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105TH CONGRESS, 1st Session | SENATE | REPORT 105–157

AMENDING TITLE 38, UNITED STATES CODE, TO ALLOW REVISION OF VETERANS BENEFITS DECISIONS BASED ON CLEAR AND UNMISTAKABLE ERROR

NOVEMBER 13, 1997.—Ordered to be printed

Mr. SPECTER, from the Committee on Veterans' Affairs, submitted the following

REPORT

[To accompany S. 464]

The Committee on Veterans' Affairs, to which was referred the bill (S. 464) to allow revision of veterans benefits decisions based on clear and unmistakable error, having considered the same, reports favorably thereon and recommends that the bill do pass.

COMMITTEE BILL

The text of the bill as reported is as follows:

SECTION 1. REVISION OF DECISIONS BASED ON CLEAR AND UNMISTAKABLE ERROR.

(a) ORIGINAL DECISIONS.—(1) Chapter 51 of title 38, United States Code, is amended by inserting after section 5109 the following new section:

"§ 5109A. Revision of decisions on grounds of clear and unmistakable error

"(a) A decision by the Secretary under this chapter is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.

"(b) For the purposes of authorizing benefits, a rating or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

"(c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the Secretary on the Secretary's own motion or upon request of the claimant.

"(d) A request for revision of a decision of the Secretary based on clear and unmistakable error may be made at any time after that decision is made.

"(e) Such a request shall be submitted to the Secretary and shall be decided in the same manner as any other claim.".

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 5109 the following new item:

"5109A. Revision of decisions on grounds of clear and unmistakable error.".

(b) BVA DECISIONS.—(1) Chapter 71 of such title is amended by adding at the end the following new section:

"§ 7111. Revision of decisions on grounds of clear and unmistakable error

"(a) A decision by the Board is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.

"(b) For the purposes of authorizing benefits, a rating or other adjudicative decision of the Board that constitutes a reversal or revision of a prior decision of the Board on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

"(c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the Board on the Board's own motion or upon request of the claimant.

"(d) A request for revision of a decision of the Board based on clear and unmistakable error may be made at any time after that decision is made.

"(e) Such a request shall be submitted directly to the Board and shall be decided by the Board on the merits, without referral to any adjudicative or hearing official acting on behalf of the Secretary.

"(f) A claim filed with the Secretary that requests reversal or revision of a previous Board decision due to clear and unmistakable error shall be considered to be a request to the Board under this section, and the Secretary shall promptly transmit any such request to the Board for its consideration under this section.".

(2) The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

"7111. Revision of decisions on grounds of clear and unmistakable error.".

(c) EFFECTIVE DATE.—(1) Sections 5109A and 7111 of title 38, United States Code, as added by this section, apply to any determination made before, on, or after the date of enactment of this Act.

(2) Notwithstanding section 402 of the Veterans Judicial Review Act (38 U.S.C. 7251 note), chapter 72 of title 38, United States Code, shall apply with respect to any decision of the Board of Veterans' Appeals on a claim alleging that a previous determination of the Board was the product of clear and unmistakable error if that claim is filed after, or was pending before the Department of Veterans Affairs, the Court of Veterans Appeals, the Court of Appeals for the Federal Circuit, or the Supreme Court on, the date of enactment of this Act.

INTRODUCTION

On March 18, 1997, Committee member Patty Murray introduced S. 464, a bill to allow revision of veterans benefits decisions based on clear and unmistakable error.

On July 25, 1997, the Committee held a hearing to receive testimony on S. 464 and on other bills pending before the Committee. The Committee received testimony from Senator Daniel K. Inouye, Senator Barbara Boxer, Representative Bob Filner, and Representative Benjamin A. Gilman, and received testimony for the record from Representative Sue W. Kelly. The Committee also received testimony from Stephen L. Lemons, Ed.D., VA's Acting Under Secretary for Benefits, Thomas L. Garthwaite, M.D., VA's Deputy Under Secretary for Health, and from representatives of The American Legion, Veterans of Foreign Wars, Disabled American Veterans, and Vietnam Veterans of America. Testimony was also submitted for the record of the hearing by the Office of Veterans Affairs, Philippine Embassy; Paralyzed Veterans of America; AMVETS; the American Coalition for Filipino Veterans; the Coordinating Council of Leaders of Veterans Organizations in Southern California; Filipino War Veterans, Incorporated; the National Coalition for Homeless Veterans; and LA Vets.

