Vet. App. No. 16-3039

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

RICHARD D. SIMMONS,
Appellant,

v.

DAVID J. SHULKIN, M.D.,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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I. ISSUE PRESENTED

Whether the May 13, 2016, Board of Veterans' Appeals (Board) determination that there was no clear and unmistakable error (CUE) in a September 18, 1974, rating decision, was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

This Court has jurisdiction under 38 U.S.C. § 7252(a).

B. Nature of the Case

Appellant, Richard D. Simmons, appeals the May 13, 2016, Board decision finding that CUE was not committed by the Department of Veterans Affairs (VA)

when it denied entitlement to service connection for an acquired psychiatric disorder in a September 18, 1974, rating decision. Record Before the Agency (R) [R. at 2-21].

C. Statement of Facts and Procedural History

Appellant served on active duty in the United States Navy from November 1968 to January 1970. [R. at 43].

On entrance to service, Appellant denied a history of depression or excessive worry, in August 1968, and he did not disclose any history of psychological symptoms or treatment. [R. at 119-120]. A Report of Medical Examination deemed Appellant qualified for duty at sea and in foreign service, and also noted a normal psychiatric system. [R. at 121-122]. Service treatment records from April 1969 reveal that Appellant had a laceration to his left wrist and was in acute emotional distress. [R. at 127-129]. Appellant was unable and/or unwilling to answer questions from medical staff, and was given an impression of depressive reaction, and attempting suicide. [R. at 127-128]. Appellant was hospitalized for two days, was diagnosed with a laceration to his left wrist, and was also diagnosed with situational depression. [R. at 129]. In review of Appellant's medical history, it was noted that Appellant had a long history of nerve problems, that he suffered from several episodes of being homesick, and that he was depressed since he began his service on the USS Cambria. [R. at 129]. Appellant was depressed for forty-eight hours, which resolved when he

received a letter from home. [R. at 129]. Appellant was then discharged to duty. [R. at 129].

A Consultation Report from December 1969 diagnosed Appellant with immature personality and it was recommended that Appellant be given an administrative discharge. [R. at 130-131]. A medical review of Appellant noted that prior to his April 1969 incident, he had thirteen months of active duty service. [R. at 130-131]. On examination, Appellant was moderately depressed in mood, and it was determined that because of family issues, he was seeking a hardship discharge. [R. at 130-131]. It was also noted that Appellant suffered from increased nervousness that he attributed to worrying about his family back home. [R. at 130-131]. Appellant's Report of Medical Examination from January 1970 included a clinical evaluation of a normal psychiatric system. [R. at 106-107].

Appellant initiated a claim for service connection for rheumatoid arthritis secondary to his in-service depression, which resulted in his administrative discharge. [R. at 52]. A medical opinion dated from June 4, 1974, from Dr. Jeffress G. Palmer was associated with the record. [R. at 49]. The doctor stated that he had treated Appellant's rheumatoid arthritis, and that he believed that Appellant's mental depression during service is the same illness which was currently being manifested as arthritis involving multiple joints. [R. at 49]. The doctor continued and stated that it was likely that his chronic disorder, rheumatoid arthritis, was present at the time of his military service. [R. at 49].

Appellant was denied service connection for rheumatoid arthritis and a nervous condition in a September 18, 1974, rating decision. [R. at 1447-1449]. The RO noted its review of Appellant's service records and that he was discharged due to an immature personality. [R. at 1449]. The decision noted that Appellant did not have a chronic neurosis in service and that there was no indication that Appellant had arthritis in service. [R. at 1449]. The rating decision reviewed the medical evidence of record and determined that Appellant's currently diagnosed anxiety reaction was not related to his immature personality shown in service. [R. at 1448]. The rating decision also noted that "immature personality is a constitutional or developmental abnormality and not a disability under the law." [R. at 1448]. The September 1974 rating decision noted symptoms related to his arthritis but the RO determined that the evidence showed that his condition waxed and waned, and it relied on the VA exam which was negative for arthritis. [R. at 1448-1449].

