Understanding

Clear and Unmistakable Errors

and Difference of Opinion

Lesson Plan

Instructor Lesson Plan

Time Required: 3 Hours

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| Lesson Description | | | | |
| The information below provides the instructor with an overview of the lesson and the materials that are required to effectively present this instruction. | | | | |
| TMS # | | 4175764 | | |
| Prerequisites | | Prior to this lesson, the RVSR/DRO must have completed training in all identified topics from the schedule that applies to his/her specific level of experience. Trainees should also have Prerequisite Lesson Plans. | | |
| target audience | | The target audience for Understanding Clear and Unmistakeable Error and Difference of Opinin is **RVSR, DRO**, Post Challenge.  Although this lesson is targeted to teach the **RVSR, DRO, Post Challenge,** employee, it may be taught to other VA personnel as mandatory or refresher type training. | | |
| Time Required | | 3 hours | | |
| Materials/ TRAINING AIDS | | Lesson materials:   * Understanding Clear and Unmistakeable Error and Difference of Opinion PowerPoint Presentation * Understanding Clear and Unmistakeable Error and Difference of Opinion Trainee Handouts * Understanding Clear and Unmistakeable Error and Difference of Opinion Job Aid | | |
| Training Area/Tools | | The following are required to ensure the trainees are able to meet the lesson objectives:   * Classroom or private area suitable for participatory discussions * Seating, writing materials, and writing surfaces for trainee note taking and participation * Handouts, which include a practical exercise * Large writing surface (easel pad, chalkboard, dry erase board, overhead projector, etc.) with appropriate writing materials * Computer with PowerPoint software to present the lesson material   Trainees require access to the following tools:   * VA TMS to complete the assessment * VBA Intranet * Practical Excersises at end of lesson | | |
| Pre-Planning | | * Become familiar with all training materials by reading the Instructor Lesson Plan while simultaneously reviewing the corresponding PowerPoint slides. This will provide you the opportunity to see the connection between the Lesson Plan and the slides, which will allow for a more structured presentation during the training session. * Become familiar with the content of the trainee handouts and their association to the Lesson Plan. * Practice is the best guarantee of providing a quality presentation. At a minimum, do a complete walkthrough of the presentation to practice coordination between this Lesson Plan, the trainee handouts, and the PowerPoint slides and ensure your timing is on track with the length of the lesson. * Ensure that there are copies of all handouts before the training session. * When required, reserve the training room. * Arrange for equipment such as flip charts, an overhead projector, and any other equipment (as needed). * Talk to people in your office who are most familiar with this topic to collect experiences that you can include as examples in the lesson. * This lesson plan belongs to you. Feel free to highlight headings, key phrases, or other information to help the instruction flow smoothly. Feel free to add any notes or information that you need in the margins. | | |
