

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

---

**ROBERT H. PATTON,**

Appellant,

v.

**ROBERT A. MCDONALD,**  
Secretary of Veterans Affairs,

Appellee.

---

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

---

**BRIEF OF THE APPELLEE  
SECRETARY OF VETERANS AFFAIRS**

---

**LEIGH A. BRADLEY**  
General Counsel

**MARY ANN FLYNN**  
Chief Counsel

**JAMES R. DRYSDALE**  
Acting Deputy Chief Counsel

**LANCE STEAHLY**  
Appellate Attorney  
U.S. Department of Veterans Affairs  
Office of the General Counsel (027H)  
810 Vermont Avenue, N.W.  
Washington, D.C. 20420  
(202) 632-6809

Attorneys for Appellee

---

---

**TABLE OF CONTENTS**

I. ISSUE PRESENTED.....1

II. STATEMENT OF THE CASE.....2

III. ARGUMENT.....4

    A. The Board Provided an Adequate Statement of Reasons or Bases Finding That Evidence Received Since the Final November 2005 Board Decision is Not New and Material.....5

    B. The September 2015 Board decision finding no CUE in the November 17, 2005 Board decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or unsupported by adequate reasons or bases.....12

IV. CONCLUSION.....16

## TABLE OF AUTHORITIES

### CASES

<i>Barr v. Nicholson</i> , 21 Vet.App. 303 (2007) .....	11
<i>Bostain v. West</i> , 11 Vet. App. 124 (1998) .....	9, 10
<i>Bowen v. Shinseki</i> , 25 Vet.App. 250 (2012) .....	15
<i>Dolan v. Brown</i> , 9 Vet.App. 358 (1996) .....	5
<i>Evans v. McDonald</i> , 27 Vet.App. 180 (2014) .....	13
<i>Fountain v. McDonald</i> , 27 Vet. App. 258 (2015) .....	10
<i>Gilbert v. Derwinski</i> , 1 Vet.App. 49 (1990) .....	4, 6
<i>Hilkert v. West</i> , 12 Vet.App. 145 (1999) .....	11
<i>King v. Shinseki</i> , 23 Vet.App. 464 (2010) .....	6
<i>Lane v. Principi</i> , 16 Vet.App. 78 (2002) .....	13
<i>Livesay v. Principi</i> , 15 Vet.App. 165 (2001) .....	5, 13
<i>Molloy v. Brown</i> , 9 Vet.App. 513 (1996) .....	9
<i>Paller v. Principi</i> , 3 Vet.App. 535 (1992) .....	9
<i>Robinson v. Shinseki</i> , 557 F.3d 1355 (Fed. Cir. 2009) .....	12, 15
<i>Russell v. Principi</i> , 3 Vet.App. 310 (1992) .....	13, 14, 15
<i>Savage v. Gober</i> , 10 Vet.App. 488 (1997) .....	10
<i>Shinseki v. Sanders</i> , 556 U.S. 396 (2009) .....	5, 12
<i>Stallworth v. Nicholson</i> , 20 Vet.App. 482 (2006) .....	12
<i>Walker v. Shinseki</i> , 708 F.3d 1331 (Fed.Cir. 2013) .....	10
<i>Woehlaert v. Nicholson</i> , 21 Vet.App. 456 (2007) .....	6, 10

**STATUTES**

38 U.S.C. § 7261(a)(3)(A) ..... 13  
38 U.S.C. § 7104(d)(1) ..... 13  
38 U.S.C. § 7261(b)(2) ..... 16  
38 USC § 5108 ..... 5

**REGULATIONS**

38 C.F.R. 3.303 ..... 13, 15  
38 C.F.R. § 20.1403 (2012) ..... 14  
38 C.F.R. § 20.1403(d) ..... 13  
38 C.F.R. § 3.156 ..... 5  
38 C.F.R. § 3.303(b) ..... *Passim*  
38 C.F.R. § 3.309(a) ..... 10

