

**BOARD OF VETERANS' APPEALS**  
**DEPARTMENT OF VETERANS AFFAIRS**  
**WASHINGTON, DC 20420**

IN THE MATTER OF THE MOTION OF  
ANNE S. ALLEN

XC [REDACTED]

IN THE CASE OF  
RICHARD C. ALLEN

DOCKET NO. 14-23 906

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)  
)

DATE *February 3, 2015*

*cf*

**THE ISSUES**

1. Whether there was Clear and Unmistakable Error (CUE) in a June 1989 decision of the Board of Veterans' Appeals (Board) that denied entitlement to a total disability rating based on individual unemployability (TDIU), including not granting the benefit sought retroactively to May 2, 1986, on an accrued benefits basis.
2. Whether there was CUE a June 1989 Board decision in not assigning a 100 percent evaluation for a psychiatric disorder, effective May 2, 1986, on an accrued benefits basis.
3. Whether there was CUE in a January 1992 Board decision that granted a 100 percent evaluation for a psychiatric disorder, with anxiety reaction and depression, by not assigning an effective date of May 2, 1986, on an accrued benefits basis.
4. Whether there was CUE in a January 1992 Board decision in not adjudicating a claim for Special Monthly Compensation (SMC) based on Aid and Attendance (A&A), on an accrued benefits basis.

IN THE MATTER OF THE MOTION OF  
ANNE S. ALLEN

XC [REDACTED]

IN THE CASE OF  
RICHARD C. ALLEN

(The matter of entitlement to an earlier effective date than June 9, 1989 for the assignment of a 100 percent schedular evaluation for a psychiatric disorder, with anxiety reaction and depression, including based upon CUE in an April 1992 rating decision, on an accrued benefits basis, is the subject of a separately issued decision.)

#### REPRESENTATION

Moving party represented by: Chris Attig, Esq.

#### APPEARANCE AT ORAL ARGUMENT

Attorney representing the moving party

#### ATTORNEY FOR THE BOARD

Jason A. Lyons, Counsel

#### INTRODUCTION

The Veteran served on active duty from December 1942 to December 1945. He died in February 2010. The moving party is his surviving spouse. This matter comes before the Board of Veterans' Appeals following motions alleging CUE in prior Board decisions of June 1989 and January 1992, on an accrued benefits basis, filed by the moving party's attorney on her behalf.

IN THE MATTER OF THE MOTION OF  
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A Board videoconference hearing was held in September 2014 before the undersigned Veterans Law Judge (VLJ), and whereas the moving party was unavailable to provide testimony, the attorney presented the case on her behalf.

The Virtual VA paperless claims processing system contains the Board hearing transcript, with the remainder of the documents in that file being either irrelevant or duplicative of the existing evidence. The Veterans Benefits Management System (VBMS) itself contains entirely duplicative documentation.

**As set forth in greater detail in the Board's separately issued decision regarding a claim for earlier effective date than June 9, 1989 for assignment of a 100 percent schedular evaluation for psychiatric disability, the Board is referring for initial adjudication by the RO as the Agency of Original Jurisdiction (AOJ) an additional claim for Special Monthly Compensation based on Aid and Attendance, on an accrued benefits basis. As explained therein, this additional claim is premised upon the inferred issue of SMC entitlement still pending at the time of the Veteran's death, and not upon any claim of CUE in a prior Board decision or prior rating decision.**

This appeal has been advanced on the Board's docket pursuant to 38 C.F.R. § 20.900(c) (2014). 38 U.S.C.A. § 7107(a)(2) (West 2014).

#### FINDING OF FACT

A veteran's CUE claim does not survive the death of the veteran for the purposes of accrued benefits.

### CONCLUSION OF LAW

The claims for CUE in June 1989 and January 1992 Board decisions, on an accrued benefits basis, for failing to assign higher evaluations or TDIU with earlier effective dates, and failure to adjudicate a Special Monthly Compensation claim based on need for Aid and Attendance, are dismissed. 38 U.S.C.A. §§ 5109A , 7111 (West 2014); 38 C.F.R. §§ 3.1000, 20.1400, 20.1401(b) (2014).

