IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

RICHARD D. SIMMONS,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 16-3039
	)	
DAVID J. SHULKIN, M.D., Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

APPELLEE'S RESPONSE TO THE COURT'S JANUARY 8, 2018, ORDER

Appellee, David J. Shulkin, M.D., Secretary of Veterans Affairs, submits this response to the Court's January 8, 2018, Order. The Order instructed the Secretary to provide a supplemental memorandum of law addressing the Court's restrictions on fact finding de novo, harmless error review, and whether a claimant's assertion of clear and unmistakable error (CUE) impacts the analysis.

"In administrative law, as in federal civil and criminal litigation, there is a harmless error rule." *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659-60 (2007) (internal quotation marks omitted). The harmless error rule attempts to prevent appellate courts from becoming overly technical in their application with errors that simply "do not affect the parties' 'substantial rights. . . .'" *See Shinseki v. Sanders*, 556 U.S. 396, 408 (2009) (internal citations omitted). The rule of harmless error dictates that if an "agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it [is]

senseless to vacate and remand for reconsideration." *PDK Labs. Inc. v. United States DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004).

Respectfully, the Secretary notes that harmless error review is only triggered once error is found and maintains that the May 13, 2016, Board of Veterans' Appeals (Board) decision does not contain error. *See Mayfield v. Nicholson*, 19 Vet.App. 103, 111 (2005) ("before prejudice becomes relevant, of course, the Court must conclude that there has been an error.") *rev'd on other grounds*, 444 F.3d 1328 (Fed. Cir. 2006).

1. What is the Proper Understanding of 38 U.S.C. § 7261(c)?

The scope of review for the Court is enumerated in 38 U.S.C. § 7261. Section § 7261(c) specifically limits the Court from reviewing de novo findings of fact made by the Secretary or the Board of Veterans' Appeals (Board). *See* 38 U.S.C. § 7261(c) ("In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court."). The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) ruled that 38 U.S.C. § 7261(c) "prohibits the Veterans Court from making factual findings in the first instance." *Andre v. Principi*, 301 F.3d 1354, 1362 (Fed. Cir. 2002). Furthermore, there is a "general rule against initial factfinding by appellate tribunals . . . ." *Roberson v. Principi*, 17 Vet.App. 135, 144 (2003) (discussing *Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000)).

In *Roberson*, the Court reviewed 38 U.S.C. § 7261(c) with explicit consideration given to the changes to 38 U.S.C. § 7261 implemented by the

Veterans Benefits Act of 2002, Pub. L. No. 107-330, § 401, 116 Stat. 2820, 2832 (2002). *Roberson*, 17 Vet.App. 135. The Court specifically held that 38 U.S.C. § 7261(c) "bars trial de novo on findings of fact already made by the Secretary." *Id.* at 144-145. The Court also stated that fact finding involving "facts not considered by the Board . . . would arguably also run afoul of [38 U.S.C. §] 7252(a) . . . ." *Id.* (holding that the reference to "trial de novo" in 38 U.S.C. § 7261(c) prohibits "[a] new adjudication on the Secretary's findings of fact, conducted as if there had been no findings of fact in the first instance."). The Court also noted that "trial courts (and government agencies) create records; appellate courts review records" and that "it is clear from [statutory] language and [statutory] history that [the] Court was meant to be a court of review rather than a claims adjudicator and a fact finder." *Id.* at 146-147. Simply put, the Court is barred from readjudicating findings of fact made by the Secretary or the Board and should not engage in its own fact finding in the first instance when reviewing Board decisions for error.

The Court's decision in *Roberson* remains controlling precedent and a court of higher authority has not expressed a contrary opinion on the term "trial de novo" under 38 U.S.C. § 7261(c); thus, the Secretary asserts that the Court is barred from readjudicating findings of fact made by the Secretary and should not engage in its own fact finding in the first instance. *Roberson*, 17 Vet.App. at 144-147; *Elkins v. Gober*, 229 F.3d 1369, 1377 (Fed. Cir. 2000) ("Fact-finding in veterans cases is to be done by the expert [Board], not by the Veterans Court.").