Appellant submitted a motion alleging CUE in the September 18, 1974, rating decision in December 2005. [R. at 326-333]. In a September 2008 follow-up submission, Appellant again alleged CUE in the September 18, 1974, rating decision. [R. at 322-333]. In September 2009, Appellant's CUE motion was denied, and the RO determined that revision to the denial of rheumatoid arthritis, and anxiety disorder with depressive features was not warranted. [R. at 313-317]. A Notice of Disagreement (NOD) was received in October 2012, [R. at 293-300], and in March 2012, a Statement of the Case was issued, [R. at 234-

247]. Appellant submitted correspondence labeled "substantive appeal in lieu of VA Form 9" in April 2012, and limited his appeal to the issue of an anxiety disorder with depressive features only. [R. at 194-205].

In March 2015, the Board denied Appellant's claim, and determined that there was no CUE in the denial of service connection for anxiety disorder with nervous features in the September 18, 1974, rating decision. [R. at 183-192]. A Joint Motion For Vacatur and Remand (JMR) was granted by the Court on January 27, 2016. [R at. 136,136-142]. The JMR determined that the Board's finding that the 1991 Board decision subsumed the 1974 rating decision was an error. *Id.*

In May 2016, the Board again denied Appellant's CUE claim. [R at. 2-21]. The Board decision reviewed the evidence of record at the time of the September 1974 rating decision, and Appellant's contention that the RO failed 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) when it denied the claim of service connection for an acquired psychiatric disorder. [R at. 7-8]. The Board decision concluded that Appellant's in-service diagnosis of immature personality was a personality disorder not subject to service connection under the law, and that the RO in September 1974 did not make an error of fact or law. [R at. 9-10]. The Board decision also concluded that the September 1974 decision appropriately considered Appellant on a presumptive basis, that the

presumption of service connection did not apply, and that the presumption of soundness was not at issue. [R. at 2-21].

III. SUMMARY OF THE ARGUMENT

The Court should affirm the May 2016 Board decision because it correctly determined that the September 1974 rating decision did not contain CUE. The Appellant has failed to fulfill his pleading burden that any Board error resulted in an arbitrary and capricious determination. The Board also provided a satisfactory explanation detailing how the September 1974 rating decision did not misapply 38 U.S.C. § 105, or 38 U.S.C. § 1111.

IV. ARGUMENT

A. Standard of Review

The Court reviews a Board decision on whether there is CUE in one of its prior decisions under the arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, standard of review. *Hillyard v. Shinseki*, 24 Vet.App. 343, 349 (2011), *aff'd* 695 F.3d 1257 (Fed. Cir. 2012). CUE itself is "a very specific and rare kind of error," and the burden of demonstrating CUE is an onerous one. 38 C.F.R. § 20.1403; *see Berger v. Brown*, 10 Vet.App. 166, 169 (1997). The Court must affirm the Board's decision so long as the Board articulates a satisfactory explanation for its decision, "including a rational connection between the facts found and the choice made." *Lane v. Principi*, 16 Vet.App. 78, 83 (2002). Although the Board is required to provide an adequate statement of reasons or bases for its determination on CUE,

the Board does not reweigh the evidence. *Cacciola v. Gibson*, 27 Vet.App. 45, 60 (2014).

The Court also reviews the Board's decision to determine whether the Board supported its decision with a "written statement of [its] findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1). "The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). However, § 7104(d)(1) does not require the Board to use any particular statutory language or "terms of art." *Jennings v. Mansfield*, 509 F.3d 1362, 1366 (Fed. Cir. 2007). Additionally, the Board is presumed to have considered all the evidence of record, even if the Board does not specifically address each item of evidence. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007).

The Secretary further asserts that it is relevant to the Court's standard of review that the appellant generally bears the burden of demonstrating error in a Board decision. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999), *aff'd* 232 F.3d 908 (Fed. Cir. 2000). The appellant's burden also includes the burden of demonstrating that any Board error is harmful. *Waters v. Shinseki*, 601 F.3d 1274, 1278 (Fed. Cir. 2010). The Court "requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and

assess the validity of the appellant's arguments." *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006).

Furthermore, arguments not raised in the initial brief are generally deemed abandoned, and the Court should find that Appellant has abandoned any argument not presented in his initial brief. *See Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999) ("[C]ourts have consistently concluded that the failure of an appellant to include an . . . argument in the opening brief will be deemed a waiver of the . . . argument").

