Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-3039

RICHARD D. SIMMONS, APPELLANT,

V.

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

O R D E R

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

Veteran Richard D. Simmons has appealed through counsel a May 13, 2016, Board of Veterans' Appeals (Board) decision that found no clear and unmistakable error (CUE) in a September 1974 rating decision that denied service connection for an acquired psychiatric disorder. On December 5, 2017, the Court referred the case to a panel for resolution.

The parties disagree as to whether the Board correctly applied 38 U.S.C. §§ 105 and 1111 in its determination that the September 1974 rating decision did not contain CUE. The Board determined that the law had been correctly applied in the September 1974 rating decision and, in addition, found that nothing in the record indicated that any claimed error would have manifestly changed the outcome of the rating decision. Assuming, without deciding, that the Board erred regarding section 105 but that any such error is nonprejudicial because the Board correctly determined that the record does not show a manifestly changed outcome, the Court requests supplemental briefing to aid in the resolution of issues related to the Court's harmless error review.

The Court is prohibited from making initial findings of fact except in rare circumstances. 38 U.S.C. § 7261(c); *see Byron v. Shinseki*, 670 F.3d 1202, 1205-06 (Fed. Cir. 2012); *Hensley v. West*, 212 F.3d 1255, 1263 (2000) ("[A]ppellate tribunals are not appropriate fora for initial fact finding."). Nevertheless, the Court, in all cases, has a statutory duty to consider whether any Board error was prejudicial. 38 U.S.C. § 7261(b)(2); *see Shinseki v. Sanders*, 556 U.S. 396, 406 (2009); *Vogan v. Shinseki*, 24 Vet.App. 159, 164 (2010) ("[I]t is the Court's responsibility to apply the rule of prejudicial error.").

This obligation provides the Court with considerable latitude as to how to determine whether an error was prejudicial to a veteran, as "[t]he wording of [section 7261] itself places no limitation on the scope of the Court's inquiry." *Vogan*, 24 Vet.App. at 163; *see Mayfield v. Nicholson*, 19 Vet.App. 103, 114 (2005), *rev'd in part by Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006). "[I]n assessing the prejudicial effect of any error of law or fact, the Court is not

confined to the findings of the Board, but may examine the entire record before the Agency." *Vogan*, 24 Vet.App. at 164 ("employing the full scope of review"); *see Mlechick v. Nicholson*, 503 F.3d 1340, 1345 (Fed. Cir. 2007); *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007) ("The statute does not limit the Veterans Court's inquiry to the facts as found by the Board, but rather requires the Veterans Court to 'review the record of the proceedings before the Secretary and the Board' in determining whether a VA error is prejudicial.").

Therefore, the Court directs the parties to submit supplemental briefing on the following questions:

1) Section 7261(c) provides that "[i]n no event shall findings of fact made by the Secretary or the [Board] be subject to trial de novo by the Court." What is the proper understanding of the prohibitory scope of this statutory provision, including, but not limited to, the reference to "trial de novo," concerning "findings of fact made by the Secretary or the [Board]"?

2) What is the proper standard for the Court to employ in making factual determinations pursuant to a harmless error analysis? Should it find facts de novo in all cases, or is there some other more appropriate standard?

3) What is the proper test for making the ultimate determination as to whether an error harmed a VA claimant? Is the test whether the error would affect the judgment, affect the essential fairness of the adjudication, *see Sanders*, 556 U.S. at 407-08; *Vogan*, 24 Vet.App. at 163, or is there another more appropriate test? *See Sanders*, 556 U.S. at 406 (holding that the statute "requires the Veterans Court to apply the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases"); *but see id*. at 412 (noting that the VA "adjudicatory process in not truly adversarial, . . . [which] might lead a reviewing court to consider harmful in a veteran's case error that it might consider harmless in other circumstances") (internal citation removed).

4) Although the Court normally "may examine the entire record before the Agency," *Vogan*, 24 Vet.App. at 164, would the Court's examination differ in determining whether an error was harmless when a VA claimant asserts CUE given that CUE is adjudicated "based on the record and the law that existed at the time of the prior . . . decision," *Russell v. Principi*, 3 Vet.App. 310, 314 (1992)?

5) In undertaking a harmless error analysis, are there any limitations as to the Court's ability to make factual and legal determinations and to apply the law to the facts found?

Upon consideration of the foregoing, it is

ORDERED that the parties shall each submit, within 21 days of the date of this order, a supplemental memorandum of law not exceeding 15 pages addressing the matters set forth above.

DATED: January 8, 2018 PER CURIAM.

Copies to:

Kenneth M. Carpenter, Esq.

VA General Counsel (027)