No. 22-3069

In the

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

APPELLANT'S BRIEF

Re

ROBERTO PEREZ-SOTO,

Appellant,

versus

DENIS MCDONOUGH,

Secretary of Veterans Affairs,

Appellee.

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Statement of the Issue

Whether the Board erred by not sympathetically reading Mr. Perez-Soto's *pro se* filing by his accredited agent alleging clear and unmistakable error by the December 2020 Board regarding the applicability of the provisions of 38 C.F.R. § 3.157(b)(1)(1971) and 38 C.F.R. § 3.103(1971).

Statement of the Case

Mr. Perez-Soto's accredited agent presented a request for revision of a December 2020 Board decision based upon an allegation of clear and unmistakable error that the Board failed to consider and apply the provisions of 38 C.F.R. § 3.157(b)(1)(1971) and 38 C.F.R. § 3.103(1971). The Board, neither in its December 2020 decision nor in its February 2022 decision, sympathetically read the *pro se* filing.

Course of Proceedings Below

Mr. Perez-Soto served on active duty from July 1968 to July 1970 in the United States Army. RBA 5331. On September 10, 1970, Mr. Perez-Soto submitted to VA an application for outpatient treatment using VA Form 10-2827, which confirmed his admission to a VA hospital for treatment of hepatitis. RBA 5843-5845.

On September 17, 1971, Mr. Perez-Soto filed with VA an application using VA Form 21-526 for service connection for his post-service disability for liver conditions. RBA 6007-6010. On March 23, 1972, VA submitted a rating decision which mistakenly identified September 17, 1971 and not September 9, 1970 as the date of Mr. Perez-Soto's initial claim under 38 C.F.R. § 3.157(b)(1)(1971). RBA 5986. Additionally, this rating decision identified the issue adjudicated as abdominal pain and liver condition and not as a claim for hepatitis. *Id.*

This rating decision did note that Mr. Perez-Soto was hospitalized June 25, 1971

to June 28, 1971 claiming a history of viral hepatitis. On April 5, 1972, VA provided Mr. Perez-Soto with defective notice regarding VA's March 23, 1972 rating decision, merely stating that a disability from hepatitis was not incurred or aggravated by service, without any reason for such a decision, although that was not what VA's March 23, 1972 rating decision adjudicated. RBA 5993.

On May 5, 2014, VA received from Mr. Perez-Soto an application to reopen the claim for service connection for hepatitis via VA Form 21-526b (Veteran's Supplemental Claim for Compensation). In a May 2015 rating decision, VA again denied service connection for hepatitis. In July 2015, Mr. Perez-Soto filed a timely Notice of Disagreement (NOD) with VA's May 2015 rating decision. Subsequently, in a May 2017 rating decision, VA awarded Mr. Perez-Soto service connection for hepatitis and assigned a 10 percent rating, effective May 5, 2014. RBA 4185-4188. Mr. Perez-Soto appealed the effective date assigned for VA's award of service connection for viral hepatitis. On September 19, 2019, the Board of Veterans Appeals issued a decision denying an earlier effective date for VA's award of service connection for viral hepatitis. RBA 2439-2462.

On January 14, 2020, Mr. Perez-Soto, using a VA Form 20-0995 supplemental claim application, presented a motion to revise VA's March 23, 1972 rating decision. RBA 2275-2285. On February 5, 2020, VA submitted a decision which indicated that no revision was warranted in the rating decision of March 1972, without an explanation as to why revision was not warranted. RBA 568-570. On February 6, 2020, Mr. Perez-Soto sought direct review by the Board of Veterans Appeals. RBA 548. On February

11, 2020, VA notified Mr. Perez-Soto of its decision to deny revision, again stating only that no revision was warranted. RBA 558-567. On December 31, 2020, the Board of Veterans Appeals issued a decision denying revision of VA's March 1972 rating decision which denied service connection for viral hepatitis. RBA 269-276. The sole finding of fact made by the Board was that the denial of service connection for hepatitis in the March 1972 rating decision was not the result of errors of fact or law, and the evidence then of record did not undebatably show that the condition was incurred in or aggravated by service. RBA 269-276 at 269. The Board's December 31, 2020 decision was not appealed.

On October 16, 2021, Mr. Perez-Soto filed a request for revision of the Board's December 31, 2020 decision based upon an allegation of clear and unmistakable error. RBA 28-35. On February 10, 2022, the Board of Veterans Appeals denied Mr. Perez-Soto's request for revision of the Board's December 31, 2020 decision based on a clear and unmistakable error. RBA 4-15. Mr. Perez-Soto appealed to this Court.

