REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

18-7265

DEMETRIUS L. SMITH,

Appellant

v.

ROBERT L. WILKIE
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Record Before the Agency

APPELLANT'S REPLY ARGUMENTS

In the pleadings before the Board, Mr. Smith explicitly alleged that the 1988 rating decision was the product of CUE because "the reduction of [the] left knee evaluation" was erroneous, and "the evidence of record at the time of the decision clearly displays the veteran's knee condition was symptomatic." R-2320; *see also* R-53-54; R-127. These contentions raised three theories of CUE: (1) the RO failed to apply the extant regulations governing rating reductions; (2) the RO misinterpreted and misapplied DC 5259, which required only that the knee be "symptomatic;" and (3) the RO did not misinterpret the DC, but made the erroneous factual finding that the knee was not "symptomatic." *See* Appellant's Br. at 17-18, 24-25, 26-27. The Board adjudicated each of these theories, concluding that "the contention is that the 10 percent rating should not have been reduced," that it could not "say that the Veteran's left knee clearly and unmistakably was symptomatic," and that "[r]easonable minds could differ on weighing the evidence that improvement was affirmatively shown." R-12-13.

The Secretary concedes that the pleadings raised the theory that the RO made an erroneous factual finding that the left knee was not symptomatic. *See* Secretary's Br. at 9 ("These submissions . . . show that Appellant previously contended that the December 1987 VA examination shows subjective and objective evidence that his left knee was symptomatic . . . ."); *see also* Secretary's Br. at 10, 11, 12, 13, 14. However, he

maintains that the Board correctly found that the 1988 RO did not commit CUE in that respect. Secretary's Br. at 14-16. In addition, he argues that "[t]he CUE allegations about the misapplication of law raised in Appellant's brief were not raised or adjudicated below." Secretary's Br. at 8. For the following reasons, the Court should reject the Secretary's argument and reverse—or at the very least, vacate—the Board's decision.

I. The Court should reject the Secretary's argument in defense of the Board's conclusion that the facts before the 1988 RO did not demonstrate clearly and unmistakably that the left knee was "symptomatic."

Mr. Smith argued in his initial brief that the Board erred in finding no CUE in the 1988 RO decision because to the extent that the RO made the *factual* finding that the December 1987 VA examination report did not show that the left knee was symptomatic, its finding was undebatably erroneous. Appellant's Br. at 26. And an adjudicator's erroneous factual finding can be the basis of CUE. *See Simmons v. Wilkie*, 30 Vet.App. 267, 274 (2018).

The Secretary responds that "Appellant's CUE theory was . . . merely 'a disagreement with how the facts were weighed or evaluated.'" Secretary's Br. at 16 (citing *Russell v. Principi*, 3 Vet.App. 310, 313-14 (1992)); *see also* Secretary's Br. at 15. But as argued in Mr. Smith's initial brief, in finding that the left knee was not "symptomatic," the 1988 RO could not possibly have weighed any evidence, because there was no negative evidence in the record. Appellant's Br. at 26. Rather, the

December 1987 examination showed that he continued to suffer from limitation of flexion and tenderness, and that he had developed the new symptom of an audible "clicking" when he walked. R-2433. In other words, there was no evidence in 1988 that Mr. Smith did *not* suffer any left knee symptoms against which the RO could have weighed the December 1987 findings. *Cf. Evans v. McDonald*, 27 Vet.App. 180, 187-88 (2014) (affirming the Board's finding that it was not undebatable that the veteran was unemployable when there was evidence weighing against such a finding).

Although, as the Secretary points out, the Board noted that the 1987 examination did not show swelling or abnormality on imaging, Secretary's Br. at 19, neither did the September 1985 MEB report upon which the initial 10 percent rating was based. *See* R-1198-1200; R-2446-48. The lack of such symptoms could not demonstrate that there were *no* symptoms in light of the findings of limited flexion, tenderness, and "clicking." R- 2433. The RO's finding that the knee was no longer symptomatic was therefore clear and unmistakable error. *See Simmons*, 30 Vet.App. at 274.

The Secretary next argues that because the 1988 rating board included a doctor, the Board properly "declined to interfere with the decision of a rating board consisting of a medically competent member." Secretary's Br. at 16. But a medical doctor's participation on a rating board does not immunize a rating decision from CUE. It was a medical doctor—the 1987 VA examiner—who identified the flexion reduced to 130 degrees, tenderness, and an audible "clicking" sounds. *See* R-2433. As

argued in Mr. Smith's initial brief, no reasonable fact finder, regardless of his or her qualifications, could find that these were not left knee *symptoms*. Appellant's Br. at 26;[1] *Joyce v. Nicholson*, 19 Vet.App. 36, 48 (2005) (holding that the Board erred in finding that the RO had not committed CUE because "no reasonable fact finder" could have reached the same conclusion as the RO). The Secretary cannot deny the existence of the symptoms, and his attempt to shield the RO's factually erroneous finding that he did not have such symptoms should be rejected.