### REASONS AND BASES FOR FINDING AND CONCLUSION

A final decision issued by the Board is subject to revision on the grounds of CUE. 38 U.S.C.A. § 7111(a) (West 2014); 38 C.F.R. § 20.1400 (2014). A finding of CUE is defined as 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. Thus, even where the premise of error is accepted, if it is not absolutely clear that a different result would have ensued, the error complained of cannot be, ipso facto, clear and unmistakable.” *Fugo v. Brown*, 6 Vet. App. 40, 43-44 (1993).

A determination of CUE requires that: (1) the correct facts, as they were known at the time, were not before the adjudicator (that is, more than a simple disagreement as to how the facts were weighed and evaluated) or the statutory or regulatory provisions extant at that time were incorrectly applied; (2) 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 (3) a basis in the record and the law that existed at the time of the prior adjudication in question. *See Damrel v. Brown*, 6 Vet. App. 242, 245 (1994), citing *Russell v. Principi*, 3 Vet. App. 310, 313-14 (1992) (en banc).

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XC [REDACTED]

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Upon the death of an individual receiving benefit payments, certain persons shall be paid periodic monetary benefits to which that individual was entitled at the time of death under existing ratings or decisions, or those based on evidence in the file at date of death, and due and unpaid for a period prior to the last date of entitlement. *See* 38 U.S.C.A. § 5121; 38 C.F.R. § 3.1000(a).

Here, the Board finds that the claims on appeal must be dismissed. A surviving spouse “cannot initiate a freestanding CUE claim . . . if the veteran had not already filed such a claim.” *Rusick v. Gibson*, 760 F.3d 1342, 1346 (Fed. Cir. 2014). Here, no such claims were pending at the time of the Veteran’s death. As noted in *Haines v. West*, 154 F.3d 1298, 1301 (Fed. Cir. 1998), cert. denied, 119 S. Ct. 1249 (1999), “[t]he CUE claim provision provides nothing more than a procedure for a claimant to seek reconsideration of a limited type of error in a prior decision. It cannot be read as providing a procedure for adjudication or payment of veterans benefits to survivors. The only statutory basis providing such a remedy is section 5121.” Consequently, the issues on appeal are dismissed.

ORDER

The claims for CUE in the prior June 1989 and January 1992 Board decisions are hereby dismissed.

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K. MILLIKAN  
Veterans Law Judge, Board of Veterans’ Appeals

## **YOUR RIGHTS TO APPEAL OUR DECISION ON YOUR MOTION FOR REVIEW FOR CLEAR AND UNMISTAKABLE ERROR**

The attached decision by the Board of Veterans' Appeals (BVA or Board) is the final decision on your motion for the Board to review one or more of its final decisions for clear and unmistakable error (CUE). If you are satisfied with the outcome of this decision, you do not need to do anything. However, if you are not satisfied with this decision, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision.

None of these things is mutually exclusive - you can do all three at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court *before* you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

There is **no** time limit for filing a motion for reconsideration or a motion to vacate with the Board.

**How long do I have to start my appeal to the Court?** You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the Court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you*, you will then have another 120 days from the date the BVA decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time*. Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

**How do I appeal to the United States Court of Appeals for Veterans Claims?** Send your Notice of Appeal to the Court at:

**Clerk, U.S. Court of Appeals for Veterans Claims  
625 Indiana Avenue, NW, Suite 900  
Washington, DC 20004-2950**

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: <http://www.uscourts.cavc.gov>, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

**How do I file a motion for reconsideration?** You can file a motion asking the BVA to reconsider any part of this decision by writing a letter to the BVA clearly explaining why you believe that the BVA committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that such letter be as specific as possible. A general statement of dissatisfaction with the BVA decision or some other aspect of the VA claims adjudication process will not suffice. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

