BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE MATTER OF
ROBERTO PEREZ-SOTO
Represented by
Gordon A. Graham, Agent

Docket No. 200207-61461A
Advanced on the Docket

DATE: February 10, 2022

ORDER

The October 25, 2021, motion to revise a December 31, 2020, decision of the Board of Veterans' Affairs (Board) on the basis of clear and unmistakable error (CUE) is denied.

FINDINGS OF FACT

1. The October 2021 motion to revise a December 2020 decision on the basis of CUE contends that that decision made an undebatable error by failing to consider the provisions of 38 C.F.R. § 3.157(b)(1) (1971) and 38 C.F.R. § 3.103 (1971).

2. The December 2020 decision that is the subject of the October 2021 CUE motion addressed the issue of whether a March 1972 rating decision contained CUE.

3. There were no clear and specific arguments before the Board in December 2020 that the March 1972 rating decision clearly and unmistakably erred in its application of 38 C.F.R. § 3.157(b)(1) (1971) and 38 C.F.R. § 3.103 (1971) and that that error manifestly led to a different outcome.

CONCLUSION OF LAW

The criteria for revision of a December 2020 decision of the Board on the basis of clear and unmistakable error have not been met. 38 U.S.C. § 7111; 38 C.F.R. §§ 20.1400-1411.

REASONS AND BASES FOR FINDINGS AND CONCLUSION

This matter comes before the Board of Veterans' Appeals from an October 25, 2021, motion to revise a December 2020 Board decision on the basis of CUE.

The Board finds it useful at this point to describe the somewhat complicated procedural history that led to the December 2020 decision. The underlying benefit for this decision was service connection for hepatitis. The Veteran's current motion largely centers around the Board's treatment of a March 1972 rating decision. After multiple subsequent rating decisions denying reopening of the March 1972 decision, the Veteran submitted an additional claim for service connection in May 2014. This claim was eventually granted, and the Veteran challenged the effective date. The Board issued a September 2019 decision that denied entitlement to an earlier effective date. This Board decision included a consideration of the December 2017 motion regarding CUE in the March 1972 rating decision.

In January 2020, the Veteran's representative submitted a motion to revise the March 1972 rating decision on the basis of CUE. In that motion, the representative repeated many of the arguments that were initially brought before and considered by the September 2019 Board decision. After a VA Regional Office denied the motion, the Veteran's representative appealed the decision to the Board, which issued the December 2020 decision that is the subject of the current motion.

Shortly after the December 2020 decision, the Veteran submitted a January 2021 motion to revise the September 2019 decision on the basis of CUE. The Board dismissed the January 2021 motion in a June 2021 decision.

Entitlement to revision of a December 2020 decision of the Board on the basis of CUE.

A prior final Board decision must be reversed or revised where evidence establishes that there is CUE in the decision. 38 U.S.C. §§ 5109A, 7111; 38 C.F.R. §§ 20.1400-02. All final Board decisions are subject to revision on the basis of CUE except for those decisions which have been appealed to and decided by the United States Court of Appeals for Veterans Claims (Court) and decisions on issues which have subsequently been decided by the Court. 38 C.F.R. § 20.1400.

The motion to revise a prior final Board decision must set forth clearly and specifically the alleged clear and unmistakable error, or errors, of fact or law in the Board decision, the legal or factual basis for such allegations, and why the result would have been manifestly different but for the alleged error. Non-specific allegations of failure to follow regulations or failure to give due process, or any other general, non-specific allegations of error, are insufficient to satisfy this requirement. Motions that fail to comply with these requirements shall be dismissed without prejudice to refiling. *See* 38 C.F.R. § 20.1404 (b); *see also Disabled American Veterans v. Gober*, 234 F.3d 682 (Fed. Cir. 2000); *Simmons v. Principi*, 17 Vet. App. 104 (2003).

Motions for review of prior Board decisions on the grounds of CUE are adjudicated pursuant to the Board's Rules of Practice. 38 C.F.R. Part 20. CUE is a very specific and rare kind of error. It is the kind of error, of fact or of law, 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. *Fugo v. Brown*, 6 Vet. App. 40, 43 (1993). Generally, either the correct facts, as they were known at the time, were not before the Board, or the statutory and regulatory provisions extant at the time were incorrectly applied. Review for CUE in a prior Board decision must be based on the record and the law that existed when that decision was made. To warrant revision of a Board decision on the grounds of CUE, there must have been an error in the Board's adjudication of the appeal which, had it not been made, would have manifestly changed the outcome when it was made. If it is not absolutely clear that

a different result would have ensued, the error complained of cannot be clear and unmistakable. 38 U.S.C. § 7111; 38 C.F.R. §§ 20.1403, 20.1404.

