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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 14-2292

STEPHEN E. SUTTON, APPELLANT,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

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

PIETSCH, *Judge*: The appellant, Stephen E. Sutton, appeals through counsel a May 13, 2014, Board of Veterans' Appeals (Board) decision in which the Board concluded that the VA regional office (RO) did not commit clear and unmistakable error (CUE) in decisions it issued in July 1976 and January 1978 and, based on that conclusion, denied him entitlement to an effective date prior to May 30, 2007, for disability benefits compensating him for service-connected schizophrenia. Record (R.) at 3-18. This appeal is timely and the Court has jurisdiction over the claim on appeal pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate when the issue is of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will affirm the Board's determination that the RO's 1976 and 1978 decisions are not undermined by CUE. The Court, however, will vacate the Board's overall conclusion that the appellant is not entitled to an effective date prior to May 30, 2007, for his disability benefits and remand that matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Coast Guard from October 1971 until November 1974. R. at 775, 1172. In August 1974, the appellant was hospitalized for psychiatric evaluation. R. at 1192-94. His care providers diagnosed him with a passive-aggressive personality. *Id*. From October 1975 until January 1976, the appellant received in-patient hospital care for a "[p]ersonality disorder, explosive personality, manifested by poor impulse control, hyperirritability and fears of hurting self or others." R. at 1150-51.

In October 1975, the appellant filed a claim for entitlement to disability benefits for a mental disorder. R. at 1155-58. In July 1976, the RO denied him entitlement to disability benefits for a "nervous condition." R. at 1149. The RO concluded that the appellant's explosive personality is a "[c]onstitutional or developmental abnormality [that is] not a disability under the law." *Id.*

In about September 1977, the appellant's care providers diagnosed him with paranoid schizophrenia. R. at 85-104, 128-33, 142. Also in September 1977, the appellant filed a new claim for entitlement to disability benefits for a "nervous condition." R. at 1138-42.

In January 1978, the RO concluded that the appellant's claim "remains in its present disallowed status." R. at 1096-1102. The RO noted that the appellant was not diagnosed with schizophrenia until 1977, and it determined that the "nervous disorder shown during service . . . was a personality disorder, which is not a ratable disability for compensation purposes." R. at 1100. It found no connection between the appellant's schizophrenia and his in-service psychiatric symptoms. *Id.*

In 1988, 1995, and 1997, the appellant asked the RO to reopen his claim. R. at 858, 977-86, 1035, 1055-58, 1060. The RO denied those requests in decisions dated September 1988, October 1995, and May 1998. R. at 859-61, 996-97, 1041, 1044.

On May 30, 2007, the appellant once again asked VA to reopen his claim. R. at 822. In April 2008, a VA medical examiner diagnosed the appellant with schizophrenia, paranoid type, and opined that the appellant's schizophrenia became symptomatic during his active service. R. at 590-95. In August 2008, the RO determined that the VA examiner's opinion was new and material evidence sufficient to reopen the appellant's claim for entitlement to disability benefits for a psychiatric disorder. R. at 330-34. The RO then granted the appellant entitlement to disability

benefits for schizophrenia, paranoid type, and assigned his disorder a 100% disability rating effective May 30, 2007, "the date we received your statement to reopen your claim." R. at 328-34.

In a February 4, 2010, submission, the appellant asserted that he is entitled to an earlier effective date for his disability benefits. R. at 318-20. He argued that his benefits should be effective "as early as 07-12-1976 application for benefits." R. at 320. The RO construed the appellant's statement to be an assertion that its earlier decisions were clearly and unmistakably erroneous. R. at 151-55. The RO determined that they were not and, on February 26, 2010, denied the appellant's request for an earlier effective date for his benefits. *Id.*

On May 13, 2014, the Board issued its decision here on appeal. R. at 3-18.

II. ANALYSIS

A. Potential Unadjudicated Issues

In its February 2010 decision, the RO concluded that "[e]ntitlement to an earlier effective date of service connection for schizophrenia, paranoid type, continuous is not shown due to clear and unmistakable error." R. at 151-55. The RO explained that its decision to set May 30, 2007, as the effective date for the appellant's disability benefits "is not considered to have been clearly and unmistakably erroneous." R. at 152.

In March 2010, the appellant filed a Notice of Disagreement with the RO's decision. R. at 146-47. The appellant noted that he "requested and was denied Service Connection for a Mental Health condition on four occasions, as early as 07-12-1976. It is my contention that those denials are flawed." R. at 147.