**Director, Management, Planning and Analysis (014)  
Board of Veterans' Appeals  
810 Vermont Avenue, NW  
Washington, DC 20420**

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

**How do I file a motion to vacate?** You can file a motion asking the BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. 20.904. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence submitted by or on behalf of the appellant. Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

**Can someone represent me in my appeal?** Yes. You can always represent yourself in any claim before VA, including the BVA, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: <http://www.va.gov/vso>. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before VA, then you can get information on how to do so at the Court's website at: <http://www.uscourts.cavc.gov>. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at Court's website, or at: <http://www.vetsprobono.org>, [mail@vetsprobono.org](mailto:mail@vetsprobono.org), or (888) 838-7727.

**Do I have to pay an attorney or agent to represent me?** An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

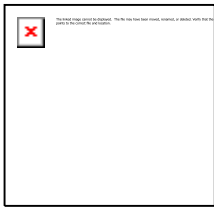
The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

**Fee for VA home and small business loan cases:** An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

**Filing of Fee Agreements:** In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to the Secretary at the following address:

**Office of the General Counsel (022D)  
810 Vermont Avenue, NW  
Washington, DC 20420**

The Office of the General Counsel may decide, on its own motion, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of the General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).



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IN THE APPEAL OF  
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IN THE CASE OF  
RICHARD C. ALLEN

DOCKET NO. 14-23 906

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DATE *February 3, 2015*  
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On appeal from the  
Department of Veterans Affairs Regional Office in New Orleans, Louisiana

**THE ISSUE**

Entitlement to an earlier effective date than June 9, 1989 for the assignment of a 100 percent schedular evaluation for a psychiatric disorder, with anxiety reaction and depression, including based upon Clear and Unmistakable Error (CUE) in an April 1992 RO rating decision, on an accrued benefits basis.

(The matter of whether there was CUE in prior Board of Veterans' Appeals (Board) decisions is the subject of a separately issued decision.)

**REPRESENTATION**

Appellant represented by: Chris Attig, Esq.



IN THE APPEAL OF  
ANNE S. ALLEN

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IN THE CASE OF  
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ATTORNEY FOR THE BOARD

Jason A. Lyons, Counsel

INTRODUCTION

The Veteran served on active duty from December 1942 to December 1945. He died in February 2010. The appellant is his surviving spouse. This matter comes before the Board on appeal from an August 2010 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Milwaukee, Wisconsin, with jurisdiction later transferred to the RO located in New Orleans, Louisiana.

A Board videoconference hearing was held in September 2014 before the undersigned Veterans Law Judge (VLJ), and whereas the appellant was unavailable to provide testimony, her attorney presented the case on her behalf. The hearing transcript is located in the Virtual VA electronic claims file.

The Virtual VA electronic claims file contains the Board hearing transcript, with the remainder of the documents in that file being either irrelevant or duplicative of the existing evidence. The Veterans Benefits Management System (VBMS) itself contains entirely duplicative documentation.

**The Board finds preliminarily that there is an additional claim for Special Monthly Compensation (SMC) for Aid and Attendance (A&A) on an accrued benefits basis which has not yet been adjudicated by the RO as the Agency of Original Jurisdiction (AOJ). In this regard, the appellant's representative has argued that the original SMC claim was raised during the Veteran's lifetime and remains pending. The Veteran was awarded a 100 percent disability rating for his service-connected psychiatric disorder effective June 9, 1989. A January 1990 psychological report indicated that he required assistance from**

