

APPELLANT'S BRIEF

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(31pp.)

UNITED STATES COURT OF VETERANS APPEALS

CASE NO. 95-1000

VIOLET V. MC NEELY,

Appellant,

v.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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TABLE OF CONTENTS

Page

I.	<u>STATEMENT OF ISSUES PRESENTED FOR REVIEW</u>	1
A.	Did The Board Of Veterans Appeals Err In Finding That The Prior Rating Decisions Of The Regional Office Were Not Clearly And Unmistakably Erroneous?	1
B.	Did The Board Of Veterans Appeals Err Refusing To Reopen The Prior Claims? ..	1
C.	Did The Board Of Veterans Appeals Fail To Acknowledge And Weigh The Positive Evidence Of A Service-Connected Disability?	1
D.	Did The Board Of Veterans Appeals Violate Its Duty To Assist The Veteran By Refusing To Obtain An Independent Medical Evaluation Of The Veteran's Medical Records By A Specialist In Gastroenterology?	1
E.	Did The Board Of Veterans Appeal Violate Its Duty To Consider All Of The Issues Raised On Appeal?	1
II.	<u>STATEMENT OF THE CASE</u>	1
A.	Jurisdiction.	1
B.	The Nature Of The Case.	1
1.	<u>Procedural Background</u>	2
a.	Prior Applications	3
b.	1990 Application	4
c.	Proceedings Before The Board Of Veterans Appeals.	5
2.	Statement of Material Facts	6
III.	<u>ARGUMENT</u>	10
A.	Summary of Argument	10
B.	The Board Of Veterans Appeals Erred In Finding That There Was No Clear And Unmistakable Error In The June 1944 and August 1950 VARO Decisions.	10
1.	The Misstatement Of Fact That There Was No Evidence To Support The Veteran's Claim Is Clear And Unmistakable Error.	11

2.	The Prior VARO Decisions Violated The Law In Existence At The Time By Ignoring The Positive Evidence Of Gastrointestinal Bleeding.	12
3.	There Is No Evidence That The Veteran Had A Chronic Psychoneurotic Condition.	13
4.	The Prior Decisions Do Not Meet The Criteria For Rebutting The Presumption of Soundness Applied To Veterans Of Wartime Service.	14
5.	The Prior Decisions Do Not Meet The Criteria For Rebutting The Presumption of Aggravation Applied To Veterans Of Wartime Service.	17
C.	The BVA Erred In Refusing To Reopen The Veteran's Prior Claims.	18
1.	The BVA Erred In Holding That The Evidence Establishing A Chain Of Causation Between The Medication Administered During Service And The Gastrointestinal Bleeding Shown During Service Was Not Material	19
2.	The New And Material Evidence Submitted Requires That The Claim Be Reopened And A Determination On The Merits That The Gastrointestinal Bleeding Documented During Military Service Was Service-Connected.	21
D.	The Board Of Veterans Appeals Failed To Acknowledge And Weigh The Positive Evidence Of A Service-Connected Disability.	22
E.	The Board Of Veterans Appeals Violated Its Duty To Assist The Claimant By Refusing To Obtain An Independent Medical Evaluation Of The Veteran's Medical Records By A Specialist In Gastroenterology.	23
F.	The Board Of Veterans Appeal Violated Its Duty To Consider All Of The Issues Raised On Appeal.	24
1.	The BVA Failed To Address The Widow's New Claim.	24
2.	The BVA Failed To Consider The 1990 Medical Records.	25
IV.	<u>CONCLUSION</u>	25
	<u>CERTIFICATE OF SERVICE</u> *	26

TABLE OF AUTHORITIES

CASES

Akins v. Derwinski, 1 Vet. App. 228 (1991) * 17

Ashley v. Brown, 6 Vet. App. 52 (1993) 25

Blackburn v. Brown, 8 Vet. App. 97 (1995) 19

Brannon v. Derwinski, 1 Vet. App. 314, 317 (1991) 17

Chisem v. Brown, 4 Vet. App. 169 (1993) 14, 20, 24

Colvin v. Derwinski, 1 Vet. App. 171 (1991) 19, 24

Cook v. Brown, 4 Vet. App. 231 (1993) 22,23, 25

Crowe v. Brown, 7 Vet. App. 238 (1995) 15-17, 22, 24

Gilbert v. Derwinski, 1 Vet. App. 49 (1990) 22

Jones v. Derwinski, 1 Vet. App. 210 (1991) 21,23

Manio v. Derwinski, 1 Vet. App. 140 (1991) 19, 21

Robinette v. Brown, 8 Vet. App. 69 (1995) 11

Russell v. Principi, 3 Vet. App. 310 (1992) **10, 12**

Sammaraco v. Derwinski, 1 Vet. App. 111 (1991) 22

Stanton v. Brown, 5 Vet. App. 563 (1993) 23

Wilkinson v. Brown, 8 Vet. App. 263 (1995) 19,20

STATUTES

38 U.S.C. 5 726 (1946 ed.) 12, 17

38 U.S.C. 0 726 as enacted December 20, 1941 (U.S.C., 1946 ed.) 13

38 U.S.C. p 1101 17

38U.S.C. \$1111 15

38 U.S.C. §1153 17

38 U.S.C. 6 1154 (1991 ed.) 12

38 U.S.C. §1154(a) 22

38 U.S.C. §1521(i)(2) 2, 14,21

38 U.S.C. §5107(a) 21,23

38 U.S.C. §5107(b) 22

38 U.S.C. §5108 18,21

38 U.S.C. 97104(b) 18

38 U.S.C. §7104(d) 24

38 U.S.C. §7252 1

REGULATIONS

38 C.F.R. 12

38 C.F.R. 0 2.1078 (1938) 15

38C.F.R. §3.303(a) 12

38 C.F.R. 0 3.303(b) 14

38C.F.R. §3.304(b) 15,16,18

38C.F.R. § 3.309(a) 17

38 C.F.R. Q 3.80 (1949 ed.) 14

38 C.F.R. § 3.95 (1949 ed.) 17

U.S. Vet. App. R. 28 (a) (3) 1

U.S. Vet. App. R. 28(a)(4) 1

Vet. Reg. No. 1 (a) Part I (b) as amended July 13, 1943, *reprinted in United States Code* (1952 ed.)
 15

