## Section B. Revision of Decisions

#### Overview

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| In This Section | This section contains the following topics |

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| Topic | Topic Name |
| 1 | Finality of Decisions |
| 2 | Considering Additional Service Records |
| 3 | Reopening a Previously Denied Claim Based on New and Material Evidence |
| [4](#Topic7) | Clear and Unmistakable Error (CUE) |
| 5 | Jurisdiction When There Has Been a Board of Veterans’ Appeals (BVA) Decision |

#### 1. Finality of Decisions

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| Introduction | This topic contains general information on revising prior determinations, including   * final and binding determinations * significance of final and binding determinations * finally adjudicated claims * final and binding but not finally adjudicated claims, and * requests for an earlier effective date. |

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| a. Final and Binding Determinations | Under [38 CFR 3.104](http://www.ecfr.gov/cgi-bin/text-idx?SID=1b953117f1b8962a3b73df9da177f7ec&node=se38.1.3_1104&rgn=div8) a decision of a duly constituted rating agency or other agency of original jurisdiction is final and binding on all field offices of the Department of Veterans Affairs (VA) as to the conclusions made based on the evidence on file at the time VA issues written notification in accordance with [38 U.S.C. 5104](https://www.law.cornell.edu/uscode/text/38/5104). |

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| b. Significance of Final and Binding Determinations | ***Final and binding*** means, for the purpose of regional office (RO) adjudication, that RO employees may not revise the conclusion of a decision on the same factual basis.  ***Exceptions***: A decision may be amended on the same factual basis by RO employees as follows   * upon *de novo* review of a timely notice of disagreement (NOD) as provided by [38 CFR 3.2600](http://www.ecfr.gov/cgi-bin/text-idx?SID=99530df3e43083cb0b621693d1dd177c&node=se38.1.3_12600&rgn=div8) * when there is difference of opinion authority when permitted by [38 CFR 3.105(b)](http://www.ecfr.gov/cgi-bin/text-idx?SID=99530df3e43083cb0b621693d1dd177c&node=se38.1.3_1105&rgn=div8), or * when there is clear and unmistakable error (CUE) as provided by [38 CFR 3.105(a)](http://www.ecfr.gov/cgi-bin/text-idx?SID=99530df3e43083cb0b621693d1dd177c&node=se38.1.3_1105&rgn=div8). |

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| c. Finally Adjudicated Claims | A ***finally adjudicated*** claim is defined in [38 CFR 3.160(d)](http://www.ecfr.gov/cgi-bin/text-idx?SID=99530df3e43083cb0b621693d1dd177c&node=se38.1.3_1160&rgn=div8). It refers to the status of an award or denial of benefits when either   * the appeal period has expired without an appeal being initiated, or * an appeal is initiated and denied on appellate review. |

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| d. Final and Binding but not Finally Adjudicated Claims | A claim that has not been finally adjudicated (which includes claims where a final and binding decision has been issued but the appeal period has not expired) is still considered a ***pending claim*** under [38 CFR 3.160(c)](http://www.ecfr.gov/cgi-bin/text-idx?SID=99530df3e43083cb0b621693d1dd177c&node=se38.1.3_1160&rgn=div8).  For more information on reconsideration and new and material evidence in the appeal period, see M21-1, Part III, Subpart iv, 2.B.3.a. |

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| e. Requests for an Earlier Effective Date | In [*Rudd v. Nicholson*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmr), 20 Vet. App. 296 (2006), the U.S. Court of Appeals for Veterans Claims (CAVC) held that VA has no authority to adjudicate a “freestanding” request for an earlier effective date in an attempt to overcome the finality of an unappealed RO decision.  Although VA cannot consider a request for an earlier effective date on a final RO decision, the claimant *may* allege CUE with respect to the assignment of the effective date in that prior final RO decision. In order for the CUE claim to be considered valid, the claimant must specify the factual or legal errors at issue.  ***Example:*** A claimant’s statement that “my effective date is wrong, or “I want an earlier effective date” does not sufficiently specify the factual or legal error at issue.  ***References***: For more information on   * revising decisions based on CUE, see * [38 CFR 3.105(a)](http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=f2a3365e1410b0a342b2771145c4f684&n=pt38.1.3&r=PART&ty=HTML#se38.1.3_1105), and * M21-1, Part III, Subpart iv, 2.B.4 * responding to requests for an earlier effective date, see M21-1, Part I, 1.B.1.g, and * prescribed forms for a specific benefit, see M21-1, Part III, Subpart ii, 2.B. |

#### 2. Considering Additional Service Records

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| **Introduction** | This topic contains general information on considering additional service records after VA issues a decision on a claim including   * reconsidering additional service records * service records that warrant reconsideration under [38 CFR 3.156(c)(1)](http://www.ecfr.gov/cgi-bin/text-idx?SID=451c6d9ad167c9185f90243046c02f86&mc=true&node=se38.1.3_1156&rgn=div8) * service records that do not justify reconsideration under [38 CFR 3.156(c)(1)](http://www.ecfr.gov/cgi-bin/text-idx?SID=451c6d9ad167c9185f90243046c02f86&mc=true&node=se38.1.3_1156&rgn=div8) * effective dates under [38 CFR 3.156(c)(1)](http://www.ecfr.gov/cgi-bin/text-idx?SID=451c6d9ad167c9185f90243046c02f86&mc=true&node=se38.1.3_1156&rgn=div8), and * procedures for rating activity review. |