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his spouse for tasks of daily living, which by implication raised the claim of SMC for A&A. *See Bradley v. Peake*, 22 Vet. App. 280, 294 (2008); *Akles v. Derwinski*, 1 Vet. App. 118, 121 (1991). The RO did not consider this issue in any rating decision or via implicit denial. Consequently, at the time of the Veteran's death, the SMC claim was still pending. The appellant now claims accrued benefits on this theory. To date, the AOJ has not fully addressed this theory of recovery, instead finding that there was not an inferred SMC claim. On longitudinal evidentiary review, however, the Board will afford the opportunity for every appropriate basis of recovery, and a valid inferred claim is deemed raised for reasons indicated. *Therefore, the claim of SMC for A&A for accrued benefits purposes is referred to the AOJ for timely and appropriate action.* 38 C.F.R. § 19.9(b) (2014). Moreover, the Board emphasizes that this referral for adjudication of SMC entitlement on an accrued benefits basis is founded entirely upon the pending claim at the time of the Veteran's death, and has no connection to the appellant's claim of CUE in the April 1992 RO rating decision for failure to adjudicate the same claim, particularly given the adjudication below. The AOJ's adjudication of the referred issue should encompass review of the pending inferred SMC claim, but not an additional theory of CUE in any prior RO rating action.

This appeal has been advanced on the Board's docket pursuant to 38 C.F.R. § 20.900(c) (2014). 38 U.S.C.A. § 7107(a)(2) (West 2014).

#### FINDINGS OF FACT

1. The Veteran filed a claim for earlier effective date for the grant of a 100 percent rating for psychiatric disability based upon CUE in a prior and final April 1992 RO rating decision. This claim was denied by an October 2009 rating action.

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2. The October 2009 denial of the original claim premised on CUE was not a final decision at the time of the Veteran's death.
3. The appellant timely filed a claim for accrued benefits.
4. The appellant is in receipt of Dependency and Indemnity Compensation (DIC) under 38 U.S.C.A. § 1318.

CONCLUSIONS OF LAW

1. The appellant's claim for CUE in an April 1992 RO rating decision that assigned an effective date of June 9, 1989 for the 100 percent rating for a psychiatric disorder, on an accrued benefits basis, is dismissed. 38 U.S.C.A. § 5121 (West 2014); 38 C.F.R. § 3.1000(a) (2014).
2. The claim for earlier effective date for a 100 percent rating for a psychiatric disorder for accrued benefits purposes in the absence of demonstrated CUE is dismissed. 38 U.S.C.A. §§ 5121, 7105(d)(5) (West 2014); 38 C.F.R. §§ 3.1000(a), 20.200, 20.202, 20.302 (2014); *Rudd v. Nicholson*, 20 Vet. App. 296 (2006).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

In reviewing this case, the Board is cognizant of the Veterans' Claims Assistance Act of 2000 (VCAA) and implementing regulations that set forth the duty to notify and assist a claimant. *See* 38 U.S.C.A. §§ 5100, 5102, 5103A, 5107, 5126 (West 2014); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326 (2014). However, this matter is being decided entirely as a matter of applicable law, and moreover, the provisions of the VCAA do not apply to CUE claims. *See Parker v. Principi*, 15 Vet. App. 407 (2002), citing *Livesay v. Principi*, 15 Vet. App. 165, 178-79 (2001)

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(en banc); *see also* 38 U.S.C.A. § 5109A; 38 C.F.R. § 3.105(a). Thus, the Board may fairly adjudicate on the merits the instant matter.

Upon the death of an individual receiving benefit payments on or after December 16, 2003, certain persons shall be paid periodic monetary benefits to which that individual was entitled at the time of death under existing ratings or decisions, or those based on evidence in the file at date of death, and due and unpaid. *See* 38 U.S.C.A. § 5121; 38 C.F.R. § 3.1000(a). An application for accrued benefits must be filed within one year after the date of the veteran's death. 38 U.S.C.A. § 5121(c); 38 C.F.R. § 3.1000(c). This requirement was met in the instant case.

As indicated, the appellant is seeking an earlier effective date of a 100 percent schedular rating for psychiatric disability, on an accrued benefits basis.