**RECORD CITATIONS**

R. at 2-15 (September 2015 Board Decision-CUE) ..... 2, 12, 13, 16  
R. at 13-23 (September 2015 Board Decision-NME) ..... *passim*  
R. at 173-226 (Private Treatment Records-Dr. Kang) ..... 4, 6, 7, 8  
R. at 360 (SMR-Aug. 5, 1964) ..... 2  
R. at 380 (SMR-Feb. 23, 1965) ..... 2  
R. at 490 (DD 214) ..... 2  
R. at 570 (VA Form 9) ..... 4  
R. at 575-90 (April 2012 SOC) ..... 4  
R. at 594 (November 2011 NOD) ..... 4  
R. at 599-602 (October 2011 rating decision) ..... 4  
R. at 612 (August 2010 CUE Motion) ..... 3, 4, 16  
R. at 623-40 (November 2005 Board Decision) ..... *passim*  
R. at 677-698 (April 2005 Board hearing) ..... 3, 8  
R. at 707-08 (March 2005 VA Addendum Opinion) ..... 3  
R. at 724 (Buddy Statement) ..... 7  
R. at 768-77 (February 2005 VA Exam) ..... 2, 3  
R. at 789-92 (June 2004 VA Exam) ..... 3  
R. at 1096 (December 2002 Dr. Malpass Letter) ..... 3, 7, 8  
R. at 1185 (Post-service Medical Record) ..... 2

R. at 1188 (May 1972 Medical Record) .....	2
R. at 1581-82 (June 1977 Rating Decision) .....	2
R. at 1599-1601 (Post-service Medical Record) .....	2
R. at 1735-49 (October 2014 Board Hearing) .....	4

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

<b>ROBERT H. PATTON,</b>	)	
	)	
Appellant,	)	
	)	
v.	)	Vet.App. No. 15-4227
	)	
<b>ROBERT A. MCDONALD,</b>	)	
Secretary of Veterans Affairs	)	
	)	
Appellee.	)	

---

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

---

**BRIEF OF THE APPELLEE  
SECRETARY OF VETERANS AFFAIRS**

---

**I. ISSUE PRESENTED**

Whether the Court should affirm the September 3, 2015, Board of Veterans' Appeals (Board or BVA) decision that found new but not material evidence had been received when it denied a motion to reopen a claim for entitlement to service connection for a back disorder, which Appellant has not demonstrated is clearly erroneous.

Whether the Court should affirm the September 3, 2015, Board decision that found there was no clear and unmistakable error (CUE) in the November 17, 2005, decision of the Board of Veterans' Appeals (Board) denying entitlement to service connection for a low back disorder, which Appellant has not

demonstrated is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or unsupported by adequate reasons or bases.

## **II. STATEMENT OF CASE**

Appellant appeals the two Board decisions of September 3, 2015, that found new but not material evidence had been received when it denied a motion to reopen a claim for entitlement to service connection for a back disorder and found there was no CUE in the November 17, 2005, decision of the Board of Veterans’ Appeals (Board) denying entitlement to service connection for a low back disorder. [Record (R.) at 2-11, 13-23]. Because Appellant has not demonstrated that the Board’s decisions are clearly erroneous, “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or unsupported by adequate reasons or bases or the product of prejudicial error, the Court should affirm them.

Appellant served on active duty from March 1963 to March 1965. [R. at 490]. Appellant was seen for muscle spasms and a lumbar strain in August 1964, September 1964, and February 1965. [R. at 360, 380, 776]. Post-service, he was treated for a lumbar strain in December 1966 and reinjured his back in 1972 and 1973. [R. at 1185, 1188, 1599-1601].

Appellant’s 1977 claim for entitlement to service for a back disorder was denied for lack of a current disability. [R. at 1581-82]. The 1977 rating decision was final. [R. at 629 (623-40)]. After submitting an application to reopen the claim in January 2001, Appellant submitted a December 2002 letter from his

physician, Dr. Malpass, among other evidence. [R. at 1096]. Appellant underwent VA examinations in June 2004 and February 2005, with an addendum opinion issued in March 2005. [R. at 707-08, 768-77, 789-92]. The February 2005 VA examiner found that Appellant was seen three times in service for back pain, but had a normal back in 1965 at separation and opined that Appellant's current back disorder was not related to service. [R. at 768-77].