In a May 2011 Statement of the Case, the RO acknowledged that the appellant had argued "that the decisions prior to August 20, 2008 contained clear and unmistakable error." R. at 122. The RO concluded that the decisions "prior to August 20, 2008 which denied service connection for schizophrenia are not considered to have been clearly and unmistakably erroneous because such were properly based on the available evidence of record at the time and the rules then in effect." *Id.* The RO indicated that it considered whether its July 1976, January 1978, October 1995, May 1998, and August 2008 decisions were undermined by CUE. R. at 122-23. In July 2011, the appellant appealed to the Board. R. at 82-84.

According to the report from a conference a decision review officer held with the appellant and his representative on January 19, 2012, the appellant asserted that the July 1976 decision "and others were flawed and in error for not granting service connection based upon the date of claim of October 8, 1975." R. at 56. The decision review officer wrote that he "will review all rating and appeal decisions dating July 12, 1976, to August 20, 2008, to ascertain if a previous denial determination was clearly and unmistakably in error based upon the laws and regulations of that time." R. at 57.

In a January 2012 Supplemental Statement of the Case, the RO denied the appellant "[e]ntitlement to an earlier effective date for service connection for schizophrenia, paranoid type, continuous, based on determination of whether clear and unmistakable error occurred." R. at 52-55. The RO wrote that the appellant's February 2010 pleading raised challenges to the July 1976 decision "and others." R. at 53. The RO then stated:

> A review of the pertinent facts includes VA rating and appeal decisions dating July 12, 1976, January 17, 1978, August 30, 1988, October 3, 1995, November 9, 1995, May 1, 1998, August 20, 2008, February 26, 2010, June 3, 2011, including the evidence cited wherein. The VA rating and appeal determinations of record considered the evidence relevant to the issue of service connection, at that time; and properly applied the relevant VA regulations and guidelines in effect at the time of the rating determinations. . . . [T]he previous rating and appeal decisions of record, dating back to July 12, 1976, were not found to be clearly and unmistakably in error, and thus, not warranting a revision of the determination of service connection.

R. at 54-55.

In a February 2012 deferred rating decision, VA noted that the appellant's claim for entitlement to disability benefits for a psychiatric disorder was denied in July 1976, January 1978, October 1995, November 1995, and May 1998. R. at 48. VA then wrote that the RO had decided that "[n]o CUE confirmed in the previous rating and appeal decisions." *Id.*

The Board only decided whether the RO clearly and unmistakably erred in its 1976 and 1978 decisions. The RO, however, appears to have decided that it did not clearly and unmistakably err in several other decisions, including the decisions denying the appellant's request to reopen his claim for entitlement to disability benefits for schizophrenia that it issued in 1988, 1995, and 1998, and the decision it issued in 2008. Based on the January 2012 Supplemental Statement of the Case, the RO

also may have made CUE findings about one or more decisions that were not yet final when the appellant challenged them. R. at 54-55.

The Board did not state why it did not review the RO's conclusion that none of the decisions it issued after 1978 are undermined by CUE. It stated only that "neither the [appellant] nor his representative has alleged CUE in any of those rating decisions." R. at 17. That unexplained assertion appears to conflict both with how the RO viewed the appellant's pleadings and how it adjudicated this case.

Moreover, the Board found that "there was no pending, unresolved claim pursuant to which the benefit sought could have been awarded." R. at 18. In a February 1992 letter, the appellant wrote: "I believe I filed a service connected nervous condition claim in the late 70s. . . . I don't recall the results, please send them. I've had continual treatment since discharge from active duty." R. at 1039. In May 1992, a VA official instructed a person identified only as "adjudicator" to "please advise [appellant] that [service connection] for schizophrenic reaction was denied in 1978 [and] 1988."[1] R. at 1038. In June 1992, VA sent the appellant a letter describing the information that he needed to submit to support his request to reopen his claim. R. at 1036-37. In July 1995, the appellant wrote that he "put in a service connected claim . . . about 1992 for a nervous condition. . . . I have not heard the results." R. at 1035. It is not clear based on the limited record before the Court what became of the claim the appellant may have initiated in February 1992.

For this and the other reasons discussed above, remand is required for the Board to determine whether it failed to decide issues that were properly before it. The Board should also ensure that it rectifies any procedural abnormalities caused by the RO's adjudicatory actions.