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| **a. Reconsidering Additional Service Records** | If VA receives or associates with the claims folder additional qualifying service records that existed and had not been associated with the claims folder when VA first decided a claim, VA will reconsider the claim under the provisions of [38 CFR 3.156(c)](http://www.ecfr.gov/cgi-bin/text-idx?SID=95b634fd8c286ed358f7ffac4fbec003&node=se38.1.3_1156&rgn=div8). See M21-1, Part III, Subpart iv, 2.B.2.b for what is considered “qualifying service records.”  ***Important***: The qualifying service records discussed under this Topic are not to be analyzed under [38 CFR 3.156(a)](http://www.ecfr.gov/cgi-bin/text-idx?SID=d6b846ee0c071814e04e6a832c1f8131&mc=true&node=se38.1.3_1156&rgn=div8) or [38 CFR 3.156(b)](http://www.ecfr.gov/cgi-bin/text-idx?SID=d6b846ee0c071814e04e6a832c1f8131&mc=true&node=se38.1.3_1156&rgn=div8).  ***Reference***: For more information on the effective date rule that applies when records received under [38 CFR 3.156(c)(1)](http://www.ecfr.gov/cgi-bin/text-idx?SID=451c6d9ad167c9185f90243046c02f86&mc=true&node=se38.1.3_1156&rgn=div8) result in favorable reconsideration, see M21-1, Part III, Subpart iv, 2.B.2.d. |

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| **b. Service Records That Warrant Reconsideration under 38 CFR 3.156(c)(1)** | Qualifying service records for the purpose of [38 CFR 3.156(c)(1)](http://www.ecfr.gov/cgi-bin/text-idx?SID=d6b846ee0c071814e04e6a832c1f8131&mc=true&node=se38.1.3_1156&rgn=div8) are any service records forwarded to VA from the Department of Defense (DoD) or service departments, including   * records related to a claimed in-service event, injury, or disease, regardless of whether such records mention the Veteran by name, and * declassified records that could not have been obtained because they were classified when VA decided the claim.   ***Exception***: Records identified in M21-1, Part III, Subpart iv, 2.B.2.c are not qualifying records for the purpose of [38 CFR 3.156(c)(1)](http://www.ecfr.gov/cgi-bin/text-idx?SID=d6b846ee0c071814e04e6a832c1f8131&mc=true&node=se38.1.3_1156&rgn=div8). |

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| c. Service Records That Do Not Justify Reconsideration under 38 CFR 3.156(c)(1) | The receipt of service records in the following two scenarios ***will not*** trigger reconsideration under the provisions of [38 CFR 3.156(c)(1)](http://www.ecfr.gov/cgi-bin/text-idx?SID=451c6d9ad167c9185f90243046c02f86&mc=true&node=se38.1.3_1156&rgn=div8)   * the service records did not exist when VA decided the claim, or * the claimant failed to provide sufficient information to enable VA to identify and obtain the service records (for example, the claimant failed to provide stressor information that would have allowed VA to contact the Joint Services Records Research Center).   ***Explanation***: In the first category above, the evidence did not exist to support entitlement when VA decided the prior claim. In the second category, VA would have fulfilled its duty to assist in attempting to procure such records at the time of the prior claim if it had the information necessary to submit the request.  ***Important***: Receipt of service records that do not warrant application of [38 CFR 3.156(c)(1)](http://www.ecfr.gov/cgi-bin/text-idx?SID=451c6d9ad167c9185f90243046c02f86&mc=true&node=se38.1.3_1156&rgn=div8) will still trigger review under [3.156(a) and/or (b)](http://www.ecfr.gov/cgi-bin/text-idx?SID=451c6d9ad167c9185f90243046c02f86&mc=true&node=se38.1.3_1156&rgn=div8), as applicable. |

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| **d. Effective Dates Under 38 CFR 3.156(c)(1)** | An award made based on the receipt of additional qualifying service records under [38 CFR 3.156(c)(1)](http://www.ecfr.gov/cgi-bin/text-idx?SID=d6b846ee0c071814e04e6a832c1f8131&mc=true&node=se38.1.3_1156&rgn=div8) is effective on the date entitlement arose *or* the date VA received the previously decided claim, whichever is later. Any other effective date provision applicable to the previous claim shall also be considered. See [38 CFR 3.156(c)(3)](http://www.ecfr.gov/cgi-bin/text-idx?SID=95b634fd8c286ed358f7ffac4fbec003&node=se38.1.3_1156&rgn=div8).  ***Important***: In [*Blubaugh v. McDonald*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bmb), 773 F. 3d 1310 (Fed. Cir. 2014), the court held that VA, under the provisions of [38 CFR 3.156(c)(1)](http://www.ecfr.gov/cgi-bin/text-idx?SID=95b634fd8c286ed358f7ffac4fbec003&node=se38.1.3_1156&rgn=div8), must consider an earlier effective date *only* if VA awards benefits resulting from reconsideration of the merits of the claim. This applies “when VA receives official service department records that were unavailable at the time that VA previously decided a claim for benefits and those records lead VA to award a benefit that was not awarded in the previous decision.”  ***Example***: VA denied service connection (SC) as “not incurred in service” for low back strain for a claim received on December 5, 1999. Although medical evidence at that time revealed the existence of “lumbosacral strain,” service treatment records (STRs) did not reveal treatment in service. On March 3, 2003, VA received additional STRs not part of the claims folder at the time of the original decision and that revealed treatment in service for a low back injury. Assuming that a current disability and link to service exists, VA may establish SC for the low back condition effective December 5, 1999.  As noted in [38 CFR 3.156(c)(4)](http://www.ecfr.gov/cgi-bin/text-idx?SID=95b634fd8c286ed358f7ffac4fbec003&node=se38.1.3_1156&rgn=div8), any retroactive disability evaluation assigned based on the receipt of additional service records must be supported adequately by medical evidence.  ***References:*** For additional information on   * effective dates for claims based on receipt of additional service records, see [*Stowers v. Shinseki*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bms), 26 Vet.App. 550, 554 (2014), and * effective dates and reconsidering the merits of claims based on additional service records, see [*Mayhue v. Shinseki*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmm), 24 Vet. App. 273 (2011). |

