

Date: December 17, 1997

VAOPGCPREC 38-97

From: Acting General Counsel (022)

Subj: Failure to Apply Evidentiary Presumption as Basis to Reopen Claim

To: Acting Chairman, Board of Veterans' Appeals (01)

QUESTION PRESENTED:

Can the misapplication of, or failure to apply, a statutory or regulatory evidentiary presumption in a prior final decision constitute new and material evidence for purposes of reopening a previously denied claim pursuant to 38 U.S.C. § 5108?

DISCUSSION:

1. Pursuant to 38 U.S.C. § 7104(b), when a claim has been disallowed by the Board of Veterans' Appeals (Board), "the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered" unless new and material evidence has been presented. Similarly, when a claim has been the subject of a final, unappealed decision of a Department of Veterans Affairs (VA) regional office, "the claim will not thereafter be reopened or allowed, except as may otherwise be provided by regulations not inconsistent with [title 38, United States Code]." 38 U.S.C. § 7105(c). When "new and material evidence is presented or secured with respect to a claim which has been disallowed" by the Board or a regional office, VA "shall reopen the claim and review the former disposition of the claim." 38 U.S.C. § 5108.

2. Resolution of the question presented turns, initially, upon whether a statutory or regulatory presumption may constitute "evidence" within the meaning of 38 U.S.C. § 5108. Absent any clear indication of a contrary legislative intent, it must be presumed that the term "evidence," as used in 38 U.S.C. § 5108, is intended to carry its ordinary and established legal meaning. See, e.g., *Molzof v. United States*, 502 U.S. 301, 307 (1992). In the context of legal proceedings, the term "evidence" ordinarily refers to "[t]estimony, writings, or material objects offered in proof of an alleged fact or proposition" or to "[a]ny species of proof . . . legally presented at the trial of an issue, by the act of the parties

and through the medium of witnesses, records, documents, exhibits, concrete objects, etc.,

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for the purpose of inducing belief in the minds of the court or jury as to their contention." Black's Law Dictionary 555 (6th ed. 1990) (emphasis added).

3. A statute or regulation requiring a factual presumption when certain predicate facts are established is not itself "evidence" within the ordinary meaning of that term. Courts have consistently recognized that "a presumption is not evidence," *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1037 (Fed. Cir. 1992), and "cannot acquire the attribute of evidence in the claimant's favor," *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935). *Accord, e.g., New York Life Ins. Co. v. Gamer*, 303 U.S. 161, 170 (1938); *New England Braiding Co., Inc. v. A.W. Chesterton Co.*, 970 F.2d 878, 882 (Fed. Cir. 1992); *Tenneco Chemicals, Inc. v. William T. Burnett & Co., Inc.*, 691 F.2d 658, 663 (4th Cir. 1982). Rather, a presumption is "a rule of law . . . by which finding of a basic fact gives rise to [the] existence of [a] presumed fact, until [the] presumption is rebutted." Black's Law Dictionary at 1185. Accordingly, a statutory or regulatory presumption which VA previously misapplied or failed to apply generally cannot, in itself, constitute "new and material evidence" within the meaning of 38 U.S.C. § 5108.

4. The assertion that VA, in a prior final decision, misapplied or failed to apply a pertinent statute or regulation is, by definition, a claim that VA committed "clear and unmistakable error" or "obvious error" in that decision. *See Russell v. Principi*, 3 Vet. App. 310, 313 (1992) (defining "clear and unmistakable error" to mean that "[e]ither the correct facts, as they were known at the time, were not before the adjudicator or the statutory and regulatory provisions extant at the time were incorrectly applied"); *see also Trice v. Brown*, 9 Vet. App. 245 (1996) ("[a] claim that there is error in a prior [Board] decision . . . is by definition a claim for [clear and unmistakable error]"); *Smith v. Brown*, 35 F.3d 1516, 1526 (Fed. Cir. 1994) (noting that there is no substantive difference between the "clear and unmistakable error" standard and the "obvious error" standard applied by the Board in according reconsideration of decisions). A claim that VA committed "clear and unmistakable error" in a prior final decision by failing to apply a statute or regulation existing at the time of that decision is inherently distinct from a claim that new and material evidence has been presented since the prior final decision. *See Flash v. Brown*,

8 Vet. App. 332, 340 (1995) ("claims to reopen and [clear and unmistakable error] claims are different, [and] mutually exclusive");

