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

IN THE APPEAL OF [redacted]
RICHARD D. SIMMONS

DOCKET NO. 12-10 110) DATE *May 13, 2016*
) *PAT*
)

On appeal from the
Department of Veterans Affairs (VA) Regional Office (RO)
in Winston-Salem, North Carolina

THE ISSUE

Whether there was clear and unmistakable error (CUE) in a September 18, 1974, rating decision that denied service connection for an acquired psychiatric disorder.

REPRESENTATION

Appellant represented by: Kenneth M. Carpenter, Attorney

ATTORNEY FOR THE BOARD

E. Blowers, Associate Counsel

INTRODUCTION

The Veteran, who is the appellant, had active service from November 1968 to January 1970.

This matter came before the Board of Veterans' Appeals (Board) on appeal from a September 2009 rating decision of the RO in Winston-Salem, North Carolina. Initially, the Board must address the exact issue on appeal. In its September 2009 rating decision, the RO found no revision warranted to the September 18, 1974 rating decision as to the issues of 1) service connection for rheumatoid arthritis and 2) service connection for anxiety disorder with depressive features. These two issues were listed in the March 2012 statement of the case (SOC) and the September 2013 VA Form 8.

If a veteran wishes to reasonably raise a claim of CUE, there must be some degree of specificity as to what the alleged error is and, unless it is the kind of error that, if true, would be CUE on its face, persuasive reasons must be given as to why one would be compelled to reach the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the alleged error. *Bustos v. West*, 179 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 967 (1999); *Fugo v. Brown*, 6 Vet. App. 40, 43-44 (1993). Here, the Veteran has never pled with any specificity some error in the September 18, 1974 RO rating decision denying service connection for rheumatoid arthritis. The arguments from the date of the original CUE claim to the present have solely addressed the denial of service connection for an acquired psychiatric disability. As such, the Board does not find that the issue of CUE in the September 18, 1974 RO rating decision as to denial of service connection for rheumatoid arthritis is currently before the Board, and, even if it were, dismissal would be required due to the failure to plead a specific error of fact or law. *See* 38 U.S.C.A. §§ 5109A (West 2014); 38 C.F.R. § 3.105 (2015).

This matter was first before the Board in March 2015, where the Board found that the issue of CUE in a September 18, 1974 RO rating decision that denied service connection for an acquired psychiatric disorder was subsumed by a prior February 4, 1991 Board decision. The Veteran appealed the March 2015 Board decision to

the U.S. Court of Appeals for Veterans Claims (Court). In a January 2016 Order, the Court granted a Joint Motion for Vacatur and Remand (JMR) and remanded the CUE issue currently on appeal for action consistent with the terms of the JMR. Specifically, the parties agreed that the Board erred in finding that the February 4, 1991 Board decision had subsumed the 1974 rating decision. In the instant decision, the Board directly addresses the issue of whether there was CUE in the September 18, 1974 rating decision that denied service connection for an acquired psychiatric disorder. *See Forcier v. Nicholson*, 19 Vet. App. 414 (2006) (holding that the duty to ensure compliance with a Court Order extends to the terms of the agreement struck by the parties that forms the basis of the JMR).

In a March 2016 brief, the Veteran's representative requested that "the previous docket number, 96-30 550, be reassigned" to the appeal. The Board notes that the Veteran's representative made the same request in a December 2013 brief. In a January 2014 letter, the Board denied this request and explained its reasoning for doing so, citing to appropriate law and regulation. The March 2016 brief does not contain any new argument and/or evidence supporting the assigning of the earlier docket number; therefor, the request need not be addressed a second time. Further, as this is a CUE claim, any grant of benefits would be retroactive to the original date of claim. There is also no reason for the instant matter to be remanded to the RO. As such, there would be no additional benefit to the Veteran in assigning the previous docket number.

The Board has reviewed the physical claims file and both the Veterans Benefits Management System (VBMS) and the "Virtual VA" files so as to insure a total review of the evidence.

FINDINGS OF FACT

1. A claim seeking service connection for an acquired psychiatric disability was received by VA in July 1974.

2. A September 18, 1974, RO rating decision denied service connection for the acquired psychiatric disabilities of anxiety reaction with depressive features and an immature personality disorder, which subsequently became final.

3. The evidence has not established, without debate, that the correct facts, as then known, were not before the RO at the time of the September 18, 1974 rating decision, or that the RO incorrectly applied the applicable laws and regulations existing at the time.