MISCELLANEOUS

Black's Law Dictionary, (6th ed. 1990)	11
<u>Diagnostic and Statistical Manual of Mental Disorders. DSM-III-R,</u> American Psychiatric Association (1987).	13
<u>Manual Explanatory of the Privileged Rights and Benefits Provided for Persons Who Served in the Armed Forces Of the United States During World War I. World War II. Or Peacetime (After April 20, 1989). and Those Dependent Upon Them. With Special Reference To Those Benefits. Rights And Privileges Administered By the Veterans' Administration, 79th Cong. House Document 772</u>	9
Miller, Benjamin F. and Claire Blackman Keane, <u>Encyclopedia and Dictionary of Medicine, Nursing, and Allied Health</u> , Second Edition, W. B. Saunders Company (Philadelphia, 1978)	6
<u>Stedman's Medical Dictionary</u> , 5th Unabridged Lawyer's Edition (1982)	7
<u>United States Pharmacopeia - 198Q</u> (United States Pharmacopeial Convention, Inc.)	11
Webster's New World Dictionary, (3rd ed. 1988)	8
Wyngaarden, James et, 1 <u>Cecil Textbook of Medicine</u> , (18th ed. 1988)	8

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Pursuant to U.S. Vet. App. R. 28 (a) (3), the following are the issues presented for review, listed in the order in which they will be considered in this brief:

- A. Did The Board Of Veterans Appeals Err In Finding That The Prior Rating Decisions Of The Regional Office Were Not Clearly And Unmistakably Erroneous?
- B. Did The Board Of Veterans Appeals Err Refusing To Reopen The Prior Claims?
- C. Did The Board Of Veterans Appeals Fail To Acknowledge And Weigh The Positive Evidence Of A Service-Connected Disability?
- D. Did The Board Of Veterans Appeals Violate Its Duty To Assist The Veteran By Refusing To Obtain An Independent Medical Evaluation Of The Veteran's Medical Records By A Specialist In Gastroenterology?
- E. Did The Board Of Veterans Appeal Violate Its Duty To Consider All Of The Issues Raised On Appeal?

II. STATEMENT OF THE CASE

Pursuant to U.S. Vet. App. R. 28 (a) (4), the following is a statement of the case as it relates to the issues in this appeal:

A. Jurisdiction.

This Court has jurisdiction over this appeal pursuant to 38 U.S.C. 5 7252 based upon a Notice of Disagreement filed September 17, 1991.

B. The Nature Of The Case.

This case results from the denial of pension and compensation benefits to the deceased veteran, MELLARD MC NEELY and his surviving spouse, VIOLET MC NEELY (the widow). While on active wartime military service, the veteran experienced **severe gastrointestinal bleeding** manifested by a 4+ **guaiac test**, the highest possible reading. This test and other evidence of gastric ulcer was

ignored by the military physicians who issued a Certificate of Disability for Discharge (CDD) based on a purported chronic psychoneurotic disability manifested by “**stomach trouble.** “

The widow alleges that her husband should be found to have been discharged or released from service for a service-connected disability, incurred or aggravated by medication administered during military service. Following military service, the veteran continued to have ulcer symptoms. Upper Gastric Intestinal Bleeding contributed to his death on November 15, 1990.* The widow of appeals from decisions denying her accrued benefits and surviving spouse benefits.³

1. Procedural Background

The veteran was discharged from military service due to a disability, purported to be “psychoneurosis, hypochondriacal type, severe. ‘¹ He filed multiple applications for compensation and/or pension benefits administered by the Veterans Administration, now known as the Department of Veterans Affairs (VA)’, beginning in 1944. He has been denied many times primarily on the basis that he did not meet the 90 day requirement of service and/or that he did not meet the alternate criteria for discharge due to a service-connected disability or had such a service connected disability as shown by

¹ Because the veteran served for less than 90 days, his eligibility for both **pension** and compensation requires that he establish that he was discharged or released from military service for a service-connected disability. 38 U.S.C. § 1521(j)(2).

² Veteran’s Death Certificate. R. at 127.

³ This appeal is filed by Violet MC Neely, widow of veteran Mellard MC Neely, for accrued pension or compensation benefits due to the veteran and for widow’s benefits due to herself under the pension or dependency and indemnity compensation programs administered by the Department of Veterans Affairs.

R. at 204. See also, R. at 184, 201 - 206. The Board of Veterans Appeals (BVA) decision addressed only the issue of accrued nonservice-connected pension benefits. R. at 4.

⁴ R. at 28. The CDD indicates that the psychoneurosis thought to pre-exist service. R. At 63.

⁵ The term “VA” used herein refers to both the current department and its predecessor.

official military records.⁶ This case is the only one in which a BVA appeal was filed.

a. Prior Applications

The veteran was first rated by the VA based on an application dated April 19, 1944. The veteran alleged treatment during military service at Camp Gruber “for kidney trouble (as far as applicant knows)“. The VA determined that

Disability not incurred in wartime service. Kidney trouble claimed by veteran is not shown by the evidence of record.’

There is no specific reference in the decision to the diagnosis of gastric ulcer or the evidence of severe gastrointestinal bleeding.⁸ The VA decision did not discuss the “presumption of soundness” applied to disabilities not noted on entrance examination.

On or about July 17, 1950, the veteran again applied for benefits alleging ulcers of the stomach for which he received a “CDD” discharge on January 14, 1943.’ He reported treat for stomach ulcers by a Dr. Dingecci from 1947 to 1950.¹⁰ The VA Regional Office (VARO) treated the application as a “Supplemental Claim” of service connection for ulcers of the stomach. The rating decision stated:

Facts: Svc records reveal **no evidence** of alleged condition. G.I. **studies revealed no organic condition in svc and complaints were diagnosed under an N.P.** [Neuropsychiatric] condition for which a CDD was given and rated not svc com.

Discussion: No evidence of ulcers in service. Rating of 6/4/44 is confirmed with the following amendment:

⁶ R. at 76, 93, 103, 122 and 181.

⁷ R. at 74. This finding appears incorrect since the military hospital records reflect evidence of frequent urination and a possible “Chronic prostatitis”. R. at 44. Nonetheless, the veteran does not allege that these urinary tract problems met the criteria for service-connection.

⁸ R. at 74.

⁹ R. at 27 - 29.

¹⁰ R. at 80.

7. ULCERS OF THE STOMACH not shown by evidence of record. 'I [Emphasis supplied.]

These findings do not mention the objective evidence of gastrointestinal bleeding manifested by the 4+ **guaiac report** or **the clinical diagnosis of "gastric ulcer"** shown in the SMRs. '*

The cover letter to the veteran dated August 3 1, 1950 stated:

Your claim was initially rated on June 6, 1944, at which time it was held that your nervous condition was not aggravated by your service in World War II. . .

