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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 13-2725

JAMES W. BEALL, APPELLANT,

v.

SLOAN D. GIBSON,
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before KASOLD, *Chief Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

KASOLD, *Chief Judge*: Veteran James W. Beall appeals pro se that part of a June 13, 2013, decision of the Board of Veterans' Appeals (Board) that denied entitlement to an effective date for benefits for intervertebral disc syndrome prior to August 12, 2005, because, inter alia, there was no clear and unmistakable error (CUE) in a 1948 VA regional office (RO) denial of his claim.¹ Liberally reading Mr. Beall's brief, he argues that the Board erred in not finding that the 1948 rating decision (1) failed to give guidance regarding and consideration to a 1944 in-service injury, and (2) failed to take into account the delay between his application for benefits and the provision of a physical examination. He further argues that the RO, in its 2012 Statement of the Case (SOC), mischaracterized a 1948 medical report. The Secretary argues for dismissal of this appeal because Mr. Beall has presented assertions of error that were not presented to the RO or Board. Single-judge disposition is appropriate. *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons stated below, Mr. Beall's appeal will be dismissed in part, and that part of the June 13, 2013, Board decision on appeal will be affirmed.

As to Mr. Beall's first argument, and contrary to the Secretary's argument for complete

¹ Mr. Beall asserts no error with regard to the Board's denial of CUE in a 1963 RO decision.

dismissal of the appeal, Mr. Beall sufficiently argued below that the 1948 RO did not consider his 1944 in-service injury and the Board addressed that assertion of CUE. The Board noted that the 1948 RO referenced a 1948 medical report that specifically noted such injury, and the Board further noted that the 1948 RO denied Mr. Beall's claim because he had no current injury. The Board ultimately determined that Mr. Beall had not established CUE in the 1948 RO decision. Based on the record of proceedings (ROP), the Board's findings and ultimate determination are neither clearly erroneous nor are they arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See Eddy v. Brown*, 9 Vet.App. 52, 57 (1996) (Court's CUE review is "limited to determining whether the Board's conclusion is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'" and "whether it is supported by an adequate statement of 'reasons or bases'"); *see also Andrews v. Principi*, 18 Vet.App. 177, 187 (2004) (Steinberg, J., concurring in part and dissenting in part) (Board determination regarding whether the adjudicator had the correct facts as known at that time before him might be subject to the "clearly erroneous" standard of review).

On the other hand, as to Mr. Beall's second argument, the ROP does not reflect a specific assertion by Mr. Beall that the 1948 RO decision contained CUE for failing to take into account the delay between his application for benefits and the provision of a physical examination. On review of the ROP, neither the RO nor the Board addressed any such assertion of CUE. Accordingly, that part of Mr. Beall's appeal related to this assertion of CUE will be dismissed. *See Ledford v. West*, 136 F.3d 776, 779 (Fed. Cir. 1998) (holding that this Court's "jurisdiction is premised on and defined by the Board's decision concerning the matter being appealed"); *see also Andre v. Principi*, 301 F.3d 1354, 1361 (Fed. Cir. 2002) ("[E]ach 'specific' assertion of CUE . . . must be the subject of a decision by the [Board] before the Veterans Court can exercise jurisdiction over it."); *Jarrell v. Nicholson*, 20 Vet.App. 326, 333 (2006) (en banc) ("[E]ach wholly distinct and different CUE theory underlying a request for revision is a separate matter and, when attacking a prior RO decision, each must be presented to and adjudicated by the RO in the first instance and, if not, the Board [and subsequently the Court] lack[] jurisdiction over the merits of the matter.").

With regard to Mr. Beall's third argument, he fails to recognize that the 2012 SOC was subsumed by the Board decision on appeal and thus is not the matter on appeal. *See* 38 C.F.R.

§ 20.1104 (2014) ("When a determination of the agency of original jurisdiction is affirmed by the Board . . . , such determination is subsumed by the final appellate decision."); *see also Brown v. West*, 203 F.3d 1378, 1381 (Fed. Cir. 2000). Only the June 13, 2013, Board decision is on appeal and, as noted above, based on the ROP, the Board's ultimate determination regarding CUE in the 1948 decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Accordingly, that part of Mr. Beall's appeal asserting Board error in not finding that the 1948 RO failed to take into account the delay between his application for benefits and provision of a physical examination is DISMISSED, and that part of the June 13, 2013, Board decision on appeal is AFFIRMED.

DATED: September 25, 2014

Copies to:

James W. Beall

VA General Counsel (027)