2. What is the Proper Standard for the Court to Employ when Making Factual Determinations in a Harmless Error Analysis?

Although the statutory language of 38 U.S.C. § 7261(b)(2) does not use the term harmless error and specifically uses the term "prejudicial error," the concepts are the same. The Supreme Court unambiguously held that "the Veterans Court['s statutory obligation to] 'take due account of the rule of prejudicial error,' requires the Veterans Court to apply the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases." *Shinseki v. Sanders*, 556 U.S. 396, 406 (2009). The Supreme Court came to this determination after noting the similarities in 38 U.S.C. § 7261(b)(2) with the wording used in the Administrative Procedure Act (APA), which is widely known as the "administrative law . . . harmless error rule." *Id.* at 406-407; c*ompare* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error") *with* 5 U.S.C. § 706 ("[A] court shall review the whole record . . . and due account shall be taken of the rule of prejudicial error").

Harmless error analysis is separate and distinct from error analysis. *Mayfield*, 19 Vet.App. at 111 ("before prejudice becomes relevant, of course, the Court must conclude that there has been an error."). Only after an error has been identified does the Court then undertake harmless error analysis. Harmless error analysis is not a voluntary undertaking; it is a Congressionally mandated requirement of the Court. *See Mlechick v. Nicholson*, 503 F.3d 1340, 1345 (Fed. Cir. 2007) ("Congress requires the Veterans Court to take due account of the rule

of prejudicial error . . . .") (discussing *Newhouse v. Nicholson*, 497 F.3d 1298, 1301-02 (2007)); *see also* 38 U.S.C. § 7261(b)(2) (the Court shall "take due account of the rule of prejudicial error."); *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting Congress's "use of a mandatory 'shall' . . . to impose discretionless obligations"); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion").

Reviewing actions by the Secretary and the Board with consideration of the rule of prejudicial error entails a broader review than a primary error analysis. As noted, the Court is precluded from readjudicating findings of fact made by the Secretary or the Board and should not engage in its own fact finding in the first instance. *Roberson*, 17 Vet.App. at 144-147. However, when engaging in harmless error analysis, the Court is provided with more latitude and can go outside the facts as found by the Board and review the record before the Agency. *Mlechick*, 503 F.3d at 1345 (the "statutory obligation permits the Veterans Court to go outside of the facts as found by the Board . . . "); *see also Vogan v. Shinseki*, 24 Vet.App. 159, 164 ("the Court is not confined to the findings of the Board but may examine the entire record before the Agency, which includes the record of proceedings."). When undertaking a harmless error analysis, the Court is tasked with reviewing the judgment and ultimate conclusion by the Board and not the decision making process or reasoning by the Board. *See Szemraj v. Principi*, 357 F.3d 1370, 1375 (discussing that appellate courts "sit to review

judgments, not opinions") (citing *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1540 (Fed. Cir. 1983) (affirming a patent judgment despite flawed analysis)).

In short, the restriction established in *Roberson* to fact finding in the first instance does not apply in harmless error analysis. *Roberson*, 17 Vet.App. at 144-147; *see also Byron v. Shinseki*, 670 F.3d 1202, 1206 (Fed. Cir. 2012) (holding that under *Newhouse* the Court may undertake fact finding solely to consider harmless error). Furthermore, the requirements of 38 U.S.C. § 7261(c) and 38 U.S.C. § 7261(b)(2) are not in conflict. *Medrano v. Nicholson*, 21 Vet.App. 165, 171 n.1 (2007) (distinguishing fact finding for the purpose of assessing prejudicial error from the general preclusion of fact finding in the first instance).

The Court has a statutory obligation to review actions by the Secretary and the Board for prejudicial error and, in order to fulfill its obligation, it must be able to make its own factual findings for the purposes of prejudicial review. *See Newhouse*, 497 F.3d at 1302 ("[38 U.S.C. § 7261(b)(2)] does not limit the Veterans Court's inquiry to the facts as found by the Board . . . ."). Thus, in the absence of authority that limits the Court's fact-finding ability in the context of prejudicial-error analysis, anything other than de novo review minimizes the Court's statutory obligation. To optimally fulfill its Congressionally mandated requirement, the Court must make factual findings de novo when undergoing a harmless error analysis. *See Vogan v. Shinseki*, 24 Vet.App. 159, 164 (2010) ("If

the Court's review were restricted to findings made by the Board, the usefulness of Congress's direction that we examine an error for prejudice would be marginalized . . . .).

3. What is the Proper Test for Determining if an Error Was Harmful?

Congress requires that the Court "take due account of the rule of prejudicial error" in order to avoid "remands that entail no realistic prospect of an outcome more favorable to a veteran." *Vogan* 24 Vet.App. at 163-64. The Supreme Court ruled that the Court's harmless error rule should be "the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases." *Sanders*, 556 U.S. at 406. Notably, the appellant bears the burden and must show that any error by the Board was harmful. *See Waters* v. *Shinseki*, 601 F.3d 1274, 1277-78 (Fed. Cir. 2010).