CONCLUSION OF LAW

The September 18, 1974 rating decision denying service connection for an acquired psychiatric disability was not clearly and unmistakably erroneous. 38 U.S.C.A. § 5109A (West 2014); 38 C.F.R. § 3.105 (2015)

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Duties to Notify and Assist

The Veterans Claims Assistance Act of 2000 (VCAA) enhanced VA's duty to notify and assist claimants in substantiating their claims for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2014); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) (2014). VA's duties to notify and assist claimants under the VCAA do not apply to claims alleging CUE. *Parker v. Principi*, 15 Vet. App. 407 (2002); *Livesay v. Principi*, 15 Vet. App. 165, 179 (2001) (en banc). Therefore, no further discussion of VCAA duties to notify or assist will take place regarding the CUE issue.

Whether Clear and Unmistakable Error was Present in the September 18, 1974 Rating Decision

Previous determinations that are final and binding, including decisions of service connection and other matters, will be accepted as correct in the absence of CUE. Where evidence establishes such error, the prior rating decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicatory decision which constitutes a reversal of a prior decision on the grounds of CUE 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).

CUE is a very specific and rare kind of "error." It is the kind of error, of fact or of 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. Simply to claim CUE on the basis that previous adjudications had improperly weighed and evaluated the evidence can never rise to the stringent definition of CUE. Similarly, neither can broad-brush allegations of "failure to follow the regulations" or "failure to give due process," or any other general, nonspecific claim of "error." *Fugo v. Brown*, 6 Vet. App. 40, 43-44 (1993). In addition, failure to address a specific regulatory provision involves harmless error unless the outcome would have been manifestly different. *Id.* at 44.

The Court has held that there is a three-pronged test to determine whether CUE is present in a prior determination: (1) "[e]ither the correct facts, as they were known at the time, were not before the adjudicator (i.e., more than a simple disagreement as to how the facts were weighed or evaluated) or the statutory or regulatory provisions extant at the 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 determination that there was CUE must be based on the record and law that existed at the time of the prior adjudication in question. *Damrel v. Brown*, 6 Vet. App. 242, 245 (1994) (quoting *Russell v. Principi*, 3 Vet. App. 310, 313-14 (1992) (en banc)).

If a veteran wishes to reasonably raise a claim of CUE, there must be some degree of specificity as to what the alleged error is and, unless it is the kind of error that, if true, would be CUE on its face, persuasive reasons must be given as to why one would be compelled to reach the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the alleged error. *Bustos v. West*, 179 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 967 (1999); *Fugo*, 6 Vet. App. at 43-44. If the error alleged is not the type of error that, if true, would be CUE on its face, if the veteran is only asserting disagreement with how the RO evaluated the facts before it, or if the veteran has not expressed with specificity how the application of cited laws and regulations would dictate a "manifestly different" result, the claim must be denied or the appeal to the Board terminated because of the absence of legal merit or the lack of entitlement under the law. *Luallen v. Brown*, 8 Vet. App. 92 (1995); *Caffrey v. Brown*, 6 Vet. App. 377, 384 (1994). Further, VA's failure in the duty to assist cannot constitute CUE. *See Cook v. Principi*, 318 F.3d 1334, 1346 (Fed. Cir. 2003).

In the present case, the Veteran alleges CUE in a prior September 18, 1974 RO rating decision that denied service connection for various acquired psychiatric disabilities. As an initial matter, the Board finds the allegations of CUE made by the Veteran and representative are adequate to meet the threshold pleading requirements. *See Simmons v. Principi*, 17 Vet. App. 104 (2003); *Phillips v. Brown*, 10 Vet. App. 25 (1997) (distinguishing denial of CUE due to pleading deficiency and denial of CUE on merits). Additionally, the Veteran was notified of the September 18, 1974 rating decision through a September 24, 1974 correspondence. The Veteran filed a notice of disagreement (NOD) to the denial and a SOC was issued in November 1974. The Veteran did not perfect the appeal and it became final. 38 U.S.C.A. § 7105 (West 1972).

Evidence of record at the time of the September 1974 RO rating decision included service treatment records, post-service treatment records, and an August 1974 VA mental health examination. The Veteran's August 1968 service entrance examination reflects no psychiatric disability at service entrance. An April 1969 service treatment record noted that the Veteran was treated after an attempted suicide. At that time, the Veteran was diagnosed with "depressive reaction." In a

corresponding April 1969 service treatment record, the Veteran was diagnosed with "situational depression."

