BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

17-1361

RICHARD M. SIMON

Appellant,

v.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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ISSUES PRESENTED FOR REVIEW

The Board is required to afford a veteran the protections of 38 C.F.R. § 3.344 (2017) when a rating has been at the same level for at least five years. Clear and unmistakable error exists in a rating decision when the law at the time the decision was made was improperly applied and if it had been properly applied there would have been a manifestly different outcome. Where the Board misinterpreted the law and decided section 3.344 did not apply to the Veteran's case and as a result failed to recognize CUE in a 1974 rating decision, did it commit prejudicial legal error?

STATEMENT OF THE CASE

Mr. Richard Simon served honorably in the United States Marine Corps from January 1967 through February 1968. R-471. During service he earned the Vietnam Service Medal with One Device. *Id.*

While his unit was stationed in the demilitarized zone in Vietnam, he saw six of his buddies killed. R-2026 (2022-31). He was covered with his friend's entrails when the friend was killed by a motor shell. *Id.* The Veteran also killed an enemy soldier by stabbing him to death. *Id.* Mr. Simon was hospitalized due to his experience in service for about three months after service. R-2028.

The Regional Office, in a March 1968 rating decision, granted Mr. Simon service connection and compensation for an anxiety reaction at a 50 percent level effective March 1, 1968. R-2067. The Veteran had a medical examination in July

1969. R-2022-31. The Veteran was engaged, but when he told his fiancé about his war experiences, she terminated the engagement. R-2028. The Veteran's speech was hesitant and he became nervous easily. R-2022.[1] After his combat experience, he became extremely tense and anxious. R-2026. He would crawl under his bed and suffered from insomnia. R-2026-28. Upon examination, the Veteran's speech was hesitant and he stammered mildly. R-2028. His mood was neutral, but the Veteran subjectively emphasized his feelings of tremendous anxiety and tension. *Id.*

In October 1969, the RO reduced the Veteran rating from a 50 percent rating to a 30 percent rating effective January 1970. R-2017 (2016-17). Mr. Simon had another VA examination in August 1974. R-1938-39. The Veteran had hesitation of speech, especially in unfamiliar surroundings and when he was in a tense state. R-1938. He then felt nervous and became shaky and tremulous. *Id.* The Veteran did not have any close friends and his sleep was restless. *Id.* On examination the Veteran exhibited some anxiety, tremulousness, and hesitation and halting of speech. *Id.* The examiner asserted that in spite of these symptoms, the Veteran seemed to be functioning rather adequately. *Id.*

In a September 1974 rating decision, the RO reduced the Veteran's rating from a 30 percent to 10 percent effective December 1, 1974. R-1934.

[1] One page of the examination is illegible, R-2025, but there is a typed portion of the examination as well. *See* R-2026-30.

In an August 2014 letter, the Veteran argued that there was clear and unmistakable error in the September 1974 rating decision that reduced his rating from 30 to 10 percent. R-831 (831-33). He explained that since his PTSD was rated at a 50 percent level from March 1, 1968 and a 30 percent level from January 1, 1970, he had at least a 30 percent rating for a period of five years. R-831. This entitled him to the protections of 38 C.F.R. § 3.334. *Id.*

The RO, in an April 2016 decision, concluded that no revision of the September 3, 1974 rating decision was warranted. R-587 (573-83; 587-91). The Veteran filed a timely notice of disagreement with that rating decision, the Board remanded the issue, the RO then continued the denial in a statement of the case, and the Veteran timely perfected his appeal. R-50 (February 2017 VA Form 9); R-58-78 (February 2017 statement of the case); R-319-26 (August 2015 Board remand); R-481-84 (May 2015 notice of disagreement).

In the May 1, 2017 decision on appeal, the Board concluded there was no clear and unmistakable error in the September 3, 1974 rating decision. R-4 (1-38). This appeal followed.

SUMMARY OF THE ARGUMENT

The Board erred when it misinterpreted the law and found that section 3.344 did not apply to Mr. Simon's case. Although the Veteran had higher ratings, the Veteran's rating never fell below a 30 percent rating for five years. According to the

plain language of section 3.344, a veteran is not required to have the highest rating assigned for a condition for five years in order to warrant application of the protections of section 3.344. Rather, he is required only to have a rating that goes no lower than the same level for a five years period. The Secretary has conceded this is the proper interpretation of the regulation and that interpretation should be applied.