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| **e. Procedures for Rating Activity Review** | All additional *non-duplicate* service records received at any time after VA makes a decision on a claim shall be forwarded to the rating activity for review. See the table below for actions to take when reviewing the additional service records. |

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| **If service records...** | **Then the rating activity must ...** |
| *do not* require reconsideration of the merits of a previous claim   * see Example 1 below | indicate “no action necessary” on *VA Form 21-6789, Deferred Rating Decision*. End product (EP) 699 will be cleared. |
| require reconsideration of the merits of a previously claimed issue(s)   * See Example 2 below | complete a formal rating decision under EP 020 and include all pertinent issues that warrant reconsideration. |
| contain a chronic unclaimed condition | refer the claim to authorization to solicit a claim. See M21-1, Part IV, Subpart ii, 2.A.1.f. |

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| ***Examples***:   * #1: Military dental records are received five years after a previous rating decision awarded SC for hypertension, low back strain, and hearing loss. No formal rating is required. * #2: Additional STRs received indicate treatment from a private doctor while the Veteran was on leave during active duty. Several issues were previously denied SC in two separate rating decisions. All of these issues must now be reconsidered in a formal rating decision. |

#### 3. Reopening a Previously Denied Claim Based on New and Material Evidence

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| Introduction | This topic contains information on reopening a previously denied claim based on new and material evidence, including   * making a new decision after a claim has been finally denied * making a new decision before a claim is considered finally adjudicated * section 5103 requirements * definition of *new and material evidence* * cumulative evidence * requirement for reopening a claim * examples of evidence not sufficient to reopen a previously denied claim * benefit of the doubt **under 38 USC 5107(b)** * presuming the evidence to be credible * handling cases in which VA has requested new and material evidence * appealing a new and material evidence determination, and * effective date for revisions based on new and material evidence, and * effective date for revisions based on new and material evidence within the appeal period. |

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| a.  Making a New Decision After a Claim Has Been Finally Denied | Under the provisions of [38 CFR 3.156(a)](http://www.ecfr.gov/cgi-bin/text-idx?SID=95b634fd8c286ed358f7ffac4fbec003&node=se38.1.3_1156&rgn=div8), once a claim has been finally denied, and therefore is considered a finally adjudicated claim under [38 CFR 3.160(d)](http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=6809d54969a24832f2933461d688134a&r=SECTION&n=se38.1.3_1160), it cannot be ***reopened*** unless new *and* material evidence is received.  ***Important***: The principles of reopening a claim under [38 CFR 3.156(a)](http://www.ecfr.gov/cgi-bin/text-idx?SID=95b634fd8c286ed358f7ffac4fbec003&node=se38.1.3_1156&rgn=div8) do not apply when making a new decision on a claim that is final and binding, but not finally adjudicated (that is, within the one-year appeal period). In such cases, the claim must be ***reconsidered***. See M21-1, Part III, Subpart iv, 2.B.3.b for details on reviewing evidence on claims for reconsideration.  ***References***: For more information on   * new and material evidence, see * M21-1 Part III, Subpart iii, 1.B.6. * [38 U.S.C. 5108](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00005108----000-.html), and * [*Shade v. Shinseki*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bms), 24 Vet. App. 110 (2010), and * [*Manio v. Derwinski*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmm), 1 Vet. App. 140 (1991) * the definition of a “reopened claim,” see M21-1 Part III, Subpart ii, 2.E.1.b, and * finality, see M21-1, Part III, Subpart iv, 2.B.1. |