The Court has set forth a three-pronged test to determine whether CUE is present in a prior determination: (1) either the correct facts, as they were known at the time, were not before the adjudicator (i.e., more than a simple disagreement as to how the facts were weighed or evaluated) or the statutory or regulatory provisions extant at that time were incorrectly applied; (2) the error must be "undebatable" and of the sort which, had it not been made, would have manifestly changed the outcome at the time it was made; and (3) a determination that there was CUE must be based on the record and law that existed at the time of the prior adjudication in question. *Damrel v. Brown*, 6 Vet. App. 242 (1994), *Russell v. Principi*, 3 Vet. App. 310 (1992).

Examples of situations that are not CUE include: (1) a new medical diagnosis that "corrects" an earlier diagnosis considered in a Board decision; (2) a failure to fulfill VA's duty to assist the moving party with the development of facts relevant to his claim; or (3) a disagreement as to how the facts were weighed or evaluated. *See* 38 C.F.R. § 20.1403(d). CUE also does not encompass the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a change in the interpretation of the statute or regulation. *See* 38 C.F.R. § 20.1403(e).

As an initial matter, the Board finds that the October 2021 motion to revise the December 2020 decision on the basis of CUE complies with the procedural requirements of 38 C.F.R. § 20.1404(a). Although for the reasons stated below the Board does not agree with the arguments set forth in the October 2021 motion, the Board does find that it also complies with the specificity requirements set forth at 38 C.F.R. § 20.1404(b).

The October 2021 motion makes two basic arguments in contending that the March 1972 decision erred in applying the applicable regulations in effect and that the Board therefore similarly erred in determining that the March 1972 decision did not contain CUE.

First, the motion argues that VA erred in its application of 38 C.F.R. § 3.157(b)(1) (1971). The motion contends that this regulation, which was applicable at the time of the March 1972 decision, mandated that VA accept a report of hospitalization or examination by a VA facility as a claim for VA benefits. The motion argues that just such an event occurred in September 1970 when VA received a VA Form 10-7131. The representative contends that because VA did not address this claim, it remained pending until 2017, when the Veteran was granted service connection.

In addition to its failure to treat the September 1970 VA treatment for hepatitis as a claim, the October 2021 motion argues that the VA Regional Office that adjudicated the claim also erred by adjudicating a claim of generic abdominal pain and a generic liver condition, rather than as a claim for hepatitis.

The second major argument in the motion is that VA erred in notifying the Veteran of the March 1972 rating decision. It contends that 38 C.F.R. § 3.103 (1971) was not considered and the April 1972 notice of the March 1972 rating decision was defective as a matter of law because VA had actually adjudicated a claim for entitlement to service connection for abdominal pain and a liver condition when the notice related to hepatitis.

The Board will address each argument in turn. However, at the outset, the Board must emphasize the procedural posture before the Board in 2020 that will play a central part in addressing the representative's current contentions. As noted above, that decision was the result of a motion to revise the March 1972 rating decision on the basis of CUE. Although motions to revise Regional Office decisions on this basis are not explicitly governed by 38 C.F.R. § 20.1404, which applies to motions to revise final Board decisions, the regulatory provisions governing revision of prior final decisions based on CUE also enumerate specific filing requirements for CUE motions.

More specifically, a CUE motion must be in writing, signed by the requesting party or that party's authorized representative, and include the name of the claimant, the applicable VA file number, and the date of the decision to which the request relates. 38 C.F.R. § 3.105(a)(vii)(A). The request must also set forth clearly and specifically the alleged clear and unmistakable error, or errors, of factor or law in

the prior decision, the legal or factual basis for such allegations, and why the result would have been manifestly different but for the alleged error. 38 C.F.R. § 3.105(a)(vii)(B). Non-specific allegations of failure to follow regulations or failure to give due process, or other general, non-specific allegations, are insufficient to satisfying the filing requirements. *Id*.

With respect to CUE in Regional Office rating decisions, the Board must address each specific assertion of CUE, as each such assertion must be clearly and specifically pled and a decision upon each assertion will act as res judicata on subsequent identical assertions of error, the Board is only required to address the specific Regional Office CUE arguments made and appealed to the Board. *See e.g. Andre v. Princip*, 301 F.3d 1354, 1361 (Fed. Cir. 2002).