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*Russell*, 3 Vet. App. at 313. A reversal of a prior decision on the basis of clear and unmistakable error has the same effect as if the corrected decision had been made on the date of the reversed decision, 38 C.F.R. § 3.105(a), and benefits may be made effective based on the date of the earlier claim, 38 C.F.R. § 3.400(k), whereas, in a claim reopened on the basis of new and material evidence after final disallowance, benefits may only be paid based on the date of the reopened claim, 38 C.F.R. § 3.400(r). See *Flash*, 8 Vet. App. at 340. The criteria for deciding clear and unmistakable error claims and claims to reopen differ. Compare *Russell*, 3 Vet. App. at 313-14 (clear and unmistakable error), with *Manio v. Derwinski*, 1 Vet. App. 140, 145 (1991) (claim to reopen). Moreover, statutes and regulations such as 38 U.S.C. § 7103 and 38 C.F.R. § 20.1000 establish specific procedures by which legal errors in prior final decisions may be collaterally attacked. Any conclusion that VA's misapplication of, or failure to apply, a statutory or regulatory presumption may provide a basis for de novo review of a claim under 38 U.S.C. § 5108 would represent a departure from the scheme established by the referenced authorities.

5. Pursuant to 38 C.F.R. § 3.105(a), an otherwise final and binding regional-office decision may be reversed or amended if it was based on "clear and unmistakable error." In *Russell*, the United States Court of Veterans Appeals (CVA) noted that VA's authority under section 3.105(a) to revise a prior final decision based on the same evidence, statutes, and regulations extant at the time of the prior final decision may appear superficially at odds with the statutory finality provisions prohibiting reopening in the absence of new and material evidence. *Russell*, 3 Vet. App. at 313. The CVA concluded, however, that section 3.105(a) does not conflict with the prohibition on reopening in the absence of new and material evidence because "the claim which is reversed or amended due to a 'clear and unmistakable error' is not being reopened. It is being revised to conform to the 'true' state of the facts or the law that existed at the time of the original adjudication." *Id.* As *Russell* indicates, section 3.105(a) does not permit VA to reopen a claim and adjudicate de novo all issues finally resolved in a prior decision. Rather, it merely permits VA to revise a prior final decision to the extent necessary to correct the clear and unmistakable error. In contrast, permitting a legal error, such as

the misapplication of, or failure to apply, a statute or regulation, to constitute a basis for reopening under 38 U.S.C. § 5108 would, in effect, permit de novo adjudication of finally decided issues based on the same underlying facts extant at the time of the prior final decision. Permitting de novo consideration of a  
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previously denied claim based solely upon an assertion of error in a prior final decision would contravene the express provisions of 38 U.S.C. §§ 7104(b) and 7105(c), which prohibit reopening and de novo review of a claim on the same factual basis existing at the time of a prior final disallowance.

6. Under 38 U.S.C. § 7103 and 38 C.F.R. § 20.1000, the Chairman of the Board has discretion to order reconsideration of an otherwise final Board decision based on, among other things, "allegation of obvious error of fact or law" in that decision. In *Smith v. Brown*, 35 F.3d at 1526-27, the United States Court of Appeals for the Federal Circuit held that a VA regional office may not consider a claim based on an assertion of clear and unmistakable error in a prior final Board decision. The court concluded that permitting a regional office to conduct collateral review of a final Board decision would contravene 38 U.S.C. § 7103, which gives the Chairman exclusive and discretionary authority to order reconsideration of final Board decisions and, further, would be inconsistent with the statutory scheme of title 38, United States Code, inasmuch as it would permit an inferior body, i.e., a regional office, to review decisions of a superior body, i.e., the Board. *Id.* Permitting an assertion of error in a prior final Board decision to provide the basis for reopening and de novo review by a regional office under 38 U.S.C. § 5108 would be inconsistent with *Smith*, because it would require a regional office, at least as an initial matter, to collaterally review a final Board decision and would permit a finding of error in the Board's decision to provide a basis for de novo review by the regional office.

7. Pursuant to the authorities discussed above, VA's misapplication of, or failure to apply, a statutory or regulatory evidentiary presumption in existence at the time of a prior final decision may not, in our view, constitute "new and material evidence" to reopen a claim under 38 U.S.C. § 5108. We note that the CVA, in *Akins v. Derwinski*, 1 Vet. App. 228, 230 (1991), and *Corpuz v. Brown*, 4 Vet. App. 110, 112 (1993), expressed the view that statutory or regulatory evidentiary presumptions may constitute new and material evidence when it is shown that the presumptions were not considered in the prior final disallowance. However, those statements do not appear to have been essential

to the CVA's holding in either case and, further, have been significantly undermined by subsequent precedential decisions of the CVA and the Federal Circuit. Under these circumstances, *Akins* and *Corpuz* do not, in our view, establish binding precedent which would require VA to

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conclude that a misapplied statute or regulation may itself be "new and material evidence" within the meaning of 38 U.S.C. § 5108.