The medical evidence now available shows that **studies** made of your stomach and gastric system while you were in the service **failed to show any abnormality of the same but it was determined that the complaints referable to your stomach were due to your nervous condition**³ [Emphasis supplied.]

The claim was denied. The veteran re-applied for benefits in 1957, 1965, 1974 and 1982. These claims were also denied. None of these decisions were appealed.

b. 1990 Application

The veteran again filed an application for pension in March of 1990. In a letter dated October 5, 1990, the VA stated:

A review of your file shows we informed you on July 11, 1974, that you are not entitled to pension because you did not serve on active duty for 90 days or more based upon your period of service from October 27, 1942, to January 14, 1943. Unless you can provide proof of additional duty, we cannot reconsider your claim.⁴

On September 17, 1991, the veteran (now deceased) through his widow filed a Notice of Disagreement (NOD) alleging clear and unmistakable error in the prior determinations and requesting that all prior

¹¹ R. at 91.

¹² R. at 41,45 and 61

¹³ R. at 93.

¹⁴ R. at 122.

decisions be reopened and revised. A request was made that all evidence be reviewed by a specialist in a gastroenterology. The error specifically identified was the finding that there was “no evidence” to support the veteran’s gastrointestinal claim. All prior decisions had ignored objective medical evidence of gastric ulcer and gastrointestinal bleeding contained in the SMR.

New evidence was submitted in the form of medical treatises to show a link between the gastrointestinal bleeding noted in service and the medications which had been administered to the veteran during his military hospitalization.¹⁵ The VA refused to re-open the claim.

The service medical records do not objectively identify an ulcer condition even after an upper GI test and barium enema examination. . . There is **no evidence** that Mr. McNeely suffered from an ulcer in any **of the records** available. I¹⁶ [Emphasis supplied.]

The decision states that the letter of October 5, 1990 was an “informational letter” and not a refusal to reopen the prior claims. The NOD of September 17, 1991 was not accepted. No reference is made to the evidence of gastrointestinal bleeding or of the request for a medical opinion. The death certificate showing gastrointestinal bleeding as a contributing cause of death was not accepted as evidence of a service-connected cause of death. The widow appealed.”

c. *Proceedings Before The Board Of Veterans Appeals.*

The BVA denied the widow’s claim for accrued benefits finding no clear and unmistakable error in the prior decisions. The BVA determined that the “new” evidence submitted in support of reopening the claim, namely the medical treatises establishing a link between the medication which was administered and the gastrointestinal bleeding which was manifested was “new”, but not “material”.¹⁷*

¹⁵ R. at 152 - 170.

¹⁶ R. at 181.

¹⁷ R. at 181 - 182. In her appeal to the BVA, the widow identified a number of issues to be addressed on appeal. R. at 204 - 207.

¹⁸ R. at 14.

The BVA refused to reopen the claims.⁹ The BVA denied the request for an independent medical evaluation of the veteran's claim. The BVA decision did not address the widow's new claim for death pension or death compensation. The BVA decision did not address the VA's failure to obtain the hospital records from the veteran's final illness.

2. Statement of Material Facts

There was no indication of a psychoneurotic condition or any gastrointestinal diseases noted on the on the veteran's entrance examination of September 8, 1942.¹⁹ That examination revealed several problems not relevant to this appeal." With respect to his mental status, the veteran was noted to have had only a fourth grade education and was described as "illiterate. N. D."²⁰ Despite these limitations, on October 13, 1942, the veteran was inducted into the Army.²³

On October 31, 1942, he first sought medical attention. His medical history on hospital admission indicated that on October 29, he had:

received injections for typhoid and tetanus at Camp Robinson. Then marched in the rain and got chilled. Felt sick -- chills, aching feeling and went to dispensary where sent to hospital.

R. at 38.

He also gave a vague history of "spells" where he faints, jerks and bites his tongue.²⁴ His pharynx was

¹⁹ R. at 16.

²⁰ R. at 23 - 26.

²¹ These included amblyopia, a partial loss of vision or dullness of vision, in the right eye. See. Stedman's Medical Dictionary, 5th Unabridged Lawyer's Edition (1982) p. 49. There was "no uncorrected vision" in the right eye. R. at 25. The examination also revealed "limited function middle finger left hand amputation of second ring and middle fingers right hand. " R. at 25.

²² R. at 24 and 26.

²³ R. at 26.

²⁴ The BVA appears to have characterized all of the veteran's symptoms on admission to the hospital as very vague. R. at 8. The history itself states "Claims he has spells where in bed - faints

injected. No other abnormalities were noted except for the visual and orthopedic impairments noted on the induction physical.²⁵ There were **no complaints of any gastrointestinal problems** noted. The diagnosis was acute nasopharyngitis.²⁶ A drug, APC and bed rest were prescribed.²⁷

Beginning on October 31, 1942, the claimant was given 1 AK capsule qid [four times a day].²⁸ On November 1, 1942 he began receiving **Aspirin** gr. x qid.²⁹ The first complaint of “stomach trouble” was not noted until after the medication was administered for four or five days. R. at 42. He continued to receive aspirin until November 15, 1942.³⁰ Evidence of gastrointestinal bleeding and gastric ulcer disease during military service include:

- . No history of gastric ulcer, gastrointestinal problems or bleeding from the gastrointestinal tract on the induction physical examination and medical history.³¹
- b No indication of stomach problems or gastrointestinal complaints prior to the administration of APC and aspirin.³²
- . Administration of “APC” (which contains aspirin) and aspirin four times per day from October 31, 1942 until November 15,

away & claims people who are in bed with him say he jerks and bites tongue (very vague).” R. at 38.

²⁵ R. at 36 - 38.

²⁶ R. at 41.

²⁷ R. at 52.

²⁸ R. at 58. APC is no longer in use. The United States Pharmacopeia - 1980 (Unites States Pharmacopeial Convention, Inc.) describes the drug as a combination of 227.5 mg. of aspirin, 162.5 mg of phenacetin and 32.5 mg. of caffeine. R. at 153. One dose of 300 mg of aspirin prolongs the bleeding time for up to 5 days. Id. Side effects of the medication are reported to include (gastrointestinal bleeding), nausea and vomiting, stomach pain (gastrointestinal irritation). R. at 154.

²⁹ R. at 58.

³⁰ R. at 58.

³¹ R. at 23 - 26.