As the current motion before the Board is one of revision due to CUE in a prior *Board* decision that adjudicated Regional Office CUE, the Board may therefore only consider whether the December 2020 decision clearly and unmistakably erred in its handling of the Veteran's prior CUE motion to revise the March 1972 decision. Necessarily, new arguments that the Regional Office erred in March 1972 cannot be the basis of revision of the December 2020 Board decision, as the Board was only permitted to address the specific allegations that were made at that time.

The Board therefore finds it useful to briefly reiterate what the December 2020 Board considered in the decision. First, it noted that the Board had previously considered the following CUE theories in a September 2019 decision and that the principle of res judicata precluded the Board in December 2020 from re-considering the following arguments: 1) the service treatment records were not considered; 2) the rating decision was inconsistent in discussing one service treatment record while simultaneously stating there were no service treatment records; 3) the regional office should have granted presumptive service connection; and 4) VA treatment records that were constructively in the Regional Office's possession were not considered. The Veteran's representative does not challenge the December 2020 decision's determination that res judicata acted as a bar to reconsidering those arguments.

The December 2020 decision did, however, indicate an additional theory of CUE was presented at that time. Namely, that a 1971 treatment record included evidence that the Veteran's hepatitis was the result of drug addiction and that, under the version of 38 C.F.R. § 3.301 applicable in 1971, drug addiction was not considered willful misconduct and would not act as a bar to benefits.

The Board now finds that the arguments presented in the October 2021 motion do not present a clear and unmistakable error of fact or law in the December 2020 decision that resulted in a manifestly different outcome.

The first set of arguments largely relates to the apparent improper treatment of an early claim submitted within a year of separation from active service. The representative is correct that 38 C.F.R. § 3.157(b)(1) (1971) did allow for evidence of VA treatment or examination to serve as the date of claim for service connection. The Board notes that in the January 2020 motion to revise the March 1972 decision based on CUE, 38 C.F.R. § 3.157 was mentioned. The representative explained in that motion that the date of admission to a VA or uniformed service hospital will be accepted as the date of receipt of a claim. However, that January 2020 motion in no way explained how this fact was applicable to the ultimate denial of service connection for liver disease and/or hepatitis. The Board cannot now determine that that January 2020 motion included a clear and specific argument for how the March 1972 decision erred in failing to recognize that there was a September 1970 claim on the basis of VA treatment or examination. Nowhere in that motion did the representative claim that it was this error that resulted in the manifestly incorrect outcome of denial of service connection for hepatitis. It also did not address whether the March 1972 rating decision denied such a claim or the impact of the finality of subsequent rating decisions denying a petition to reopen.

As any such arguments were not clear and specific enough for the Board to adjudicate, the Board finds that the arguments relating to an informal claim and 38 C.F.R. § 3.157(b)(1) (1971) did not represent a proper claim to revise the March 1972 decision on the basis of CUE. The Board therefore finds that any error in handling those arguments cannot serve as the basis of revision of a Board decision denying Regional Office CUE on the basis of Board CUE.

The Board observes, however, that even had the Board determined in December 2020 that the § 3.157 arguments been properly pled, it is unclear how the downstream issue of when the actual claim was filed could have had any impact on the ultimate question in March of 1972 of whether the criteria for service connection for liver disease and/or hepatitis were met. Although the Veteran now makes substantial arguments that the Regional Office erred in March 1972 with its sloppiness in describing the disability on appeal as hepatitis rather than liver disease (or vice versa), it is undebatable from the record that the Regional Office at that time had recognized there was a claim relating to the Veteran's liver. After recognizing that the claim was filed, the specific date of the submission of such a claim was irrelevant to the ultimate question decided in the March 1972 decision of whether the criteria for service connection were met.

In sum, the Board now finds that the current motion to revise the December 2020 Board decision does not explain how, even assuming that the question was before the Board in December 2020, any failure to recognize that the claim was submitted in 1970 rather than 1971 resulted in a manifestly different outcome of the grant of the underlying claim of service connection.

Next, the Board will consider the arguments set forth in the motion that address VA's duty to notify of decisions in accordance with 38 C.F.R. § 3.103. While the Veteran's representative did mention 38 C.F.R. § 3.157(b) in the January 2020 motion that was before the Board in December 2020, nowhere in that motion did the representative contend that the notification of the March 1972 decision contained any legal defect, as the Veteran's representative now contends. As noted above, the Board is not required to engage in an extensive review of all potential instances of CUE when a claimant claims that a decision contains CUE, but instead is limited to the specific theories that the claimants themselves raise. The October 2021 motion does not explain in any detail why the Board erred in failing to discuss the notice provisions of 38 C.F.R. § 3.103 when there is no indication that the Veteran had raised that theory of entitlement up until that point. As a result, the Board is unable to now determine that the December 2020 decision clearly and unmistakably erred in adjudicating a theory of CUE that was not before the Board.