Appellant testified at an April 2005 Board hearing. [R. at 677-698]. In a November 2005 decision, the Board reopened the claim of entitlement to service connection for a back disorder, but found that a back disorder was not incurred or aggravated during Appellant's service. [R. at 623-40]. The 2005 Board found a February 2005 VA opinion to be highly probative. [R. at 639 (623-401)]. Appellant did not seek appeal to the U.S. Court of Appeals for Veterans Claims, nor did he seek reconsideration, and the November 2005 Board decision became final. [R. at 18 (13-23)].

In September 2010, Appellant alleged CUE in the November 2005 Board decision. [R. at 612]. Appellant alleged that the Board, in its November 2005 decision, "failed to recognize" that he, within nine months from service discharge, injured his back in December 1966 (lumbosacral strain), and that this was the same condition that he was treated for in service in 1965. [R. at 612]. He points out that he sought and was treated for a back condition within one year of release from active duty; this condition was more likely than not due to the first treatment in 1965 and thus contributed to his work-related injury in 1966. [R. at

612]. The evidence received after the November 2005 Board decision includes private treatment records, principally June 2013 and September 2014 letters from Dr. Kang, in support of his claim to reopen. [R. at 174-75 (173-226)].

An October 2011 rating decision found a revision to the previous decision denying service connection for a back disorder was not warranted because the evidence submitted was not new and material and found no CUE. [R. at 599-602]. Appellant submitted his Notice of Disagreement in November 2011 [R. at 594]. An April 2012 Statement of the Case continued to find new and material evidence was not submitted and found no CUE. [R. at 575-90].

At a 2014 Board hearing, Appellant testified that he injured his back in the Navy and that the in-service injury has bothered him continuously. [R. at 1742 (1735-49)]. He also testified that he reinjured his back post-service. [R. at 1742 (1735-49)].

Appellant filed his VA Form 9 in April 2012. [R. at 570]. The Board issued two the decisions of September 3, 2015. [Record (R.) at 2-11, 13-23]. This appeal followed.

### **III. ARGUMENT**

The Court should affirm the two Board decisions of September 3, 2015, that found new but not material evidence had been received when it denied a motion to reopen a claim for entitlement to service connection for a back disorder, which Appellant has not demonstrated is clearly erroneous, See *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990); and found that found there was

no clear and unmistakable error (CUE) in the November 17, 2005, Board decision denying entitlement to service connection for a low back disorder, which Appellant has not demonstrated is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or unsupported by adequate reasons or bases. *Livesay v. Principi*, 15 Vet.App. 165, 174 (2001). Appellant has not demonstrated that the Board committed prejudicial error that would warrant any action by the Court other than affirmance. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009) (explaining that the burden of demonstrating prejudice normally falls upon the party attacking the agency’s determination).

**A. The Board Provided an Adequate Statement of Reasons or Bases Finding That Evidence Received Since the Final November 2005 Board Decision is Not New and Material**

In a September 2015 decision, the Board found that the November 2005 decision was final and that evidence received since then is new, but not material. [R. at 19 (13-23)]. The Board found the new evidence is cumulative and does not substantiate that the Veteran’s back disability had its onset during active military service. [R. at 19 (13-23)].