³² R. at 35 - 39.

1942 and again on December 16, 1942.³³

Medical treatises linking aspirin and APC to gastric irritation and gastrointestinal bleeding.³⁴

- ▶ Complaints of vomiting and gastrointestinal distress on November 4, 1942, after receiving APC and/or aspirin.³⁵
- ▶ Complaints that vomiting had “grown much worse” since entering the military service.³⁶
- ▶ Generalized abdominal tenderness.³⁷
- ▶ Stool **markedly positive (4+) for occult blood.**³⁸
- ▶ Complaints of vomiting after eating meat, grease, or onions.³⁹
- ▶ Complaints of pain across the upper abdomen about 30 minutes after meals, relieved by vomiting.⁴⁰
- ▶ A physician notation to “check presence of gastric ulcer”.⁴¹
- ▶ The recommendation for a “Sippy diet”.⁴²

³³ R. at 59.

³⁴ R. at 153 - 154.

³⁵ R. at 39, 42 and 58.

³⁶ R. at 39 - 40. The objective laboratory stool study showed a 4+ guaiac, indicating the highest rating for gastrointestinal bleeding.

³⁷ R. at 40.

³⁸ R. at 61. Positive guaiac tests for gastrointestinal bleeding range from trace to 4 + . R. at 216.

³⁹ R. at 41

⁴⁰ R. at 41. “Upper abdominal **discomfort related to meals** usually means that the **stomach, duodenum, gallbladder, or pancreas** is the site of the problem.” Wyngaarden, James et, 1 Q&1 Textbook of Medicine, (18th ed. 1988) at 656. R. at 157. [Emphasis supplied.]

⁴¹ R. at 41.

⁴² R. at 41 and 52. A “Sippy diet” is defined as “a graduated diet for **peptic ulcer** and other conditions requiring a smooth diet, at first consisting of only milk and cream, with gradual addition of

- A clinical diagnosis of “Gastric Ulcer” .December 11, 1942.⁴³
- No reference in the treating physicians’ notes relating the 4+ guaiac test to the veteran’s symptomatology.⁴⁴
- An initial upper G.I. series showing “general visceroptosis”, with a reexamination recommended in 10 days.⁴⁵

In spite of the objective laboratory evidence of gastrointestinal bleeding and gastric ulcer, the military physicians focussed almost exclusively on this poorly educated veteran’s low intelligence and purported chronic psychiatric impairment.& No follow-up studies were performed on the veteran’s stool. After the positive occult blood test, no blood tests were performed to detect the presence of anemia. The recommended repeat upper G.I. X-ray was not performed. The “Sippy diet” for treatment of peptic ulcer disease was not provided. The veteran continued to receive medication which was known to cause gastric bleeding. In sum, it appears that the primary focus of the military physicians inquiry was the veteran’s purported neuropsychiatric condition⁴⁶

There is no evidence that any psychiatric diagnosis or treatment was required or received by the veteran either before or after military service. Following military service, the veteran passed a

other foods, the amounts increasing until on day 28 the patient is placed on a regular ward diet. ” Miller, Benjamin F. and Claire Blackman Keane, Encyclopedia and Dictionary of Medicine, Nursing, and Allied Health, Second Edition, W. B. Saunders Company (Philadelphia, 1978) p. 922. There is no evidence that the diet was provided to the veteran.

⁴³ R. at 45.

⁴⁴ Although the laboratory report indicates that the guaiac test was 4+ (the highest possible reading for blood in the stool), it is not referenced in any of the medical reports, progress notes, or nurse/s notes.

⁴⁵ R. at 45. There is no evidence that the repeat examination was performed.

⁴⁶ R. at 40, 46-47, 49 - 50.

⁴⁷ “[H]e may have epilepsy and inadequate intelligence & should have N-P [neuropsychiatric examination.]” R. at 40. “Family apparently of low intelligence.” R. at 46. “Moron mental age 8.” R. at 47. “Does not read nor write. Always has worked since 15 years of age.” R. at 48.

civil service examination and obtained employment as a First Class Ordnanceman at the U. S. Ammunition Depot in Hawthorne, Nevada.⁴⁸ The veteran continued to experience episodes of stomach problems, including gastrointestinal bleeding until it contributed to his death on November 15, 1990.⁴⁹

III. ARGUMENT

A. Summary of Argument

The earlier VARO decisions in this case, denying the existence of evidence of gastric ulcer and gastrointestinal bleeding in the SMR, were clearly and unmistakably erroneous. The prior decisions failed to apply the correct legal presumptions required by the relevant statutes and regulations in effect at the time they were made. Even if the prior decisions had not been clearly and unmistakably erroneous, new and material evidence to re-open the veteran's claims was submitted in the form of medical treatises establishing a direct link between medication shown by the SMR to have been given during service and the gastrointestinal bleeding manifested by the 4+ guaiac test contained in the SMR. This additional evidence demonstrates a causal connection establishing direct service connection. The BVA failed to properly adjudicate the widow's new claim for survivor's benefits. The BVA decision should be reversed and the claims allowed.

B. The Board Of Veterans Appeals Erred In Finding That There Was No Clear And Unmistakable Error In The June 1944 and August 1950 VARO Decisions.

Since the BVA adjudicated the claim for clear and unmistakable error (CUE), this court has jurisdiction to review the claim. Russell v. Principi, 3 Vet. App. 310, 315 (1992). The criteria for CUE is set forth in Russell, 3 Vet. App. at 313 - 314.

Either the correct facts, as they were known at the time, were not before the adjudicator or the statutory and regulatory provisions extant at the time were incorrectly applied. The claimant, in short, must

⁴⁸ R. at 71.

⁴⁹ Statement of veteran's widow dated August 16, 1950. R. at 85. Death Certificate, R. at 127.

assert more than a disagreement as to how the facts were weighed or evaluated.

. . .

They are errors that are undebatable, so it can be said that reasonable minds could only conclude that the original decision was fatally flawed at the time it was made. A determination that there was a “clear and unmistakable error” must be based upon the record and the law that existed at the time of the prior AOJ or BVA decision.

This criteria was met in the present case.⁵⁰

1. The Misstatement Of Fact That There Was No Evidence To Support The Veteran’s Claim Is Clear And Unmistakable Error.

The BVA made a factual finding that the 1944 and 1950 VA Regional Office (VARO) decisions in this case were supported by the evidence then of record. Those decisions found no **evidence** of the alleged disabilities in the SMR.