The Veteran was prejudiced by the Board's misunderstanding of the regulation because its misinterpretation led it to find there was no CUE in the September 1974 rating decision that reduced the Veteran's rating from 30 to 10 percent. If the RO properly interpreted and applied section 3.344, it would have found the protections applied. The application of the regulation would have manifestly changed the outcome of the RO's decision, as it would have not reduced the Veteran's rating at that time based on the protections afforded in the regulation. The examination that the Board used to reduce the Veteran's rating was less full and complete than the one it used to grant the rating. This was in contravention of the regulation. Further, the RO was required to determine whether there was improvement under the ordinary conditions of life before reducing the Veteran's rating. It failed to perform that analysis and the evidence of record demonstrates that it did not improve.

STANDARD OF REVIEW

The Court reviews claimed legal errors by the Board under the *de novo* standard, by which the Board's decision is not entitled to any deference. 38 U.S.C. § 7261(a)(1);

see Butts v. Brown, 5 Vet.App. 532 (1993) (en banc). The Court will set aside a conclusion of law made by the Board when that conclusion is determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Butts*, 5 Vet.App. 532. The Court should determine whether the Board's decision is not in accordance with the law.

ARGUMENT

The Board misinterpreted the law when it found 38 C.F.R. § 3.344 was not applicable to the Veteran's case. This misinterpretation led it to improperly conclude there was no CUE in the September 1974 rating decision.

The Board misinterpreted the law when it decided that in order for a veteran to be afforded the benefit of 38 C.F.R. § 3.344, he must have the same exact disability rating for a five year period. R-32-35. This is contrary to the plain language of that regulation. Further, the Secretary has conceded that the Veteran's interpretation of the regulation is correct in another case pending before this Court, *Simunovich v. Shulkin*, No. 16-2604. As a result of the Board's misinterpretation, it erroneously concluded that there was no clear and unmistakable error in the September 1974 rating decision. That rating decision contained the same legal flaw as the Board decision on appeal here: the RO should have, but did not, apply 3.344. This Court should hold that 3.344, properly interpreted, does not require that the Veteran have the highest rating assigned throughout the five-year period; and remand this case for the Board to apply that correct interpretation in a new decision.

A. *The Board's misinterpretation of section 3.344(c).*

At the time of the 1974 reduction, sections 3.344(a) and (b), as now, "appl[ied] to ratings which have continued for long periods at the same level (5 years or more). They do not apply to disabilities which have not become stabilized and are likely to improve." *See* 38 C.F.R. § 3.344 (1961)[2] *and* 38 C.F.R. § 3.344 (2017). *See also* R-32 (noting that sections 3.344(a), (b), and (c) have remained unchanged since the present time).

The Board held that section 3.344 did not apply to Mr. Simon's case in 1974 because:

> [His] rating did not continue at the same level for five years. Instead, the Veteran was given three different ratings between his separation from service in 1968 and 1974, the latter two of which revised his rating down. This history is consistent with a disability that had not become stabilized, and thus should not have been afforded the protections of § 3.344(a).

R-33. In other words, because the Veteran did not have a 50 percent rating for the entire five year period, but had a 50 percent for part of the time and a 30 percent for another part of the time, the Board held that 3.344 did not apply. This misinterprets the regulation as it is contrary to its plain language.

[2] Going to WestLaw, at the bottom of the page for the regulation, 38 C.F.R. § 3.344, there is a link to "26 FR 1586, Feb. 24, 1961." *See* 38 C.F.R. § 3.344. If you click on that link, it brings you to a page where you can click on another link, "26 FR 1561-1610." If you click on that link, the 1961 version of the regulation appears on page 1587 of the Federal Register. That version of the regulation was in effect in 1974. The text of the regulation, which was in effect in 1974, is the same as it is today. The Board agrees. *See* R-32.