When a claim is denied and the claimant fails to initiate and perfect a timely appeal, the decision denying the claim becomes final. *Dolan v. Brown*, 9 Vet.App. 358, 361 (1996). A claim that has been finally decided and disallowed will be reopened only if new and material evidence is presented or secured. 38 USC § 5108; 38 C.F.R. § 3.156. Evidence is new if it was not previously

submitted. Evidence is material if “either by itself, or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim.” *King v. Shinseki*, 23 Vet.App. 464, 467 (2010). New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim. *Woehlaert v. Nicholson*, 21 Vet.App. 456, 461 (2007). A determination that new and material evidence has not been submitted is reviewed under the clearly erroneous standard. *Sauviso v. Nicholson*, 19 Vet.App. 532, 533 (2006); see *Gilbert*, 1 Vet.App. at 52-53 (1990) (finding of fact is not clearly erroneous if there is a plausible basis for it in the record).

In the decision on appeal, the Board found the new evidence submitted after the 2005 Board decision consisted of private treatment records, principally two letters from Dr. Kang. [R. at 19 (13-23)]. In a June 2013 letter, Dr. Kang wrote that based on his review of the record that it was his belief that Appellant injured his back “in the 1960s.” [R. at 174-75]. In a September 2014 letter, Dr. Kang wrote that it “appears” Appellant has a longstanding history of recurrent back injuries since the 1960s. [R. at 174-75]. He noted both the in-service low back pain complaints in 1964 and 1965 and the post-service diagnoses in 1966 and 1972. [R. at 174-75]. Dr. Kang stated that Appellant continued to have back problems, which resulted in five lumbar laminectomy surgeries. [R. at 174-75]. Dr. Kang concluded Appellant was disabled and unable to participate in gainful

employment. [R. at 174-75]. The treatment records show that the Veteran still has a low back disability. [R. at 174-75].

The Board, in the decision on appeal, found the additional evidence new, but not material, because it does not show the Veteran's back disability had its onset during active military service, and thereby fails to raise a reasonable possibility of substantiating the claim even when considered with the earlier evidence of record. [R. at 19 (13-23)]. The Board declined to reopen the claim finding new and material evidence had not been received. [R. at 19 (13-23)].

Appellant argues the Board's reasons or bases is inadequate because the evidence raised the theory of continuity of symptomatology and the Board failed to discuss this theory or 38 C.F.R. § 3.303(b). To the extent that Appellant is attempting to relitigate the 2005 Board decision by arguing that previously submitted evidence, namely a buddy statement and a 2002 letter from Dr. Malpass, suggests continuity of symptomatology, such evidence was before the Board at the time of its 2005 decision and his argument is foreclosed by the finality of the finality of 2005 Board decision. AB at 6-7 [R. at 724, 1096]. Appellant argues that the new evidence, consisting largely of a letter from Dr. Kang, in conjunction with his testimony at the 2014 Board hearing, is evidence relating to continuity of symptomatology. SOI at 4. [R. at 174-75].

However, as Appellant concedes, his testimony at the 2014 Board hearing is duplicative of the of his 2004 RO hearing, which the Board considered in its 2005 decision. AB at 7. See November 2005 Board decision [R. at 634 (623-

40)], *cf.* October 2014 Board hearing 1742 (1735-49)] and April 2005 Board hearing. [R. at 679, 691 (677-98)]. New and material evidence can be neither cumulative nor redundant. In both instances, Appellant testified that a large swell hit the ship and caused him to fall and that he continued to have back problems and that his work injuries worsened his existing back problem. Appellant also testified to the effect at his 2005 Board hearing. [R. at 679, 691 (677-98)].

Appellant argues that Dr. Kang's opinion that he "appears" to have had a "long standing history of recurrent back injuries since the 1960s" is new and material because it relates to an unestablished fact necessary to substantiate his claim. AB at 8. See Dr. Kang's September 2014 letter [R. at 175]. Appellant argues, in other words, that Dr. Kang's letter provides evidence sufficiently "connecting [Appellant's] symptoms to his noted, inservice injuries and his post service symptoms." AB at 8.