8. In *Akins*, the claimant asserted that a 1946 regional-office decision on his claim contained clear and unmistakable error because the regional office had failed to apply VA regulations providing a presumption of sound condition upon entry into service and a presumption of aggravation for conditions increasing in severity during service. In discussing the claim, the CVA stated:

[T]he Court notes that the factual predicate demonstrated by the presumptions have an important evidentiary value and, to that extent, are the functional equivalent of evidence. Because it is clear that this evidentiary presumption was not previously considered and because it bears directly and substantially on the issue of entitlement to service connection, it provides a basis for reopening the claim.

1 Vet. App. at 230. The CVA proceeded, however, to decide the case solely upon the basis that the veteran had shown clear and unmistakable error in the 1946 decision, warranting revision of that decision under 38 C.F.R. § 3.105(a). 1 Vet. App. at 231-33. As noted above, the CVA has recognized that a claim of clear and unmistakable error in a prior final decision is distinct from a claim for reopening and is not dependent upon the submission of new and material evidence. See *Flash*, 8 Vet. App. at 340; *Russell*, 3 Vet. App. at 313. Accordingly, the statement in *Akins* that the failure to apply a regulatory presumption may constitute a basis for reopening was not essential to the CVA's holding in that case and may be regarded as dictum. See *Smith v. Orr*, 855 F.2d 1544, 1550 (Fed. Cir. 1988) ("[b]road language in an opinion, which language is unnecessary to the court's decision, cannot be considered binding authority").

9. In *Corpuz*, 4 Vet. App. at 112, the CVA, citing *Akins*, stated that "[n]ormally, . . . new and material evidence is in the form of tangible evidence but it can be in the form of a misapplied evidentiary-type regulation." However, as in

*Akins*, the CVA's decision in *Corpuz* turned on the issue of whether clear and unmistakable error had occurred in a prior final decision due to failure to apply a presumption and not on whether the presumption could be considered evidence for purposes of reopening the claim. Accordingly, the statement that a misapplied evidentiary-type regulation may constitute

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new and material evidence was not essential to the CVA's holding and may also be regarded as dictum.

10. In *Jensen v. Brown*, 4 Vet. App. 304 (1993), *rev'd*, 19 F.3d 1413 (Fed. Cir. 1994), the claimant asserted that VA's failure to apply a regulatory presumption of aggravation in a prior final decision constituted new and material evidence to reopen his claim. The CVA rejected that argument based on its conclusion that the regulation at issue was invalid. 4 Vet. App. at 306-07. On appeal, the Federal Circuit, citing *Corpuz*, stated that "[t]he [CVA] has held that the misapplication of, or in this case the alleged complete failure to apply, an evidentiary regulation may be a form of new and material evidence sufficient to reopen a claim. For present purposes, we accept this conclusion." *Jensen v. Brown*, 19 F.3d 1413, 1415 (Fed. Cir. 1994) (citation omitted). The court reversed the CVA's conclusion that VA's regulation was invalid and remanded the matter to the CVA for further proceedings. On remand, the CVA stated that, "[i]t appears that the Federal Circuit in reversing this Court has determined, as a matter of law, that 38 C.F.R. § 3.306(b)(2) constituted 'new and material' evidence, and that appellant's claim must be reopened." *Jensen v. Brown*, 7 Vet. App. 27, 28 (1994) (*per curiam*). The CVA vacated the Board's decision and remanded the case with instructions to reopen and readjudicate the claim. *Id.* at 29.

11. The Federal Circuit's opinion in *Jensen* indicates that the Court "accept[ed]" the conclusion stated in *Corpuz* for the limited purpose of facilitating review of the question on appeal in *Jensen* regarding the validity of VA's regulation. The Federal Circuit did not conclude, as a matter of law, that the alleged misapplication of or failure to apply a statute or regulation may constitute new and material evidence. To the contrary, the Federal Circuit's statement that it accepted the principle stated in *Corpuz* "[f]or present purposes" implies that the court was not itself deciding that issue or affirming the CVA's statement in *Corpuz*, but was limiting its review to the CVA's determination regarding the validity of VA's regulation. Accordingly, the Federal Circuit's opinion in *Jensen* does not, in our view, constitute precedential authority for a conclusion that the misapplication or failure to apply a statutory or regulatory presumption constitutes new and material evidence. See *United States v. Daniels*, 902 F.2d 1238, 1241 (7th Cir.), *cert. denied*, 498 U.S. 981 (1990) ("[j]udicial assumptions concerning, judicial allusions to, and judicial discussions of issues that are not contested are not holdings").