The plain language of regulation does not say that the Veteran must have the same highest level of disability assigned for the entire five year period. The regulation applies to conditions that have stabilized at a certain minimum level. 38 C.F.R. § 3.344(c). It does not apply to disabilities that have not become stabilized and are likely to improve. *See id.* The word stabilize is defined as "to hold steady." MERRIAM-WEBSTER ONLINE DICTIONARY, DEFINITION, STABILIZED, *available at https://www.merriam-webster.com/dictionary/stabilize* (last visited Nov. 20, 2017). *See McDowell v. Shinseki*, 23 Vet.App. 207, 211-212 (2009) (properly using the dictionary definition of words in a regulation to understand the regulation's plain meaning). Therefore, according to the plain language of the regulation, a disability has stabilized whenever a rating has held steady at a particular level for at least five years.

Mr. Simon's disability had held steady at the level required for at least a 30 percent rating for more than five years at the time of the September 1974 rating decision. R-2067 (March 1968 decision granting an initial 50 percent rating); R-2017 (October 1969 rating decision reducing the Veteran's rating from 50 to 30 percent). At times he had a higher rating, but the level of severity of his condition never dipped below the severity required for a 30 percent rating for the five years required by the regulation. The plain language of the regulation does not suggest that a disability rating must be completely static—never changing at all for a five year period—before it may apply. *See* 38 C.F.R. § 3.344. If the Secretary wanted to have the regulation drafted that way, he would have.

Further, subsection (c) of the regulation is entitled "Disabilities which are likely to improve." 38 C.F.R. § 3.344. The relevant period for purposes of determining whether section 3.334 applies is prior to the reduction to the 10 percent rating in September 1974. *See* 38 C.F.R. § 3.344(c). The Veteran's condition never improved from the severity warranting at least a 30 percent rating for five years or more prior to the 1974 reduction. R-1934. *See* R-2067; R-2017.

The Board's reasoning, that to afford Mr. Simon the protections afforded in section 3.344(c) is contrary to the policy of the regulation, is without merit and is undermined by the plain language of the regulation as explained above. R-34. Since the plain language of the regulation is clear, that is the end of the matter and that is the interpretation to be used. *Tropf v. Nicholson*, 20 Vet.App. 317, 320 (2006). The Court should hold that in order for section 3.344 to apply, a veteran need not have the highest rating assigned for five years. Rather, the veteran need only to have been rated at a level no lower than a particular disability level for five years. The Court should remand this case to the Board for a decision consistent with that interpretation of the regulation.

The Board's reliance on *Smith (Raymond) v. Brown*, 5 Vet.App. 335 (1993) and *Brown v. Brown*, 5 Vet.App. 413 (1993) to decide section 3.344 does not apply in this case is misguided. *See* R-34.

Initially, the facts of this case are distinguishable from those at issue in *Smith*. In *Smith* the claimant was granted a 10 percent rating for his knee disability effective

September 1983. *Smith (Raymond)*, 5 Vet.App. at 337. In *Smith* the Court found that section 3.344 was not applicable because the Veteran was one month short of the five year period required. *Id.* at 339. *Smith* did not involve the issue here, whether the "same level" language in section 3.344 requires a veteran to have the higher rating obtained for a five year period before the regulation can apply. *See id.* at 337-39. Therefore, *Smith* does not defeat Mr. Simon's argument.

Brown also does not apply. *Brown* held that the five year period is calculated starting with the effective date of the rating and ending with the effective date of the actual reduction in rating, not the date of the rating decision proposing the reduction. *Brown*, 5 Vet.App. at 418. That is not at issue in this case. This Court's holding in *Brown* does not defeat the Veteran's argument.