The federal harmless error rule is intended "to prevent appellate courts from becoming 'impregnable citadels of technicality.'" *Sanders*, 556 U.S. at 407-408 (citing *Kotteakos v. United States*, 328 U.S. 750, 760 (1946)).[1] A harmless error determination requires nuance from a judge, because it must be "case-

[1] The federal harmless error rule is codified in 28 U.S.C. § 2111 and states that "the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." The statute is effectuated through Rule 52 of the Federal Rules of Criminal Procedure and in Rule 61 of the Federal Rules of Civil Procedure. *See* Fed. R. Crim. P. 52(a) (instructing that harmless error is "Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."); *see also* Fed. R. Civ. P. 61 (instructing that "the court must disregard all errors and defects that do not affect any party's substantial rights.").

specific" and without the "use of mandatory presumptions and rigid rules." *Id.* Ideally, the Court's test should be simple, flexible, and ad hoc. *See id.* (criticizing the Federal Circuit's harmless error framework for being "complex, rigid, and mandatory.").

This Court has special expertise in making complex determinations in the administration of veterans' benefits. *See Sanders*, 556 U.S. at 412. The Court, through precedent, may also "make empirically based, nonbinding generalizations about [the] natural effects" of certain kinds of errors." *Id.* at 411-12. But a test for harmless error should not include the use of mandatory presumptions, impose rigid rules, place unreasonable evidentiary burdens on VA, or place the initial burden on VA to explain why an error is harmless. *Id.* at 407-411.

The Supreme Court unambiguously stated that under 38 U.S.C. § 7261(b)(2), the Court is "to apply the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases." *Sanders*, 556 U.S. at 406. The decision in *Sanders* took into consideration the uniqueness of the nonadversarial VA claims process and that VA has a statutory duty to help a veteran develop his or her claim. *Sanders*, 556 U.S. at 412. Thus, based on the benefit of the doubt standard, the duty to assist, and other provisions (38 U.S.C. §§ 5103A, 5107(b)), determinations as to what is harmful to a veteran appealing a determination by the Secretary or the Board may be different than what is harmful to an individual appealing a civil law decision. Furthermore, the Supreme Court's determination

that 38 U.S.C. § 7261(b)(2) is akin to the federal civil law harmless error rule inherently rejects the application of a higher, criminal-law-burden standard.[2] *Sanders* firmly holds that the claimant in civil proceedings has the burden to show that an error was harmful. *Id.* at 409-10. The Supreme Court also rejected the creation of a special rule which would place upon VA the burden of proving that an error did not cause harm, because such an equivalent burden was appropriate only in criminal matters. *Id.* at 410.

In sum, a harmless error test should require that an appellant show that an error affected the essential fairness of the adjudication. *See Mayfield*, 19 Vet.App. at 105. Not every technical violation taints the fairness of adjudication or impacts the outcome of a case. In the absence of an appellant making a persuasive showing of prejudice, the error is deemed harmless, warranting affirmance of the Secretary's or Board's findings. *See generally Sanders*, 556 U.S. at 406-12.

4. Is a Harmless Error Analysis Unique When the Court Reviews a CUE Motion?

In a CUE case, once an error of law or fact is found, the question is not whether that error was "harmless"; the question is whether correction of that error "would have manifestly changed the outcome at the time it was made." *Russell*

[2] In review of harmless error in a criminal context under Fed. R. Crim. P. 52(a), the Supreme Court confirmed that the test for whether a constitutional error is harmless for a criminal conviction "is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder v. United States*, 527 U.S. 1, 15-16 (1999) (internal citations omitted).

v. Principi, 3 Vet.App. 310, 313 (1992) (en banc); *see* 38 U.S.C. § 5109A. This requirement that "CUE must be outcome-determinative" means that a claimant must show that correction of the error would have had "a dispositive impact on the outcome[ ] of the prior decision[ ]." *Bustos v. West*, 179 F.3d 1378, 1381 (Fed. Cir. 1999). It is not sufficient to show that an error "might possibly change the outcome" or "seriously affects the fairness, integrity, or public reputation of the proceedings." *Id.* at 1380 (rejecting such an argument). Rather, it must be "absolutely clear that a different result would have ensued." *Fugo v. Brown*, 6 Vet.App. 40, 43 (1993). It must be the case that "reasonable minds could only conclude that the original decision was fatally flawed at the time it was made." *Russell*, 3 Vet.App. at 313-14.