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| **b. Making a New Decision Before a Claim Is Considered Finally Adjudicated** | Evidence received after a decision and prior to the expiration of the appeal period, or prior to the appellate decision if a timely appeal has been filed, must be analyzed to determine if it is new and material. See [38 CFR 3.156(b)](http://www.ecfr.gov/cgi-bin/text-idx?SID=95b634fd8c286ed358f7ffac4fbec003&node=se38.1.3_1156&rgn=div8) for more information on how such evidence will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period.  ***Important***: The purpose of the review for new and material evidence under this Topic is *not* to determine if the claim can be reopened (since the claim is not yet final). Therefore, it is not necessary to include the standard new and material language in the rating narrative.  In [*Beraud v. McDonald*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmb), 766 F.3d 1402 (Fed. Cir. 2014), the court held that VA, under [38 CFR 3.156(b)](http://www.ecfr.gov/cgi-bin/text-idx?SID=451c6d9ad167c9185f90243046c02f86&mc=true&node=se38.1.3_1156&rgn=div8), must directly respond to a new submission of evidence received prior to the expiration of the one-year appeal period, and that, until it does, the claim remains open. Therefore to comply with the court’s decision, ROs must continue to   * respond directly to any and all evidence submitted during the appeal period or before disposition of appellate decision (reconsideration), and * evaluate such evidence on its merits and complete a formal decision that addresses the new evidence. |

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| **c. Section 5103 Requirements** | There is no need to provide a case-specific Section 5103 notice to the claimant when he/she is attempting to reopen a previously denied claim as the prior decision denying the claim will have included a written statement of the specific reasons for the denial and evidence considered.  ***Reference***: For more information on Section 5103 requirements when a claimant attempts to reopen a previously denied claim, see   * [VAOGCPREC 6-2014](VAOGCPREC%206-2014), and * M21-1 Part III, Subpart ii, 2.E.2.c |

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| d. Definition: New and Material Evidence | Evidence is ***new*** if it has not previously been considered.  Evidence is ***material*** if, by itself, or when considered with previous evidence of record, it relates to any unestablished fact necessary to substantiate the claim.  New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last final denial, and must raise a reasonable possibility of substantiating the claim.  ***Important***: In [*Shade v. Shinseki*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bms), 24 Vet. App. 110 (2010), the court held that the phrase, “must raise a reasonable possibility of substantiating the claim,” does not create a third element for new and material evidence. Instead, it provides guidance in determining whether submitted evidence meets the new and material requirements. The case further held that when SC was previously denied because multiple facts necessary to substantiate the claim were not established, new and material evidence relating to only one of these facts is sufficient to raise a reasonable possibility of substantiating the claim.  Examples of new and material evidence include   * written and sworn testimony of the claimant or witnesses to an event * lay statements from a family member or friend, and * a medical nexus opinion with supporting rationale.   ***Note***: To substantiate a previously denied claim does not necessarily mean to prove a claim, but the evidence supports a claim or provides substance to a claim.  ***References***: For more information on new and material evidence, see   * M21-1, Part III, Subpart iii, 1.B.6 * [VAOPGCPREC 6-2014](https://vaww.portal2.va.gov/sites/manualrewrite/MRchange/Shared%20Documents/Part%20III/III_iv/M21-1MRIII_iv_2_SecB/Change%20Documents/VAOPGCPREC%206-2014) * [*Cuevas v. Principi*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmc), 3 Vet. App. 542 (1992) * [*Barnett v. Brown*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmc), 8 Vet. App. 542 (1995), and * [*Bostain v. Wes*t](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmc), 11 Vet. App. 124 (1998). |

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| e. Cumulative Evidence | Evidence that is merely cumulative is *not* to be considered new evidence.  Cumulative evidence reinforces a previously proven or conceded element of the claim, or merely rehashes previously submitted statements.  ***Important***: Corroborating witness statements and supplemental medical nexus opinions are neither cumulative nor redundant if they address an element of the claim that has *not* already been proven or conceded. |

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| f. Requirement for Reopening a Claim | A previous, finally denied claim is considered reopened *only* when the evidence submitted is both new *and* material, as described in M21-1, Part III, Subpart iv, 2.B.3.d.  [38 CFR 3.156](http://www.ecfr.gov/cgi-bin/text-idx?SID=95b634fd8c286ed358f7ffac4fbec003&node=se38.1.3_1156&rgn=div8) must be read as creating a low threshold for reopening claims.  Evidence considered as sufficient to reopen a previously denied claim includes any competent medical or lay evidence that was not considered in the prior  claim and that now relates to (not necessarily proves) one or more of the  unestablished facts from the previous denial.  ***Examples of New and Material Evidence***:   * After VA denies SC due to “no nexus,” the Veteran submits a new opinion from a specialist. * After VA denies SC because “disability does not exist,” the Veteran submits a medical report showing the existence of the disability. * After VA denies SC for back injury as “not incurred in service,” the Veteran submits a buddy statement for the first time from a friend who witnessed the Veteran injure his back in service.   ***Important***: On or after March 24, 2015, a request to reopen a claim based on new and material evidence must be received on a prescribed form.  ***Reference***: See M21-1, Part III, Subpart ii, 2.D.2.b for form requirements for claims to reopen. |

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| g. Examples of Evidence Not Sufficient to Reopen a Previously Denied Claim | The following are examples of evidence ***not*** considered new and material and therefore, ***not*** sufficient to reopen a denied claim   * a record photocopied from the claims folder that was considered in the previously denied claim. * a new medical nexus opinion incorporating an inaccurate history. See [*Reonal v. Brown*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmr), 5 Vet. App. 458 (1993)for more information. * written testimony from an eyewitness that is substantially identical to a statement already on file. * a layperson’s assertion about the cause (but not the onset) of a disability, or * medical evidence that reveals the existence of a disability when previous evidence already revealed that the disability existed. |

