Vet.App. No. 17-1361

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**IN THE UNITED STATES COURT**
**OF APPEALS FOR VETERANS CLAIMS**

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**RICHARD M. SIMON**,
Appellant,

**v.**

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

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**ON APPEAL FROM THE BOARD OF VETERANS' APPEALS**

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# BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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**ON APPEAL FROM THE BOARD OF VETERANS' APPEALS**

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# BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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## I. ISSUE PRESENTED

Whether the Board of Veterans' Appeals (BVA or Board), in its May 1, 2017, decision, properly determined that there was no clear and unmistakable error (CUE) in a September 3, 1974, rating decision which reduced a disability rating for posttraumatic stress disorder (PTSD), formerly diagnosed as anxiety reaction, from 30% to 10% disabling.

## II. STATEMENT OF THE CASE

### *A. Jurisdictional Statement*

The Court has proper jurisdiction pursuant to 38 U.S.C. § 7252(a), which grants the Court of Appeals for Veterans Claims exclusive jurisdiction to review final decisions of the Board.

### *B. Nature of the Case*

Appellant, Richard M. Simon, appeals a May 1, 2017, Board decision that found there was no CUE in a September 3, 1974, rating decision which reduced his disability rating for PTSD, formerly diagnosed as anxiety reaction, from 30% to 10% disabling. (Record Before the Agency (R.) at 1-38).

### *C. Statement of Facts*

Appellant served on active duty in the United States Marine Corps from January 16, 1967, through February 29, 1968. (R. at 471)(R. at 1943). During service, he earned the Vietnam Service Medal with One Device. *Id*.

In service, Appellant's unit was stationed in the demilitarized zone in Vietnam and he saw his friends killed. (R. at 2026 (2022-2031)). He also killed an enemy soldier by stabbing him to death. *Id*. Appellant was hospitalized due to his experience in service prior to his discharge. (R. at 2028 (2022-2031)).

In January 1968, a Medical Board Report discussed the history of Appellant and his experiences, confirmed his diagnosis of anxiety disorder and recommended he appear before a Physical Evaluation Board. (R. at 460-464).

Later in January 1968, a Physical Evaluation Board determined that Appellant was unable to perform his duties due to the anxiety reaction, which was related to service, and that his disability was ratable at 10%, Code #9400 for anxiety reaction. (R. at 465).

A March 1968 regional office (RO) rating decision granted Appellant service connection and compensation for an anxiety reaction (DC 9400) at a 50% rating, effective March 1, 1968 (discharge). (R. at 2067).

Three months later, in June 1968, the Department of Veterans Affairs (VA) (then-named Veterans Administration) sought to schedule an initial examination of Appellant in September 1, 1968 (six months after the date of the grant of service connection) to assess his anxiety reaction. (R. at 2047). Appellant then informed VA that he was living and working out of the area (R. at 2046) and VA granted him an extension for the initial VA examination. (R. at 2036-2037).

In July 1969, over a year after the initial grant of service connection, Appellant underwent a VA medical examination for his anxiety reaction. (R. at 2022-2031). It was noted that after his release from hospitalization in service, “he gradually began to feel somewhat better” and that “[c]urrently

he still has somewhat impaired sleep or some feelings of apprehension when he wakes. However he feels he is functioning satisfactorily at his job." (R. at 2028 (2022-2031)). The mental status examination revealed that he appeared in a reserved manner and conversed satisfactorily, with no evidence of thought interference, but his speech was "slightly hesitant." *Id*. Appellant noted that he was engaged, but that the girl broke it off after he told her about his experiences and reactions, and he felt bad about this, but he had no abnormal ideation. *Id*. The examiner diagnosed him with anxiety reaction and found that that the impairment was "moderate in the neurotic sphere", but his "stresses [were severe] in the past." (R. at 2028, 2030 (2022-2031)).

In October 1969, the RO reduced the rating from a 50% rating to a 30% rating, effective January 1970, because it determined that Appellant's disability was improving. (R. at 2016-2017). The RO stated, "[t]he current psychiatric findings establish that the veteran's anxiety reaction is not productive of more than considerable industrial impairment. Accordingly, reduction is effected to reflect current disablement." (R. at 2016 (2016-2017)). Appellant did not disagree with that determination.