Appellant argues Dr. Kang's letter corroborates the 2002 letter from Dr. Malpass, that was considered and discussed in the final 2005 Board decision. AB at 8. See December 2002 letter from Dr. Malpass [R. at 1096]. As an initial matter, Appellant's complaint that that the 2005 Board decision fails to discuss Dr. Malpass' December 2002 letter is not supported by the record. AB at 8. The 2005 decision found Dr. Malpass' letter speculative and equivocal, and does little more than propose that it is possible that Appellant has a back disorder due to trauma in service. [R. at 638 (623-40)]. AB at 8. The 2005 Board decision

accorded Dr. Malpass' December 2002 letter less probative value than the 2005 VA opinion. [R. at 639 (623-40)].

The Court has held that a medical opinion submitted after a final disallowance of a claim, which is corroborative of a favorable medical opinion previously considered by the Board as part of a final disallowance, can serve as new and material evidence. See *Bostain v. West*, 11 Vet. App. 124, 128 (1998) (citing *Molloy v. Brown*, 9 Vet.App. 513, 515–17 (1996); *Paller v. Principi*, 3 Vet.App. 535, 538 (1992)). “Corroborate” means “[t]o strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence.” *Bostain*, 11 Vet. App. at 128. Dr. Kang’s letters are merely cumulative of earlier evidence already considered by the Board in its November 2005 decision, to include Dr. Malpass’ letter which was found to be speculative and equivocal. [R. at 19 (13-23)]. On their face, Dr. Kang’s letter only relate an “apparent” history of back injuries going back to the “1960’s” and are no more definitive than the speculative opinion rendered by Dr. Malpass, which Appellant claims Dr. Kang’s letters corroborate. The Board found that Dr. Kang does not relate the current low back disorder to service, but rather provides a sequence of events from the in-service complaints of low back pain in service and the post service injuries and concludes that the Veteran is disabled and cannot work. [R. at 19 (13-23)]. At no time does Dr. Kang state that the current back disorder is related to service. [R. at 19 (13-23)]. The Board concluded that even when considering the newly-submitted evidence together with the previous evidence of record, the evidence

does not raise a reasonable possibility of substantiating the Veteran's claim of service connection for a back disability. [R. at 19 (13-23)]. Dr. Kang's letter does not add weight or credibility to Dr. Malpass' letter by additional and confirming facts or evidence, and therefore cannot be corroborative. See *Bostain*, 11 Vet. App. at 128. Therefore, Dr. Kang's letter cannot be new and material evidence because there is no reasonable possibility that the opinion could change the outcome of the appellant's claim on the merits. See *Woehlaert*, 21 Vet.App. at 461.

Arguendo, even if Dr. Kang's letter is new and material, it fails to show a nexus. See *Savage v. Gober*, 10 Vet.App. 488, 497-98 (1997). (that notwithstanding the Veteran's showing of postservice symptomatology, the question of whether his arthritis was related to his in-service fall was a question of etiology requiring medical expertise). Stated differently, Appellant is competent to report experiencing the same symptoms since service but is not competent to opine as to the etiology of his symptoms or his current condition. For chronic diseases listed in 38 C.F.R. § 3.309(a), service connection may be established by showing continuity of symptoms, which requires a claimant to demonstrate (1) a condition "noted" during service; (2) evidence of post-service continuity of the same symptoms; and (3) medical or, in certain circumstances, lay evidence of a nexus between the present disability and the post-service symptoms. 38 C.F.R. § 3.303(b). *Fountain v. McDonald*, 27 Vet. App. 258, 263-64 (2015) (citing *Walker v. Shinseki*, 708 F.3d 1331, 1339-40 (Fed.Cir. 2013)).