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12. In its decision on remand in *Jensen*, the CVA concluded that the Federal Circuit had apparently "determined, as a matter of law," that the regulation at issue in that case constituted new and material evidence requiring VA to reopen the appellant's claim. *Jensen*, 7 Vet. App. at 28. Although we disagree with the CVA's conclusion, the CVA's decision must be regarded as precedential authority with respect to any legal issues decided by the CVA. However, several factors suggest that the CVA's decision on remand in *Jensen* should not be viewed as precedential authority establishing that evidentiary presumptions generally may constitute new and material evidence. In the first place, neither the CVA nor the Federal Circuit purported to decide that question based on legal analysis of the pertinent statutes. Rather, the Federal Circuit merely assumed, without deciding, that a regulatory presumption could be new and material evidence, and the CVA concluded that the Federal Circuit had determined, as a matter of law, that the presumption in *Jensen* was new and material evidence, thereby precluding the CVA from deciding the issue on its own. See 1B James W. Moore et al., *Moore's Federal Practice* ¶ 0.404[1] (2d ed. 1993) ("[w]hen a case is appealed and remanded, the decision of the appellate court establishes the law of the case, which *must* be followed by the trial court on remand" (emphasis in original)). The absence of analysis in *Jensen* raises questions as to the precise scope of the CVA's holding and its impact on subsequent cases. Further, the CVA's statement that "[i]t appears that the Federal Circuit . . . has determined . . . that 38 C.F.R. § 3.306(b)(2) constituted 'new and material' evidence" may suggest a degree of uncertainty as to the basis and scope of the Federal Circuit's perceived determination, and, consequently, a degree of uncertainty as to the precedential effect, if any, of that determination. Finally, as explained below, subsequent decisions of the CVA significantly undermine any conclusion that *Jensen* established, as a matter of precedent, that statutory or regulatory presumptions themselves may generally constitute new and material evidence.

13. In *Dolan v. Brown*, 9 Vet. App. 358, 362 (1996), *appeal dismissed*, 119 F.3d 14 (Fed. Cir. 1997) (table), the CVA rejected a claim that the regulatory presumptions of soundness and aggravation (the same presumptions at issue in *Akins*) constituted new evidence for purposes of reopening a claim. The CVA stated that, for it "to adjudicate the issue[] of whether the [regional office] correctly applied the presumptions in [a prior final decision] . . . would appear to be tantamount to the Court reviewing a decision over which we have no jurisdiction." *Id.* The CVA also concluded that it lacked an adequate



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basis to conclude that the presumptions had not been applied in the prior final decision. *Id.* Although the decision in *Dolan* appeared to rely on alternative bases, it is consistent with the view that a collateral attack on a prior final decision generally may not form the basis for reopening.

14. In *Routen v. Brown*, 10 Vet. App. 183 (1997), the claimant sought to reopen a claim for service connection. After concluding that the evidence submitted by the claimant was not new and material, the CVA stated, "[t]he appellant also contends that the Board erred by not addressing the presumption of soundness under 38 C.F.R. § 3.304(b) and the presumption of aggravation of a preexisting disease under 38 C.F.R. § 3.306. However, the Board was not required to reach these issues unless the claim was reopened." 10 Vet. App. at 187. The *Routen* opinion does not state whether the presumptions had been correctly applied in the prior final disallowance. However, the CVA's opinion indicates that those presumptions are generally not for consideration unless new and material evidence has been submitted to reopen a claim. That conclusion may cast doubt upon any suggestion in *Akins* and *Corpuz* that statutory and regulatory presumptions themselves may constitute new and material evidence. In a dissenting opinion in *Routen*, one judge asserted that the decision was inconsistent with *Akins* insofar as *Akins* suggested that a regulatory presumption itself may constitute new and material evidence. *Id.* at 188, 191 (Steinberg, J., dissenting).