Generally, the effective date for an award of increased compensation is the date the claim was received or the date entitlement arose, whichever is later. 38 U.S.C.A. § 5110(a) (West 2014); 38 C.F.R. § 3.400(o)(1) (2014). Where the evidence demonstrates that a factually ascertainable increase in disability occurred during the one-year period preceding the date of receipt of the claim for increased compensation; otherwise, the effective date remains the date the claim is received. 38 U.S.C.A. § 5110(b)(2); 38 C.F.R. § 3.400(o)(2).

After a rating decision that grants service connection and assigns an effective date is final, an earlier effective date may be established only by a request for revision of that decision based on CUE. *Rudd v. Nicholson*, 20 Vet. App. 296, 299 (2006). Free-standing earlier effective date claims that could be raised at any time are impermissible because such claims would vitiate decision finality. *Rudd*, 20 Vet. App. at 300. Accordingly, where a free-standing earlier effective date claim is made, the claim must be dismissed. *Rudd*, 20 Vet. App. at 300.

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Previous RO decisions that are not timely appealed are final and binding on a veteran based on the evidence then of record and will be accepted as correct in the absence of CUE. The prior decision will be reversed or amended only where the evidence establishes this error. *See* 38 U.S.C.A. § 5109A; 38 C.F.R. § 3.105(a). CUE is defined as 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. Thus, even where the premise of error is accepted, if it is not absolutely clear that a different result would have ensued, the error complained of cannot be, ipso facto, clear and unmistakable.” *Fugo v. Brown*, 6 Vet. App. 40, 43-44 (1993).

A determination of CUE requires that: (1) the correct facts, as they were known at the time, were not before the adjudicator (that is, more than a simple disagreement as to how the facts were weighed and evaluated) or the statutory or regulatory provisions extant at that time were incorrectly applied; (2) 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 (3) a basis in the record and the law that existed at the time of the prior adjudication in question. *See Damrel v. Brown*, 6 Vet. App. 242, 245 (1994), citing *Russell v. Principi*, 3 Vet. App. 310, 313-14 (1992) (en banc).

The Board finds, unfortunately, that the appellant’s effective date claim to include as due to CUE must be dismissed.

A January 1990 Board decision granted a 100 percent rating for the Veteran’s service-connected psychiatric disorder with anxiety reaction and depression. An April 1992 rating decision implemented the Board’s issuance and assigned an effective date of June 9, 1989 for the 100 percent rating. The Veteran did not appeal therefrom, nor submit new and material evidence within one year, and the

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April 1992 rating decision was final and binding. *See* U.S.C.A. § 7105; 38 C.F.R. §§ 3.104(a), 20.200, 20.302.

In December 2008, the Veteran filed a December 2008 claim for “back pay” for his psychiatric disorder. It was eventually clarified that the Veteran requested an earlier effective date for the 100 percent rating for psychiatric disability, based on an allegation of CUE. An October 2009 rating decision denied the claim, finding no CUE in several prior rating decisions, including the April 1992 rating decision. The Veteran did not appeal that decision. He died in February 2010. The appellant timely filed for accrued benefits. Given that the one-year appeal period had not yet expired at the time of the Veteran’s death, the RO deemed the earlier effective claim as pending for accrued benefits purposes. *See* 38 C.F.R. § 3.160(c); *Taylor v. Nicholson*, 21 Vet. App. 126, 129 (2007). **On appeal, for purposes of the instant claim, the Veteran’s attorney’s CUE inquiry centers upon entirely the April 1992 RO rating decision (Hearing transcript at 10).**

The Veteran’s CUE claim, however, does not survive the death of the claimant. *See Haines v. West*, 154 F.3d 1298, 1301, 1302 (Fed. Cir. 1998); *see also Rusick v. Gibson*, 760 F.3d 1342 (Fed. Cir. 2014) (noting that an appellant on an accrued benefits basis may not claim CUE where no such claim was pending). Although an appellant may be entitled to DIC benefits under 38 U.S.C.A. § 1318 on the basis of the CUE, here, the appellant is already in receipt of such benefits. No matter how compelling the equities may otherwise be, simply stated, the Board is bound by the laws and regulations. Accordingly, this claim must be dismissed.