The Secretary has conceded that the plain language interpretation proffered in this brief is the correct interpretation of section 3.344(c). *See Simunovich*, No. 16-2604. The Secretary conceded the Board erred when it decided Mr. Simunovich's rating had not stabilized, and therefore section 3.344(c) did not apply, because it "failed to appreciate that the 80% rating assigned in August 2010 was not the first rating applied to Appellant's disability." Sec. Br. at 14. The Secretary explained that the claimant's hearing loss was rated at 40 percent effective July 27, 2005. *Id.* When the RO, in a January 2012 decision, reduced the Veteran's rating from 80 to 20 percent, that "disability had been rated as at least 40% disabling for approximately six and one half years [from the November 2005 grant of the 40 percent rating]." *Id.* As a result of

the 40 percent rating being in effect since November 2005, "that rating was, therefore, stabilized at the 40% level." *Id.*

The Court may take judicial notice of the concession as it is a fact not subject to reasonable dispute and appears in a pleading before the Court. *See Smith v. Derwinski*, 1 Vet.App. 235, 238 (1991) ("Courts may take judicial notice of *facts* not subject to reasonable dispute.") (emphasis in original); *Brannon v. Derwinski*, 1 Vet.App. 314, 316 (1991) (courts may take judicial notice of "whatever is generally known within [its] jurisdiction[ ].") (citing *B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 728 (Fed. Cir. 1998)). His interpretation is entitled to deference as it is consistent with the plain language of the regulation. *Auer v. Robbins*, 519 U.S. 452 (1997). In his brief in *Simunovich* the Secretary interprets 38 C.F.R. § 3.344 the same way the Veteran does here and therefore that interpretation of the regulation should apply.

B. The misapplication and prejudice.

The Veteran was prejudiced by the Board's misinterpretation of section 3.344 because its misreading of the regulation underlies its failure to recognize that there was CUE in the September 1974 rating decision. Had the Board properly interpreted 3.344, it would have found that the 1974 RD contained CUE because that RD also misinterpreted 3.344 in the same way the Board misinterpreted the regulation. The Court should vacate and remand the Board's decision for a decision consistent with the proper interpretation of the regulation, explained above, as the Veteran's rating

was improperly reduced. *See Kitchen v. Brown*, 7 Vet.App. 320, 325 (1995) ("Where . . . the Court finds that the [Board] has reduced a veteran's rating without observing applicable laws and regulation, such a rating is void ab initio and the Court will set it as aside as not in accordance with law.")

The Veteran's CUE claim meets the three elements required. *See* 38 C.F.R. § 3.105 (2017); *Damrel v. Brown*, 6 Vet.App. 242, 245 (1994); *Russell v. Principi*, 3 Vet.App. 310, 313-14 (1992) (en banc). First, the regulatory provisions extant at the time of the decision were incorrectly applied; second, the error is undebatable and would have manifestly changed the outcome of the case at the time it was made; and third, this determination is consistent with the law as it stood at the time of the original adjudication. *Damrel*, 6 Vet.App. at 245; *Russell*, 3 Vet.App. at 313-14.

The allegation of CUE in the 1974 rating decision relies on the law at the time the decision was made, thus meeting that element. *Damrel*, 6 Vet.App. at 245; *Russell*, 3 Vet.App. at 313-14. Section 3.344(c) has not changed since 1974. *See* R-32 *supra*, Part A, fn. 1. Further, based on the proper interpretation of section 3.344(c), the RO failed to properly apply that regulation in its September 1974 decision as required. *See*, *supra* Part A. The regulation does not appear in the rating decision. R-1934. The body of the rating decision evidences that it did not afford Mr. Simon the protections required of section 3.344(a) either. *See id.* Thus, the second element is met as the RO misapplied section 3.344 in its 1974 decision. *Damrel*, 6 Vet.App. at 245; *Russell*, 3 Vet.App. at 313-14.

Finally, if the RO had properly applied section 3.344(c) it would have had to afford the Veteran's rating the protections required under section 3.344(a) and the application of that regulation would have manifestly changed the outcome of the decision—no reduction would have been effectuated—satisfying the third element. *See* 38 C.F.R. §§ 3.344(a), (c).

Pursuant section 3.344(a), ratings for diseases subject to episodic improvement, such as a psychotic reaction, will not be reduced on any one examination, unless all of the evidence of record clearly warrants the conclusion that sustained improvement had been demonstrated. 38 C.F.R. § 3.344(a). The RO did not show in its decision, on the basis of all of the evidence of record, that the Veteran had demonstrated sustained improvement in his disability. *See* R-1934. This means that the RO should not have reduced Mr. Simon's rating on the basis of the single August 1974 examination, because he had a psychological disability. *See id.* It needed to get another examination before reduction was proper. *See* 38 C.F.R. § 3.344(a). And the Veteran's condition did not improve as evidenced by the August 1974 examination report. In fact, the August 1974 examination report noted that the Veteran had no friends and was shaky and tremulous as a result of his nervousness. R-1938. Those two symptoms evidenced a worsening of the Veteran's condition when compared to the July 1969 examination report. *See* R-1938; R-2026-30.