15. In *Routen*, a 1992 amendment to 38 C.F.R. § 3.306(b) had clarified that the presumption of aggravation applied with regard to the subject veteran's claim. VA asserted that the amendment may have created a new basis of entitlement which would warrant de novo review of the claim under *Spencer v. Brown*, 4 Vet. App. 283 (1993), *aff'd*, 17 F.3d 368 (Fed. Cir. 1994). In response to that assertion, the CVA stated that, "while it does appear that a change in a law or regulation can constitute new and material evidence under appropriate circumstances, see *Jensen v. Brown*, 19 F.3d 1413 (Fed. Cir.), *on remand*, 7 Vet. App. 27, 28 (1994), the record before the Court compels the conclusion that this appeal does not present such circumstances." *Routen*, 10 Vet. App. at 187. The CVA noted that, "[t]he Board found as a matter of fact that the newly submitted records 'do not show that there was an increase in the severity of [the appellant's disabling condition] during service,'" and found that, "[t]here is a plausible basis in the record for the Board's finding of fact." *Id.* Accordingly, the CVA

concluded that the regulatory presumption was not applicable to the claim.

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16. The CVA in *Routen* apparently concluded that the presumption of aggravation did not itself constitute new and material evidence in the absence of newly-submitted evidence establishing a factual basis for application of the presumption. This aspect of the *Routen* opinion also casts significant doubt upon the dicta in *Akins* and *Corpuz*, to the extent that those dicta may suggest that a statutory or regulatory presumption alone may constitute new and material evidence. The CVA's apparent conclusion that the presumption did not provide a basis for reopening in the absence of new evidence supporting the application of the presumption suggests that VA is not required to treat a statutory or regulatory presumption, standing alone, as new and material evidence, but may require the claimant to submit new evidence which, in light of the presumption, creates a reasonable possibility of changing the outcome of the prior disposition of the claim. Although this portion of the CVA's opinion pertains to an intervening change in a regulatory presumption, we believe that the CVA's analysis would be equally applicable with respect to presumptions which existed at the time of the prior disallowance. The fact that the regulation in question in *Routen* was not applicable at the time of the prior final decision would, if anything, provide stronger support for the proposition that the regulation in that case was "new" evidence within the meaning of 38 U.S.C. § 5108. Accordingly, the conclusion that the expanded applicability of the regulation was not new and material evidence in the circumstances of *Routen* implies that the regulation would not have been new and material evidence if it had been applicable at the time of the prior final decision but had been misapplied or ignored.

17. *Routen* also casts doubt upon the precedential effect of the CVA's remand decision in *Jensen*. The CVA in *Routen* cited *Jensen* for the proposition that a change in law or regulation can constitute new and material evidence in appropriate circumstances. *Routen*, 10 Vet. App. at 187. (We note that that citation is somewhat confusing, inasmuch as *Jensen* did not involve an intervening change in law and other CVA precedents have suggested that new and material evidence is not required when a change in law establishes a new substantive basis of entitlement to benefits. See, e.g., *Green v. Brown*, 10 Vet. App. 111, 116 (1997).) The CVA did not, however, discuss *Jensen* in connection with its conclusion that VA generally is not required to consider statutory or regulatory presumptions unless new and material evidence has been submitted to reopen a claim. As noted above, that portion of the *Routen* opinion may imply that a statutory or regulatory presumption itself

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generally cannot constitute new and material evidence. Further, in a dissenting opinion in *Routen*, one judge, who was on the panel which issued the CVA's opinion on remand in *Jensen*, stated that he did "not believe that this Court has ever expressly reopened a claim based on the mere failure of the [Board] or [a regional office] in a previous final decision to consider the presumption of aggravation (or sound condition)." *Routen*, 10 Vet. App. at 190 (Steinberg, J., dissenting). Although that statement is difficult to reconcile with the facts of *Jensen*, it does, consistent with the majority opinion, cast further doubt upon any suggestion that the CVA's decision on remand in *Jensen* establishes precedential authority for the proposition that a statutory or regulatory presumption, standing alone, may constitute new and material evidence.

18. Another decision which runs counter to the dicta in *Akins* and *Corpuz* is the Federal Circuit's decision in *Smith*. The conclusion in *Smith*, 35 F.3d at 1526, that the authority to review prior final Board decisions is within the exclusive discretion of the Board Chairman would preclude any conclusion that a regional office may review a final Board decision and may reopen and conduct de novo review of a claim based solely upon its conclusion that the Board committed legal error by misapplying, or failing to apply, a statutory or regulatory presumption.