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| **h. Benefit of the Doubt Under 38 USC 5107(b)** | The benefit of the doubt under [38 USC 5107(b)](https://www.law.cornell.edu/uscode/text/38/5107) cannot take the place of the standard for reopening claims. The standard for reopening claims, as stated in [38 U.S.C. 5103A(f)](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00005103---A000-.html), requires only that new and material evidence be presented or secured. The weight of the evidence is not considered.  ***Reference***: For more information on the benefit-of-the-doubt rule, see [*Martinez v. Brown*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bmm)*,* 6 Vet. App. 462 (1994). |

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| **i. Presuming the Evidence to be Credible** | When determining whether new and material evidence has been submitted to justify reopening a claim, presume the new evidence to be credible.  ***Note***: Once a claim has been reopened, the presumption of the credibility of the evidence no longer applies, and the evidence must be weighed.  ***Reference***: For more information on credible evidence, see  [*Justus v. Principi*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bmj)*,* 3 Vet. App. 510 (1992). |

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| j. Handling Cases in Which VA Has Requested New and Material Evidence | The table below shows how to handle cases in which VA has requested new and material evidence. |

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| If … | Then … |
| the evidence submitted is new and material | the development and/or rating activity will   * reopen the claim, * complete any necessary development including a VA exam, and * reconsider the claim on its merits based on all previously existing and newly submitted evidence. |
| the evidence submitted is new, but not material | the rating activity will prepare a rating decision that   * confirms the previous decision, and * indicates that the claim is not considered to have been successfully reopened.   ***Important***: The rating decision must explain the reason for the continued denial and why the submitted evidence is considered to be new, but not material. |
| the evidence submitted is not new, because it is clearly duplicate | the authorization activity will   * deny the claim administratively without a rating decision, and * advise the claimant why the claim is not considered to have been successfully reopened. |
| no evidence has been submitted in response to the request for new and material evidence | the authorization activity will   * deny the claim administratively, and * advise the claimant why the claim is not considered to have been successfully reopened. |

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| **k. Appealing a New and Material Evidence Determination** | A claimant may appeal a determination that evidence is not new and material.  Limit the statement of the case (SOC) to that issue, citing all of the following in the summary of evidence and adjudicative actions     * the date of the * original denial * notification of that denial * receipt of the evidence submitted to reopen the claim * finding that the evidence was not considered to be new and material * notification of that decision, and * the evidence submitted. |

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| **l. Effective Date for Reopened Claims Based on New and Material Evidence** | A claim that is reopened based on new and material evidence and awarded is generally effective the date of receipt of claim or the date entitlement arose, whichever is later. See [38 CFR 3.400(r)](http://www.ecfr.gov/cgi-bin/text-idx?SID=e5ea8a848b3ba9fce6ec4856ec1f5155&node=se38.1.3_1400&rgn=div8) for more information.  ***Example***:  VA issues a rating decision on March 1, 2010 denying SC for hypertension because there was no evidence of a current disability. On July 3, 2014, the Veteran submits new and material evidence that revealed the existence of hypertension as of June 2014. In this case, SC is awarded and the effective date, pursuant to [38 CFR 3.400(r)](http://www.ecfr.gov/cgi-bin/text-idx?SID=e5ea8a848b3ba9fce6ec4856ec1f5155&node=se38.1.3_1400&rgn=div8), is established as of the date of the receipt of the reopened claim, which is July 3, 2014.d  ***Important***: If there was an intent to file associated with a reopened claim, the effective date may be the date the intent to file was submitted per [38 CFR 3.155(b)](http://www.ecfr.gov/cgi-bin/text-idx?SID=a8dd811e89bb258d77aa9e5df9d78309&node=se38.1.3_1155&rgn=div8). |

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| m. Effective Date for Revisions Based on New and Material Evidence Within the Appeal Period | When new and material evidence other than service department records is received within the appeal period or prior to an appellate decision, as provided by [38 CFR 3.156(b)](http://www.ecfr.gov/cgi-bin/text-idx?SID=6186b627206495f710857728c9ee5a21&node=se38.1.3_1156&rgn=div8), and the pending claim is reconsidered and SC awarded, the effective date will be as though the former decision had not been rendered. See [38 CFR 3.400(q)](http://www.ecfr.gov/cgi-bin/text-idx?SID=88c3573740f7441f127f35fac5e1e8ab&node=se38.1.3_1400&rgn=div8) and M21-1, Part III, Subpart iv, 2.B.3.a for more information.  ***Example 1***:  VA issues a rating decision on March 1, 2010 denying SC for a claim for hypertension, which was received on December 2, 2009. On May 5, 2010, the Veteran submits new and material evidence, which results in VA awarding SC for hypertension. Because the claim is still open, (i.e., “pending” in accordance with [38 CFR 3.156(b)](http://www.ecfr.gov/cgi-bin/text-idx?SID=95b634fd8c286ed358f7ffac4fbec003&node=se38.1.3_1156&rgn=div8)), the evidence is considered as having been filed with the prior pending claim and, thus, an earlier effective date of December 2, 2009 is warranted based on the provisions of [38 CFR 3.400(q)](http://www.ecfr.gov/cgi-bin/text-idx?SID=e5ea8a848b3ba9fce6ec4856ec1f5155&node=se38.1.3_1400&rgn=div8).  ***Example 2***:  VA issues a rating decision on March 1, 2010 denying SC for hypertension. On May 5, 2010, the Veteran requests a reconsideration and submits evidence for the hypertension issue that is not considered new and material evidence. In this case, VA issues a decision on its merits that continues the denial of SC for hypertension. |