| Training Day | | * Arrive as early as possible to ensure access to the facility and computers. * Become familiar with the location of restrooms and other facilities that the trainees will require. * Test the computer and projector to ensure they are working properly. * Before class begins, open the PowerPoint presentation to the first slide. This will help to ensure the presentation is functioning properly. * Make sure that a whiteboard or flip chart and the associated markers are available. * The instructor completes a roll call attendance sheet or provides a sign-in sheet to the students. The attendance records are forwarded to the Regional Office Training Managers. | | |
| Introduction to Understanding Clear and Unmistakeable Error and Difference of Opinion | | | | |
| INSTRUCTOR INTRODUCTION | | | Complete the following:   * Introduce yourself * Orient learners to the facilities * Ensure that all learners have the required handouts | |
| time required | | | .75 hour | |
| Purpose of Lesson  Explain the following: | | | This lesson is intended to provide additional guidance on the topic of clear and unmistakable errors (CUE’s). This lesson will contain discussions and exercises that will allow you to gain a better understanding of:   * The history of a CUE and be able to define what is a clear and unmistakable error verses a difference of opinion | |
| Lesson Objectives  Discuss the following:  Slide 2  Handout 2 | | In order to accomplish the purpose of this lesson, the RVSR/ DRO will be required to accomplish the following lesson objectives.  The RVSR/DROwill be able to:   * Define a clear and unmistakable error * Review what constitutes a claim for CUE * Clarify the revision of the decision provisions of 38 CFR 3.105 * Compare what is and what is not a CUE * Distinguish the differences in a CUE and the difference of opinion authority that a Decision Review Officer (DRO) has | | |
| Explain the following: | | Each learning objective is covered in the associated topic. At the conclusion of the lesson, the learning objectives will be reviewed. | | |
| Motivation | | The compensation and pension benefits program is one of the most important functions of the Department of Veterans Affairs. Much of the fairness and integrity of this program dependents on the accuracy and increased productivity of the Rating Veterans Services Representative (RVSR) and Decision Review Officer (DRO. | | |
| STAR Error code(s) | | TBD | | |
| References  Slide 3 & 4  Handout 3 | | Explain where these references are located in the workplace.   * [38 U.S.C. 7103(c), Reconsideration; correction of obvious errors](https://vaww.compensation.pension.km.va.gov/system/temhttps:/www.law.cornell.edu/uscode/text/38/7103) * [38 CFR 3.104, Finality of decisions](http://vbaw.vba.va.gov/bl/21/publicat/Regs/Part3/3_104.htm) * [38 CFR 3.105, Revision of decisions](http://vbaw.vba.va.gov/bl/21/publicat/Regs/Part3/3_105.htm) * [38 CFR 3.2600, Review of benefit claims decisions](http://vbaw.vba.va.gov/bl/21/publicat/Regs/Part3/3_2600.htm) * [38 CFR 3.500 (b), Error; payee's or administrative](http://vbaw.vba.va.gov/bl/21/publicat/Regs/Part3/3_500.htm) * [38 CFR §20.1403, What constitutes clear and unmistakable error; what does not](https://www.law.cornell.edu/cfr/text/38/20.1403) * [M21-1 Part III, Subpart iv, 2, B, Revision of decisions](https://vaww.compensation.pension.km.va.gov/system/templates/selfservice/va_ka/portal.html?portalid=554400000001034) * [M21-1, Part IV, Subpart ii, 3. A, General Authorization and Claimant Notification Issues](https://vaww.compensation.pension.km.va.gov/system/templates/selfservice/va_ka/portal.html?portalid=554400000001034) * [Russell and Collins v Principi, No. 90-396 and 90-416, October 6, 1992](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm) * [Bell v. Derwinski, No. 91-1749, July 21, 1992](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bmb) | | |