In August 1974, Appellant underwent another VA examination for his anxiety reaction. (R. at 1938-1939). The examiner noted Appellant had hesitation of speech, especially in unfamiliar surroundings and when he was in a tense state, and that he was employed at a phone company,

which he had worked for over 5 years; he was not satisfied at the job as he felt it was not challenging enough. (R. at 1938 (1938-1939)). It was noted that since service, Appellant obtained a degree in marketing and was looking for a new job in that field. *Id*. Appellant had acquaintances, but no close friend, but did have girlfriends. *Id*. The mental status examination portion found that Appellant "was oriented in all spheres and his calculations, abstractions, and similarities were all very good. His proverbial interpretations were appropriate. His judgment was good. The veteran tended to show some anxiety and tremulousness and also some hesitation and halting of speech." *Id*. Appellant was diagnosed with anxiety reaction, chronic and in summary, the examiner found Appellant:

> seems to have signs of anxiety and halting speech especially under pressure However, in spite of that, it seems that he is functioning rather adequately, although he has been having trouble getting a job as a Marketing or Personnel expert which he is trained to be. The veteran is competent on the basis of the mental status examination and history.

*Id*.

In a September 1974 rating decision, the RO noted that Appellant was "separated with severance pay and evaluated by the Service Department at 10%. The initial VA rating assigned at 50% evaluation and ordered an examination in 6 months. The veteran was not examined until 7-29-69 and at that time his evaluation was reduced to 30%." (R. at 1934). The RO then noted that the August 1974 VA examination showed, *inter*

*alia*, Appellant had been employed at the same job for the past 5 years, had obtained a marketing degree and was looking for a job in that field. The RO then decided that "the current examination shows a good industrial and social adjustment and the reduction under VAR 1105E is indicated" and reduced the 30% rating to a 10% rating, effective December 1, 1974, due to improvement of his disability. *Id*. Appellant did not disagree with that decision and it became final.

Four decades later, in an August 2014 letter, Appellant, via his current counsel, argued that there was CUE in the September 1974 rating decision that reduced his rating from 30% to 10%. (R. at 831 (831-833)). He argued that since his PTSD was rated at a 50% from March 1, 1968 and 30% from January 1, 1970, he had at least a 30% rating for a period of five years, which entitled him to the protections of 38 C.F.R. § 3.344(a). *Id*.

The RO, in an April 2015 decision, concluded that no revision of the September 3, 1974 rating decision was warranted. (R. at 587 (587-591)) (R. at 573-583). It noted that despite Appellant's argument that material improvement under the ordinary conditions of life had not been established based on review of the entire medical-industrial history at the time of the reduction that here:

> two consecutive and thorough exam reports demonstrated an improvement in the veteran's symptoms and functioning. Evidence from the exam reports and the veteran's statements indicate that he was working and functioning appropriately in his ordinary life, and no further documentation was submitted

> or available to agency decisionmakers to show more significant impairment. The veteran did not request an increase in his disability evaluation until 2006, and the subsequent evidence received with that claim is not illustrative of the level of impairment in 1974.

(R. at 589 (587-591)).

In May 2015, Appellant filed a notice of disagreement and continued to argue that evidence at the time of the reduction did not show "material improvement under the ordinary conditions of daily life" so VA did not meet its burden to reduce Appellant's rating (R. at 489 (481-489)). In August 2015, the Board remanded the issue for the issuance of a statement of the case (SOC). (R. at 324 (319-326)).

In February 2017, a SOC was issued that continued the denial of the CUE claim (R. at 58-78) and Appellant filed an appeal to the Board, and in support referred to the arguments made in the August 2014 and May 2015, letters from counsel. (R. at 49-50).

On May 1, 2017, the Board issued the decision on appeal that determined that there was no CUE in the September 3, 1974, rating decision that reduced the disability rating for PTSD, formerly diagnosed as anxiety reaction, from 30% to 10% disabling. (R. at 30-35 (1-38)).

## III. SUMMARY OF ARGUMENT

The Court should affirm the Board's decision on appeal that properly determined that there was no CUE in the September 3, 1974, rating

decision that reduced his disability rating for PTSD, formerly diagnosed as anxiety reaction, from 30% to 10% disabling. (R. at 1-38).

Specifically, Appellant argues that "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." (Appellant's Brief (AB) at 5) (*See* AB at 6-10)). Further, he argues that had the RO "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." (AB at 14) (*See* AB at 10-15).

However, the Secretary submits that the Board did properly find that 38 C.F.R. § 3.344 did not apply in this case. Moreover, even assuming such, *arguendo*, that Appellant's argument that 38 C.F.R. § 3.344 did apply, Appellant, in his brief, fails to demonstrate how the outcome would have been manifestly changed if the alleged error did not occur. *See* 38 C.F.R. § 20.1403(c) ("If it is not absolutely clear that a different result would have ensued, the error complained of cannot be clear and unmistakable."); *Grover v. West*, 12 Vet.App. 109, 111-12 (1999); *see Hillyard v. Shinseki*, 24 Vet.App. 343, 349 (2011). Thus, Board's decision on appeal was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law and as a result, the decision should be affirmed.