18. VA is required to adhere to the precedential decisions of the CVA. See *Tobler v. Derwinski*, 2 Vet. App. 8, 14 (1991). VA is not, however, required to conform to statements in CVA opinions which are merely dicta. See *In re McGrew*, 120 F.3d 1236, 1238 (Fed. Cir. 1997) (Board of Patent Appeals and Interferences properly declined to follow dictum from Federal Circuit opinion); *Smith v. Orr*, 855 F.2d at 1550. As noted above, the CVA's statements in *Akins* and *Corpuz* that the misapplication of, or failure to apply, a presumption may constitute new and material evidence to reopen a claim were not essential to the holdings in those cases. Accordingly, those statements are dicta. Although the CVA may have cited those statements as authority in subsequent cases, it does not appear that the CVA has ever relied upon those dicta as the basis for its holding in any precedential decision. See *Routen*, 10 Vet. App. at 190 (Steinberg, J., dissenting). The fact that dictum has been cited as authority in subsequent cases does not transform it into binding precedent. See *United States v. Dominguez-Mestas*, 687 F. Supp. 1429, 1432 (S.D. Cal. 1988), *aff'd*, 929 F.2d 1379 (9th Cir), *cert. denied*, 502 U.S. 958 (1991). We note that there may be circumstances

where dictum provides a useful guide to what the law is. See, e.g.,

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*Reich v. Continental Casualty Co.*, 33 F.3d 754, 757 (7th Cir. 1994), cert. denied, 513 U.S. 1152 (1995) (adhering to reasoned dictum in recent Supreme Court opinion). Here, however, the CVA itself apparently has not relied upon the dicta in *Akins* and *Corpuz* as a basis for disposition in any precedential decision, and the decisions of the Federal Circuit in *Smith* and the CVA in *Routen* cast considerable doubt upon the validity of those statements. Under these circumstances, it is not, in our view, necessary to accord binding weight to the isolated statements in *Akins* and *Corpuz* concerning reopening of claims based upon misapplication of, or failure to apply, presumptions.

20. Pursuant to the plain meaning of the term "evidence" in 38 U.S.C. § 5108, the precedents of the Supreme Court and the Federal Circuit establishing that a presumption is not evidence, and the statutory and regulatory scheme governing consideration of previously denied claims, we conclude that a statutory or regulatory presumption, standing alone, may not constitute "new and material evidence" to reopen a claim. For the reasons stated above, the decisions of the CVA do not, in our view, compel a contrary conclusion.

21. Finally, we note that the opinion request refers to 38 U.S.C. § 1154(b) as establishing an "evidentiary presumption." In our view, however, section 1154(b) does not establish an evidentiary presumption similar to the presumptions of soundness and aggravation at issue in *Akins*, *Jensen*, *Dolan*, and *Routen*, or the presumption of service connection at issue in *Corpuz*. The presumptions of soundness, aggravation, and service connection each require the presumption of a fact based on the existence of other facts. See 38 U.S.C. §§ 1111, 1112, and 1153; 38 C.F.R. §§ 3.304(b), 3.306, and 3.307. In contrast, 38 U.S.C. § 1154(b) requires claimants to submit actual evidence of service incurrence or aggravation of a disease or injury, rather than presuming service incurrence or aggravation from other facts. Section 1154(b) merely allows acceptance of a particular form of evidence, i.e., "satisfactory lay or other evidence," in lieu of another form, i.e., official service records. It does not establish a presumption which may in any sense be considered the equivalent of evidence. See *Collette v. Brown*, 82 F.3d 389, 392 (Fed. Cir. 1996) ("[s]ection 1154(b) does not create a statutory presumption that a combat veteran's alleged disease or injury is service-connected"); H.R. Rep. No. 1157, 77th Cong., 1st Sess. 2 (1941) (in reporting on legislation which originally

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established the provisions now codified at 38 U.S.C. § 1154(b), the House Committee on World War Veterans' Legislation stated, "[t]he language of the bill has been carefully selected to make clear that a statutory presumption in connection with determination of service connection is not intended"). Accordingly, we do not believe that the alleged misapplication of or failure to apply section 1154(b) would provide an evidentiary basis for reopening a claim, even if the CVA's statements in *Akins* and *Corpuz* were precedential authority.

HELD:

The misapplication of, or failure to apply, a statutory or regulatory evidentiary presumption in a prior final decision cannot, in itself, constitute "new and material evidence" within the meaning of 38 U.S.C. § 5108 for purposes of reopening a claim.

Robert E. Coy