Arguments

STANDARD OF REVIEW

This Court reviews claimed legal errors by the Board under the *de novo* standard, by which the Board's decision is not entitled to any deference. 38 U.S.C. § 7261(a)(1); *see Butts v. Brown*, 5 Vet. App. 532 (1993) (*en banc*); *Palmer v. Nicholson*, 21 Vet. App. 434, 436 (2007). This Court also reviews *de novo* whether an applicable law or regulation was correctly applied. *Joyce v. Nicholson*, 19 Vet. App. 36, 42-46 (2005). This Court will set aside a conclusion of law made by the Board when that conclusion is determined to be

"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Butts*, 5 Vet. App. at 538. In the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary, the Court shall hold unlawful and set aside or reverse such finding if the finding is clearly erroneous. 38 U.S.C. § 7261(a)(4). *Padgett v. Nicholson*, 19 Vet. App. 133, 147 (2005).

This Court reviews "whether an applicable law or regulation was not applied" under the *de novo* standard. *Acciola v. Peake*, 22 Vet. App. 320, 324 (2008); *Joyce v. Nicholson*, 19 Vet. App. 36, 42-43 (2005). Upon such review, should this Court find that they were not applied, reversal of the Board's decision is required as well as remand, with instructions to the Board on how to correctly apply the applicable law or regulation.

Under the legal standard that governs this Court's prejudicial-error analysis, a claimant shows that an error is prejudicial when it "(1) prevented the claimant from effectively participating in the adjudicative process, or (2) affected or could have affected the outcome of the determination." *Simmons v. Wilkie*, 30 Vet. App. 267, 279 (2018); see also id. at 279–85 (providing details and examples); *accord Smith v. Wilkie*, 32 Vet. App. 332, 339 (2020) (noting that this Court "cannot conclude that an error [i]s not prejudicial where 'it is possible that the appellant would have sought and obtained additional medical opinions, evidence[,] or treatises' on the disputed question" (quoting *Daniels v. Brown*, 9 Vet. App. 348, 353 (1996)).

Summary of the Arguments

The Board erroneously rejected Mr. Perez-Soto's accredited agent's request for revision of the Board's December 2020 decision on the basis that there were no clear and specific arguments before the Board 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). The Board, in both its December 2020 decision and in the decision on appeal, was required to have sympathetically read the *pro se* filings. Instead, the Board in the decision on appeal concluded that 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). If that had been the case, the Board would have been required to dismiss without prejudice Mr. Perez-Soto's request for revision as having been defectively pled, which it did not.

It was a clear error of law for the Board to have simply announced that 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). Much more was required, as shown below.

I.

The Board erred by not sympathetically reading Mr. Perez-Soto's *pro se* filing by his accredited agent alleging clear and unmistakable error by the December 2020 Board regarding the applicability of the provisions of 38 C.F.R. § 3.157(b)(1)(1971) and 38 C.F.R. § 3.103(1971).

The Board in its decision, RBA 4-15, made the following findings of fact:

1. The October 2021 motion to revise a December 2020

decision on the basis of CUE contends that that (sic) 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 (sic) error manifestly led to a different outcome.

4. 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.

RBA 4-15 at 5-6. These findings of fact do not address relevant facts of record.

For example, the Board did not consider the indisputable fact that on September 10, 1970, Mr. Perez-Soto had submitted to VA an application for outpatient treatment using VA Form 10-2827 which confirmed his admission to a VA hospital for treatment of hepatitis. RBA 5843-5845. In accordance with the provisions of 38 C.F.R. § 3.157(b)(1)(1971), it applies when a claim specifying the benefit sought is submitted within one year from such treatment. On September 17, 1971, Mr. Perez-Soto filed an application, using VA Form 21-526, for service connection for his post-service disability for liver conditions. RBA 6007-6010. This application indicated treatment at a VA hospital in San Juan in 1971. RBA 6007-6010 at 6008. As a result, § 3.157(b)(1)(1971) was applicable.

Furthermore, VA's March 23, 1972 rating decision identified September 17, 1971 and not September 9, 1970 as the date of Mr. Perez-Soto's initial claim, contrary to § 3.157(b)(1)(1971). RBA 5986. And, as relevant to Mr. Perez-Soto's allegation of CUE, this rating decision identified the issue adjudicated as abdominal pain and liver condition, not as a claim for hepatitis. *Id.* This rating decision did note that Mr. Perez-Soto was hospitalized from June 25, 1971 to June 28, 1971 claiming a history of viral hepatitis. *Id.* But it did not deny him service connection for hepatitis. VA's April 5, 1972 notice of its March 23, 1972 rating decision was defective because, while it stated that a disability from hepatitis was not incurred or aggravated by service, that claim was not in fact addressed in VA's March 23, 1972 rating decision. RBA 5993.

As a result, the evidence of record raised the issues of whether the Board in its December 2020 decision had considered and applied the provisions of 38 C.F.R. § 3.157(b)(1) (1971) and 38 C.F.R. § 3.103 (1971). Whereas, the Board in the decision on appeal merely offered the following unsubstantiated conclusion:

> 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.

RBA 4-15 at 13. It is evident from this conclusion that the Board did not sympathetically read Mr. Perez-Soto's *pro se* allegations of CUE.