Subsequently, the Veteran received an in-service mental health examination. The report reflects that at the time of the suicidal action the Veteran was in "acute emotional distress." It was also noted that the Veteran had advanced frequent feelings of depression. The Veteran further conveyed having increased nervousness, insomnia, and crying spells. Upon examination the Veteran's mood was depressed. At the conclusion of the examination, the Veteran was diagnosed with "immature personality" and it was recommended that the Veteran be given an administrative discharge. The report from the January 1970 administrative discharge medical examination states that the Veteran was mentally normal at separation from service.

In a January 1970 employment application, completed soon after service separation, the Veteran denied symptoms of depression, excessive worry, and/or nervousness. The Veteran also denied receiving medical treatment for any condition other than minor aches and pains for the previous five years. While VA received multiple treatment records for the period from 1971 to 1974, none reflected treatment for a mental health disorder. A June 1974 letter from a private physician noted that "it is a reasonable presumption that the illness manifested as mental depression during [service] is the same illness now being manifested as arthritis involving multiple joints."

The Veteran received a VA psychiatric examination in August 1974. The examination report reflects that the Veteran advanced feeling tense and nervous when stationed overseas onboard a ship. After separation from service, the Veteran conveyed getting along alright, but also having a little nervousness at times. Then, in 1971, the Veteran was diagnosed with rheumatoid arthritis. Subsequently, the Veteran began to regularly feel nervous and shaky. Upon examination it was noted that the Veteran appeared mildly depressed and moderately tense. At the conclusion of the examination, the VA examiner diagnosed the Veteran with anxiety reaction with depressive features, and opined that the psychiatric disability was secondary to the diagnosed arthritic condition.

Per the September 18, 1974 RO rating decision, the issue of service connection for "polyarthritis variously diagnosed rheumatoid arthritis" was denied. As the VA examiner at the August 1974 VA mental health examination had found that the currently diagnosed anxiety reaction with depressive features, the only mental health disability diagnosed at that time, was secondary to the arthritis disability, service connection for the mental health disability was also denied. Further, the RO found that service connection for an immature personality disorder could not be granted as it was a constitutional or developmental abnormality that was not a disability under the law.

As discussed above, to reasonably raise a claim of CUE there must be some degree of specificity as to what the alleged error is unless it is the kind of error that, if true, would be CUE on its face. The Veteran argues, as will be addressed below, that the RO erred in failing to appropriately apply 38 C.F.R. § 3.303(b) (1974), 38 U.S.C.A. § 105(a) (West 1972), and 38 U.S.C.A. § 1111 (previously 38 U.S.C.A. § 311) (West 1972) in the denial of service connection for an acquired psychiatric disorder in the September 18, 1974 RO rating decision.

Per the September 18, 1974 RO rating decision, as to the issue of service connection for an acquired psychiatric disorder, the RO 1) denied service connection for anxiety reaction with depressive features on a direct and, as will be addressed below, presumptive basis, and 2) denied service connection for immature personality as "a constitutional or developmental abnormality and not a disability under the law."

With respect to personality disorders, such as an immature personally, congenital or developmental abnormalities are not "diseases or injuries within the meaning of applicable legislation" and, hence, do not constitute disability for VA compensation purposes. 38 C.F.R. §§ 3.303(c), 4.9 (1974). However, service connection may be granted, in limited circumstances, for disability due to aggravation of a constitutional or developmental abnormality by superimposed disease or injury. *See* VAOPGCPREC 82-90, 55 Fed. Reg. 45,711 (1990); *Carpenter v. Brown*, 8 Vet. App. 240, 245 (1995); *Monroe v. Brown*, 4 Vet. App. 513, 514-15 (1993).