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| Topic 1: clear and unmistakable error | |
| Introduction | This topic will allow the trainee to gain an understanding of the history of a CUE and be able to define what is a clear and unmistakable error verses a difference of opinion |
| Time Required | .75 hours |
| OBJECTIVES/ Teaching Points | Topic objectives:   * Define a clear and unmistakable error * Review what constitutes a claim for CUE * Clarify the revision of the decision provisions of [38 CFR 3.105](http://vbaw.vba.va.gov/bl/21/publicat/Regs/Part3/3_105.htm) * Compare what is and what is not a CUE   The following topic teaching points support the topic objectives:   * What is a clear and unmistakable error? * The History of a CUE: * Court’s findings in Russell and Collins v. Principi * What constitutes a claim for CUE? * Correcting the decision: * What is not considered to be a CUE |
| What is a Clear and Unmistakable Error?  Slide 5  Handout 4 | A determination that there was "clear and unmistakable error" must be based on the record and the law that existed at the time of the prior AOJ or BVA decision.   |  | | --- | | Discuss the point of what constitutes reasonable minds. There is no direct provision of the law, which covers this topic. | |
| What Does it Really Mean?  Slide 6  Handout 4 | A CUE is a very specific and rare kind of error. It is the kind of error, of fact or 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. |
| History of a CUE  Slide 7  Handout 4  The Courts Findings in Russell  Slide 8  Handout 5  What Constitutes a Claim for CUE  Slide 9  Handout 5  A valid claim for review based on “clear and unmistakable error’ should meet the following six criteria:  Slide 10 & 11 Handout 5  If CUE Criteria is not met!  Slide 12 & 13 Handout 5  What is not considered CUE?  Slide 14 Handout 6  Time Limits  *Click mouse a second time to reveal answer*  Slide 15  Handout 7  Revision/Correcting the Decision  Slide 16 & 17  Handout 7 | * Revision of decisions by agencies of original jurisdiction has been available to claimants since 1928 * The regulatory provisions for such determinations are currently found at[38 CFR 3.105](http://vbaw.vba.va.gov/bl/21/publicat/Regs/Part3/3_105.htm)   Have the students review the Court’s findings in [Russell and Collins v. Principi (consolidated appeals)](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmr) and discuss the three elements of what consitutues a CUE.  In layman’s terms the claimant must note what he/she believes was in error with the decision and what law the VA misinterpreted and the VA must review the allegation for merit in the most liberal sense of possibility.  Remember Benefit of the doubt is NOT applicable to CUE’s.  Three-pronged test to determine whether CUE was present in a prior determination:  • either the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions extant at the time were incorrectly applied  • the error must be undebatable and of the sort which, had it not been made, would have manifestly changed the outcome at the time it was made; and  • a determination that there was CUE must be based on the record and law that existed at the time of the prior adjudication in question.  This analysis applies to cases where a claimant or representative raises a questions of CUE either explicitly or implicitly. When there is no explicit or implicit allegation of CUE, Regional Office personnel have no obligation to develop such an issue. (See Russell and Collins v. Principi, 3 Vet. App. 310, 315 (1992))  If the alleged CUE meets the above criteria, the Regional Office is obliged to consider the matter – whether or not a related issue is already on appeal  Discuss disposition of Un-appealed cases vs, Appealed cases.  Changed medical diagnosis. 38 CFR §20.1403(d)  Failure to fulfill the duty to assist. 38 CFR §20.1403(d)  Disagreement as to how the facts were weighed or evaluated. 38 CFR §20.1403(d)  Change in interpretation of a statute or regulation 38 CFR §20.1403(d).  The claimant has only one opportunity to file for a CUE on a particular issue or decision.  The instructor should point out to students the Finality of decision under [38 CFR 3.105](http://vbaw.vba.va.gov/bl/21/publicat/Regs/Part3/3_105.htm) , which simply means that the claimant can only file a claim for CUE on a particular issue once - after the issue is decided that same issue cannot be claimed again as a CUE.  Apply the appropriate laws that were missed when the initial decision was completed if the decision is favorable or in some cases where the decision is not. |
| Topic 2: CUE vs Difference of Opinion | |
| Introduction | This topic will allow the trainee todistinguish between a CUE and a DO. |
| Time Required | .25 hours |
| OBJECTIVES/ Teaching Points | Topic objectives:   * Distinguish the differences in a CUE and the difference of opinion   authority that a Decision Review Officer (DRO) has  The following topic teaching points support the topic objectives:   * Definition of difference of Opinion * Difference of Opinion [38 CFR 3.105](http://vbaw.vba.va.gov/bl/21/publicat/Regs/Part3/3_105.htm) * Helpful Hints |
| CUE vs DO  Slide 18 & 19  Handout 8 | Definition of difference of opinion?  A disagreement, argument, or divergence of opinions about a Rating Decision based on the evidence of record.  Difference of opinion [38 CFR 3.105](http://vbaw.vba.va.gov/bl/21/publicat/Regs/Part3/3_105.htm) - Whenever an adjudicative agency is of the opinion that a revision or an amendment of a previous decision is warranted, a difference of opinion being involved rather than a clear and unmistakable error, the proposed revision will be recommended to Central Office. However, a decision may be revised under 38 CFR 3.2600 without being recommended to Central Office  Whenever there is a difference of opinion versus a clear and unmistakable error involved:   * the proposed revision will be recommended to Central Office (CO) for review; * unless the decision may be revised under [3.2600](http://vbaw.vba.va.gov/bl/21/publicat/Regs/Part3/3_2600.htm), Review of Benefit Claims Decision, without being recommended to CO. |
| CUE Helpful Hints  Slide 20 & 21  Handout 8 | Remind students to always support their decisions with a detailed, clear and concise analysis and explanation. |
| CUE Example  Slide 22 | Discuss CUE Example (in demonstration block below) as a way to stimulate thought process prior to Practical excersises. |
| Practical Excersise  Slide 23  Handout 17  Reveiw  Slide 24 | Instruct students to complete Practical excersises found in handout. |
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| note(s) | See AK for BackgoundAnalysis of excersise. |
| DEMONSTRATION | See AK for Excersise answers. Discuss with students. |
| Regional Office Specific Topics | | **N/A**At this time add any information pertaining to:   * Station quality issues with this lesson * Additional State specific programs/guidance on this lesson |