The term “evidence” is defined as follows: “something that tends to prove; ground for belief”. WEBSTER’S NEW WORLD DICTIONARY, 471 (3rd ed. 1988). Black’s Law Dictionary defines “evidence” as follows:

All the means by which any alleged matter of fact the truth of which is submitted to investigation is proved or disproved. Any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion of the existence or nonexistence of some matter of fact. That which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or the other. BLACK’S LAW DICTIONARY 555 (6th ed. 1990) . . .

Robinette v. Brown, 8 Vet. App. 69, 78 (1995).

In this case, the veteran’s SMR contain facts which tend to establish that he suffered from

⁵⁰ The benefits available to service-connected World War II veterans were described in a 1946 Manual Explanatory of the Privileged, Rights, and Benefits Provided for Persons Who Served in the Armed Forces Of the United States During World War I, World War II, Or Peacetime (After Anril 20, 1989), and Those Dependent Upon Them. With Special Reference To Those Benefits, Rights And Privileges Administered By the Veterans’ Administration, 79th Cong. House Document 772, pp. 55-71. There are no material difference between the law as of the prior adjudications and present law.

c
gastrointestinal bleeding and a gastric ulcer while hospitalized at Camp Gruber.⁵¹ This evidence was not even mentioned, much less accounted for in the VARO decisions. Denying the existence of evidence, that did indeed exist, is clear and unmistakable error. Russell v. Princioi, 3 Vet. App. at 319.

2. The Prior VAR Violated The Law In Existence At The Time By Ignoring The Positive Evidence Of Gastrointestinal Bleeding.

At the time of the prior decisions, as now, the VA was required to consider all of the evidence presented by the veteran, including evidence contained in the SMR.⁵² The VARO denied the existence of the positive evidence of gastrointestinal bleeding and gastric ulcer in the 1944 and 1950 decisions. The veteran's discharge was determined to have been based upon a "chronic" psychoneurotic condition manifested by complaints of a "stomach disorder." The decisions fail to explain how the veteran's purported psychoneurotic condition could conjure up objective laboratory signs of serious gastrointestinal bleeding. The claims were denied on the grounds that the purported "chronic" psychoneurotic condition pre-dated service and was not service-connected. Service connection means:

that the facts, shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces, or if preexisting such service was aggravated therein.

38 C.F.R. § 3.303 (a)⁵³

In the present case, the veteran's induction examination and SMR document no complaints related to gastrointestinal bleeding or gastric ulcer **prior to the administration of**

⁵¹ The evidence is listed and described at pp. 7 - 9, *supra*.

⁵² *Compare*, 38 U.S.C. 0 726 (1946 ed.) and 38 U.S.C. Q 1154 (1991 ed.).

⁵³ Unless otherwise indicated, all citations to 38 C.F.R. in this brief refer to the July 1, 1995 version of the regulations.

medication, AFT and aspirin which can cause gastrointestinal bleeding.⁵⁴ The laboratory report demonstrating gastrointestinal bleeding (4+ guaiac) and the clinical diagnosis of “gastric ulcer” were before the prior adjudicators. There is no mention in the decisions of the gastrointestinal bleeding or the drugs administered. The failure to consider this evidence violated the VA’s duty to give due consideration to the circumstances of service shown by the SMR and all pertinent medical and lay evidence.⁵⁵ This failure constitutes clear and unmistakable error in the prior decisions.

3. There Is No Evidence That The Veteran Had A Chronic Psychoneurotic Condition.

Although the veteran clearly had a limited education manifested by illiteracy, the evidence of record as of the time of the veteran’s discharge does not support the military physicians’ diagnosis of a pre-existing chronic hypochondriacal psychoneurosis.⁵⁶ There is no indication in the SMR that the veteran was preoccupied with the fear of having a serious disease based upon his interpretation of his stomach symptoms. The objective evidence of gastrointestinal bleeding and gastric ulcer can account

⁵⁴ See, pp. 7 - 9, *supra*.

⁵⁵ 38 U.S.C. 0 726a enacted December 20, 1941 (U.S.C., 1946 ed.)

⁵⁶ The diagnostic criteria for Hypochondriasis includes:

- A. Preoccupation with the fear of having, or the belief that one has a serious disease
- B. Appropriate physical evaluation does not support the diagnosis of any physical disorder
- C. The fear of having, or belief that one has a disease persists despite medical reassurance.
- D. Duration of at least six months.
- E. The belief in A is not of delusional intensity, . .

Diagnostic and Statistical Manual of Mental Disorders. DSM-III-R, American Psychiatric Association (1987). R. at 212.

for the symptomatology noted in the SMR. There is not a shred of evidence that the veteran had any nervous problem prior to or subsequent to his military service. An analysis of the correct facts demonstrates that the military diagnosis was obvious error

The evidence in this case is similar to that in Chisem v. Brown, 4 Vet. App. 169, 174 (1993) where a veteran with limited education was incorrectly labelled as psychoneurotic by military physicians. The objective medical evidence of serious gastrointestinal bleeding and other symptoms are consistent with the gastric ulcer as described in the medical treatises.⁵⁷ The absence of any pre-service or post-service diagnosis of or treatment for any psychoneurotic condition coupled with the evidence of continued gastrointestinal bleeding and symptomatology suggests an error in the in-service diagnosis. Even if a diagnosis of psychoneurosis had been correct, since it was limited to the time of the veteran's military service, it was an illness for which the veteran was discharged, 38 U.S.C. 0 1521(j)(2), but would not have met the requirement of chronicity.⁵⁸

4. The Prior Decisions Do Not Meet The Criteria For Rebutting The Presumption of Soundness Applied To Veterans Of Wartime Service.

The prior decisions failed to correctly apply the law and concerning a disability was incurred during military service. As a wartime veteran, the claimant was entitled to a rebuttable "presumption of soundness". This presumption was in effect at the time of the original decisions.

For the purposes of paragraph I (a) hereof every person employed in the active military or naval service shall be taken to have been in sound condition when examined, accepted, and enrolled for service except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrates that the injury or disease existed prior to acceptance and enrollment and was not aggravated by such

⁵⁷ See, discussion in memorandum submitted to the VARO. R. at 141 - 151.