Some of the witnesses expressed views on S. 464; some did not. Among those who expressed views on S. 464, there was an absence of consensus. The American Legion, Veterans of Foreign Wars, Dis-

abled American Veterans, Paralyzed Veterans of America, AMVETS, and Vietnam Veterans of America expressed support for S. 464. VA opposed enactment of S. 464.

COMMITTEE MEETING

After carefully reviewing the testimony from the July 25, 1997, hearing, the Committee met in open session on October 7, 1997, and voted by unanimous voice vote to report S. 464 favorably to the Senate.

DISCUSSION

BACKGROUND

The Department of Veterans Affairs (VA) determines eligibility for veterans benefits through its adjudication process. There are two major administrative steps in the process. VA's Veterans Benefits Administration (VBA) initially processes claims through its 57 regional offices. Claimants who choose to do so may appeal regional office decisions once to VA's Board of Veterans' Appeals (BVA) by filing a "notice of disagreement." Generally, a claimant's notice of disagreement must be filed within 1 year of the date when the decision to be appealed was mailed to the claimant by the regional office. BVA decisions on appeals are de novo; that is, they are based on the Board's consideration of the entire record and upon consideration of all evidence of record. To gain such review, the substantive appeal must be perfected subsequent to the submission of a notice of disagreement filed within 1 year of the decision being appealed.

BVA decisions are subject to appeal by claimants to the U.S. Court of Veterans Appeals (CVA), an Article I court created by Public Law 100–687 (November 18, 1988). Pursuant to section 402 of Public Law 100–687, however, CVA only has authority to review BVA decisions rendered in cases for which the notice of disagreement giving rise to BVA jurisdiction was filed on or after November 18, 1988, the date of enactment of Public Law 100–687.

Regional office decisions are final and binding. However, pursuant to regulations adopted by VA, final decisions will be reversed or amended where evidence establishes that there has been clear and unmistakable error. CVA has ruled that "clear and unmistakable error" is error that is obvious and was outcome-determinative with respect to the decision under review. *Russell* v. *Principi,* 3 Vet. App. 310 (1992). A claim that evidence was improperly weighed or evaluated "can never rise to the stringent definition of clear and unmistakable error." *Fugo* v. *Brown,* 6 Vet. App. 40, 43–44 (1993). "Similarly, neither can broad-brush allegations of 'failure to follow the regulations' or 'failure to give due process,' or any other general, non-specific claim of 'error'" rise to the level of clear and unmistakable error. *Id.* Moreover, claimants cannot reopen a clear and unmistakable error claim with new and material evidence. *Flash* v. *Brown,* 3 Vet. App. 310 (1992). In cases where clear and unmistakable error has resulted in the denial of benefits, benefits are awarded retroactively to the date that the underlying claim was filed.

VA authority to correct clear and unmistakable error, and to make retroactive awards of benefits in cases where clear and unmistakable error is found, is a product of VA regulation. There is no independent statutory directive requiring VA to adopt such a standard for correcting error.

Prior to 1994, claimants could assert that either a regional office decision or a BVA decision contained clear and unmistakable error, and they could assert that claim before a regional office. However, in *Smith* v. *Brown,* 35 F.3d 1516 (Fed. Cir. 1994), the Court ruled that VA's regulation-based clear and unmistakable error authority applies only to regional office decisions, and that BVA decisions are final unless reconsideration is ordered by the BVA Chairman or they are reversed or remanded by CVA. The Court noted that a body akin to a trial court (a regional office) does not properly review decisions rendered by an appellate body (BVA) that has jurisdiction over it.