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| Exercise | Have the RVSR/DRO review the practice scenarios and render a determination if they are CUE or not to determine the effectiveness of this lesson. Some suggested additions for building glossary statements on CUE’s include: |
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| DEMONSTRATION | A RVSR denies hypertension based on no current diagnosis. The STRs show a diagnosis in service but the RVSR forgot to review the VAMC records mentioned by the veteran. Those records show a diagnosis of hypertension with treatment.  A CUE would be called on that failure to grant. Since hypertension is covered under the provisions of 3.309(a) as a presumptive condition, no opinion is needed if diagnosed in service and after service. The decision to deny SC because there was no diagnosis, when in fact the VAMC records show a diagnosis, was in error. The RD was fatally flawed in the denial. (GC 12-95) |

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| Practical Exercise | |
| Time Required | 1 hours |
| EXERCISE | **Review excersise #1 Scenarios to determine if a CUE exsist.**  Have the RVSR/DRO review the practice scenarios and render a determination if they are CUE or not to determine the effectiveness of this lesson.  Some suggested additions for building glossary statements on CUE’s include:  The provisions of 38 CFR 3.105(a) regarding clear and unmistakable errors pertain to errors which are undebatable, so that it can be said that reasonable minds could only conclude that the previous decision was fatally flawed at the time it was made. A clear and unmistakable error may have been committed if VA failed to apply or incorrectly applied the appropriate law or regulation. The veteran was sent the due process letter on XXXX. The Rating Decision of XXXX, did not allow the veteran the proper time for his due process rights. Therefore, a clear and unmistakable error existed.  In the decision of Wood v. Derwinski, the Court of Veterans Appeals determined that the veteran must bear some responsibility for the evidentiary development of his claim, as the Department of Veterans Affairs’ duty to assist is not always a "one-way-street." In your case you claimed that the VA did not properly provide you with the evidentry requirements to ensure that your claim was properly developed. However, you did not furnish any additional evidence to support your contentions and you were provided with a 5103 notice on XXXX which explained the necessary elements to proceed with your claim. However, as of the date of this decision, no evidence has been received. Furthermore, the lack of evidence is not grounds to grant your claim under your recent claim of CUE.  **The best recommendation though for this topic is to let your RVSR know that when utilizing glossary statements they must be tweaked for each individual veteran’s case.** |
| Practical Excersises  Slide 22  Handout <> | **Review excersise #2 to determine if a CEU or Difference of opinions exist**.  Have the students review the practice scenarios and determine whether a CUE exists.  Ask if there are any questions about the information presented in the exercise, and then proceed to the Review. |

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| Lesson Review, Assessment, and Wrap-up | |
| Introduction  Discuss the following: | The Understanding Clear and Unmistakeable Error and Difference of Opinion lesson is complete.  Review each lesson objective and ask the trainees for any questions or comments. |
| Time Required | .25 hours |
| Lesson Objectives | You have completed the Understanding Clear and Unmistakeable Error and Difference of Opinion lesson.  The trainee should be able to:   * Define a clear and unmistakable error * Review what constitutes a claim for CUE * Clarify the revision of the decision provisions of 38 CFR 3.105 * Compare what is and what is not a CUE * Distinguish the differences in a CUE and the difference of opinion authority that a Decision Review Officer (DRO) has |
| Assessment | Remind the trainees to complete the on-line assessment in TMS to receive credit for completion of the course.  The assessment will allow the participants to demonstrate their understanding of the information presented in this lesson. |