Moreover, because CUE is based on the record and the law that existed at the time of the decision, any evidence subsequent to the determination being challenged is irrelevant. *Russell*, 3 Vet.App. at 314; see *also Bustos*, 179 F.3d at 1380 (noting that 38 U.S.C. § 5109A effectively codified *Russell*); 38 C.F.R. § 20.1403(b)(1). In a manifestly-changed-outcome determination, therefore, the Court, as well as the Board, is limited to reviewing the record before the agency at the time of the decision. In sum, CUE cases involve a different standard and different limitations than a traditional harmless error analysis. *See Robinson v. Shinseki*, 557 F.3d 1355, 1360 (Fed. Cir. 2009) ("CUE proceedings are fundamentally different from direct appeals.").

The Court also reviews Board decisions regarding CUE to ensure that the Board provided an adequate statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record. *See* 38 U.S.C. 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). This review is also based on the record and the law that existed at the time of the decision. 38 C.F.R. § 20.1403(b)(1). When reviewing a Board's statement of reasons and bases regarding a CUE judgment, so long as the Board's decision shows "a rational connection between the facts found and the choice made, the Court must affirm." *Lane v. Principi*, 16 Vet.App. 78, 83 (2002), *aff'd* 339 F.3d 1331 (Fed. Cir. 2003) (quoting *Jordan v. Brown*, 10 Vet.App. 171, 175 (1997)). For a review of prejudice regarding a reasons or bases error, the Court is similarly limited to review of the record before the Agency at the time of the decision being collaterally attacked in addition to the Board decision on appeal.

5. When Undergoing a Harmless Error Analysis, is the Court Limited?

The Court may make factual and legal determinations necessary to a harmless error analysis when undergoing that analysis. 38 U.S.C. § 7261(a) (Court may resolve factual and legal questions "to the extent necessary to its decision and when presented"). Even in instances where the Board applies the wrong legal standard and makes an obvious mistake, the Court still must affirm the decision if the errors are harmless. *See Waters*, 601 F.3d at 1277-78 (holding that, because the claimant had not shown any factual basis for his claim,

"any possible error by the Board in using the wrong standard under [38 U.S.C. § 5103A(d)(1)(B)] could not have prejudiced [the claimant]"). The Court may not, however, venture beyond its harmless error inquiry to make other factual or legal findings. 38 U.S.C. § 7261(c). For instance, if the Court finds error in one Board finding, that is not license for the Court to review the entire record through its harmless error analysis and make additional factual findings de novo.

The Court has wide latitude in ensuring compliance with 38 U.S.C. § 7261(b)(2) and has stated that the "statute itself places no limitations on the scope of the Court's inquiry regarding prejudicial error." *Vogan*, 24 Vet.App. at 163 (internal citations omitted). However, the Supreme Court did provide guidance in that the Court must "apply the same kind of 'harmless error' rule that courts ordinarily apply in civil cases." *Sanders*, 556 U.S. at 406. Thus, the Court has the type of discretion when it engages in factual determinations in a harmless error analysis that is normally accorded to other courts.

The *Chenery* doctrine typically dictates that when a court reviews a determination or judgement of an administrative agency which an administrative agency alone is authorized to make, it must judge the action solely on the grounds invoked by the agency. *Newhouse*, 497 F.3d at 1301-02 (reviewing *Sec. & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194 (1947); *Sec. & Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80, (1943) (internal citations omitted). However, the *Chenery* doctrine is not implicated when the Court performs its mandatory prejudicial analysis because under 38 U.S.C. §

7261(b)(2) “whether a VA error is prejudicial or harmless is not ‘a determination or judgment which [VA] alone is authorized to make.’” *Id.*

“Congress has imparted to the Court the ultimate responsibility for determining whether an error below was prejudicial.” *Medrano*, 21 Vet.App. at 171. Therefore, with the understanding that the judiciary is charged with showing restraint in its exercise of power, the Court is limited only by what is necessary to render its prejudicial error determination and by the ordinary constraints of civil harmless error analysis.

WHEREFORE, Appellee, David J. Shulkin, M.D., Secretary of Veterans Affairs, respectfully responds to the Court’s January 8, 2018, Order.

Respectfully submitted,

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