Since *Smith*, claimants who perceive clear and unmistakable error—indeed, who perceive any error in a post-Smith regional office decision—may gain review of their claims at BVA. They must, however, file a notice of disagreement within 1 year of the alleged erroneous regional office decision. After the expiration of that period, they may not seek BVA review. The only review option open to them is at the regional office, and there they must meet a very high standard of review—clear and unmistakable error.

Those who believe that a BVA decision contains clear and unmistakable error may, since *Smith,* appeal to CVA, but only if the BVA decision in question arose from a case where the claimant filed his or her notice of disagreement on or after November 18, 1988, and the notice of appeal to CVA was filed within 120 days of the BVA decision. Claimants having older BVA decisions cannot effectively assert clear and unmistakable error as a matter of right. Such a claim, however, may be reconsidered by the Board on order of the Board's Chairman, and if it is reconsidered, it may be modified or reversed by the Board on the basis of obvious error, new or material evidence, or a finding that BVA was materially influenced by fraudulent evidence. If obvious error is found, BVA may grant retroactive benefits. The Chairman's decision to reconsider a claim is discretionary; it may not be appealed.

During fiscal years 1991 through 1996, approximately 4,500 motions for reconsideration were submitted to the Chairman of BVA, and of these, more than 900 were reconsidered. In approximately 75 percent of these 900+ reconsidered cases, the Board either allowed the claim or remanded the claim back to the regional office.

COMMITTEE BILL

The Committee bill would accomplish two purposes. First, it would codify, in statute, the allowance currently specified by regulation: that regional offices may reopen, revise, and reverse prior decisions based on a finding of "clear and mistakable error." Second, the Committee bill would authorize claimants, as a matter of right, to appeal prior BVA decisions to BVA, without regard to the generally applicable 1-year limitation period, upon alleging that the appealed decision contains "clear and unmistakable error."

COST ESTIMATE

In compliance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate, the Committee, based on information supplied by Congressional Budget Office (CBO), estimates that, compared to the CBO baseline, there would be no costs or savings resulting from enactment of the Committee bill.

The cost estimate provided by CBO follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 8, 1997.

Hon. ARLEN SPECTER,
Chairman, Committee on Veterans' Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 464, a bill to amend title 38, United States Code, to allow revision of veterans benefits decisions based on clear and unmistakable error.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mary Helen Petrus.

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

S. 464—A BILL TO AMEND TITLE 38, UNITED STATES CODE, TO ALLOW REVISION OF VETERANS BENEFITS DECISIONS BASED ON CLEAR AND UNMISTAKABLE ERROR

Summary: CBO estimates that S. 464 would raise administrative costs over the first two or three years after enactment by $1 million to $2 million in total, but in the longer run administrative costs would rise by less than $500,000 a year. In addition, CBO estimates that the bill would have a direct spending impact of less than $500,000 a year through 2002. Because the bill would raise direct spending, it would be subject to pay-as-you-go procedures. S. 464 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 and would not affect the budgets of state, local, or tribal governments.

Section 1(a) would have no budgetary impact because it would codify the current procedure for revising veterans' claims decisions made by regional offices. Other sections of the bill would give certain veterans new rights and opportunities for appeal. Under current law, a veteran may appeal a regional office's decision to the Board of Veterans Appeals (BVA). Once the BVA has rendered a decision, a veteran may appeal directly to the Court of Veterans Appeals (COVA) or move for reconsideration of the Board's decision on the basis of "obvious error." The Chairman of BVA reviews the motion and at his discretion may allow it, thus referring the matter to a panel of members for reconsideration. Section 1(b) would require BVA to review decisions challenged on the basis of "clear and unmistakable error." Section 1(c) would make sections 1(a) and 1(b) retroactive and would allow veterans to appeal BVA decisions involving claims of "clear and unmistakable error" to COVA and other higher courts regardless of a current restriction limiting con-

sideration to cases in which administrative appeals were initiated on or after November 18, 1988.

