

Department of Veterans Affairs

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agreements and expenses for reasonableness.

(Authority: 38 U.S.C. 7104, 7105, 7105A; 38 U.S.C. 5902, 5903, 5904)

[57 FR 4109, Feb. 3, 1992, as amended at 60 FR 25851, May 15, 1995; 61 FR 20453, May 7, 1996; 67 FR 3105, Jan. 23, 2002; 69 FR 53808, Sept. 3, 2004; 73 FR 29880, May 22, 2008]

Subpart O—Revision of Decisions on Grounds of Clear and Unmistakable Error

SOURCE: 64 FR 2139, Jan. 13, 1999, unless otherwise noted.

§ 20.1400 Rule 1400. Motions to revise Board decisions.

(a) Review to determine whether clear and unmistakable error exists in a final Board decision may be initiated by the Board, on its own motion, or by a party to that decision (as the term “party” is defined in Rule 1401(b) (§20.1401(b) of this part) in accordance with Rule 1404 (§20.1404 of this part).

(b) All final Board decisions are subject to revision under this subpart except:

- (1) Decisions on issues which have been appealed to and decided by a court of competent jurisdiction; and
- (2) Decisions on issues which have subsequently been decided by a court of competent jurisdiction.

(Authority: 38 U.S.C. 501(a), 7111)

[64 FR 2139, Jan 13, 1999, as amended at 64 FR 73414, Dec. 30, 1999]

§ 20.1401 Rule 1401. Definitions.

(a) *Issue.* Unless otherwise specified, the term “issue” in this subpart means a matter upon which the Board made a final decision (other than a decision under this subpart). As used in the preceding sentence, a “final decision” is one which was appealable under Chapter 72 of title 38, United States Code, or which would have been so appealable if such provision had been in effect at the time of the decision.

(b) *Party.* As used in this subpart, the term “party” means any party to the proceeding before the Board that resulted in the final Board decision which is the subject of a motion under this subpart, but does not include offi-

cially authorized to file administrative appeals pursuant to §19.51 of this title.

(Authority: 38 U.S.C. 501(a), 7104(a))

§ 20.1402 Rule 1402. Inapplicability of other rules.

Motions filed under this subpart are not appeals and, except as otherwise provided, are not subject to the provisions of part 19 of this title or this part 20 which relate to the processing and disposition of appeals.

(Authority: 38 U.S.C. 501(a))

§ 20.1403 Rule 1403. What constitutes clear and unmistakable error; what does not.

(a) *General.* Clear and unmistakable error is a very specific and rare kind of error. It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. Generally, either the correct facts, as they were known at the time, were not before the Board, or the statutory and regulatory provisions extant at the time were incorrectly applied.

(b) *Record to be reviewed*—(1) *General.* Review for clear and unmistakable error in a prior Board decision must be based on the record and the law that existed when that decision was made.

(2) *Special rule for Board decisions issued on or after July 21, 1992.* For a Board decision issued on or after July 21, 1992, the record that existed when that decision was made includes relevant documents possessed by the Department of Veterans Affairs not later than 90 days before such record was transferred to the Board for review in reaching that decision, provided that the documents could reasonably be expected to be part of the record.

(c) *Errors that constitute clear and unmistakable error.* To warrant revision of a Board decision on the grounds of clear and unmistakable error, there must have been an error in the Board’s adjudication of the appeal which, had it not been made, would have manifestly changed the outcome when it was made. If it is not absolutely clear

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that a different result would have ensued, the error complained of cannot be clear and unmistakable.

(d) *Examples of situations that are not clear and unmistakable error*—(1) *Changed diagnosis.* A new medical diagnosis that “corrects” an earlier diagnosis considered in a Board decision.

(2) *Duty to assist.* The Secretary’s failure to fulfill the duty to assist.

(3) *Evaluation of evidence.* A disagreement as to how the facts were weighed or evaluated.

(e) *Change in interpretation.* Clear and unmistakable error does not include the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a change in the interpretation of the statute or regulation.

(Authority: 38 U.S.C. 501(a), 7111)

§ 20.1404 Rule 1404. Filing and pleading requirements; withdrawal.

(a) *General.* A motion for revision of a decision based on clear and unmistakable error must be in writing, and must be signed by the moving party or that party’s representative. The motion must include the name of the veteran; the name of the moving party if other than the veteran; the applicable Department of Veterans Affairs file number; and the date of the Board of Veterans’ Appeals decision to which the motion relates. If the applicable decision involved more than one issue on appeal, the motion must identify the specific issue, or issues, to which the motion pertains. Motions which fail to comply with the requirements set forth in this paragraph shall be dismissed without prejudice to refiling under this subpart.

(b) *Specific allegations required.* The motion must set forth clearly and specifically the alleged clear and unmistakable error, or errors, of fact or law in the Board decision, the legal or factual basis for such allegations, and why the result would have been manifestly different but for the alleged error. Non-specific allegations of failure to follow regulations or failure to give due process, or any other general, non-specific allegations of error, are insufficient to satisfy the requirement of the previous sentence. Motions which fail to comply with the requirements set forth in this

paragraph shall be dismissed without prejudice to refiling under this subpart.

(c) *Filing.* A motion for revision of a decision based on clear and unmistakable error may be filed at any time. Such motions should be filed at the following address: Director, Management and Administration (01E), Board of Veterans’ Appeals, 810 Vermont Avenue, NW., Washington, DC 20420.

(d) *Requests not filed at the Board.* A request for revision transmitted to the Board by the Secretary pursuant to 38 U.S.C. 7111(f) (relating to requests for revision filed with the Secretary other than at the Board) shall be treated as if a motion had been filed pursuant to paragraph (c) of this section.

(e) *Motions for reconsideration.* A motion for reconsideration, as described in subpart K of this part, whenever filed, will not be considered a motion under this subpart.

(f) *Withdrawal.* A motion under this subpart may be withdrawn at any time before the Board promulgates a decision on the motion. Such withdrawal shall be in writing, shall be filed at the address listed in paragraph (c) of this section, and shall be signed by the moving party or by such party’s representative. If such a writing is timely received, the motion shall be dismissed without prejudice to refiling under this subpart.

(Authority: 38 U.S.C. 501(a), 7111)

[64 FR 2139, Jan. 13, 1999, as amended at 66 FR 35903, July 10, 2001]

§ 20.1405 Rule 1405. Disposition.

(a) *Docketing and assignment; notification of representative*—(1) *General.* Motions under this subpart will be docketed in the order received and will be assigned in accordance with § 19.3 of this title (relating to assignment of proceedings). Where an appeal is pending on the same underlying issue at the time the motion is received, the motion and the appeal may be consolidated under the same docket number and disposed of as part of the same proceeding. A motion may not be assigned to any Member who participated in the decision that is the subject of the motion. If a motion is assigned to a panel, the decision will be by a majority vote of the panel Members.