B. CUE

To demonstrate that a prior decision was undermined by CUE, an appellant must do more than disagree with "how the facts were weighed or evaluated" by the adjudicator who issued the decision. *Russell v. Principi*, 3 Vet.App. 310, 314 (1992). The appellant must show that "[e]ither 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." *Id.* Any identified error must be

[1] The official's signature is illegible and is not accompanied by an official title. R. at. 1038.

"undebatable" and, "had it not been made, would have manifestly changed the outcome at the time it was made." *Id.* Finally, a CUE analysis "must be based on the record and the law that existed at the time" of the decision under consideration. *Id.*

The appellant does not argue that the RO incorrectly applied statutory or regulatory law extant in 1976 and 1978. He argues only that the correct facts were not before the RO both times that it adjudicated his claim.

The appellant faces a difficult task. The Court may only overturn the Board's disposition of his CUE theory if the appellant convinces it that the Board's conclusion is "arbitrary, capricious, an abuse of discretion, or not in accordance with the law." 38 U.S.C. § 7261(a)(3)(A); *Livesay v. Principi*, 15 Vet.App. 165, 174 (2001) (en banc).

A CUE decision, however, is not immune from the reasons or bases standard generally applicable to Board decisions. Under that standard, the Board must include in its decision a written statement of the reasons or bases for its findings and conclusions, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam* 78 F.3d 604 (Fed. Cir. 1996) (table); *Gilbert*, 1 Vet.App. at 57.

Reviewing the 1976 and 1978 RO decisions in the detached manner required by CUE caselaw is a difficult intellectual challenge. The April 2008 VA examination report colors all past evidence. There is little doubt that if the April 2008 examination report had been extant in the 1970s, the RO would have had a clearer understanding about the nature of the appellant's disorder.

The Court, however, must view the evidence from the vantage point of the adjudicators who issued the 1976 and 1978 decisions. *Grover v. West*, 12 Vet.App. 109, 111-12 (1999); *Damrel v. Brown*, 6 Vet.App. 242, 245 (1994); *Russell*, 3 Vet.App. at 314. A "new medical diagnosis that 'corrects' an earlier diagnosis" cannot be the basis for CUE. 38 C.F.R. § 20.1403(d)(1) (2014). Moreover, "[w]hile it is true that an incomplete record may ultimately lead to an incorrect

determination, it cannot be said that an incomplete record is also an incorrect record." *Caffrey v. Brown*, 6 Vet.App. 377, 383 (1994). That the April 2008 medical report reveals that the RO and the medical examiners it relied upon misunderstood the nature of the appellant's disorder in the 1970s is, therefore, inconsequential to the present analysis.

The appellant insists that he "is not challenging the 1978 rating decision on the basis of a misdiagnosis," but that is exactly what he tries to do. Appellant's Br. at 11. The appellant argues that when, in 1978, the RO found "that his schizophrenia did not manifest in service or within the presumptive period[, its finding] was not based on the correct facts, as they were known at the time." *Id.* The only discernable support that the appellant gives for this argument is his assertion that "the record demonstrates that [the appellant's] schizophrenia manifested in service when he experienced his first psychotic break and attacked his Executive Officer." *Id.* at 12.

The appellant cited to four documents to corroborate this statement. The first is the April 2008 examination report. R. at 593-94. The second and third are statements given by the appellant's commanders near the end of his service. R. at 1186-89. They describe the appellant's poor in-service behavior. The fourth is an August 1974 medical record documenting his care providers' opinion that he had "no organic brain syndrom" and that his misbehavior was caused by a passive-aggressive personality. R. at 1192. Read without the April 2008 examination report, the officers' statements and the 1974 medical record do not reveal that the appellant had schizophrenia during his service. Hints of schizophrenia only become evident in those documents when they are read in light of the April 2008 examiner's opinion.

The appellant asks the Court to find that "the Board was required to consider whether the April 2008 VA examiner's opinion raised the question of whether the correct facts were before the rating adjudicators." Appellant's Br. at 11. This is very obviously an attempt to force impermissible consideration of the April 2008 report into the analysis, and it cannot be allowed. To the extent that the appellant believes that his care providers and the RO adjudicators relying on their opinions should have realized that his in-service behavior indicated that he had schizophrenia, that constitutes a disagreement with how the facts were weighed and cannot be the basis for finding CUE. *See Russell*, 3 Vet.App. at 314.