⁵⁸ 38 C.F.R. Q 3.303(b) and 38 C.F.R. 6 3.80 (1949 ed.)

active military or naval service.⁵⁹

The “presumption of soundness” attaches only “where there has been an induction examination in which the later complained of disability was not detected.” Crowe v. Brown, 7 Vet. App. 238, 245 (1995). Since no gastrointestinal bleeding or stomach ulcers were “noted at entrance into service”, the presumption of soundness must apply unless clear and unmistakable (obvious or manifest) evidence demonstrates that the veteran’s gastrointestinal bleeding existed prior thereto. No such evidence is of record. Since neither the 1944 nor the 1950 decision recognized the **objective medical evidence of gastric ulcer** during military service, the presumption of soundness was discussed only by reference to the veteran’s purported “chronic” hypochondriacal disorder manifested by stomach complaints.

In his 1944 application the veteran specifically claimed that he had “no trouble before induction,”⁶⁰ The 1944 decision did not discuss the presumption of soundness, stating only the disability was not **incurred** in wartime service.⁶¹ The 1950 decision characterized the 1944 decision as holding that the nervous condition was not **aggravated** by service in World War II.⁶² The 1950 decision held that the stomach complaints were due to the veteran’s purported nervous condition.⁶³ The BVA found that the presumption of soundness was rebutted by evidence of a chronic psychoneurotic condition.

The RO’s finding that **the chronic nature of the psychiatric disability coupled with the short period of military service** and the lack of

⁵⁹ Vet. Reg. No. 1 (a) Part I (b) as amended July 13, 1943, *reprinted in* United States Code (1952 ed.). See also, 38 C.F.R. 5 2.1078 (1938). The corresponding law is presently found at 38 U.S.C. § 1111 and 38 C.F.R. § 3.304 (b).

⁶⁰ R. At 71.

⁶¹ R. at 76.

⁶² R. at 93. The presumption of aggravation is discussed *infra* at 17 - 18.

⁶³ R. at 93.

circumstance which would tend to produce or aggravate the condition adequately rebuts the presumption of soundness. [Emphasis supplied.]

BVA Decision, R. at 12.

As previously noted, the veteran disputed that the purported **chronic** psychiatric diagnosis was correct. Even if the facts shown in the SMR could support a psychiatric diagnosis, there is no evidence that the veteran's purported chronic psychiatric condition was present at any time prior to or subsequent to service. Since the only diagnosis of a psychoneurotic disorder was made during military service, the presumption has not been rebutted. See, Crowe v. Brown, 7 Vet. App. 238, 247 (1995).

The predominate symptoms of the purported hypochondriasis observed during military service were "stomach complaints".⁶⁴ With respect to the gastrointestinal bleeding, there is no admissible evidence sufficient to rebut the presumption of soundness. Even a signed statement by the veteran concerning:

the origin, or incurrence of any disease or injury made in service if against his or her own interest is of no force and effect **if other data do not establish the fact**. Other evidence will be considered as if such statements are not of record. [Emphasis supplied.]

38 C.F.R. !§ 3.304 (b)(3).

The stomach complaints were noted only after the veteran was administered medication likely to cause gastric bleeding.

With respect to the gastrointestinal condition, the BVA stated:
the Board notes that the evidence of record at the time of the August 1950 rating decision did not establish the presence of chronic stomach pathology. Even assuming that a chronic stomach disorder had been identified during service, the appellant's history of "stomach trouble" . . . would be adequate to rebut the presumption of soundness with regard to any stomach disorder.

BVA Decision, R. at 13.

⁶⁴ The veteran's symptoms noted in the SMR's are consistent with the submitted medical treatise describing peptic ulcer disease. R. at 148 - 150.

The BVA agreed with the VARO that the evidence of record at the time of the 1950 decision did not establish the presence of chronic stomach pathology. A gastric ulcer is defined statute and regulations as a chronic condition.⁶⁵ Rather than rebutting the presumption of soundness, the evidence of record taken as a whole, suggests that the veteran's gastric ulcer was not properly treated during military service. Application of the presumption of soundness dictates a conclusion that the condition was incurred during military service. The failure to apply the presumption of soundness to the facts of this case constitutes CUE. Akins v. Derwinski, 1 Vet. App. 228 (1991).

5. The Prior Decisions Do Not Meet The Criteria For Rebutting The Presumption of Aggravation Applied To Veterans Of Wartime Service.

The BVA held that even if the veteran did manifest evidence of a gastric ulcer during service, it was a pre-existing condition not aggravated by military service. Even if the veteran's condition had been diagnosed prior to military service, the VA was required to consider the presumption of aggravation. Crowe v. Brown, 7 Vet. App. 238, 247 (1995). The presumption of aggravation applies to wartime veterans claiming service-connection for a disability.

A preexisting injury or disease will be considered to have been aggravated by military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease.

38 U.S.C. Q 1153.⁶⁶

Clear and unmistakable evidence is needed to rebut the presumption that a pre-existing condition was not aggravated by wartime military service. 38 U.S.C. § 1153. Akins v. Derwinski, 1 Vet. App. 228, 232 (1991). After being given APC and aspirin for several days, the veteran began

⁶⁵ 38 U.S.C. 5 1111, 38 C.F.R. § 3.309 (a) and 38 C.F.R. 0 3.95 (1949 ed.). See also, Brannon v. Derwinski, 1 Vet. App. 314, 317 (1991).

⁶⁶ The law as of the prior decisions was essentially the same. See, 38 U.S.C. 0 726 (U.S.C., 1946 ed.)

complaining of stomach trouble. He then alluded to a pre-service history of “stomach trouble” and difficulty in digesting certain types of food.⁶⁷ These reports do not meet the stringent requirements of clear and unmistakable evidence. To the contrary, they support the claim that the condition, if pre-existing, was aggravated by military service. There is affirmative evidence tending to establish that the gastrointestinal bleeding was caused by the administration of medication known to have that effect and the failure to properly treat the veteran. There is no evidence to suggest that the bleeding was due to the natural progression of the disease. The VA has not met its onerous burden of demonstrating that the bleeding was not aggravated by the treatment the veteran received in service. The VARO’s failure to apply the presumption of aggravation constitutes clear and unmistakable error.

C. The BVA Erred In Refusing To Reopen The Veteran’s Prior Claims.

Even if the evidence discussed above was not sufficient to establish CUE, the VARO should have re-opened the claim for consideration of new and material evidence. Under 38 U.S.C. §Q 5108 and 7104 (b), a VA claimant who submits “new and material” evidence with respect to a previously

⁶⁷ The history taken **after the veteran was given the medication and began complaining of stomach trouble** reveals the possibility of some digestive problems prior to service.