As a result, the Court should reject his defense of the Board's decision, reverse its conclusion that the 1988 rating decision was not the product of CUE, and order the Secretary to revise the decision to reflect that the 10 percent rating under DC 5259 was continued. *See* 38 C.F.R. § 3.105(a)(1)(ii) (2019). At the very least, the Court should vacate the Board's decision for the Board to provide an adequate statement of reasons or bases for its finding. 38 U.S.C. § 7104(d)(1).

II. Alternatively, the Court should reject the Secretary's unduly narrow view of the Veteran's CUE pleadings and the Board's decision and reverse the Board's conclusion that the 1988 RO did not commit CUE by failing to apply or misapplying the extant regulations.

In addition to the theory that the 1988 RO's factual finding that the left knee was not symptomatic was clearly and unmistakably erroneous, Mr. Smith's

[1] Mr. Smith mistakenly stated in this part of the initial brief that the December 1987 VA examination revealed limitation of flexion to 135 degrees. Appellant's Br. at 26. In fact, the examination report reveals that flexion was limited to 130 degrees. R-2433. Counsel apologizes to the Secretary and the Court for the oversight.

submissions to the RO and the Board raised the theories that (1) the RO failed to apply the extant regulations governing rating reductions; and (2) the RO misinterpreted and misapplied DC 5259, which required only that the knee be "symptomatic." R-2320; *see also* R-53-54; R-127. As argued in his initial brief, he did not cite the applicable regulations governing rating reductions, nor state explicitly that "the . . . regulatory provisions extant at the time were incorrectly applied . . . ." *See* Appellant's Br. at 17-18; *Bouton v. Peake*, 23 Vet.App. 70, 71 (2008). But the Board's duty to liberally and sympathetically construe a pro se veteran's CUE pleadings requires it "to infer the appropriate authority based upon a claimant's description of the factual basis of his CUE motion . . . ." *Acciola v. Peake*, 22 Vet.App. 320, 327 (2008); *see* Appellant's Br. at 18.

A. Mr. Smith's pleadings before the agency sufficiently raised the theory that the 1988 RO failed to correctly apply the rating reduction regulations, and the Court should reverse the Board's decision that the 1988 decision did not contain CUE.

The Secretary ignores this well-established tenant and argues that Mr. Smith's pleadings did not raise the theory that the Board erred in failing to apply the regulations governing rating reductions. He contends that the Veteran's "generalized assertion that January 1988 RO [sic] erred in reducing his rating" could not "encompass[] every regulation that pertains to reductions of ratings that have been in effect fewer than five years," because he "never referenc[ed] these regulations." Secretary's Br. at 11. The Secretary does not and cannot explain why it would be unreasonable for the Board to infer those regulations, as required under *Acciola*, from

Mr. Smith's statements that "[t]he *reduction* of [his] left knee evaluation . . . is a [c]lear and [u]nmistakable error," (R-2320 (emphasis added)), that the "decision to *reduce* [his] benefits from 10% to 0% was erroneous," (R-127 (emphasis added)), and that "the 10 percent evaluation should have been maintained and not *reduced*," (R-54 (emphasis added)). *See* 22 Vet.App. at 327.

In this respect, the facts of this case are distinguishable from *Acciola*, where the claimant argued before the agency only that VA committed CUE in failing to award presumptive service connection, but argued before the Court that the failure to award direct service connection was CUE. *See* 22 Vet.App. at 327. In that case, it would have been unreasonable for the Board to have anticipated and adjudicated the direct service connection error. *See id.* However, here, it is entirely reasonable for the Board to understand from Mr. Smith's submissions that he believed the January 1988 RO to have failed to follow the law when it reduced his 10 percent rating. *See* R-54; R-127; R-2320.

The facts of this case are therefore similar to those in *Jordan v. Principi*, where the Court agreed that the veteran's CUE pleadings before the agency sufficiently raised the theory argued at Court. 17 Vet.App. 261, 270-71 (2003). There, the veteran argued before the Court that VA had committed CUE in failing to correctly apply the presumption of soundness under 38 U.S.C. § 1111, but did not cite that statute in his pleadings to the agency. *Id.* at 270. The Court held that the failure to cite the pertinent statute was not "sufficient to deny him, on the basis that he has

raised a new CUE claim, jurisdiction to obtain review in this Court . . . ." *Id.* By citing the pertinent statute in his appellate pleadings" the veteran "merely place[d] this argument within the rubric of the statutory framework but d[id] not alter the essential nature of what he argued to the Board." *Id.* "[H]is rephrasing of his CUE argument still m[et] the requirement that he allege error with 'some degree of specificity.'" *Id.*

Likewise, here, Mr. Smith argued all along that the 1988 RO committed clear and unmistakable error when it reduced his rating. R-54; R-127; R-2320. Indeed, the Board explicitly acknowledged that "the contention is that the 10 percent rating should not have been reduced" (R-11), and adjudicated whether "improvement was affirmatively shown" (R-13). In providing citations to the pertinent regulations in his initial brief before this Court, Mr. Smith merely placed the argument in the rubric of the regulatory framework. *See Jordan*, 17 Vet.App. at 270. The Court should reject the Secretary's argument to the contrary.