To obtain revision of a BVA decision under the bill, the claimant must assert "clear and unmistakable error," which is an error of law or fact in the record at the initial decision that compels the conclusion that the decision would have been different but for the error. The "clear and unmistakable error" standard is roughly the same as the current standard of "obvious error." The standard of review, therefore, is not the key change that the bill would make in the procedure. Rather, the bill would eliminate the Chairman's discretion to allow or not allow reconsideration and make the review of a BVA decision a matter of right.

The administrative costs of the bill would have two parts—a continuing increase in costs associated with the annual caseload under current law and a larger initial increase that would stem from retroactively extending the right to review. CBO assumes that the longer run increase in caseload resulting from this bill would be a portion of the requests for reconsideration under current law that are denied. From 1991 to 1995, BVA denied reconsideration for about 500 motions a year, including motions that might have been based on clear and unmistakable error. Data from the Department of Veterans Affairs indicate that the average cost per case is about $1,000. Because the marginal cost of each new case would be less than $1,000 and BVA would have to review fewer than 500 new motions a year, the long-run costs of administration would be less than $500,000 annually.

The number of veterans who would demand review of past cases based on clear and unmistakable error is the key uncertainty in estimating the costs of the bill. Whether or not the case involved such error, the demand would still add to BVA's workload and costs because it would at least have to screen the demands and document its conclusions. Nevertheless, the current process for adjudicating veterans claims allows many opportunities for appeal, and it is probable that most veterans having claims pursue them under current law. CBO estimates that up to 2,000 veterans would return to BVA for reconsideration under the bill and add about $1 million to $2 million to BVA's administrative costs, currently about $38 million annually, during the first three years after enactment.

By their nature, claims of clear and unmistakable error, if sustained, are very likely to lead to additional benefits to the claimant. The bill would raise direct spending to the extent that the cases involved such benefits as disability compensation, pension benefits, or survivor benefits. Although the extra administrative costs of the bill would not cumulate from year to year, the additional benefits would be paid for the life of the veteran or surviving beneficiary. How much direct spending would rise depends on the caseload and average award in benefits, both of which are very uncertain. Because veterans have many opportunities under current law to appeal claims decisions, CBO estimates that a small number of additional cases would be successfully appealed under the bill. Also, it is unlikely that the average annual benefit involved in such a case would be more than $1,000 to $2,000. Thus, the bill would probably increase direct spending by less than $500,000 a year in 1998 and the next several years.

The CBO staff contact for this estimate is Mary Helen Petrus. This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee on Veterans' Affairs has made an evaluation of the regulatory impact that would be incurred in carrying out the Committee bill. The Committee finds that the Committee bill would not entail any regulation of individuals or businesses or result in any impact on the personal privacy of any individuals, and that the paperwork resulting from enactment would be minimal.

TABULATION OF VOTES CAST IN COMMITTEE

In compliance with paragraph 7 of rule XXVI of the Standing Rules of the Senate, the following is a tabulation of votes cast in person or by proxy by members of the Committee on Veterans' Affairs at its October 7, 1997, meeting. On that date, the Committee, by unanimous voice vote, ordered S. 464, as amended, reported favorably to the Senate.

AGENCY REPORT

On July 25, 1997, Stephen L. Lemons, Ed.D., Acting Under Secretary for Benefits, Department of Veterans Affairs, submitted testimony on, among other things, S. 464. An excerpt from that testimony is reprinted below:

> STATEMENT OF HONORABLE STEPHEN L. LEMONS, ACTING UNDER SECRETARY FOR BENEFITS, DEPARTMENT OF VETERANS AFFAIRS
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> Mr. Chairman and Members of the Committee: I am pleased to be here this morning to discuss those items on your agenda that would impact the Veterans Benefits Administration, the National Cemetery System, and the Board of Veterans' Appeals. Your letter of invitation asked that we address each of the following bills and draft proposals: S. 987 (VA requested draft legislation proposing a compensation cost-of-living adjustment and other program improvements); S. 464; S. 623; S. 714; S. 730; Committee Print (to increase the Medal of Honor pension); S. 813; S. 986 (VA requested draft legislation proposing home loan program improvements); Committee Print (to make technical amendments to Public Law 104–275); and Committee Print (codification of FY 1997 cost-of-living adjustment legislation, Pub. L. No. 104–263).
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> S. 464—REVISION OF BVA DECISIONS BASED ON CLEAR AND UNMISTAKABLE ERROR
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> Mr. Chairman, S. 464 would amend title 38, United States Code to allow the revision of veterans benefits deci-