Has had stomach trouble since 1938. Began with intermittent episodes of cramp-like abd[ominal] pain & diarrhea (5 X daily) of loose, watery stools with blood in it - & occ[asional] vomiting. Vomit has also contained blood.

Since admission to army grown much worse - vomits after every meal. Vomit contains blood. No melena.

R. at 39 - 40.

Has been having “stomach trouble” since 1935. Frequent cramps in abdomen if he did not eat right. Can’t eat meat.

R. at 47.

Without other evidence of record, these statements are insufficient to rebut the presumption of aggravation. 38 C.F.R. § 3.304 (b).

disallowed claim is entitled to have the claim reopened. Wilkinson v. Brown, 8 Vet. App. 263, 267 (1995). This determination requires a two-step analysis. Manio v. Derwinski, 1 Vet. App. 140, 145 (1991). The first step involves a determination as to whether or not the proffered evidence is new and material.

1. The BVA Erred In Holding That The Evidence Establishing A Chain Of Causation Between The Medication Administered During Service And The Gastrointestinal Bleeding Shown During Service Was Not Material.

Whether evidence proffered by a claimant is “new” and “material” evidence is a conclusion of law to be reviewed de novo by the Court. Wilkinson, 8 Vet. App. at 268. In the present case, the veteran’s SMR document that during his military service, the veteran was given medication known to cause gastrointestinal bleeding.⁶⁸ An objective laboratory test showed strongly positive, 4+ evidence of severe gastrointestinal bleeding.⁶⁹ The veteran’s widow submitted medical treatises establishing a causal link between the medications administered during military service and the gastrointestinal bleeding shown in the SMR. Recognized medical treatises can be used to support a medical conclusion. Colvin v. Derwinski, 1 Vet. App. 171, 175 (1991).

The BVA considered the additional evidence as “new”, but not “material”.
“Evidence is ‘material’ where [assuming its credibility] it is relevant to and probative of the issue at hand and where there is a reasonable possibility that, when viewed in the context of all the evidence, both new and old, it would change the outcome.” Blackburn v. Brown, 8 Vet. App. 97, 102 (1995). . . .” [Additional cites omitted.]

⁶⁸ R. at 58 - 59 and 152 - 154.

⁶⁹ R. at 61.

⁷⁰ In the opinion of the Board, the evidence submitted since service connection for psychoneurosis and stomach ulcers in August of 1950, **which** is **new**, is not material to the issue of service connection.

R. at 14.

Wilkinson, 8 Vet. App. at 267

The new evidence submitted included medical treatises describing gastric ulcer disease which is consistent with signs and symptoms noted in the SMR,⁷¹ pharmacological evidence showing that the medication administered to the veteran was known to cause gastrointestinal bleeding,⁷² laboratory interpretative evidence showing that the veteran received the highest possible result on the test for the presence of occult blood in his stool⁷³ and a treatise showing the criteria for hypochondriasis.⁷⁴

In discounting the materiality of the veteran's new evidence, the BVA ignored the clinical diagnosis of "gastric ulcer" noted in the veteran's SMR and gave short shrift to the objective laboratory evidence of gastrointestinal bleeding.

The medical literature which suggests **a potential relationship between the administration of medication, specifically aspirin, which the veteran received during service and a positive guaiac test**, are too vague in nature to establish that the veteran had stomach ulcers during service. The literature further suggests that **a relationship may exist between positive guaiac findings and gastrointestinal bleeding such as would be present with stomach ulcers**. However, there is **no objective medical evidence** linking the literature and its proposed relationships to the veteran and the facts in this case. [Emphasis supplied.]

BVA Decision, R. at 14 - 15.

The treatises submitted provide a strong evidentiary basis for the claim that the military physicians made an incorrect diagnosis and failed to properly treat the veteran's in-service gastrointestinal bleeding. This evidence provides a plausible basis for the veteran's claim that the military physicians misdiagnosed his illness. It is therefore, material. Chisem v. Brown, 4 Vet. App. 169, 173 (1993).

⁷¹ R. at 148- 150.

⁷² R. at 153- 155.

⁷³ R. at 213-214.

⁷⁴ R. at 209 - 211.

The widow asserts that the new evidence meets the test of materiality in that, assuming its credibility, it tends to establish a direct causal link between the medications administered and the side effects noted, namely gastrointestinal bleeding manifested by objective laboratory tests.⁷⁵ The evidence submitted is probative of the issue at hand and should have been found material to a determination of the veteran's eligibility for pension under 38 U.S.C. Q 1521(j)(2) and compensation for any period in which the gastric ulcer symptoms met a compensable rating. They are also material to the widow's new claim for death pension or compensation.

2. The New And Material Evidence Submitted Requires That The Claim Be Reopened And A Determination On The Merits That The Gastrointestinal Bleeding Documented During Military Service Was Service-Connected.

Once a veteran submits new and material evidence, the second Manio step requires an adjudication on the merits. A previously final decision must be reopened when new and material evidence is presented. 38 U.S.C. § 5108. In evaluating the reopened claim, the VA is required to consider all of the evidence both old and new. Jones v. Derwinski, 1 Vet. App. 210, 215 (1991). The new evidence submitted in this case, establishes a direct chain of causation between the medication administered to the veteran during military service and the gastrointestinal bleeding which resulted. There is no medical evidence of record to establish any other basis for the gastrointestinal bleeding. The overwhelming medical evidence of record discussed *supru* at 6 - 10 supports a finding that the veteran's gastrointestinal bleeding was misdiagnosed during military service and caused him to be discharged. There is no plausible basis in the record to support the BVA's implied conclusion that the medication did not cause the bleeding. The BVA's finding that there is "no objective medical evidence

⁷⁵ The objective medical evidence noted *supru* at pp. 7 - 9 correlates with the medical treatises at R. at 153 - 170 and 214. To the extent that expert medical opinion is needed, this indigent widow requested the specific assistance of the VA in having the evidence reviewed by a specialist in gastroenterology. The request was refused. R. at 15. As discussed *inji-a* at 23 - 24, the widow contends that this refusal under the facts of this case violates the VA's duty to assist under 38 U.S.C. 0 5107 (a).

linking the literature and its proposed relationships to the veteran and the facts in this case” is clearly erroneous.

There is no contrary evidence of record to refute the evidence in the medical treatises establishing that the medication which was administered to this veteran causes gastrointestinal bleeding. The SMR specifically indicate that the veteran’s most significant complaint **during this hospitalization were of gastrointestinal origin**. The gastrointestinal complaints were erroneously treated as of psychiatric origin. The new evidence submitted when viewed in the context of the old, provides a plausible basis for the claim that the veteran was discharged for a medical condition incurred or aggravated by military service. The claims should have been allowed.