## IV. LAW AND ARGUMENTS

As the Board noted (R. at 30-31 (1-38)), a claim of CUE is a limited exception to the rule of finality that allows a collateral attack on a final decision by an RO or the Board only where "a very specific and rare kind of error [is made] 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." *Robinson v. Shinseki*, 557 F.3d 1355, 1360 (Fed. Cir. 2009). The standard is demanding and in order to establish CUE in a final decision of an RO or the Board, an appellant must first show that either the correct facts in the record were not before the adjudicator, or the statutory or regulatory provisions in existence at the time were incorrectly applied. *King v. Shinseki*, 26 Vet. App. 433, 439 (2014), *aff'd sub nom. King v. McDonald*, 599 F. App'x 957 (Fed. Cir. 2015). Second, the alleged error must be "undebatable," not merely "a disagreement as to how the facts were weighed or evaluated." *Id*. Third, the alleged error must have "manifestly changed the outcome" of the decision. *Id.* The Court's review of a Board determination that CUE was not committed in a prior final decision is limited to determining whether the Board decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or unsupported by adequate reasons or bases. 38 U.S.C. § 7261(a)(3)(A); 38 U.S.C. § 7104(d)(1); *Livesay v. Principi,* 15 Vet.App. 165, 174 (2001); *see*

*also Sorakubo v. Principi*, 16 Vet.App. 120, 123 (2002) (recognizing the narrow scope of review under the arbitrary and capricious standard). Under this highly deferential standard of review, the Court "cannot conduct a plenary review of the merits of the original decision," *Stallworth, v. Nicholson*, 20 Vet.App. 482, 487 (2006), and 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), *aff'd* 339 F.3d 1331 (Fed.Cir.2003). "It must always be remembered that CUE is a very specific and rare kind of 'error.'" *Fugo v. Brown*, 6 Vet. App. 40, 43 (1993).

Additionally, the Board noted that a review of whether the reduction was proper involves the laws and regulations in effect at that time of the September 1974 rating decision, in this case 38 C.F.R. §§ 3.105 and 3.344. The Board noted that the applicable 1974 version of 38 C.F.R. § 3.105(e) stated:

> Where the reduction in evaluation of a service-connected disability or employability status is considered warranted and the lower evaluation would result in a reduction or discontinuance of compensation payments currently being made, rating action will be taken. The reduction will be made effective the last day of the month in which a 60-day period from date of notice to the payee expires. The veteran will be notified at his or her latest address of record of the action taken and furnished detailed reasons therefor, and will be given 60 days for the presentation of additional evidence.

(R. at 31-32 (1-38)). The Board then stated:

> In 1974, provisions of 38 C.F.R. §§ 3.344(a) and 3.344(b) applied 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. Reexaminations disclosing improvement, physical or mental, in these disabilities will warrant reduction in rating." *See* 38 C.F.R. § 3.344(c) (1961) (which has remained unchanged to the present time). The provisions of 38 C.F.R. § 3.344(a) require that rating agencies handle cases involving service-connected disabilities "so as to produce the greatest of stability of disability evaluations…" and "[r]atings on account of diseases subject to temporary or episodic improvement, e.g., manicdepressive or other psychosis…[or] psychoneurosis… will not be reduced on any one examination, except in those instances where all the evidence of record clearly warrants the conclusion that permanent improvement of physical or mental condition has been demonstrated." Essentially, under 38 C.F.R. § 3.344, if a rating has been in effect for five years or more, VA has a heightened duty to demonstrate a reduction is proper.

(R. at 32 (1-38)) (underline added).

In the Board decision on appeal, the Board acknowledged Appellant's argument that there was CUE in the September 3, 1974, rating decision that reduced his disability rating for PTSD, formerly diagnosed as anxiety reaction, from 30% to 10% disabling; that he believes he had a minimum of a 30% rating over a 5-year period. (R. at 30-36 (1-38)). Appellant, in his brief makes essentially the same argument as he did to the Board, namely that the September 1974 rating decision contained CUE because his 30% rating for anxiety reaction should have been afforded the protections of 38 § 3.344(a) since it was rated at 50% from March 1, 1968,

and 30% from January 1, 1970, until it was reduced, over five years later, by the September 1974 rating decision to 10%, effective December 1, 1974. *See* (R. at 33-35 (1-38)) (AB at 1-14)(R. at 831-833).