Here, the Veteran has offered no argument that the RO made an error of fact or law in applying 38 C.F.R. § 3.303(c) and 38 C.F.R. § 4.9 to find that the Veteran's in-service diagnosis of immature personality was a personality disorder not subject to service connection under the law. Even assuming, *arguendo*, that the RO did err in its application of 38 C.F.R. § 3.303(b), 38 U.S.C.A. § 105(a), and/or 38 U.S.C.A. § 1111, service connection would still have been barred under 38 C.F.R. § 3.303(c) and 38 C.F.R. § 4.9; therefore, it cannot be said that any error under 38 C.F.R. § 3.303(b), 38 U.S.C.A. § 105(a), and/or 38 U.S.C.A. § 1111 would have manifestly changed the outcome as to the denial of service connection for an immature personality disorder. Absent any argument from the representative that the RO erred in its application of 38 C.F.R. § 3.303(c) and 38 C.F.R. § 4.9, CUE has not been showed in the September 18, 1974 RO rating decision as to the issue of service connection for the acquired psychiatric disorder of immature personality disorder. *Damrel*, 6 Vet. App. at 245; *Fugo*, 6 Vet. App. at 43-44.

Further, as to the personality disorder issue, the fact pattern of the instant matter is strikingly similar to that found in *Morris v. Shinseki*, 678 F.3d 1346 (Fed Cir. 2012). There, the veteran, who was represented by the same representative as the Veteran in the instant matter, argued the following:

> Mr. Morris hinges his CUE claim on the argument that, in the 1988 Board Decision, the Board incorrectly applied 38 C.F.R. § 3.303(c) and that the 2008 Board Decision and the decision of the Veterans Court now on appeal continued the error. His argument essentially is as follows: It is true that under § 3.303(c) a disability attributable to a personality disorder is not compensable. Reply Br. at 2. However, under 38 U.S.C. § 1111, a veteran claiming disability compensation under 38 U.S.C. § 1110 is entitled to a presumption that he was in sound condition when he entered service. Thus, even when the record contains an in-service diagnosis of a personality disorder, in order to have that diagnosis defeat a claim for compensation under § 1110, the VA must rebut the presumption of sound condition under § 1111. According to Mr. Morris, if, as here, "no pre-service disability was

> noted, ... the VA must in accordance with the presumption of sound condition show by clear and unmistakable evidence that the condition noted during service was a pre-service disability." Claimant's Br. at 12. That this requirement exists, Mr. Morris contends, is supported by the language of § 3.303(c), *id.* at 10–14, and the interpretation of § 3.303(c) set forth in two VA General Counsel opinions, *id.* at 14-19. Thus, Mr. Morris argues, the Board erred when it interpreted § 3.303(c) to mean that the in-service diagnosis of a personality disorder in and of itself was enough to defeat Mr. Morris's claim of a psychiatric disorder. Rather, the VA should have been required to demonstrate affirmatively that the personality disorder existed prior to service. In short, we understand Mr. Morris to be saying the following: I recognize that a personality disorder is not a compensable disability. I also recognize that, in my case, the record shows an inservice diagnosis of a personality disorder. However, before that diagnosis could serve to disqualify me from compensation, the VA should have been required to overcome § 1111's presumption of soundness by demonstrating that I had a personality disorder when I entered the service.

Id. at 1351-52.

After reviewing the relevant law and regulation, the United States Court of Appeals for the Federal Circuit (Federal Circuit) found that the Board had not erred in its previous 1988 decision denying service connection for a personality disorder, as it fell outside the scope of the applicable legislation and was not compensable under 38 C.F.R. § 3.303(c). *Id.* at 1353. In addressing the veteran's presumption of soundness argument, the Federal Circuit held that 38 U.S.C.A. § 1111 only grants veterans a statutory presumption of soundness for "injuries" and "diseases," and that when a valid VA regulation such as 38 C.F.R. § 3.303(c) designates something as not an injury or disease, the presumption of soundness does not come into play. *Id.* at 1354. As such, there, as in the instant matter, according to the express language of 38 C.F.R. § 3.303(c), personality disorders are not diseases or injuries within the meaning of 38 U.S.C.A. § 1110, are not compensable, and it was not

CUE to find the presumption of soundness as inapplicable to the case at hand. *Id.* at 1356.

As the Board has found no CUE in the denial of service connection for an immature personality disorder, the remainder of this decision will address possible CUE in the RO's denial of the acquired psychiatric disorder of anxiety reaction with depressive features. First, the Veteran has argued that at the time of the September 18, 1974 RO rating decision the RO failed to consider the applicability 38 C.F.R. § 3.303(b). At the time of the RO rating decision, 38 C.F.R. § 3.303(b) provided then, as now, that service connection will be presumed where there are either chronic symptoms shown in service or continuity of symptomatology since service for diseases identified as "chronic" in 38 C.F.R. § 3.309(a). With a chronic disease shown as such in service, subsequent manifestations of the same chronic disease at any later date, however remote, are service connected, unless clearly attributable to intercurrent causes. 38 C.F.R. § 3.303(b). Further, where a veteran served ninety days or more of active service, and a chronic disease becomes manifest to a degree of 10 percent or more within one year after the date of separation from such service, such disease shall be presumed to have been incurred in service, even though there is no evidence of such disease during the period of service. 38 C.F.R. §§ 3.307, 3.309(a) (1974).