D. The Board Of Veterans Appeals Failed To Acknowledge And Weigh The Positive Evidence Of A Service-Connected Disability.

The BVA is required to give due consideration to the time, place and circumstances of the veteran’s military and medical records. 38 U.S.C. 8 1154 (a). In reviewing the evidence, where there is a balance of positive and negative evidence, the veteran is to be given the benefit of the doubt.⁷⁶ The “benefit of the doubt rule” does not apply to a determination of CUE in the prior adjudications. Crowe v. Brown, 7 Vet. App. at 248. However, once CUE has been demonstrated, by showing that the claim was not correctly adjudicated, the rule should be applied to a determination on the merits. Cook v. Brown, 4 Vet. App. 238 (1993). ~~have been applied to the widow’s new claim.~~

In Gilbert v. Derwinski, 1 Vet. App. 49 (1990) and Sammaraco v. Derwinski, 1 Vet. App. 111

⁷⁶ When, after consideration of all evidence and material of record in a case before the Department with respect to benefits . . . , there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving each such issue shall be given to the claimant.

38 U.S.C. 8 5107 (b)

(1991), the requirement has been firmly established that the VA must include an evaluation of the positive evidence, and a weighing of the positive and negative evidence, and finally a statement of the reasons or bases for a conclusion that the benefit of the doubt rule does not apply. See, Jones v. Derwinski, 1 Vet. App. 210 and Cook v. Brown, 4 Vet. App. at 238. To the extent that the veteran's stomach complaints were discussed at all, the VARO relied on X-ray evidence from 1941. The test relied on, even with modern techniques, misses one out of every five gastric ulcers."

An evaluation of all the evidence suggests that the positive evidence significantly outweighs the negative X-ray finding. The objective evidence of gastrointestinal bleeding was not rebutted by competent evidence. However, even if the tests can be considered of equal weight, the benefit of the doubt rule requires a finding if service-connected disability.

E. The Board Of Veterans Appeals Violated Its Duty To Assist The Claimant By Refusing To Obtain An Independent Medical Evaluation Of The Veteran's Medical Records By A Specialist In Gastroenterology.

Once a veteran or survivor has submitted a well grounded claim for benefits, the VA has a statutory duty to assist the claimant in developing the claim for benefits. 38 U.S.C. Q 5 107 (a). In the present case, there was no finding that the new claim was not well grounded. While the duty to assist does not apply to a determination of CUE in the earlier decisions, once CUE has been demonstrated, the VA is under a duty to assist the veteran. Stanton v. Brown, 5 Vet. App. 563, 569 (1993). Likewise, the duty attached to the new claim.

The widow acknowledges that, apart from the treatises submitted, the record does not contain a medical opinion addressing the relevant questions as to misdiagnosis in service and the relationship between the gastrointestinal bleeding and the medication given. Since the veteran has passed away, it was not possible to obtain a medical examination. The veteran's widow requested that the VARO

⁷⁷ R. at 164.

obtain an expert medical opinion based **on** the records and other evidence. No opinion was provided. The BVA determined that the proffered medical treatises were “too vague” to be considered and refused to provide this indigent widow with the requested medical evaluation.

The Board does not believe that the issue is of such medical complexity or that there is a medical controversy sufficient to warrant an advisory opinion from a medical expert either in the context of a clear and unmistakable error analysis or a new and material evidence analysis.

BVA Decision at 12.⁷⁸

This finding is a medical conclusion not supported by independent medical evidence as required by Colvin v. Derwinski, 1 Vet. App. at 175. The duty to assist was violated. Crowe v. Brown, 7 Vet. App. at 247.

F. The Board Of Veterans Appeal Violated Its Duty To Consider All Of The Issues Raised On Appeal.

The BVA must review all of the issues reasonably raised by a liberal reading of the claimant’s substantive appeal. Chisem v. Brown, 4 Vet. App. at 176. The BVA decision failed to address two issues specifically raised by the widow’s appeal.

1. The BVA Failed To Address The Widow’s New Claim.

The widow’s claim for pension or death compensation was a new claim. The BVA decision does not discuss this claim, which was clearly before it.⁷⁹ The BVA is not free to ignore issues raised on appeal by the claimant. 38 U.S.C. 3 7104 (d). It erred in doing so.

Evidence was submitted showing “Upper Gastric Bleeding” as a contributory cause of death⁸⁰

In order to establish service connection for the cause of a veteran’s death, the evidence must show that a disability incurred or aggravated

⁷⁸ R. at 15.

⁷⁹ R. at 184 - 186 and 204 - 207.

⁸⁰ R. at 127.

by service was either the principal cause of death or a contributory cause of death.

Ashlev v. Brown, 6 Vet. App. 52, 57 (1993).

The BVA refused to recognize the objective evidence of gastric bleeding in the SMR. A gastric ulcer which has been service-connected will be compensated whenever manifested after service, regardless of the time interval involved so long as it is not clearly attributable to an intercurrent causes. 38 C.F.R. 5.3.303 (b). Cook v. Brown, 4 Vet. App. at 238. The BVA should have found that the gastrointestinal bleeding first manifested in service was a contributory cause of the veteran's death.

2. The BVA Failed To Consider The 1990 Medical Records.


In her appeal to the BVA, the widow claimed that the 1990 medical records should be considered. There is no evidence that this was done. The BVA decision does not mention this issue. The BVA erred in not considering this evidence.

IV. CONCLUSION

The veteran, was entitled to compensation and pension as the result of a gastrointestinal disability incurred or aggravated during his wartime military service. The prior decisions to the contrary are clearly and unmistakably erroneous. Even if CUE had not been shown, the decisions should have been reopened on the basis of new and material evidence. Mrs. MC Neely should be awarded the accrued benefits which the veteran was wrongly denied under the compensation or pension programs and continuing widow's benefits.

RESPECTFULLY SUBMITTED this / & day of April, 1996.

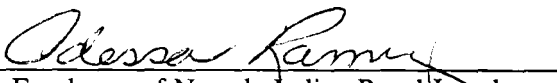
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CERTIFICATE OF SERVICE

I hereby certify that on this 15 day of April, 1996, I served the foregoing APPELLANT'S BRIEF upon the following person by depositing a copy of same in a sealed envelope in the United States mail, postage pre-paid, at Carson City, Nevada, addressed to the following:

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