To the extent Appellant argues that his arthritis is a chronic disease and his assertions of continuous back pain since discharge establish continuity of symptomatology in lieu of medical nexus, see *Barr v. Nicholson*, 21 Vet.App. 303, 307 (2007) (noting that continuity of symptomatology is an alternative way to establish medical nexus), the Board must still weigh the statements of continuity of symptomatology against other evidence of record, including negative medical nexus opinions. The Board considered that the opinion of the 2005 VA examiner had been found most probative and found that Appellant's back disorder was less likely than not related to an incident in service and also noted that Appellant's service separation examination was normal. [R. at 18]. The Board found Dr. Kang's letters new but not material as they were merely cumulative of other evidence, including the lay evidence of symptoms since service, that had been outweighed. Significantly, 2004 and 2005 VA opinions noted that three complaints of back pain in service were documented as sprains that resolved and that Appellant had a normal back when examined for separation. [R. at 633, 639 (623-40)]. The Board considered such evidence and the Appellant's newly submitted evidence from Dr. Kang does not relate to that finding. Neither Appellant nor the record demonstrates that the Board's weighing of the evidence is clearly erroneous. See *Hilkert*, 12 Vet.App. 145, 151 (1999). As noted above, the Board determined that Dr. Kang's letter does not provide a medical nexus or otherwise specifically address whether Appellant's reported symptoms are related to service but simply provides a sequence of events from the in-service

complains of low back pain and the post-service injuries and concludes that Appellant is disabled and cannot work. [R. at 19 (13-20)]. Appellant, therefore, fails to establish prejudicial error. See *Sanders, supra*.

**B. The September 2015 Board decision finding no CUE in the November 17, 2005 Board decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or unsupported by adequate reasons or bases.**

The Board correctly determined that 2005 Board decision did not contain CUE and that Appellant’s CUE argument is equivalent to a disagreement with the weighing of the evidence in the 2005 Board decision. [R. at 7 (2-15)]. 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). In order to establish CUE in a final decision of an RO or the Board, an appellant must show that (1) either the facts known at the time of the decision being attacked were not before the adjudicator or that the law then in effect was incorrectly applied, (2) an error occurred based on the record that existed at the time, and (3) had the error not been made, the outcome of the decision would have been “manifestly different.” *Stallworth v. Nicholson*, 20 Vet.App. 482, 487 (2006). The standard is demanding and the alleged error must be undebatable and not merely a disagreement with how the facts were

weighed or evaluated. *Evans v. McDonald*, 27 Vet.App. 180, 185 (2014); see also 38 C.F.R. § 20.1403(d). The Court's review 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). The Court must affirm if the Board articulates a satisfactory explanation for its decision, which includes a rational connection between the facts found and the CUE determination. *Lane v. Principi*, 16 Vet.App. 78, 83 (2002), *aff'd* 339 F.3d 1331 (Fed.Cir.2003).

Appellant now asserts that he alleged in his request to reopen that the Board committed clear and unmistakable error in the November 2005 decision when it failed to apply 38 C.F.R. § 3.303(b) and that Board, in the decision on appeal, incorrectly applied 38 C.F.R. 3.303 by failing to take into consideration subsection (b). AB at 10. The Board considered Appellant' request for revision based upon CUE based upon the argument as Appellant put forth below and found that it amounted to a disagreement with the weight the Board assigned to the evidence in the 2005 decision. [R. at 8 (13-23)]. See *Russell v. Principi*, 3 Vet.App. 310, 314 (1992) (an appellant must assert more than a disagreement as to how the facts were weighed or evaluated). See also *Evans v. McDonald*, 27 Vet.App. 180, 185 (2014) (An argument that the Board improperly weighed the evidence can never rise to the stringent definition of CUE). The Board found no CUE in the 2005 Board decision. [R. at 8 (2-11)].

The Board in 2005 discussed the positive and negative evidence and found persuasive VA medical opinions from 2004 and 2005 that noted three complaints of back pain in service were documented as sprains that resolved and that Appellant had a normal back when examined for separation, with no subjective or objective complaints of chronic or acute back problems. [R. at 633, 639 (623-40)]. Because § 3.303(b) is predicated on a chronic disease shown during service, and the 2005 Board found that Appellant did not suffer from a chronic back disorder during service, § 3.303(b) was not for application, and the Board consequently did not err in failing to apply it and Appellant was not prejudiced. See *Sanders, supra*. Notably, § 3.303(b) expressly cites as an example of what the “rule does not mean” is that “any manifestation of joint pain . . . will permit service connection of arthritis. . . .”