In *Walker v. Shinseki*, the Federal Circuit held that the theory of continuity of symptomatology can be used only in cases involving those conditions explicitly recognized as chronic under 38 C.F.R. § 3.309(a). *Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. 2013). At the time of the September 18, 1974 RO rating decision, none of the previously diagnosed acquired psychiatric disorders of record constituted a chronic disease under 38 C.F.R. § 3.309(a). As such, there was no need for the RO to consider presumptive service connection pursuant to 38 C.F.R. § 3.303(b).

Even if the RO were required to consider entitlement to service connection under 38 C.F.R. § 3.303(b), the September 18, 1974 RO rating decision reflects that the RO did consider whether presumptive service connection was warranted. Specifically, the RO noted that, per the August 1974 VA mental health

examination, the Veteran was currently diagnosed with the mental health disability of anxiety reaction with depressive features, which was secondary to the Veteran's arthritic condition. As the mental health disability was caused by the arthritis, the RO then considered whether the arthritis, which is a chronic disability under 38 C.F.R. § 3.309(a), was presumptively related to service.

In determining whether presumptive service connection was warranted, the RO, in September 1974, discussed the extensive medical records received since the Veteran's separation from service in January 1970, and noted that the evidence reflected that the arthritis disability did not manifest until on or about December 1971, over a year after service separation. While the RO did not specifically discuss 38 C.F.R. § 3.303(b), the fact the RO considered whether the arthritis manifested within one year of service separation reflects that the RO considered whether service connection was warranted presumptively, and–even if 3.303(b) criteria applied–the evidence does not show "chronic" symptoms in service (*see* April 1969 service treatment records diagnosing transient depressive symptoms and January 1970 service separation examination reflecting no mental health disability at service separation) or "continuous" post-service symptoms (*see* January 1970 employment application; negative treatment records from 1971 to 1974) to meet the 3.303(b) criteria. In light of the above, the Board finds that 38 C.F.R. § 3.303(b) was not incorrectly applied such that the outcome of the claim would have been manifestly different but for the error as to the issue of service connection for an acquired psychiatric disorder.

The Board notes that VA received a private opinion dated June 1974. In it, a private physician opined that it was likely that the Veteran's mental health manifestations in service were symptoms of a subsequently diagnosed arthritis disability. Even if this were to constitute evidence of possible "chronic" symptoms in service and/or "continuous" symptoms since service separation, the September 1974 RO rating decision reflects that the RO found the other evidence of record weighed in favor of a finding of post-service onset. A disagreement as to how the facts were weighed or evaluated is not the type of situation that rises to the level of clear and unmistakable error. *Russell*, 3 Vet. App. at 313 ("The claimant, in short,

must assert more than a disagreement as to how the facts were weighed or evaluated.").

The Veteran has also argued that the RO failed to consider and apply the statutory presumptions under 38 U.S.C.A. §§ 105(a) and 1111. In multiple briefs throughout the course of this appeal, the Veteran and representative have alleged that symptoms, manifestations, and diagnoses during service of a mental health disorder should have triggered VA's consideration of the presumption of service connection under 38 U.S.C.A. § 105(a). The Veteran further contended having entitlement to the benefit of presumption of soundness under 38 U.S.C.A. § 1111, as no pre-existing mental health disorder was noted on the service entrance examination. The Veteran also alleged that evidence of record extant at the time was legally insufficient to rebut the presumption of soundness and did not contain clear and unmistakable evidence that the moving party had a pre-existing mental health disorder that was not aggravated by such service. It is contended that had the Board correctly applied the extant statutory or regulatory provisions, the outcome would have been manifestly different and the moving party would have been granted service connection for the resulting post-service psychiatric disability, then diagnosed as anxiety reaction with depressive features, based on presumptive statutory provisions.