The Board found, and the parties agree, that the applicable version of 38 C.F.R. § 3.344 at the time of the 1974 rating decision was from 1961, as that version was unchanged and in effect the time of the rating decision in 1974. (AB at 6); See (R. at 31-32 (1-38)).

In response to Appellant's argument that his 30% rating for anxiety reaction should have been afforded the protections of 38 C.F.R. § 3.344(a) (See R. at 831 (831-833)); R. at 489 (481-489)), the Board found that it did not apply in this case and stated:

> The explicit language of § 3.344(c) limits the provisions of § 3.344(a) only to "ratings which have continued for long periods of time at the same level (five years)" and notes that this section does "not apply to disabilities that have not become stabilized." The Veteran's 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). Indeed, § 3.344(c) closes by noting that examinations disclosing improvement in a disability will warrant a reduction in rating, which appears to have been exactly what occurred.

(R. at 33-34 (1-38)) (underline added). Thus, the Board clearly found that 38 C.F.R. § 3.344 did not apply in this case because he did not meet the threshold set out in 38 C.F.R. § 3.344(c), namely that his disability was not

stabilized and, in fact, the condition was improving, as is reflected by the ratings consistently being revised down.

Here, Appellant was initially rated at 50% for 1 year and 10 months until that level was reduced down due to improvement as demonstrated by an examination report to 30%. Then less than 5 years after the 30% was assigned, the 30% rating was reduced to 10%, due to improvement, as reflected in the 1974 examination report. While the total of the time period for the 50% rating and 30% rating amounted to over a 5 year period, the initial 50% rating time does not count toward the 5-year period for the 30% rating because section 3.344(c), entitled "*Disabilities which are likely to improve*" states "[t]he provisions of paragraphs (a) and (b) of this section to apply 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. Reexaminations disclosing improvement, physical or mental, in these disabilities will warrant reduction in rating." 38 C.F.R. § 3.344(c).

Thus, since Appellant's disability was not stabilized and did in fact improve, his rating was properly reduced to a 30% rating (effective 1-1-70), based upon an examination, and at that point the 5-year period needed for section 3.344(c) to apply to the 30% level began. If that 30% lasted (or was increased due to a worsening and was at a minimum of 30%) for a 5-year period it would qualify for the protections of section 3.344(a). *See* 38

C.F.R. § 3.344(c). However, in this case the 30% level was reduced to 10% before the 5-year period was met due to improvement (based on an re-examination), so the 30% level did not meet the criteria in 38 C.F.R. § 3.344(c). That 30% rating was in effect from January 1, 1970 to December 1, 1974, a total of 4 years and 11 months, so it did not meet the 5-years period needed under section 3.344(c). *See Brown v. Brown*, 5 Vet.App. 413, 417-418 (1993) (noting that the duration of a rating must be measured from the effective date assigned that rating until the effective date of the actual reduction); *Smith (Raymond) v. Brown*, 5 Vet. App. 335, 339 (1993). It should be noted, had the 30% level been in effect for another month, it would have met the 5-year threshold under section 3.344(c) and the protections of section 3.344 would have applied.

As a result of the foregoing, the Board stated that it "does not find that an error of fact or law was made by the RO in not applying the provisions of § 3.344 in the September 1974 decision. As such, the Veteran's CUE claim must fail and there is no need to proceed to the second and third prongs of the CUE test." (R. at 34 (1-38)). Thus, the Secretary respectfully submits that the Board's determination that there was no CUE in the September 1974 RO decision, was reasonable and not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 38 U.S.C. § 7261(a)(3)(A); *Crippen*, 9 Vet.App. at 418. Thus, the Board decision on appeal should be affirmed.

In his brief, Appellant argues that the Board erred when it misinterpreted the law and found that section 3.344 (which is entitled "Stabilization of Disability Evaluations") did not apply to him because his rating never fell below a 30% rating for five years. (AB at 6-10). He further argues that had the 1974 RO decision applied 38 C.F.R. § 3.344 there would have been a manifestly different outcome. (AB at 10-15). These arguments are not persuasive because he misinterprets 38 C.F.R. § 3.344(c).

First, Appellant argues that the plain language of regulation does not say that a veteran must have the same highest level of disability assigned for the entire five year period and that the regulation applies to conditions that have stabilized at a certain minimum level; however, he does acknowledge that it does not apply to disabilities that have not become stabilized and are likely to improve. 38 C.F.R. § 3.344(c). He then argues that the word "stabilize is defined as 'to hold steady[]'" based on the definition in the Merriam-Webster Online Dictionary. (AB at 7) Thus, he argues that the plain language of the regulation shows a disability has stabilized whenever a rating has held steady at a particular level for at least five years, which occurred in his case at a 30% rating for five years, and that, therefore, 38 C.F.R. § 3.344 applied to his case. (AB at 6-10).