Although the Board makes this determination, it finds it useful to reiterate that at the time of the March 1972 rating decision, the Regional Office was not required to provide a statement of reasons or bases as to its conclusions. *See Natali v. Principi*, 375 F.3d 1375, 1381 (Fed. Cir. 2004) (holding that statements of reasons or bases in RO decisions were not required prior to the Veterans' Benefits Amendments of 1989, which added the statutory provision mandating that decisions denying benefits include a statement of the reasons for the decision); *see also Eddy v. Brown*, 9 Vet. App. 52, 58 (1996) (holding that "silence in a final RO decision made before February 1990 cannot be taken as showing a failure to consider evidence of record"). Consequently, in order to establish CUE in a rating decision prior to February 1990 based on the failure to consider a particular fact or law, "it must be clear from the face of that decision that a particular fact or law had not been considered in the RO's adjudication of the case." *Evans*, 27 Vet. App. at 189 (*quoting Joyce v. Nicholson*, 19 Vet. App. 36, 46 (2005)).

Ultimately, the Board finds now that the October 2021 motion must be denied. It has not stated a clear and unmistakable error that the Board made in its December 2020 issue when it addressed the limited theories of Regional Office CUE that was before it at that time and instead appears to attempt to relitigate the underlying quality of the March 1972 rating decision. As such, and for the reasons explained above, the Board finds that it must be denied.

M. Tenner
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board B. Whitelaw, Counsel

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.

Department of Veterans Affairs

YOUR RIGHTS TO APPEAL OUR DECISION ON YOUR MOTION FOR REVIEW FOR CLEAR AND UNMISTAKABLE ERROR

The attached decision by the Board of Veterans' Appeals (Board) is the final decision on your motion for the Board to review one or more of its final decisions for clear and unmistakable error (CUE). If you are satisfied with the outcome of this decision, you do not need to do anything. However, if you are not satisfied with this decision, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision.

Please note that if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your appeal at the Court because of jurisdictional conflicts. If you file a Notice of Appeal with the Court ***before*** you file a motion with the Board, the Board will not be able to consider your motion without the Court's permission or until your appeal at the Court is resolved.

There is ***no*** time limit for filing a motion for reconsideration or a motion to vacate with the Board.

How long do I have to start my appeal to the Court? You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the Court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you*, you will then have another 120 days from the date the Board decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time.* Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: http://www.uscourts.cavc.gov, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court,** not with the Board, or any other VA office.

How do I file a motion for reconsideration? You can file a motion asking the Board to reconsider any part of this decision by writing a letter to the Board clearly explaining why you believe that the Board committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that such letter be as specific as possible. A general statement of dissatisfaction with the Board decision or some other aspect of the VA claims adjudication process will not suffice. If the Board has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified may not be considered. Send your letter to:

Litigation Support Branch
Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

CONTINUED ON NEXT PAGE

How do I file a motion to vacate? You can file a motion asking the Board to vacate any part of this decision by writing a letter to the Board stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. § 20.904. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence submitted by or on behalf of the appellant. Send this motion to the address on the previous page for the Litigation Support Branch, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the Board, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: http://www.va.gov/vso. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before VA, you can get information on how to do so at the Court's website at: http://www.uscourts.cavc.gov. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: http://www.vetsprobono.org, helpline@vetsprobono.org, or (855) 446-9678.

Do I have to pay an attorney or agent to represent me? An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. § 5904; 38 C.F.R. § 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. § 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. § 5904; 38 C.F.R. § 14.636(d).

Filing of Fee Agreements: If you hire an attorney or agent to represent you, a copy of any fee agreement must be sent to VA. The fee agreement must clearly specify if VA is to pay the attorney or agent directly out of past-due benefits. *See* 38 C.F.R. § 14.636(g)(2). If the fee agreement provides for the direct payment of fees out of past-due benefits, a copy of the direct-pay fee agreement must be filed with the agency of original jurisdiction within 30 days of its execution. A copy of any fee agreement that is not a direct-pay fee agreement must be filed with the Office of the General Counsel within 30 days of its execution by mailing the copy to the following address: Office of the General Counsel (022D), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. *See* 38 C.F.R. § 14.636(g)(3).

The Office of the General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of the General Counsel. *See* 38 C.F.R. § 14.636(i); 14.637(d).