification, 9.02 Pre-termination/reduction Notice—general, states:

> Requirement of Notice. A beneficiary has the right to be informed of a proposed adverse action so that he or she can offer evidence or argument to show why the proposed adverse action should not be taken. Therefore, unless authorized by paragraph 9.05 or 9.06, do not terminate, suspend or reduce benefits or take any adverse action without first sending the beneficiary a pre-termination/reduction notice. This rule applies to all benefits.
> 9.03 PRE-TERMINATION/REDUCTION NOTICE-SPECIFIC REQUIREMENTS
> a. Time Limits
> (1) Send the beneficiary advance written notice of a proposed adverse action. Continue payments for at least 60 days after the date of notification to allow time for the beneficiary to submit evidence showing that the proposed action should not be taken.
> (2) Unless specifically requested by the beneficiary, do not implement the proposed adverse action until the latest of the following events occurs:
> (a) The 60-day period expires.
> (b) Any evidence submitted by the beneficiary during the 60-day period is reviewed
> (c) If VA receives a request from the beneficiary for a personal hearing within 30 days after the date of the pre-termination/reduction notice, a final decision is reached on the evidence developed through the hearing or the claimant fails (without good cause) to appear for the scheduled hearing. See paragraph 9.10a.
>
> NOTE: If evidence submitted establishes that the adverse action should not be taken, immediately inform the beneficiary.
>
> b. Notification. Every pre-termination/reduction notice must include the following elements.
> (1) Statement of Proposed Decision. State the proposed action fully and clearly.
> (2) Statement of Proposed Effective Date. Determine the effective date under the provisions of 38 CFR 3.500 through 3.503. The requirement that payments be continued through the 60-day pre-termination/reduction notice does not alter this date. Inform the beneficiary that he or she may minimize any potential overpayment by requesting that the award be adjusted immediately and that if an overpayment is, in fact, created, he or she will be responsible for repayment. Advise the beneficiary that, if the proposed adverse action is affirmed, he or she

must repay any overpayment that results from the continuation of payments.
(3) Basis for Proposed Decision. State the fact and reasons for the proposed action. The facts should include a statement of the evidence being considered. Include a brief statement of any calculations used to arrive at the proposed rate of payment. Tailor the language used in each notice to the facts of the case.
(4) Right to Present Evidence, Request a Personal Hearing and Have Representation. Every pre-termination/reduction notice must inform the beneficiary of these three basic rights.
(5) Required Language. Exhibit A of this chapter provides language which must be included in each pre-termination/reduction notice. VA Form 21-0506 may also be used for this purpose, but it does not contain language about minimizing an overpayment.

* * * *

Subchapter II. Reductions, Paragraph 9.24, establishes procedures in the case of incarcerated veterans, and provides that:

a. Unofficial Notice Received. If an informal notice is received stating that the veteran is incarcerated, establish controls (paragraph 9.08) and initiate development for completion of a VA Form 21-4193, "Notice to Department of Veterans Affairs of Veterans or Beneficiaries Incarcerated in Penal Institution." Send the beneficiary a predetermination notice based on the provisions of paragraph 25.04 only after official verification of incarceration is received.

b. Official Notice Received. When official notice is received that the veteran is incarcerated, most often from a completed VA Form 21-4193, "Notice to DVA of Beneficiary Incarcerated In Penal Institution," begin the due process provisions as outlined in 9.03 of this chapter. Establish end product 600 and control for 60 days per 9.08 of this chapter. Final action is based on paragraph 25.04. Note that both the EP 290 and EP 600 continue until final action is taken.

* * * *

Subchapter II, Imprisonment, Paragraph 25.04 Imprisonment in Penal Institutions, provides in section (c)(6): Notice of Discontinuance or Reduction to Payee. *A claimant is entitled to due process before reduction or termination of benefits. Cite the applicable statutory authority (38 U.S.C. 1505 or 5313) in the predetermination notice. Include information about the dependent's rights to an apportionment and other information as applicable. If the address of the dependents is available, develop for an apportionment with them at the same time the payee is notified. Inform the payee VA may resume payments effective the date of release from prison if notice of release is received within 1 year of that date. If notice is not received within 1 year of the release date, VA may only pay from the date the notice is received ((38 CFR 3.665 (i)* and 3.666 (c)).