Further, section 3.344(a) requires the rating agency to review the entire record of examinations and the medical industrial history to ascertain whether the medical

examination on which the rating was reduced was full and complete. *See* 38 C.F.R. § 3.344(a). Examinations less full and complete than the original examination that led to a rating may not be properly used as the basis of a reduction. *See id.*

This means that in its 1974 rating decision the RO was required to ascertain whether the August 1974 medical examination was full and complete after a review of the entire record of examinations and the medical industrial history. *See* 38 C.F.R. § 3.344(a). The 1974 rating decision only noted the prior July 1969 examination and the findings of the August 1974 examination. *See* R-1934. The RO did not consider the prior 1969 examination or the other evidence of record, as required, to ascertain whether the August 1974 examination was full and complete. 38 C.F.R. § 3.344(a).

Similarly, the RO did not determine whether the August 1974 examination was as full and complete as the July 1969 examination report. *See* R-1934. It was not. Whereas the July 1979 examination report spanned several pages and had several paragraphs noting the Veteran's symptoms and an extensive mental status examination, the August 1974 examination report had only a four sentence mental status examination. *Compare* R-2026-30 *with* R-1938. Further, the July 1969 medical examination was completed by a neuropsychiatrist where the August 1974 examination was only conducted by an M.D. *Compare* R-2030 *and* R-1938.

There must also be consideration of whether there is improvement under the ordinary conditions of life before a veteran's rating is reduced. 38 C.F.R. § 3.344. The RO did not consider this at all in its 1974 rating decision. *See* R-1934. When

looking at the examination reports, the Veteran's condition did not improve under the ordinary conditions of daily life. *Compare* R-1938 *and* R-2026-30. In both examinations the Veteran had hesitant speech, was described as anxious, and was tense. R-1938; R-2026; R-2028. In both examinations the Veteran was single. R-1938; R-2028.

Further, in the August 1974 examination the Veteran reported symptoms and effects he did not in the July 1969 examination report. *Compare* R-2026-30 *and* R-1938. He reported no close friends in the 1974 examination. R-1983. Further, in the 1974 examination the Veteran reported that he was shaky and tremulous due to his nervousness. *Id.*

If the RO had applied section 3.344 in its September 1974 rating decision the outcome would have been manifestly different as it would not have reduced the Veteran's rating. Remand is required for the Board to readjudicate the Veteran's allegations of CUE with the September 1974 rating decision.

CONCLUSION

The Board erred when it misinterpreted the law and found that section 3.344 did not apply to Mr. Simon's case. Although the Veteran had higher ratings, the Veteran's rating never fell below a 30 percent rating for five years. According to the plain language of section 3.344, a veteran is not required to have the highest rating assigned for a condition for five years in order to warrant application of the

protections of section 3.344. Rather, he is required only to have a rating that goes no lower than the same level for a five year period. The Secretary has conceded this is the proper interpretation of the regulation in a prior case and that interpretation should be applied.

The Veteran was prejudiced by the Board's misunderstanding of the regulation because its misinterpretation led it to find there was no CUE in the September 1974 rating decision that reduced the Veteran's rating from 30 to 10 percent. If the RO properly interpreted and applied section 3.344, it would have found the protections applied. The application of the regulation would have manifestly changed the outcome of the RO's decision, as it would not have reduced the Veteran's rating at that time based on the protections afforded in the regulation. The examination that the Board used to reduce the Veteran's rating was less full and complete than the one it used to grant the rating. This was in contravention of the regulation.

Further, the RO was required to determine whether there was improvement under the ordinary condition of life before reducing the Veteran's rating. It failed to perform that analysis and the evidence of record demonstrates that it did not improve. The Court should provide the proper interpretation of the regulation and remand to the Board for a new decision consistent with that interpretation.

Respectfully submitted,

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