B. The May 2016 Board Decision that Determined that CUE was not Present in the September 1974 Rating Decision was not Arbitrary, Capricious, an Abuse of Discretion, or Otherwise not in Accordance with the law

The Court should affirm the May 13, 2016, Board decision on appeal, which concluded that there was no CUE in a September 18, 1974, rating decision that denied entitlement to service connection for an acquired psychiatric disorder. [R. at 2-21]. The Board decision correctly provided a thorough analysis of the pertinent facts and law in support of this determination. The Board carefully considered each of Appellant's CUE allegations and supported its findings with reasoned analysis, pointing to the persuasive evidence of record underlying each finding. Thus, the Board's conclusion that there was no CUE in the September 1974 rating decision is not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law, and the Court should not disturb this decision.

1. The Board Provided a Satisfactory Explanation for the Determination that the September 1974 Rating Decision Properly Applied 38 U.S.C. § 105

The Board provided a fully articulated explanation as to why the September 1974 rating decision did not amount to CUE for its denial of Appellant's service connection claim. The Board decision discussed Appellant's diagnosis of an immature personality in service, service connection based on a presumptive condition, and whether the presumption under 38 U.S.C. § 105(a) was inappropriately applied.

The Board correctly determined and fully explained that Appellant's diagnosed immature personality in service, is a congenital or developmental abnormality not subject to VA compensation. [R. at 9]; *see also* [R. at 130-131]. Based on the law in September 1974, "service connection connotes many factors but basically it means that the facts, shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces, or if preexisting such service, was aggravated therein." 38 C.F.R. § 3.303(a) (1974). Congenital or developmental defects, refractive errors of the eye, personality disorders, and mental deficiencies, however, are not diseases or injuries within the meaning of the applicable legislation. 38 C.F.R. §§ 3.303(c), 4.9 (1974); *see also* 38 C.F.R. §§ 3.310 and 4.127 (2016).

Initially, the Board noted that Appellant did not make a specific allegation of CUE regarding the September 1974 rating decision determination that

immature personality is a constitutional or developmental abnormality and not a disability under the law. [R. at 10], *see also* [R. at 1448-1449]. Because Appellant failed to even identify VA's classification of immature personality as an abnormality not subject to compensation as a potential error, it is not a proper CUE challenge. *See Bowen v. Shinseki,* 25 Vet.App. 250, 255 (2012) (finding a claimant's statement did not raise a CUE challenge to a prior RO decision because it failed to identify a specific error in the RO decision). The Board, however, addressed the potential argument, and clearly concluded that any error in relation to Appellant's immature personality would not have manifestly changed the outcome of the denial of service connection because immature personality is not subject to compensation under the law, and it cited to 38 C.F.R. § 4.9 (1974). [R. at 10]. The Board's analysis included review of *Morris v. Shinseki*, 678 F.3d 1346 (Fed. Cir. 2012), and overtly included a determination that Appellant's immature personality diagnosis also prevented service connection within the meaning of 38 U.S.C. § 1110. Specific to Appellant's recorded diagnosis of immature personality, the Board provided a more than satisfactory explanation that Appellant's immature personality diagnosis from service was not entitled to service connection.

The Board also provided Appellant with a more than satisfactory explanation as to why the September 1974 denial of service connection for an acquired psychiatric disorder, specifically anxiety reaction with depressive features, did not amount to CUE. The Board explained that contrary to

Appellant's argument, at the time of the September 1974 rating decision, Appellant's diagnosed acquired psychiatric disorders did not constitute a chronic disease under 38 C.F.R. § 3.309(a). [R. at 12]. Thus, the Board concluded that there was no need for the RO to consider presumptive service connection under 38 C.F.R. § 3.303(b). [R. at 12]. The Board further explained that the 1974 rating decision did in fact consider 38 C.F.R. § 3.303(b) anyway. [R. at 12-13]. The Board noted that the September 1974 rating decision found that Appellant's anxiety reaction with depressive features was diagnosed secondary to his arthritis condition. [R. at 12-13]; *see also* [R. at 1448]. The Board then highlighted the fact that the September 1974 rating decision reviewed whether Appellant's arthritis manifested within a year from service. [R. at 13]; *see also* [R. at 1448]. The Board concluded that 38 C.F.R. § 3.303(b) was not incorrectly applied and it determined that CUE was not present in the September 1974 rating decision. [R. at 13].