Nothing of the kind ever happened to the veteran in this case. Even if the provisions cited above may have been written subsequent to the date that the veteran's IU benefits were withdrawn, they are illustrative of the duty to meet due process

requirements. It certainly cannot be argued that Due Process is a concept more recent that the facts of this case since they are derived from the 5th Amendment to the US Constitution. The requirement to give due process has always existed. The citations above give clear instructions on how those duties can be successfully carried out.

Both the Federal Circuit's and the Veterans Court's case law require compliance with fair process. *See Austin v. Brown*, 6 Vet. App. 547, 551 (1994); *Thurber v. Brown*, 5 Vet. App. 119 (1993) ("entire thrust of the VA's nonadversarial claims system is predicated upon a structure which provides for notice and an opportunity to be heard at virtually every step in the process"); *Sutton v. Brown*, 9 Vet. App. 553, 566 (1996) (discussing and applying VA procedural protections and remanding for "Board to consider and discuss . . . whether the veteran had been given adequate notice of the need to present argument and further evidence on the merits of his claim and an adequate opportunity to appear at a hearing"); *Archbold v. Brown*, 9 Vet. App. 124, 129 (1996) (fundamental right to receive appellate rights and Statement of the Case); *Curry v. Brown*, 7 Vet. App. 59, 66-67 (1994) (discussing and applying VA fair process principles and announcing fair process rules); *Bernard v. Brown*, 4 Vet. App. 384, 392-94 (1993) (holding that VA claimants must be afforded "full benefits of . . . procedural safeguards" afforded by statutory and regulatory provisions establishing "extensive procedural requirements to ensure a claimant's rights to full and fair assistance and adjudication in the VA claims adjudication process").

Even assuming that the basis of the VA's withdrawal were NOT the illegal "work possible environment" theory, and was some other more legally palatable theory, it remains clear that the due process provisions of the Constitution were not applied in the withdrawal of IU benefits in this case.

ADDITIONAL ERRORS OF RECORD

In addition to the critical errors listed above, the veteran notes numerous other errors in the processing of his case leading up to the challenged 1984 BVA decision. They are:

1. The January 1982 BVA decision specifically discouraged the veteran from making any argument relating to either the work possible environment issue, or the termination issue. This discouragement was critical in view of the VARO's failure to seek the veteran's response to it's subsequent rating decision and SSOC.

2. The rating decision of October 1982, and Nov 1982 supplemental statement of the case were never provided to the veteran.

3. The VARO never provided the veteran the special medical evaluations that he was entitled to pursuant to the 1982 BVA remand. It failed to make an effort to provide these examinations, and it failed to follow VA authority relating to trying to get these examinations. Exhibit 13 instructs the VARO to utilize fee based physicians if VA physicians were not available. A remand by the Board confers on an appellant the right

to compliance with the terms of the remand order and imposes on the Secretary a concomitant duty to ensure compliance with those terms. *See Stegall v. West*, 11 Vet. App. 268, 271 (1998).

4. The VARO never provided the veteran an opportunity to respond to the post remand Rating Decision or SSOC, as was required in the 1982 BVA remand ("After the appellant has been afforded an 'opportunity to respond, the claims folder should be returned to this Board for appellate consideration, if in order.")

5. The BVA sought in independent medical opinion in lieu of a medical examination. A medical opinion, based on records, is not an examination and cannot substitute for one.

6. The letter from the BVA to the IME doctor was impermissibly tainted. A letter from the Board requesting an IMO must "fully and accurately reflect[ ] the disability picture, including both objectively demonstrated disabilities and subjectively claimed pain or other disability." *Bielby v. Brown*, 7 Vet. App. 260, 268-69 (1994). "If the engagement letter fails to set forth all of the claimant's impairments, both objective and subjective, or fails to set forth any other relevant factual detail, such as the time period during which symptomatology manifested itself, the [independent medical expert] cannot render an opinion which is supported by a sufficient prior review of and plausible basis in the record." *Id*. See 38 U.S.C. § 7109 (a); 38 C.F.R. § 20.901(d) .

7. The IME was inadequate. It failed to address the TWO diagnoses of PTSD in the claims file, or that fact that the veteran had been discharged with a medical diagnosis of dissociative disorder, and currently was receiving a 10% VA disability rating for "anxiety." The IME found NO psychiatric diagnoses without consideration or discussion. The IME concurred with the diagnosis of a prison physician whose examination DID NOT include a review of the C file.