Arguendo, even if the Board provided an inadequate statement regarding 38 C.F.R. § 3.303(b), no prejudicial error occurred. See *Sanders, supra*. Appellant’s argument regarding prejudicial error relies on the belief that had the 2005 Board explicitly considered continuity of symptomatology under § 3.303(b), the evidence before the 2005 Board undeniably warranted granting service connection. Such a belief does not compel the “conclusion to which reasonable minds could not differ, that the result would have been manifestly different but for the error,” because the underlying premise that the evidence proves continuity of symptomatology is easily debatable. 38 C.F.R. § 20.1403 (2012); see *Russell v. Principi*, 3 Vet.App. 310, 313–14 (1992) (en banc) (with CUE, the alleged error

must be “undebatable,” not merely a “disagreement as to how the facts were weighed or evaluated”). Even if the Board in its 2005 decision had erred in its application of § 3.303(b), Appellant’s contentions do not establish a basis for CUE because he has not demonstrated how any of the asserted errors, had they not been made, would have been outcome determinative. *See Russell, supra*. Even if one could conclude that Appellant’s contentions of § 3.303 error are correct, he has not demonstrated how the correction of such errors would have entitled him to an award of service connection.

Appellant’s asserts alternatively that the Board lacked jurisdiction over the CUE motion because it does not contain non-specific allegations of error. AB at 12. A claimant arguing CUE bears the burden of presenting specific allegations of error in a prior decision. *Robinson v. Shinseki*, 557 F.3d 1355, 1360 (Fed. Cir. 2009). “Although ... the requirement to sympathetically read the pleadings of a pro se claimant applies to pleadings that might constitute a request for revision based on CUE, a claimant nevertheless must indicate an intent to seek revision and state what constitutes CUE with some degree of specificity.” *Bowen v. Shinseki*, 25 Vet.App. 250, 255 (2012). The Board restated Appellant’s request for revision based upon CUE in its 2015 decision:

The Veteran avers that the [2005] Board “failed to recognize” that his injury in December 1966 was the “same condition” that he was treated for in service in 1965; therefore, he argues, the Board should have found that his back disability had its onset in service.

[R. at 8 (13-23)]; see CUE motion [R. at 612]. Appellant made his intention to seek revision clear when he specifically stated, “[T]here has [sic] been several Clear and Unmistakable Errors concerning the final RO and BVA decisions.” [R. at 612]. His allegation was sufficiently specific: the 2005 Board decision failed to recognize that his post-service treatment in December 1966 for lumbosacral strain, and apparently an eventual herniated disc, is associated with his treatment in 1965. [R. at 612]. Although Appellant now takes issue with the math he presented in his CUE Motion, the Board correctly found that Appellant’s arguments alleged CUE with the requisite specificity. [R. at 6 (2-11)].

#### **IV. CONCLUSION**

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 right to address same if the Court deems it necessary or advisable for its decision. 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).

Wherefore, for the foregoing reasons, Appellee, Robert A. McDonald, Secretary of Veterans Affairs, respectfully urges the Court to affirm the two Board decisions of September 2015 that found new, but not material evidence had been received when it denied a motion to reopen a claim for entitlement to service connection for a back disorder and that found there was no CUE in the

November 17, 2005, Board decision denying entitlement to service connection  
for a low back disorder

Respectfully submitted,

**LEIGH A. BRADLEY**  
General Counsel

**MARY ANN FLYNN**  
Chief Counsel

/s/ James R. Drysdale  
**JAMES R. DRYSDALE**  
Acting Deputy Chief Counsel

/s/ Lance Steahly  
**LANCE STEAHLY**  
Appellate Attorney  
Office of the General Counsel (027H)  
U.S. Dept. of Veterans Affairs  
810 Vermont Avenue, N.W.  
Washington, DC 20420  
(202) 632-6809  
lance.steahly@va.gov

Counsel for the Secretary of  
Veterans Affairs