The Board directly addressed Appellant's argument that the RO failed to consider and to apply the statutory presumption under 38 U.S.C. § 105(a). Appellant makes the same argument in his brief, and specifically argues that the Board did not address whether the presumption of service connection was triggered by the in-service notation of "depressive reaction." App. Br. at 7-8. However, the Board noted Appellant's argument in that Appellant's symptoms of depressive reaction, and situational depression in-service, warranted a grant of service connection. [R. at 16]. The Board reasoned that this argument was a

disagreement with the Agency's weighing of the evidence of record, which does not rise to the level of clear and unmistakable error under *Russell v. Principi,* 3 Vet.App. 310, 313-14 (1992). [R. at 16]. The Board then also explained that, legally, Appellant was not entitled to the benefit of 38 U.S.C. § 105 because Appellant did not demonstrate a disability incurred in service. [R. at 16].

The Board specifically noted that Appellant's mere presence of symptoms in-service fails to consider the fact that his diagnosed anxiety reaction with depressive features was secondary to arthritis, which was not service connected. [R. at 16]. Furthermore, Appellant overstates the evidence of record regarding his depression. The Secretary notes that Appellant was assessed with "depressive reaction" and given a diagnosis with "situational depression" in-service. [R. at 128-129]. A finding that Appellant's diagnosis of immature personality, and eventual administrative discharge based on that psychological disorder, amounted to a psychological disability would require the evidence to be reweighed. Appellant fails to consider that he in fact was not diagnosed with a disability, and rather was assigned with symptoms of depression: service treatment records fail to show a confirmed diagnosed disability, therefore, Appellant was not entitled to the presumption of service connection under 38 U.S.C. § 105(a). Simply put, symptoms of depression, in the absence of a diagnosis of depression, or other acquired psychiatric disability, does not trigger the presumption of service connection. *See Shedden v. Principi*, 381 F.3d 1163, 1166 Fed. Cir. (2004) (discussing how 38 U.S.C. § 105(a) creates a presumption

for service connection for a disability first manifested or aggravated during service); *see also Sanchez-Benitez v. West,* 13 Vet.App. 282, 285 (1999) (holding that symptoms without an underlying medical condition do not constitute a disability for VA purposes). Thus, the Board provided a satisfactory explanation as to why the September 1974 rating decision did not commit CUE when it denied Appellant's claim for service connection.

The Secretary also notes that Appellant completely ignores the fact that, at the time of the September 1974 rating decision, he was not service connected for arthritis, nor was the evidence of record sufficient to warrant service connection for arthritis. The fact that Appellant was not service connected for arthritis at the time of the September 1974 rating decision is determinative, because Appellant's diagnosed anxiety reaction with depressive features was deemed secondary to his arthritic condition. [R. at 1453-1457]. There is no legal basis upon which to award service connection for a disability that is claimed as secondary to a disability that is not service connected. *See* 38 U.S.C. § 1101 (1974), 38 C.F.R. § 3.310; *see also Sabonis v. Brown*, 6 Vet. App. 426, 430 (1994) (where the law and not the evidence is dispositive, the Board should deny the claim based on a lack of legal merit). Because Appellant's claim for service connection for his acquired psychiatric disability was diagnosed as secondary to his non-service-connected arthritis, his claim for service connection had no basis in law.

2. The Board Provided a Satisfactory Explanation for the Determination that the September 1974 Rating Decision Properly Applied 38 U.S.C. § 1111

The Board decision specifically reviewed and responded to Appellant's argument that the Board failed to find CUE in the September 1974 rating decision because it improperly applied the presumption of soundness. App. Br. at 10-13. The September 1974 rating decision did not commit CUE under 38 U.S.C. § 1111. A veteran who is not noted to have a preexisting condition upon entrance into service is presumed to have entered service in sound condition. 38 U.S.C. § 1111. If the presumption of soundness applies, an injury or disease first noted in service is presumed to have occurred in service unless clear and unmistakable evidence demonstrates that it existed before acceptance and enrollment, and was not aggravated by service. S*ee Wagner v. Principi,* 370 F.3d 1089, 1096 (Fed. Cir. 2004); *see also Vanerson v. West*, 12 Vet.App. 254, 258 (1999) (explaining that clear and unmistakable evidence means evidence that "cannot be misinterpreted and misunderstood"). If, on the other hand, a veteran is noted to have a preexisting condition upon entrance into service to, he or she must show that the condition was aggravated by service. *Wagner*, 370 F.3d at 1096. Service aggravation is shown by an increase in disability during service that is not determined to be the result of the natural progress of the condition.