sions by the Board of Veterans' Appeals based on clear and unmistakable error. A substantively identical bill, H.R. 1090, was passed by the House of Representatives on April 16, 1997. We oppose each of these bills because they fail the most important test for sound veterans legislation: they would not be good for veterans.

Section 1(a) of both bills would provide by statute what VA already provides for in regulations governing our claims-adjudication process: that claim decisions by agencies of original jurisdiction (primarily, VA regional offices) are subject to revision at any time on the grounds of clear and unmistakable error, and that reversal or revision of a prior decision on these grounds would have the same effect as if the reversal or revision had been made on the date of the corrected decision. Although we have no particular objections to codifying in statute what is already provided for in regulations (38 C.F.R. §§ 3.105(a)), section 1(a) of these bills is, as a matter of law, unnecessary.

Our opposition to these bills is based on sections 1(b) and 1(c) of each, which would drastically change current law regarding review of decisions by the Board of Veterans Appeals. These provisions would require the Board to review and adjudicate, on demand, petitions alleging clear and unmistakable error in any Board decisions ever made—regardless how long ago, and regardless of the petitions' lack of merit. Board decisions on any such petitions pending before it or a reviewing court on the date of enactment of either bill, or filed with the Board thereafter, would be subject to review by the Court of Veterans Appeals.

The bills' potential for deluging the Board—already struggling to achieve acceptable response times—with cases lacking merit is patently obvious. And, of course, Board decisions are already subject to review for error in two ways: on motions to the Chairman for reconsideration (at any time) and, for decisions in administrative appeals initiated on or after November 18, 1988, by judicial review. In past Congresses, the Senate has carefully considered and rejected legislation such as S. 464 and H.R. 1090. With each passing year, the percentage of past Board decisions which have been subject to judicial review increases, making the legislation even less compelling. However, our opposition is based primarily on the adequacy of the current administrative remedy for curing error—reconsideration by the Board—and the bills' great potential for clogging the Board's stream of regular appellate casework, delaying resolution of appeals filed by deserving veterans whose cases have yet to be even initially addressed by the Board.

Section 7103 of title 38 authorizes the Chairman of the Board to order reconsideration of any Board decision on either the Chairman's own initiative or on motion of the claimant. Under departmental regulations (38 CFR § 20.1000), the Board may accord reconsideration based on

allegations that its challenged prior decisions resulted from "obvious error of fact or law—a standard the U.S. Court of Appeals for the Federal Circuit has equated with clear and unmistakable error. *Smith* v. *Brown,* 35 F.3d 1516, 1526 (Fed. Cir. 1994).

Reconsideration is not a hollow remedy. For FY's 1991 through 1996, the Board granted 907 motions for reconsideration—19% of the motions filed—and its decisions on reconsideration resulted in 328 outright benefit allowances and 334 remands of cases to the originating agencies for further consideration. The combined allowance and remand rate for cases reconsidered was 73%. The Board does reconsider prior decisions and does not hesitate to rectify problems in them as they are identified. We believe it is telling that proponents of this legislation have not, in the five years it has been under consideration by the Congress, been able to identify even a single instance involving true "clear and unmistakable error" in a prior Board decision the Board has declined to correct.

These bills are, frankly, a solution without a problem.

Given the remedies already available for correcting these errors, enactment of this legislation would be unlikely to benefit claimants and would carry the very real risk of increasing considerably the time all appellants must wait for Board decisions. No one knows how many additional Board decisions these bills would generate. Nevertheless, additional cases necessarily increase the time it takes for the Board to respond. Unless no appellants availed themselves of the proposed procedure, enactment of either bill would perforce degrade the Board's ability to decide appeals in a timely manner.