#### 4. CUE

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| Introduction | This topic contains information on CUEs, including   * definition: CUE * provisions of 38 CFR 3.105(a) * identifying a CUE * considering requests for revision based on CUE * determining a case of CUE * applying the benefit of the doubt under [38 USC 5107(b)](https://www.law.cornell.edu/uscode/text/38/5107) * approval of ratings prepared under 38 CFR 3.105(a), and * preparing a CUE decision. |

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| Change Date | June 25, 2015 |

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| a. Definition: CUE | The court, in [*Russell v Principi*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bmr), 3 Vet. App. 310 (1992), held that a ***clear and unmistakable error*** (CUE) exists if all three of the following requirements are met   * either the correct facts, as they were known at the time, were not before the adjudicator, (e.g., the adjudicator overlooked them) or the statutory or regulatory provisions extant at the time were incorrectly applied, * the error must be the sort which, had it not been made, would have manifestly changed the outcome at the time it was made, and * the determination must be based on the record and the law that existed at the time of the prior adjudication in question.   CUEs are undebatable, so that it can be said that reasonable minds could only conclude that the original decision was fatally flawed at the time it was made.  ***References***: For more information on the definition of CUE, see   * [38 CFR 3.105(a)](http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=39c7e367a71c8efc570650851b266303&rgn=div5&view=text&node=38:1.0.1.1.4&idno=38" \l "se38.1.3_1105) * [*Grover v. West*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bmg)*,* 12 Vet. App. 199 (1999) * [*Wilsey v Peake*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bmw), 535 F.3d 1368 (Fed. Cir. 2008) |

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| b. Provisions of 38 CFR 3.105(a) | [38 CFR 3.105(a)](http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=39c7e367a71c8efc570650851b266303&rgn=div5&view=text&node=38:1.0.1.1.4&idno=38#se38.1.3_1105) provides that if a CUE is established in a previous, final and binding decision, then the   * previous decision is reversed or amended, and * the effect is the same as if the corrected decision had been made on the date of the reversed decision.   ***Exceptions:***   * protection of evaluation in effect for 20 years or more under [38 CFR 3.951(b)](http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=7f4878f787ebf9871a4b5ce51586fba5&ty=HTML&h=L&r=SECTION&n=se38.1.3_1951), and * protection of SC in effect for 10 years or more under [38 CFR 3.957](http://www.ecfr.gov/cgi-bin/text-idx?SID=aaf0db75837c80ac0c8f4b8580ed9588&node=se38.1.3_1957&rgn=div8).   ***References***: For more information on   * revision based on CUE, see [38 U.S.C. 5109(a)](https://www.law.cornell.edu/uscode/text/38/5109A) * severance and its relationship to CUE, see M21-1 Part III, Subpart iv, 8.E.2 * adverse action resulting from CUE or severance of SC, see M21-1 Part IV, Subpart ii, 3.A.2 * reductions in disability evaluations and CUE see M21-1 Part IV, Subpart ii, 3.A.3 * the effective date of an allowance based on CUE, see [38 CFR 3.400(k)](http://www.ecfr.gov/cgi-bin/text-idx?SID=2d43739df18370e0d030102a7846636e&mc=true&node=se38.1.3_1400&rgn=div8) * protection of disability evaluations under [38 CFR 3.951(b)](http://www.ecfr.gov/cgi-bin/text-idx?SID=3d745bc7c246223846cc79ce13cb51e8&mc=true&node=se38.1.3_1951&rgn=div8), see M21-1, Part III, Subpart iv, 8.C.1, and * protection of SC under [38 CFR 3.957](http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=3d745bc7c246223846cc79ce13cb51e8&mc=true&r=SECTION&n=se38.1.3_1957), see M21-1, Part III, Subpart iv, 8.C.2. |

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| c. Identifying a CUE | A CUE will fall into one or more of the following categories   * the decision maker failed to apply or incorrectly applied the appropriate laws or regulations. (***Note***: These legal errors commonly involve pre-reduction due process or the failure to apply a statutory or regulatory presumption) * the decision maker overlooked material facts of record, or * the decision maker failed to follow a procedural directive that involved a substantive rule (a rule that regulates a right).   ***Important***:A duty to assist deficiency such as an insufficient examination cannot form a basis for CUE since such deficiency creates only an incomplete rather than an incorrect record. See [*King v. Shinseki*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmk), 700 F.3d 1339 (Fed. Cir. 2012) and [*Caffrey v. Brown*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmc), 6 Vet.App.377, 384 (1994).  ***Exception***: A failure to consider VA medical records, which were in VA’s constructive possession at the time of the prior decision, may constitute a CUE, if such failure affected the outcome of the claim. See [VAOPGCPREC 12-95](http://vbaw.vba.va.gov/bl/21/Advisory/PRECOP/95op/Prc12_95.doc).  ***References***: For more information on   * checking CAPRI even if the claimant does not indicate treatment at a VA medical center, see M21-1, Part III, Subpart iii, 1.C.4.a * potential errors in following procedures, see * [*Allin v. Brown*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bma)*,* 6 Vet. App. 207 (1994) * [*Cook v. Principi*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmc), 258 F. 3d 1311 (Fed. Cir. 2001), and * CUEs based on VA’s failure in duty to assist, see * [Tetro v. Principi](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmt), 314 F.3d 1310 (Fed. Cir. 2003) * [*Cook v. Principi*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmc), 258 F. 3d 1311 (Fed. Cir. 2001). |