In review of Appellant's CUE motion premised on the improper application of the presumption of soundness, the Board noted that the September 1974 rating decision did not raise the issue of the presumption of soundness and/or discuss preexistence under 38 C.F.R. § 3.303(a),(d). [R at. 17]. The Board also

stated that the September 1974 rating decision did not need to make a finding that a non-personality psychiatric disorder preexisted service. [R at.17]. In short, the Board explained that because there was no finding of preexistence to service, 38 U.S.C. § 1111 and 38 C.F.R. § 3.304 were not applicable. [R at.17]. The Board further noted that Appellant's September 1974 claim was not based upon aggravation of a preexisting psychiatric disorder, and that Appellant is merely attempting to distract from the direct service connection theory. [R at 17]. Notably, the Board's finding that Appellant was sound on entry is more favorable to Appellant because it potentially afforded him service connection for more than just the degree aggravated by service. The Board provided a more than satisfactory explanation as to why there was no finding of preexistence to service, and that 38 U.S.C. § 1111 and 38 C.F.R. § 3.304 did not apply. The Board's analysis was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law and should be affirmed.

Appellant failed to cite any evidence which indicates that Appellant had a preexisting psychiatric disability prior to entering service, or that he had a psychiatric disability noted upon entrance into service. No doubt, Appellant exhibited psychiatric symptoms in service, and was diagnosed with an immature personality in-service, but there is simply no evidence Appellant can cite which shows that a psychiatric disability pre-existed service. [R at. 121-131]. Appellant boldly declares that "because there was evidence that a mental disease, "depressive reaction," was not noted upon entry to service and his depression

manifested in service" that he was entitled to the presumption of soundness. App. Br. at 12-13. The September 1974 rating decision, did not put at issue Appellant's soundness at entry, and therefore accepted him as sound upon entry. [R at. 1447-1449]. Appellant argues that error was committed, in that he was entitled to the presumption of soundness. App. Br. at 11-13. However, the September 1974 rating decision did not dispute his soundness. Appellant fails to even propose an error which can amount to CUE.

The Board considered the alternative that even, if 38 U.S.C. § 1111 and 38 C.F.R. § 3.304 applied to Appellant's service connection claim, VA could not meet the high burden to rebut the presumption of soundness, and the claim would be a claim for direct service connection based on *Wagner v. Principi*, 370 F.3d 1089, 1096. [R at. 17-18]. The Board then fully explained that the analysis would then be exactly the same as that continued in the September 1974 rating decision, and that the evidence of record clearly showed that Appellant's anxiety reaction with depressive features was secondary to his arthritis. [R at. 18]; *see also* [R at. 1457]. Moreover, Appellant's attempt to reweigh the evidence of record at the time of the September 1974 rating decision does not fulfill the high burden of CUE. This was also noted and explained by the Board. [R at. 18].

Appellant makes the same arguments in his brief that he previously made before the Board. The Board addressed Appellant's arguments, and clearly explained why the provisions of 38 U.S.C. § 1111 and 38 C.F.R. § 3.304 did not apply based on the evidence of record in September 1974. The Board also

clearly explained that even if those provisions of law did apply, the September 1974 rating decision determination on service connection was correct. The September 1974 rating decision did not question Appellant's soundness, and therefore made no finding rebutting his soundness. [R at. 1447-1449]. The Board provided a satisfactory explanation as to whether the September 1974 rating decision committed CUE in light of 38 U.S.C. § 1111. Since the Board clearly explained that 38 U.S.C. § 1111 did not even apply to the September 1974 rating determination given the evidence of record, and the Board's explanation that even if it did apply, it would not have affected the outcome of the September 1974 rating decision, the Court should affirm the Board's decision.

C. Appellant Has Abandoned all Other Arguments

Because Appellant has limited his arguments to those addressed above, the Court should hold that he has abandoned any other errors that may be in the Board's decision. *See, e.g., Disabled Am. Veterans v. Gober*, 234 F.3d 682, 688 n.3 (Fed. Cir. 2000) (stating that the Court would "only address those challenges that were briefed"); *Hodges v. West*, 13 Vet.App. 287, 290 (2000) (citing *Degmetich v. Brown*, 8 Vet.App. 208, 209 (1995)) (issues or claims not argued on appeal are deemed to be abandoned).

V. CONCLUSION

For the foregoing reasons, the Court should affirm the Board's decision.

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