Mr. Perez-Soto's October 2021 request for revision of the Board's December 2020 was prepared and presented by an accredited agent and not an attorney. Therefore,

the Board was required as a matter of law to have sympathetically read this filing by a *pro se* claimant. *See Moody v. Principi*, 360 F.3d 1306, 1310 (Fed. Cir. 2004); *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001); *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998). *See also Comer v. Peake*, 552 F.3d 1362, 1368–69 (Fed. Cir. 2009) ("[T]he determination of whether an issue has been properly raised must be made with due regard for the VA's duty to read a veteran's submissions sympathetically . . . because a *pro se* veteran may lack a complete understanding of the subtle differences in various forms of VA disability benefits and of the sometimes arcane terminology used to describe those benefits.").

Had the Board complied with its duty to sympathetically read Mr. Perez-Soto's October 2021 pleading, the Board would have recognized that the allegations of error made went to the question of whether VA's March 1972 rating decision was final. The Board made a clear error of law by failing to consider and apply this Court's decision in *Richardson v. Nicholson*, 20 Vet. App. 64 (2006). This Court in *Richardson* established a rule of law which required the Board to consider as a threshold matter whether:

> . . . a claimant may [have] assert[ed] that VA failed to adjudicate a reasonably raised claim in the context of a request for revision of a prior decision on the basis of CUE. *See Bingham, Andrews, Moody, and Roberson, all supra.* When presented with such a request, VA must make two threshold factual determinations. First, VA must apply the holding in *Roberson* and give a full and sympathetic reading to the *pro se* claimant's prior submissions to determine whether such a claim was reasonably raised. If it is determined that a claim was reasonably raised, VA must then determine whether such a claim is pending or whether it was adjudicated as part of a final decision. *See Roberson*, 251 F.3d at 1384-85 (determining that the appellant's earlier submissions raised a TDIU claim as a matter of law and remanding the matter for a determination of entitlement to TDIU). If VA determines that the claim was adjudicated, then the claimant may

> collaterally attack the resulting decision on the basis of CUE. However, it is not for this Court to decide in the first instance whether such a claim ever existed or, if so, whether such a claim was ever adjudicated. *See Moody*, 360 F.3d at 1310.

Richardson, 20 Vet. App, 71-72. In footnotes 7 and 8, this Court indicated that "Whether or not CUE is the exclusive way to raise such a matter is an issue we need not address in order to decide the matter before us" and "If such a reasonably raised claim remains pending, then there is no decision on that claim to revise on the basis of CUE; however, the claim must be adjudicated."

As a result of this error, the Board made the following clearly erroneous finding of material fact which must be reversed by this Court under the provisions of 38 U.S.C. § 7261(a)(4):

> 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 (sic) error manifestly led to a different outcome.

RBA 4-15 at 5. Had the Board considered and applied the rule of law established by this Court in *Richardson*, the Board would have had to address whether, under the provisions of 38 C.F.R. § 3.157(b)(1)(1971) – which the Board acknowledged allowed for evidence of VA's treatment or examination to serve as the date of claim for service connection – was pending as a matter of law. Further, the Board would have had to address whether VA's April 5, 1972 notice of its March 23, 1972 rating was defective notice under the provisions of 38 C.F.R. § 3.103(e)(1972), since that notice merely stated that a disability from hepatitis was not incurred or aggravated by service. RBA 5993.

The Federal Circuit in *Ruel v. Wilkie*, 918 F.3d 939 (2019) which interpreted the provisions of 38 C.F.R. § 3.103(e)(1984), to mean that in order to meet the notice requirements of Veterans Affairs regulations, an explicit denial must state, or clearly identify in some other manner, the claim(s) being denied. In this matter, VA's April 5, 1972 notice regarding VA's March 23, 1972 rating decision only indicated that a disability from hepatitis was not incurred or aggravated by service. RBA 5993. Whereas VA's March 23, 1972 rating decision identified the issue adjudicated as abdominal pain and liver condition and not hepatitis, as was indicated in VA's notice. RBA 5986.

The Board did not apply the rule of law in *Richardson*, which requires the Board to apply *Roberson* and to give Mr. Perez-Soto's request for revision a "full and sympathetic reading." *See Roberson*, 251 F.3d at 1384 (quoting *Hodg*e, 155 F.3d at 1362). As noted in *Richardson*, after the Federal Circuit's decision in *Szemraj v. Principi*, 357 F.3d 1370 (2004), there was no question that the Board failed to apply the extant jurisprudence. Because the Board failed to apply the rule of law in *Richardson*, the Board's denial of revision must be reversed and this matter must be remanded to the Board to make the requisite factual findings. *See* 38 U.S.C. § 7104(a); *Gutierrez v. Principi*, 19 Vet. App. 1, 10 (2004) (finding that remand is the appropriate remedy where the Board has failed to apply the law correctly).

CONCLUSION

The Board's decision was not made in accordance with law and must be set aside as unlawful.

Respectfully submitted by,

/s/Kenneth M. Carpenter
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Electronically filed on January 10, 2023