Concerning service connection on a direct basis, the pertinent laws and regulations at the time of the September 1974 rating decision, including 38 C.F.R. §§ 3.303(a) and 3.303(d), were essentially the same as now. Service connection may be granted for disability arising from disease or injury incurred in or aggravated by active service. 38 C.F.R. § 3.303(a) (1974). Service connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d) (1974). As a general matter, service connection for a disability requires evidence of: (1) the existence of a current disability; (2) the existence of the disease or injury in service, and; (3) a relationship or nexus between the current disability and any injury or disease during service. *Shedden v. Principi*, 381 F.3d 1163 (Fed. Cir. 2004); *see also Hickson v. West*, 12 Vet. App. 247, 253 (1999), *citing Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd*, 78 F.3d 604 (Fed. Cir. 1996).

A veteran will be considered to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at entrance into service, or where clear and unmistakable evidence demonstrates that an injury or disease existed prior thereto and was not aggravated by service. 38 U.S.C.A. § 1111 (formally 38 U.S.C.A. § 311). Only such conditions as are recorded in examination reports are to be considered as noted. 38 C.F.R. § 3.304(b) (1974) (citing to 38 U.S.C.A. § 311).

Where such defects, infirmities or disorders are not noted when examined, accepted, and enrolled for service, pursuant to 38 U.S.C.A. § 1111 and 38 C.F.R. § 3.304, in order to rebut the presumption of soundness on entry into service, VA must show by clear and unmistakable evidence both that the disease or injury existed prior to service and that the disease or injury was not aggravated by service. *See Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004).

The Board notes that at the time of the September 1974 RO rating decision, the law concerning preexisting conditions made distinctions based upon war and peacetime service. As the Veteran had wartime service, this former distinction has no impact on the instant matter. Further, the Board notes that *Wagner* was decided in 2004; however, the Board need not address issues of retroactivity, or any other issue concerning the presumption of soundness, for, as will be discussed below, in this matter the Veteran's representative is attempting to turn what has always been a direct service connection matter under 38 C.F.R. § 3.303(a), (d) into one for aggravation/preexistence in order to invoke the higher (clear and unmistakable evidence) burden on VA under 38 U.S.C.A. § 1111 and 38 C.F.R. § 3.304.

The Board finds that the September 18, 1974 RO rating decision is consistent with 38 C.F.R. § 105(a) and the applicable laws and regulations extant at that time. In evaluating the medical evidence, the RO gave significant weight to the August 1974 VA mental health examination in which a VA examiner opined that the currently diagnosed mental disability of anxiety reaction with depressive features was caused

by a non-service-connected arthritis disability. As the Veteran was not service connected for an arthritis disability, and as there was no evidence of record indicating that the anxiety reaction with depressive features may have been related to the Veteran's in-service mental health symptoms, service connection was denied.

As stated above, the Veteran's argument is that service connection for the anxiety reaction with depressive features should have been granted because there were symptoms and manifestations of a mental disorder during service, specifically, the diagnosed "depressive reaction" and "situational depression." In essence the Veteran is really disagreeing with the weight accorded the evidence of record by the RO. A disagreement as to how the facts were weighed or evaluated is not the type of situation that rises to the level of clear and unmistakable error. *Russell*, 3 Vet. App. at 313 ("The claimant, in short, must assert more than a disagreement as to how the facts were weighed or evaluated.").

In order to obtain the benefit of the 38 C.F.R. § 105 presumption of service connection, the evidence must first demonstrate that there is a mental health disability incurred in service. *Shedden*, 381 F.3d at 1167. The mere presence of symptoms in service, in and of itself, overlooks the fact that medical evidence of record included an opinion that the diagnosed mental disability of anxiety reaction with depressive features was secondary to a non-service-connected arthritis disability. The presumption of 38 U.S.C.A. § 105 did not apply, so there was no CUE on the part of the Board in denying the claim. *Id.*

As to the Veteran's final argument, as noted above, under 38 U.S.C.A. § 1111, now and at the time of the September 1974 RO rating decision, every veteran is presumed to have been in sound condition when enrolled in service except as to defects, infirmities, or disorders, noted at the time of enrollment, or where clear and unmistakable evidence demonstrates that the injury or disease existed before enrollment and was not aggravated by such service. 38 U.S.C.A. § 1111 (formerly 38 U.S.C.A. § 311). There appears to be no controversy, other than that now advanced by the Veteran's representative, between the Veteran's contention of entitlement to the presumption of soundness and the September 18, 1974 RO rating decision.