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| d. ConsideringRequests for Revision Based on CUE | Determine the precise nature of the allegation when a claimant requests revision based on CUE. ROs shall deny requests for CUE if the claimants do not specify the factual or legal errors at issue.  In a valid claim of CUE, the claimant must assert more than a disagreement as to how the facts were weighed or evaluated. There must have been an error in the prior adjudication of the claim. See [*Russell v Principi*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bmr), 3 Vet. App. 310 (1992).  A claimant is *not* entitled to request CUE again once there has been a final decision denying CUE on the same basis.  If the CUE alleged is different from a CUE issue previously rejected, use a rating to determine whether or not a CUE was made on the new issue.  ***Important***: If a CUE finding has been determined, it may affect subsequent rating decisions to the extent that revisions in the subsequent rating decisions may be required. See [*Pirkl v. Shinseki*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmp), 718 F. 3d 1379 (Fed. Cir. 2013). |

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| e. Determining a Case of CUE | When determining whether there is a CUE   * consider only * the law that existed at the time of the prior decision, and * the full record that was before the rating activity at the time of the prior decision (to include medical records in VA’s constructive possession), and * determine whether the error would have by necessity changed the original rating decision.   ***Notes***:   * Errors that would *not* have changed the outcome are harmless and the previous decisions do not need to be revised. * A new medical diagnosis (not erroneous diagnosis that warrants severance) that corrects an earlier diagnosis ruled in a previous rating would *not* be considered an error in the previous adjudication of the claim.   ***Important***: Although CUEs are based on the record that existed at the time of the prior adjudication in question, a CUE finding that SC was predicated on a clearly erroneous diagnosis may be based on evidence that accumulated *after* the original decision to award SC. In such cases, if severance of SC is warranted, follow the provisions of [38 CFR 3.105(d)](http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=39c7e367a71c8efc570650851b266303&rgn=div5&view=text&node=38:1.0.1.1.4&idno=38#se38.1.3_1105). See [*Stallworth v. Nicholson*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bms), 20 Vet.App. 482,488 (2006) and [*Daniels v. Gober*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmd)*,* 10 Vet.App. 474 (1997).  ***References:*** For more information on   * CUEs based on VA’s constructive notice of medical records, see [VAOPGCPREC 12-95](http://vbaw.vba.va.gov/bl/21/Advisory/PRECOP/95op/Prc12_95.doc), and * correcting errors in a rating decision, see M21-1, Part III, Subpart iv, 7.B.3. |

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| f. Applying the Benefit of the Doubt Under 38 USC 5107(b) | The benefit of the doubt under [38 U.S.C. 5107(b)](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00005107----000-.html) is *not* applicable to a CUE determination since   * an error either undebatably exists, or * there was no error within the meaning of [38 CFR 3.105(a)](http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=39c7e367a71c8efc570650851b266303&rgn=div5&view=text&node=38:1.0.1.1.4&idno=38#se38.1.3_1105).   ***Reference***: For more information on applying the benefit of the doubt under [38 USC 5107(b)](https://www.law.cornell.edu/uscode/text/38/5107), see [*Russell v. Principi*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bmr)*,* 3 Vet. App. 310 (1992). |

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| g. Approval of Ratings Prepared Under 38 CFR 3.105(a) | All rating decisions preparedunder [38 CFR 3.105(a)](http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=39c7e367a71c8efc570650851b266303&rgn=div5&view=text&node=38:1.0.1.1.4&idno=38#se38.1.3_1105) require the approval of the Veterans Service Center Manager (VSCM) or Pension Management Center Manager (PMCM), or designee at the Coach level or higher.  Ratings prepared by Decision Review Officers (DROs) require the approval of the VSCM, PMCM, or Assistant VSCM or PMCM if they address   * severance of SC, or * a reduction in evaluation of an SC disability(ies).   ***Exception***: Approval of the VSCM, PMCM, or designee is not necessary if the rating decision is the result of a BVA or CAVC decision. |

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| h. Preparing a CUE Decision | Use the table below to prepare a CUE decision |