The Board notes that although substitution is an alternate theory of recovery in some cases, here, the appellant has not requested, nor has the RO granted, substitution. Moreover, the appellant’s attorney expressly disclaimed substitution. *See* Bd. Hrg. Tr. at 6; *See generally, Massie v. Shinseki*, 25 Vet. App. 123, 131 (2011) (“[T]he Board ... was entitled to assume that the arguments presented by [the appellant] were limited for whatever reason under the advice of counsel and that

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those were the theories upon which he intended to rely.”), *aff’d*, 724 F.3d 1325 (Fed. Cir. 2013); *Mason v. Shinseki*, 25 Vet. App. 83, 95 (2011) (holding that “the Court will not invent an argument for a represented party who had ample opportunity and resources to make that same argument, but, for whatever reason—be it strategy, oversight, or something in between—did not do so”).

Therefore, the instant effective date claim is dismissed. First, the Veteran's claim for entitlement to an earlier effective date was filed well after the relevant 1992 rating decision was final, in 2008. Accordingly, the claim on appeal is a free-standing earlier effective date claim which the Board must dismiss. *See Rudd*, 20 Vet. App. at 300; *see also Sabonis v. Brown*, 6 Vet. App. 426, 430 (1994) (holding that where the law is dispositive of the claim, it must be denied due to lack of legal entitlement). Second, the appellant's claim of CUE in the 1992 rating decision on an accrued benefits basis must be dismissed because, as noted above, it does not survive the Veteran's death. Accordingly, the issue on appeal is dismissed.

ORDER

The claim for entitlement to an earlier effective date than June 9, 1989 for the assignment of a 100 percent schedular evaluation for a psychiatric disorder, with anxiety reaction and depression, including based upon CUE in an April 1992 RO rating decision, on an accrued benefits basis, is dismissed.

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K. MILLIKAN  
Veterans Law Judge, Board of Veterans' Appeals

## YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. We will return your file to your local VA office to implement the BVA's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court **before** you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

**How long do I have to start my appeal to the court?** You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you*, you will have another 120 days from the date the BVA decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time*. Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

**How do I appeal to the United States Court of Appeals for Veterans Claims?** Send your Notice of Appeal to the Court at:

**Clerk, U.S. Court of Appeals for Veterans Claims  
625 Indiana Avenue, NW, Suite 900  
Washington, DC 20004-2950**

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: <http://www.uscourts.cavc.gov>, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

**How do I file a motion for reconsideration?** You can file a motion asking the BVA to reconsider any part of this decision by writing a letter to the BVA clearly explaining why you believe that the BVA committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that such letter be as specific as possible. A general statement of dissatisfaction with the BVA decision or some other aspect of the VA claims adjudication process will not suffice. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

**Director, Management, Planning and Analysis (014)  
Board of Veterans' Appeals  
810 Vermont Avenue, NW  
Washington, DC 20420**



Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

**How do I file a motion to vacate?** You can file a motion asking the BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

**How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error?** You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400 -- 20.1411, and *seek help from a qualified representative before filing such a motion*. See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

**How do I reopen my claim?** You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

**Can someone represent me in my appeal?** Yes. You can always represent yourself in any claim before VA, including the BVA, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: <http://www.va.gov/vso>. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: <http://www.uscourts.cavc.gov>. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: <http://www.vetsprobono.org>, [mail@vetsprobono.org](mailto:mail@vetsprobono.org), or (888) 838-7727.

**Do I have to pay an attorney or agent to represent me?** An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

**Fee for VA home and small business loan cases:** An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

**Filing of Fee Agreements:** In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to the Secretary at the following address:

**Office of the General Counsel (022D)  
810 Vermont Avenue, NW  
Washington, DC 20420**

The Office of the General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of the General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).