In reporting favorably on H.R. 1090, the House Committee on Veterans' Affairs stated as follows:

> Finally, the Committee notes that an appellate system which does not allow a claimant to argue that a clear and unmistakable error has occurred in a prior decision would be unique. This bill addresses errors similar to the kinds which are grounds for reopening Social Security claims. Under the Social Security system, a claim may be reopened at any time to correct an error which appears on the face of the evidence used when making the prior decision.

H.R. Rep. 105–52 (April 18, 1997). In addition to the fact that VA's appellate system already allows claimants "to argue that a clear and unmistakable error has occurred in a prior decision", the report is inaccurate in suggesting the Social Security system is more amenable to correction of clear and unmistakable error. It is true that, under 20 C.F.R. § 404.988(c)(8), a claimant can request at any time that Social Security reopen a disability determination to correct either a clerical error or an error that appears on the face of the evidence considered when the determination

was made. What is not stated in the Committee report is that Social Security decisions not to reopen a case are not subject to judicial review. *Califano* v. *Sanders,* 430 U.S. 99, 107–09 (1977); *accord, e.g., King* v. *Chater,* 90 F. 3d 323, 325 (8th Cir. 1996). Indeed, such determinations are not even subject to further administrative review within the Social Security Administration. 20 C.F.R. § 404.903(l). At the same time, Social Security claimants have only four years to reopen a claim based on "new and material evidence." 20 C.F.R. § 404.988(b). There is, of course, no such time limit for VA claimants.

In other words, these bills would not, contrary to the implication of the House report, make VA's system like Social Security's or, indeed, like any American claims-adjudication system with which we are familiar. Instead, it would compel the Board to reopen and readjudicate settled cases regardless of their merit.

Because of this legislation's very low potential for actually benefiting anyone, we cannot countenance the diminution of service to veterans—longer waits for resolution of their appeals—that would be its inevitable consequence. Accordingly, the Department opposes enactment of S. 464 and H.R. 1090.

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CHANGES IN EXISTING LAW MADE BY S. 464, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the Committee bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 38—VETERANS' BENEFITS

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PART IV—GENERAL ADMINISTRATIVE PROVISIONS

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CHAPTER 51—CLAIMS, EFFECTIVE DATES, AND PAYMENTS

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Subchapter I—Claims

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Sec. 5101. * * *

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5109A. Revision of decisions on grounds of clear and unmistakable error.

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5109A. Revision of decisions on grounds of clear and unmistakable error.

(a) A decision by the Secretary under this chapter is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.

(b) For the purposes of authorizing benefits, a rating or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

(c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the Secretary on the Secretary's own motion or upon request of the claimant.

(d) A request for revision of a decision of the Secretary based on clear and unmistakable error may be made at any time after that decision is made.

(e) Such a request shall be submitted to the Secretary and shall be decided in the same manner as any other claim.

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PART V—BOARDS, ADMINISTRATIONS, AND SERVICES

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CHAPTER 71—BOARD OF VETERANS' APPEALS

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Sec. 7101. * * *

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7111. Revision of decisions on grounds of clear and unmistakable error.

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7111. Revision of decisions on grounds of clear and unmistakable error.

(a) A decision by the Board is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.

(b) For the purposes of authorizing benefits, a rating or other adjudicative decision of the Board that constitutes a reversal or revision of a prior decision of the Board on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

(c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the Board on the Board's own motion or upon request of the claimant.

(d) A request for revision of a decision of the Board based on clear and unmistakable error may be made at any time after that decision is made.

(e) Such a request shall be submitted directly to the Board and shall be decided by the Board on the merits, without referral to any adjudicative or hearing official acting on behalf of the Secretary.

(f) A claim filed with the Secretary that requests reversal or revision of a previous Board decision due to clear and unmistakable error shall be considered to be a request to the Board under this sec-

tion, and the Secretary shall promptly transmit any such request to the Board for its consideration under this section.

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