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| If… | And… | Then… |
| a DRO   * finds a CUE on a prior decision * prepares a *draft* decision that proposes on the basis of the CUE to * reduce an SC evaluation, or * sever SC for a disability | the VSCM or PMCM agrees | * the DRO finalizes and signs the decision, and * the VSCM or PMCM (or designee) signs the decision. |
| a DRO   * finds a CUE on a prior decision * prepares a *draft* decision that proposes on the basis of a CUE to * reduce an SC evaluation, or * sever SC for a disability | the VSCM or PMCM does ***not*** agree | * the VSCM or PMCM documents his/her disagreement on *VA Form 21-0961, Rating Decision/Administrative Decision/Formal Finding/Statement of the Case (SOC)/Supplemental Statement of the Case (SSOC) (Electronic Signatures)*, and * the DRO must revise the decision to remove the proposed CUE and confirm the existing decision. |
| a DRO   * finds a CUE on a prior decision, and * writes up an allowance on the basis of a CUE | --- | * the DRO signs the decision. |
| a Rating Veterans Service Representative (RVSR)   * believes there is a CUE, and * prepares a draft decision | the VSCM or PMCM agrees | * the RVSR finalizes and signs the decision, * the VSCM or PMCM signs the decision. |
| an RVSR   * believes there is a CUE, and * prepares a draft decision | the VSCM or PMCM disagrees | * the VSCM or PMCM documents his/her disagreement on *VA Form 21-0961*, and * the RVSR removes the proposed CUE and confirms the existing decision. |

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| ***Important***:   * If the CUE involves a rating issue, the DRO or RVSR must include a certificate of error on the *Codesheet*. * The final decision reducing the evaluation or severing SC does not require the signature and approval of the VSCM, PMCM, Assistant VSCM or PMCM *unless* new evidence has been received since the proposed decision was approved. * In all cases where a decision is revised through CUE authority, a copy of the revised decision should be provided to the person who prepared the original decision (or his/her supervisor) as a training tool. |

#### 5. Jurisdiction When There Has Been a BVA Decision

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| Introduction | This topic contains information on determining jurisdiction for BVA determinations, including   * determining jurisdiction for review of a CUE allegation, and * finality of BVA decisions. |

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| a. Determining Jurisdiction for Review of a CUE Allegation | Whether a decision was appealed to BVA or not determines the jurisdiction for review of a CUE allegation, either in fact or in substance.  Use the table below to determine   * who has jurisdiction to review an allegation for a CUE determination, and * how to notify the claimant. |

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| If … | Then the RO … | And the Veterans Service Representative (VSR) or RVSR … |
| a decision has been affirmed by BVA | does not have jurisdiction to review the claim for a CUE determination  ***Rationale***: The RO does not have jurisdiction to consider a claim of CUE in a decision that has been subsumed by a BVA decision. | notifies the claimant   * that the RO does not have jurisdiction to review the claim for a CUE determination * of his/her appellate rights, and * that he/she should file a motion for reconsideration by BVA, if a review at that level is desired. |
| * the decision was not appealed, but * a later reopened claim was followed by a BVA affirmance | *does not* have jurisdiction to review the claim for a CUE determination  ***Rationale***: The General Counsel has concluded that the RO does not have jurisdiction to consider a CUE claim where BVA has   * reviewed the entire record of the claim following reopening, and * denied the benefits previously denied in the unappealed decision. | notifies the claimant   * that the RO does not have jurisdiction to review the claim for a CUE determination * of his/her appellate rights, and * that he/she should file a motion for reconsideration by BVA, if a review at that level is desired.   ***Note***: All SOCs for appeals in which the issue on appeal involves a prior unappealed RO decision, followed by a claim to reopen the claim that was decided by BVA, should contain a citation to [VAOPGCPREC 14-95](http://vbaw.vba.va.gov/bl/21/advisory/PGCOP.htm#1995). |
| * the decision was not appealed, and * a subsequent BVA decision merely * concludes that new and material evidence sufficient to reopen a prior unappealed RO decision has not been submitted, and * denies reopening | does have jurisdiction to review the claim for a CUE determination  ***Rationale***: The BVA decision does not bar a claim of CUE in the prior unappealed RO decision. The General Counsel has concluded that when BVA determines that evidence sufficient to reopen has not been submitted, it does not decide the merits of the issues raised in the claim. | reviews the unappealed decision for CUE. |
| the allegation of CUE involves an issue that has not been affirmed by a BVA decision | does have jurisdiction to review the claim for a CUE determination | reviews the unappealed decision for CUE. |

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| b. Finality of BVA Decisions | Unless overruled by the CAVC, BVA decisions are final and binding on the Veterans Benefits Administration decision makers, *but only with regard to the specific case decided*.  Appellants disagreeing with BVA’s decision on his/her appeal may file   * an appeal with CAVC, * a motion asserting CUE with BVA, or * a motion for reconsideration with BVA.   ***Notes***:   * In the absence of new and material evidence, ROs do *not* have the authority to award a benefit denied by a BVA decision. * A motion for reconsideration of a BVA decision is not a claim; therefore, the motion does not need to be submitted to BVA on a prescribed form.   ***References***: For more information on   * BVA decisions, see M21-1, Part I, 5.G.1 * the non-precedential value of BVA decisions, see [38 CFR 20.1303](http://www.ecfr.gov/cgi-bin/text-idx?SID=87b1692b5bd4b0ab4b9dabeae85c00c0&node=se38.2.20_11303&rgn=div8) * what to do with a communication from the appellant or his/her representative that disagrees with a BVA decision, see M21-1, Part I, 5.G.1 * requesting a motion of reconsideration, see [38 CFR 20.1001](http://www.ecfr.gov/cgi-bin/text-idx?SID=14d426fffe241576dc96e54730d2ee6c&mc=true&node=se38.2.20_11001&rgn=div8). |