REQUEST FOR RELIEF

Under 38 C.F.R. §§ 20.1000, 20.1001 (2002), the veteran may seek reconsideration at any time. Reconsideration may be ordered "[u]pon allegation of obvious error of fact or law." Veteran contends that there were two obvious errors of law in the 1984 BVA decision on the issue of withdrawal of his IU benefits. The first was that the withdrawal was made on the basis of an illegal policy contained in the M21-1 Manual, not justified by either regulation or Federal statute. This error was confirmed by the precedential opinion of the General Counsel 13-97.

The second error of law was even more clear. In withdrawing the veteran's IU benefits, the VA failed, neglected or refused to notify the veteran of the basis of its actions pursuant to regulatory authority existing at the time, or give him an opportunity to consider the withdrawal action and respond to it, as required by the Due Process clause of the United States Constitution. Rather than providing notice of intent to terminate due to improved condition, as required in 38 CFR § 3.343, the VA at first told

the veteran that it was withdrawing his IU benefits pursuant to the now discredited “work environment” theory. It continued telling the veteran the withdrawal was based on this theory up until the date of the 1984 BVA decision. At that time, the basis of the decision changed to a factual determination that the veteran was currently capable of employment.

Thus the VA both failed to notify the veteran of the proper theory of discontinuance of IU benefits because it never used a proper theory. Additionally it failed to give him the due process opportunity to appear and be heard as was required by its own regulations at the time.

This letter should also be considered as a claim that the 1984 BVA decision referred to above contained clear and unmistakable error. The statute authorizing BVA CUE, the "Revision of Veterans' Benefits Decisions Based on Clear and Unmistakable Error Act," is found at Pub. L. No. 105-111, 111 Stat. 2271 (November 21, 1997) (codified at 38 U.S.C.S. §§ 5109A and 7111). The BVA regulations providing procedures for BVA CUE are found at 38 C.F.R. §§ 20.1400-20.1411 (2002).

It cannot be contended that the errors committed by the BVA in this case were harmless. Loss of IU benefits without benefit of due process are hardly harmless. The veteran’s compensation dropped nearly in half. It should be pointed out at this point that this veteran is not subject to the law reducing the benefits of incarcerated veterans to the 10% rate. Both his crime, and the award of IU benefits took place before October 25, 1980. See 38 USCS § 5313(d) [Limitation on payment of compensation and dependency and indemnity compensation to persons incarcerated for conviction of a felony]

> *(d) The provisions of subsection (a) of this section shall apply (1) with respect to any period of incarceration of a person for conviction of a felony committed after October 7, 1980, and (2) with respect to any period of incarceration on or after October 1, 1980, for conviction of a felony of a person who on October 1, 1980, is incarcerated for conviction of such felony and with respect to whom the action granting an award of compensation or dependency and indemnity compensation is taken on or after such date.*

The record certainly contains no evidence that the veteran’s condition had improved between the effective date of his IU rating (Nov. 13, 1972. (Exhibit 4)), and either the date the benefit was actually discontinued (Jan 5, 1981) or the date of the challenged BVA decision in January 1984. In fact the records document a continued worsening of the veteran’s left hip and leg condition, and his mental condition until he eventually had the leg amputated. Thus, the usual burden in CUE cases, where the veteran must demonstrate that, absent the error, he would have prevailed, is considerably simplified. *Fugo v. Brown*, 6 Vet. App. 40, 44 (1993) (holding that if it is shown that a specific error was made, "persuasive reasons must be given as to why the result would have been manifestly different but for the alleged error. It must be remembered that there is a presumption of validity to otherwise final decisions, and that

where such decisions are collaterally attacked . . ., the presumption is even stronger.")

In this case the otherwise final decision was that the veteran was entitled to 100% based on IU. It would only be speculation to suggest that the veteran would have been reduced to a lower rate, if he had been accorded due process. A review of the record, however, seals the question. There is not a scintilla of evidence in the file suggesting that the veteran's physical condition, or employability had improved between 1972 and 1984. In fact there is no evidence even comparing the two situations.

It would take speculation to suggest that, if evidence was adduced relative to the veteran's condition on the two dates, it would have been adequate to revise the otherwise final decision to grant the veteran IU. There is nothing in the record to suggest this. Thus, it is clear that the status quo, in which the veteran was entitled to 100% disability based on IU was and is manifestly different from the speculative contention that he would have been reduced if the terms of 38 CFR § 3.343 had been observed.

Thank you for your immediate attention to this injustice.

Very truly yours,

Attorney at law