The September 18, 1974 RO rating decision did not raise the issue of presumption of soundness and/or discuss preexistence under 38 U.S.C.A. § 1111 as the decision was a direct service connection denial under 38 C.F.R. § 3.303(a), (d), and the RO did not need to make a finding that a non-personality psychiatric disorder preexisted service. As there was no finding of preexistence to service, 38 U.S.C.A. § 1111 and 38 C.F.R. § 3.304 are not applicable; therefore, as the RO never applied 38 U.S.C.A. § 1111/38 C.F.R. § 3.304 against the claim, this argument is meritless.

The case before the RO in 1974 did not raise application of the presumption of soundness. This is not an aggravation case and preexistence of a psychiatric disorder was not raised by the evidence and was not decided by the RO in September 1974. The representative's argument is an attempt to have the extremely high burden on VA (of clear and unmistakable evidence to prove non-aggravation) of 38 U.S.C.A. § 1111/38 C.F.R. § 3.304 applied to this direct service connection case where preexistence of a disability is *not* at issue. The fact that the diagnosis of a personality disorder shows that the disorder inherently preexisted service is controlled by the personality disorder regulations (VAOPGCPREC 82-90; 38 C.F.R. §§ 3.303(c), 4.9). The representative's arguments that a personality disorder were not "noted" at service entrance are irrelevant to this direct service connection case, and arguing that noting is required when it is not does not convert the case from one for direct service connection (whether the disorder was directly incurred in service, applying 38 C.F.R. § 3.303(a) and (d)) to one for preexistence and aggravation under 38 U.S.C.A. § 1111 and 38 C.F.R. § 3.304.

Further, even assuming, *arguendo*, that 38 U.S.C.A. § 1111 and 38 C.F.R. § 3.304 did apply to the instant matter and VA could not meet the high burden to rebut the presumption of soundness, all that would happen is that the claim would become

one for direct service connection under 38 C.F.R. § 3.303, and the analysis would be exactly the same as it was in the September 1974 RO rating decision. *See Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed. Cir. 2004) (explaining that, if VA fails to rebut the presumption of soundness under 38 U.S.C.A. § 1111, the veteran's claim is one for service connection). In other words, the RO in 1974 still would have relied on the medical evidence of record at that time and the August 1974 VA examination to find that the anxiety reaction with depressive features was secondary to the Veteran's arthritic condition, which was not incurred in service. As such, the Veteran's argument again boils down to a simple disagreement with the way the facts were weighed by the RO, which, as discussed above, is not CUE, whether the higher burden of 38 U.S.C.A. § 1111/38 C.F.R. § 3.304 is applied or not. *Russell*, 3 Vet. App. at 313 ("The claimant, in short, must assert more than a disagreement as to how the facts were weighed or evaluated.").

In sum, the Veteran has failed to demonstrate that the September 18, 1974 RO rating decision misapplied, or failed to apply, any applicable law or VA regulation, or that the decision otherwise contained CUE. The arguments of the Veteran and representative concerning the purported failure of the Board to properly apply extant law and regulations are without merit. The other arguments of the Veteran and representative boil down to allegations that the RO in 1974 improperly weighed the evidence of record in denying the claim; such allegations can never rise to the level of CUE. *Id.* Moreover, the Veteran has not offered an explanation as to how the outcome would have been manifestly different but for the errors claimed, other than to state, rather unpersuasively, that the outcome would have been manifestly different if only the Board had favorably considered the evidence supporting the claim under 38 U.S.C.A. §§ 105(a) and 1111 (formerly 311), and/or 38 C.F.R. § 3.303(b). The Board emphasizes that to demonstrate CUE in a Board decision, it must be clear that a different result would have ensued but for the claimed error or errors. *Bustos*, 179 F.3d at 1381, *cert. denied*, 528 U.S. 967 (1999); *Fugo*, 6 Vet. App. at 43-44.

For the reasons discussed above, neither the Veteran, representative, nor the record reveals an error of fact or law on the part of the RO that, had it not occurred, would have supported a different outcome. For these reasons, CUE is not shown. *Damrel*, 6 Vet. App. at 245; *Fugo*, 6 Vet. App. at 43-44.

ORDER

The September 18, 1974 RO rating decision denying service connection for an acquired psychiatric disorder was not clearly and unmistakably erroneous.

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J. PARKER
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, or (855) 446-9678.

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 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 General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).