The Secretary does not disagree with that definition, but submits that Appellant's argument is based on the faulty premise that his disability his

30% level was stabilized over the required 5-year period. The Secretary submits Appellant misinterprets what is required under section 3.344(c) and that the plain language of 38 C.F.R. § 3.344(c) demonstrates that a condition must become "stabilized" for it to apply, and in this case Appellant's rating was not "stable" and in fact improving, as is reflected in the medical examinations and consistent reductions in the rating levels for his service-connected disability.

Here, the applicable version of 38 § 3.344(c) in full stated:

> (c) *Disabilities which are likely to improve*. The provisions of paragraph (a) and (b) of this section apply 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. Reexaminations disclosing improvement, physical or mental, in these disabilities will warrant reduction in rating.

38 C.F.R. § 3.344(c) (underline added). The Secretary submits that the plain meaning is that when a disability has stabilized, or "held study," for 5 years, then the protection of section 3.344(a) and (b) would apply. However, the caveat in section 3.344(c) is that if the disability was not stable and was improving, then an examination demonstrating improvement would "warrant reduction" which is what occurred in this case and section 3.344 (a) and (b) would not apply. *See King v. Shinseki*, 26 Vet.App. 484, 488 (2014) (holding that words should not be read in isolation but rather read in the context of the regulatory structure and scheme, when assessing the meaning of a regulation).

Moreover, this interpretation of the regulation is consistent with the history of section 3.344, as a December 1956, VA Regulation (VAR) 1172(A) came into effect, setting forth protections for "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." It is clear from plain language of section 3.344(c) that VA intended to continue and protect only those ratings, which had been stabilized and in effect over 5 years.

As a result, as the Board determined in the decision on appeal, section 3.344(c) did not apply in this case because Appellant did not meet the 5-year period because his disability did not stabilize and was improving. This is reflected in the ratings assigned: an initial 50% rating, followed by a 30% rating, followed by a 10% rating; all decreasing the disability rating after demonstrating improvement in the disability based on examinations. Thus, the Secretary respectfully submits that the Court should affirm the Board's decision on appeal that properly determined that there was no CUE in in the September 3, 1974, rating decision that reduced his disability rating for PTSD, formerly diagnosed as anxiety reaction, from 30% to 10% disabling. (R. at 1-38).

It is important to note that Appellant's argument relies heavily on the brief filed by the Secretary in the case of *Simunovich v. Shulkin*, No. 16-2604 in this Court, as he argues it confirms his argued interpretation of

section 3.344(c) and that his condition did stabilize at 30%; thus he was entitled to the protections of section 3.344.

First, the Secretary submits that the VA brief in the case of *Simunovich* is not binding on this case, as each of the cases involves distinctly different fact patterns. Further, after reviewing the actual fact pattern of *Simunovich*, the Secretary submits that VA's interpretation of 3.344(c), in both that case and this case, is consistent and in accord with 3.344(c), as in the instant case, Appellant's disability was not stable and was improving and warranted lesser ratings, while in the *Simunovich* case, his condition worsened and he met the criteria for section 3.344 protections.

Further, Appellant in his brief misinterprets what the Secretary actually conceded in his brief in *Simunovich* case (based on the fact pattern in that case) and Appellant failed to discern the facts of the case as outlined in the Secretary's brief that demonstrated that the Board in that case limited its consideration to the disability levels to: (1) *Simunovich* underwent an audiological examination in February 2010 after which the RO increased his rating for hearing loss from 40% to 80% because his disability had gotten worse; (2) after a general medical examination in September 2010 the RO continued the 80% rating for hearing loss; (3) a "June 2011 audiological examination indicated that Appellant's hearing loss was less severe than indicated by his 80% rating and, accordingly,

proposed to reduce that rating to 20%" and, subsequently, "the RO effectuated a reduction of Appellant's rating for hearing loss, from 80% to 20%."; (4) another VA examination took place in August 2013, and then the RO increased Appellant's rating to 30%, effective August 2013, the date of the examination; (5) the Board, in the decision on appeal in the *Simunovich* case found that the propriety of the reduction, from 80% to 20%, of his rating for hearing loss was proper and section 3.344 did not apply because he did not have the 80% disability rating for the 5 year period when the RO proposed to reduce that rating. (VA Brief in *Simunovich* at 13).