The Secretary does not argue that the January 1988 RO correctly applied the rating reduction regulations, or that the failure to do so was not the product of CUE. Rather, he suggests that if the Court agrees that the theory was reasonably raised, it should vacate—rather than reverse—the Board's decision because "the RO and the Board did not have the opportunity to adjudicate th[is] theor[y] of CUE." Secretary's Br. at 13.

But as Mr. Smith argued in his initial brief, the Board adjudicated this theory of CUE when it undertook the inquiry of whether it was undebatable that his left knee

disability did not show "affirmative improvement." R-13; Appellant's Br. at 13. The problem with the Board's analysis is not that it failed to adjudicate the theory, it is that it found there was no CUE despite the *RO's* failure to apply the regulations and concluded that "affirmative improvement" was the correct standard. R-13. As argued in Mr. Smith's initial brief, the correct standard is whether there was *actual improvement under the ordinary conditions of life and work*. *See* 38 C.F.R. § 4.13 (1987); *Brown v. Brown*, 5 Vet.App. 413, 421 (1993); Appellant's Br. at 13.

The Secretary also argues that reversal is not the appropriate remedy because the Board did not conclude that the reduction regulations did not apply in 1988, but he does not and cannot argue that the Board otherwise applied the regulations correctly. Secretary's Br. at 14. Accordingly, the Court should reverse the Board's decision that there was no CUE in the 1988 RO decision, because the latter is *void ab initio* for the RO's failure to apply the rating reduction regulations. *See Sorakubo v. Principi*, 16 Vet.App. 120, 124 (2002).

B. The Veteran's pleadings before the agency sufficiently raised the theory that the RO's misinterpretation of DC 5259 was CUE, and the Court should reverse the Board's conclusion to the contrary.

Although Mr. Smith consistently argued before the agency that he was entitled to a 10 percent rating under DC 5259 because his left knee remained symptomatic, the Secretary argues that the Veteran did not sufficiently raise the issue of whether the RO misapplied that DC. *See* Secretary's Br. at 12. But Mr. Smith argued that the 1988 RO committed CUE because his "knee condition was symptomatic, thus warranting a

10 percent evaluation" (R-2320), and that the December 1987 examination "should have been interpreted as symptomatic . . . ." R-53. Although he did not use the word "misinterpretation" or argue explicitly that DC 5259 "w[as] incorrectly applied," he was not required to do so. Rather, as argued in Section II.a, *supra*, the Board is required to infer the appropriate legal authorities. *See Acciola*, 22 Vet.App. at 327. Mr. Smith's argument put the Board on sufficient notice that he disagreed with the manner in which the 1988 RO applied DC 5259 and therefore satisfied the requirement that he plead the error with "some degree of specificity." *See Jordan*, 17 Vet.App. at 271. The Secretary's insistence that Mr. Smith was required to cite any certain authority or articulate a sophisticated legal argument is inconsistent with this Court's case law. *See id.* at 270-71; *Acciola*, 22 Vet.App. at 237.

The Secretary does not and cannot argue that the 1988 RO correctly interpreted the DC 5259 when it interpreted "symptomatic" to mean anything more than "displaying symptoms." He argues that remand is required for the Board to address the issue in the first instance (Secretary's Br. at 13), but the Board explicitly found that it could not "say that the Veteran's left knee clearly and unmistakably was symptomatic based on the facts that were before the rating board at the time of the January 1988 rating decision." R-12-13. And as argued in Mr. Smith's initial brief and further above, the facts did not support this conclusion under any interpretation of "symptomatic." Appellant's Br. at 23-27. The Court should therefore reverse the

Board's finding that the January 1988 rating decision did not contain CUE for failure to apply DC 5259 correctly.

CONCLUSION

The 1988 RO made an erroneous factual finding that Mr. Smith did not have any knee symptoms, and that error was outcome-determinative. The Secretary has not and cannot point to any evidence before the RO that would have made it even *debatable* that Mr. Smith suffered from left knee symptoms at the time of the 1988 rating decision that reduced his rating under DC 5259. The Court should therefore reverse the Board's conclusion that there was no CUE in the 1988 rating decision because it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. At the very least, the Court should vacate the Board's decision and remand the matter for the Board to issue a new decision applying the correct facts and law.

The Board's finding that there was no CUE in the January 1988 rating decision also overlooked that the RO failed to correctly apply the regulations governing rating reductions and misinterpreted and misapplied DC 5259. The Secretary's argument that Mr. Smith did not adequately plead and the Board did not adjudicate these theories is inconsistent with this Court's caselaw and the Board decision itself. As the Secretary has not otherwise offered a defense to the Board's decision finding no CUE on these bases, the Court should reverse its decision and order the Secretary to revise the January 1988 rating decision to reflect that the 10 percent rating under DC 5259

was continued. Alternatively, it should vacate the Board's decision and remand the matter for the Board to provide an adequate statement of reasons or bases for its finding that the January 1988 RO did not commit CUE.

Respectfully submitted,

/s/ Amy F. Odom

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