It bears repeating that the "correct facts before it" inquiry does not mean the correct facts as they are *now* known. In *Russell*, the Court faulted the RO for failure to consider test results that were extant when it issued its decision and that showed that its decision "was undebatably incorrect when made." 3 Vet.App. at 319-20. Nothing remotely comparable happened here. Furthermore, in *King v. Shinseki*, 26 Vet.App. 433, 440 (2014), the Court drew a distinction between failure to mention evidence in the record, which is not a basis for CUE, and affirmatively denying the existence of favorable evidence. *See Eddy v. Brown*, 9 Vet.App. 52, 58 (1996) (holding that, if the RO "made a materially incorrect characterization" of evidence in the record before it, then "there might have been a viable CUE claim . . . if the appellant were also able to demonstrate that correction of the error would 'manifestly' have changed the outcome"); *see also Bouton v. Peake*, 23 Vet.App. 70, 71-72 (2008). There is no indication that the RO denied, ignored, or entirely misinterpreted evidence in existence at the time it issued its decisions.

The appellant faults the medical evidence the RO cited in its 1978 decision for indicating that his "currently diagnosed schizophrenia was first *shown* in 1977." R. at 1100 (emphasis added); Appellant's Br. at 11. He asserts that his schizophrenia was actually "shown" by his in-service behavior, and thus the fact the RO cited was incorrect. *Id.*

As the appellant noted, however, the "RO was not aware" that he had schizophrenia during his service and it "based its denial on a misunderstanding of the [appellant's] illness." Appellant's Br. at 7. That misunderstanding was not based on a failure to properly consider or acknowledge facts extant at the time. It was instead, as the appellant acknowledges, based on a "very incomplete understanding of schizophrenia and most other mental disorders" in the 1970s that the medical profession did not rectify until years later. R. at 594; Appellant's Br. at 11. This is a textbook example of the RO relying on a medical opinion that was later shown to be erroneous. CUE cannot be granted on that basis. *Henry v. Derwinski*, 2 Vet.App. 88, 90 (1992) (holding, in a case with similar facts, that even though "new evidence came to light as a result of a more comprehensive examination," any prior error "was made by the doctor," and the "adjudication . . . was correct given the state of the evidence at that time").

In its 1976 decision, the RO correctly recorded the appellant's diagnoses as they existed at the time. R. at 1149. No evidence before the RO, medical or otherwise, clearly indicated that the appellant had schizophrenia.

In its 1978 decision, the RO noted that the appellant was first diagnosed with schizophrenia in 1977 and found that his schizophrenia was not linked to the personality disorder he experienced during his service. R. at 1100. The appellant has not pointed to any evidence that existed in 1978 that the RO overlooked or that indisputably calls its conclusion into question. The record in 1978 contained no evidence linking the appellant's schizophrenia to his personality disorder or his in-service behavior in general.

The Court cannot say that "reasonable minds could only conclude that the original decision[s were] fatally flawed at the time [they were] made." *Russell*, 3 Vet.App. at 313. Moreover, nothing indicates that the RO clearly failed "to consider certain highly probative evidence." *Crippen v. Brown*, 9 Vet.App. 412, 421 (1996).

The Court concludes, therefore, that the Board's determination that the 1976 and 1978 RO decisions were not clearly and unmistakably erroneous is not "arbitrary, capricious, an abuse of discretion, or not in accordance with the law." 38 U.S.C. § 7261(a)(3)(A). The Court also cannot discern any deficiencies in the Board's statement of reasons or bases. To the extent that the Board's statement of reasons or bases is inadequate, however, the Court is not convinced that any such Board error would be prejudicial to the appellant. 38 U.S.C. § 7261(b)(2); *see also Shinseki v. Sanders*, 556 U.S. 396, 406 (2009) (noting that the statute requiring this Court to "take due account of prejudicial error [] requires the Veterans Court to apply the same kind of 'harmless error' rule that courts ordinarily apply in civil cases").

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs and a review of the record, the portion of the Board's May 13, 2014, decision explaining its conclusion that the RO's July 1976 and January 1978 decisions are not undermined by CUE is AFFIRMED. The Board's overall conclusion that the appellant is not entitled to an earlier effective date for the disability benefits

awarded to him in August 2008 is VACATED and that matter is REMANDED for further proceedings consistent with this decision.

DATED: May 27, 2015

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