However, in the *Simunovich* brief, the Secretary conceded that the Board erred in making its determination when it:

> failed to appreciate that the 80% rating assigned in August 2010 was not the first rating applied to Appellant's disability. The initial rating applied to Appellant's hearing loss was 40%, which was effective July 27, 2005. Accordingly, in order for there to be any reduction of Appellant's rating below that level, there must be compliance with the provisions of section 3.344(a). The Board overlooked this stabilized 40% rating and reduced Appellant's rating to 20% without any discussion as to whether the requirements of section 3.344(a) have been satisfied. The Secretary agrees that this was error, which warrants remand.

(at 14-15) (underline added). So, in the *Simunovich* case, the veteran had: (a) a 40% rating effective July 27, 2005; (b) due to a worsening of the condition, that rating was increased in February 2010 to 80% (from 40%); (c) in September 2010 the RO continued the 80% rating for hearing loss;

(d) a "June 2011 audiological examination indicated that Appellant's hearing loss was less severe than indicated by his 80% rating and, accordingly, proposed to reduce that rating to 20%." (4) another VA examination took place in August 2013, and then the RO increased Appellant's rating to 30%, effective August 2013.

So in that dissimilar case, Appellant had a 40% rating for almost 5 years, and before the 5 year period under section 3.344(c) had been met, it was determined that his disability had gotten worse (demonstrating that it was not improving), so that he was granted an increased rating of 80% until it was later reduced in June 2011. So in this fact pattern (unlike Appellant's fact pattern in the instant case), the veteran was rated at 40% (from July 27, 2005) and it was increased to 80% from February 2010 to June 2011 because it worsened. As a result, as the Secretary conceded in that case, under section 3.344(c), the disability was stabilized at 40% because he maintained at least a 40% for the five year period (from 2005 to 2011); thus *Simunovich* was entitled to the protections of section 3.344 and that was conceded to by the Secretary.

It is important to note that the Secretary would come to that same result as in *Simunovich* in the instant case if the fact pattern was slightly different. Here, if Appellant was first assigned a 30% rating in March 1968, that was increased to a 50% rating in January 1970 (because the disability had gotten worse) and then reduced it to 10% in December 1974, the

Secretary would agree (as it did in *Simunovich*) that the disability stabilized at a minimum of a 30% level for over a 5 year period (1968 to 1974) and he would be entitled to the protections under section 3.344. However, that was not the fact pattern here, as Appellant was first assigned a 50% level that was reduced 30% due to improvement as reflected in an examination report and then again reduced to 10% due to further improvement based on an examination report.

Since in the instant case the 50% level was not stabilized and his disability was shown to be improving (by an examination report) a reduced 30% level was warranted and since that 30% level was not held for the five year period before it was reduced to a 10% rating (due to further improvement) it was not stabilized under section 3.344(c). Thus, the Board in the decision on appeal properly found, pursuant to section 3.344(c) that the disability was not stabilized and it was improving and that the protection of section 3.344(a) and (b) did not apply. It should also be noted that Appellant submits that 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 was in error. However, the Secretary submits that they do apply, as articulated by the Board, and Appellant's argument to the contrary is misguided as he misinterprets 3.334(c). As discussed above, section 3.344(c) requires a disability to become stabilized and not likely to improve for a period of 5 years before the

protection of section 3.344(a) and (b) apply, and that did not occur in this case, as articulate by the Board.

Based on the foregoing, the Secretary respectfully submits that Board's decision on appeal that determined that there was no CUE in the September 3, 1974, RO rating decision that reduced the disability rating for PTSD, formerly diagnosed as anxiety reaction, from 30% to 10% disabling was proper and should be affirmed.

Furthermore, the Secretary submits that even assuming such *arguendo* that the Board in the decision on appeal misinterpreted the law and that section 3.344 did apply, that Appellant has not demonstrated that error would have manifestly changed the outcome of the September 1974 rating decision; as such, CUE could not have occurred. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant bears the burden of demonstrating error on appeal), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

Appellant argues that had 38 § 3.344 been applied, then it would have manifestly changed the outcome of the September 1974 rating decision because he would have been entitled to the protections under section 3.344(a) and (b). (AB at 10-15). Established case law clearly requires Appellant to demonstrate that correction of the error would have changed the outcome of the 1974 rating decision—i.e., that consideration of section 3.344 would have manifestly changed the outcome and resulted

in his rating not being reduce from 30% to 10%. *See Bustos, 179 F.3d at 1381* (holding that "to prove the existence of CUE..., the [movant] must show that an outcome-determinative error occurred, that is, an error that would manifestly change the outcome of a prior decision," and that CUE involves a "dispositive impact on the ultimate outcome"); *Crippen v. Brown*, 9 Vet.App. 412, 422 (1996) (holding that to succeed on a CUE motion attacking a prior decision that had denied reopening of a claim, it was necessary for the movant to establish not only that, but for the error, he or she would have been entitled to reopening but also that the underlying claim for benefits would have been granted).

In this case, as Appellant acknowledges the version of section 3.344(a) at the time of the issuance of the 1974 RO decision stated that ratings for diseases subject to episodic improvement, such as a psychotic reaction, "will not be reduced on any one examination, except in those instances where all the evidence of record clearly warrants the conclusion that sustained improvement had been demonstrated" and that "though material improvement in the physical or mental condition is clearly reflected, the rating agency will be considered whether the evidence makes it reasonably certain that the improvement will be maintained under the ordinary conditions of life." 38 C.F.R. § 3.344(a); (AB at 12-13).

Appellant argues that "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" and thus, it could not reduce his rating on a single examination report." (AB at 12). Further, he argues that when the two examinations from 1969 and 1974 are compared that they demonstrate that his disability had in fact worsened and that the 1974 examination was not adequate, but that the 1969 examination was more probative. Lastly, he argues that the 1974 RO decision did not consider whether there was improvement under the ordinary conditions of life, which is required under section 3.344 before a rating can be reduced. (AB at 13). Thus, under his view and weighing of the record, he argues that that consideration of section 3.344(a) by the 1974 RO would have manifestly changed the outcome and resulted in his rating not being reduce from 30% to 10%. (AB at 10-14). However, for the reasons stated below, Appellant's argument is not persuasive and does not rise to the level needed for CUE.

As noted above, in order to establish CUE, Appellant must demonstrate, *inter alia*, that the error in not applying section 3.344 would have manifestly changed the outcome of the September 1974 rating decision. CUE is more than a difference of opinion (38 C.F.R. § 3.105(b)) and it is not enough for the appellant to merely disagree as to how the facts were weighed or evaluated. 38 C.F.R. § 20.1403(d)(3). Clear and unmistakable error is a very specific and rare kind of error; it is an error of fact or of law that compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for

that error. *See* 38 C.F.R. § 20.1403(a); *Fugo v. Brown*, 6 Vet.App. 40, 43 (1993).

This is a high burden that Appellant has not met in this case. Although Appellant concludes that that a rating reduction would not have occurred if the RO had applied section 3.344(a), he based that conclusion on his own view and weighing of the evidence over 40 years after the decision was made. This is clearly reflected when he weighs the symptoms in the examination reports, and then uses his weighing of the evidence to declare that his disability was not improving, but worsening, and allege that the 1974 examination was inadequate. This was done in an effort to show that the RO in its 1974 decision failed to consider all of the evidence of record in finding that Appellant's disability had sustained improvement and thus, the RO could not reduce his rating on a single examination report. *See* 38 C.F.R. § 3.344(a). However, Appellant's above arguments are only based on his reweighing of the record (over 40 years after the decision was made) and that does not amount to CUE or demonstrate a manifestly difference outcome would have occurred. 38 C.F.R. § 20.1403(d)(3).

Further, it is important to note that Appellant's argument that the RO in its 1974 decision failed to properly account for its reasoning and weighing of the evidence is without merit because the requirement for RO to provide a detailed statement of reasons and bases was not applicable at

the time of the challenged decision. *Natali v. Principi*, 375 F.3d 1375 (Fed. Cir. 2004); *Pierce v. Principi*, 240 F.3d 1348 (Fed. Cir. 2001); *Joyce v. Nicholson*, 19 Vet. App. 36 (2005) (in general for the proposition that because the law prior to the enactment of the Veterans' Benefits Amendments of 1989 did not require VA to set forth in detail the factual bases for its decisions; nor provide in depth discussion of applicable law, the failure to do so was not clear and unmistakable legal error at the time of such decisions, and the adjudicators were presumed to have made the requisite findings under a presumption of validity).

Thus, Appellant's argument that the RO was not able to reduce his rating based on one examination under section 3.344(a) because it did not find all of the evidence demonstrated sustained improvement, is not persuasive, because it is based on his reweighing of the evidence in his favor. Further, assuming much *arguendo*, that the 1974 rating decision could not rely on a single examination report to properly reduce the rating under section 3.344(a), it appears that the reduction was based on more than a single examination report, in that it was based on both the July 1969 (which was the basis for a reduced rating at that time to 30% (from 50%)) and August 1974 examination reports demonstrating improvement, thereby the RO in 1974 permissibly reduced the rating to 10% (from 30%), had 3.344(a) applied. Here, the 1974 RO decision did note that there was a July 1969 examination that showed improvement, resulting in a reduction

of the rating to 30%, and it also specifically discussed the 1974 examination. (R. at 1934).

Thus, even if 3.344(a) did apply and the 1974 RO decision could not reduce the rating based on one examination report, there is evidence that it relied upon two examination reports demonstrating improvement, which would allow the RO reduce the rating from 30% to 10%. Again, it should be noted that since a statement of detailed reasons or bases was not required at the time, it cannot be said that had 3.344(a) been applied, that a manifestly different outcome would have occurred, as it is not undebatable that it would have manifestly changed the outcome.

It is also important to note that Appellant argued that the 1974 RO decision did not consider whether there was improvement under the ordinary conditions of life, which is required under section 3.344(a) before a rating can be reduced. However, he fails to note that the rating decision specifically determined in its decision that "[t]he current examination shows a good industrial and social adjustment and reduction under VAR 1105E is indicated" which clearly demonstrates that his conditions of ordinary life (work and social life) were improving." (R. at 1934).

In sum, after synthesizing Appellant's arguments, it is apparent that Appellant is disagreeing as to how the facts were weighed and evaluated and that he believes that there was not enough evidence to allow the RO in 1974 to reduce his rating under section 3.344(a). However, as

demonstrated above, it is clearly possible that had section 3.344(a) been applied in September 1974 that his disability would still have been reduced to 10%, and, thus, CUE could not exist because it has not been properly demonstrated how the alleged error would have manifestly changed the outcome of the September 1974 RO decision. *See Bustos*, 179 F.3d at 1381 ("[T]o prove the existence of CUE . . . , the claimant must show that an *outcome-determinative* error occurred." (emphasis added)).

Moreover, to the extent that Appellant now argues that an examination was inadequate, it should once be noted that a failure in the duty to assist cannot be CUE, and that never have the adequacy of the 1969 or 1974 examination reports been challenged until now, over 40 years later, by Appellant in his brief. 38 C.F.R. § 20.1403(d)(3). Therefore, Appellant's argument is without merit and he has not meet the burden in demonstrating that consideration and application of section 3.344(a) in the 1974 rating decision would have manifestly changed the outcome and resulted in his rating not being reduce from 30% to 10%. *Quattlebaum v. Shinseki*, 25 Vet.App. 171, 175-76 (2012) (noting that the CUE framework's requirement of showing a manifestly changed outcome "impos[es] a significantly higher burden than that of demonstrating 'a reasonable possibility of substantiating the claim'").

Because Appellant's alleged error could not have manifestly changed the outcome of his claim, the Board's finding that the September

1974 RO decision does not contain CUE is not arbitrary and capricious. *See Russell*, 3 Vet.App. at 315; *See Shinseki v. Sanders*, 129 S. Ct. 1696 (2009) (under the harmless error rule, the appellant has the burden of showing that he suffered prejudice as a result of VA error).

In sum, the Board's determination that there was no CUE in the September 1974 RO decision, was reasonable and not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 38 U.S.C. § 7261(a)(3)(A); *Crippen*, 9 Vet.App. at 418. Thus, the Board decision on appeal should be affirmed.

In closing, the Secretary notes that it is axiomatic that issues not raised on appeal are abandoned. See *Disabled American 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"); *Winters v. West*, 12 Vet.App. 203, 205 (1999); *Bucklinger v. Brown*, 5 Vet.App. 435, 436 (1993). Therefore, any and all other issues that have not been addressed in Appellant's Brief should be deemed abandoned on appeal. Additionally, the Secretary does not concede any material issue that the Court may deem Appellant adequately raised, argued and properly preserved, but which the Secretary may not have addressed through inadvertence, and reserves the opportunity to address same, if the Court deems it necessary or advisable for its decision. *But cf. McWhorter v. Derwinski*, 2 Vet. App. 133, 136 (1992). The Secretary also requests that

the Court take due account of the rule of prejudicial error wherever applicable in this case. 38 U.S.C. § 7261(b)(2); *See Shinseki v. Sanders,* 129 S.Ct. 1696, 1706 (2009) (noting that the burden of demonstrating prejudice on appeal "normally falls upon the party attacking the agency's determination").

## V. CONCLUSION

**WHEREFORE**, for the foregoing reasons, Appellee respectfully requests the Court affirm the May 1, 2017, Board decision that found the September 1974 RO decision was not clearly and unmistakably erroneous.

Respectfully submitted,

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