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

No. 09-1752

MALCOLM H. MELANCON, JR., APPELLANT,

v.

ERIC K. SHINSEKI,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before SCHOELEN, *Judge*.

**MEMORANDUM DECISION**

*Note: Pursuant to U.S. Vet. App. R. 30(a),  
this action may not be cited as precedent.*

SCHOELEN, *Judge*: The pro se appellant, veteran Malcolm H. Melancon, Jr., appeals an April 17, 2009, Board of Veterans' Appeals (Board) decision that denied his claims for entitlement to an initial disability rating for hepatitis C virus and an earlier effective date for the grant of service connection for hepatitis C based on clear and unmistakable error (CUE) in a December 1991 rating decision. Record of Proceedings (R.) at 3-17. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm, in part, and vacate, in part, the Board's decision, and remand the vacated matter for further proceedings.

**I. BACKGROUND**

The appellant served on active duty in the U.S. Navy from August 1987 to August 1991. R. at 341. His service medical records (SMRs) indicate that he was diagnosed with and treated for hepatitis B. R. at 350-65, 432, 512. An April 1991 treatment note indicates that the appellant's screenings for hepatitis A and C were negative, and that his "recent acute [hepatitis] B [was] now clinically resolving." R. at 358. His separation examination report notes that he had been

hospitalized for hepatitis, but that his current liver function tests were within normal limits and that he had recovered. R. at 373.

In September 1991, the appellant filed a claim for entitlement to service connection for hepatitis B. R. at 692-95. The regional office (RO) denied his claim in December 1991, stating that "[s]ervice connection for hepatitis is not established because this condition was considered acute, was treated, and resolved without residual disability." R. at 686-87. The appellant did not appeal this decision, and it became final.

The appellant sought to reopen his claim for service connection for hepatitis in November 2001 (R. at 653) and in May 2002 (R. at 637). He stated that he was treated at a VA medical facility between 1996 and 2002, and requested copies of his treatment records. R. at 637. The record contains blood test results from 1999 (R. at 640-42) and an August 2000 VA treatment note indicating that the appellant's weight was 119 pounds and that he was experiencing nausea and vomiting (R. at 652). The record also contains VA treatment records for various conditions, including hepatitis, from June 2003 to July 2004. R. at 725-73.

In a March 2004 statement in support of his claim, the appellant asserted CUE in the December 1991 RO decision, stating that he was mistakenly diagnosed with hepatitis B in service because current medical evidence shows that he has hepatitis C. R. at 817.

The appellant underwent a VA medical examination in June 2004. R. at 744-45. The examiner noted that the appellant weighed 139 pounds and reported no "vomiting, hematemesis, or melena" and "no abdominal pain, distention, fatigue, weakness, depression, or anxiety." R. at 744. The examiner noted that the appellant had been diagnosed with hepatitis B in service and that tests performed at that time were negative for hepatitis A and C. *Id.* The examiner diagnosed chronic hepatitis C, and opined that "[i]t is at least as likely as not that his hepatitis C was contracted while on active military service, as the risk factors for it were present during that period." R. at 745.

In August 2004, the RO granted service connection for hepatitis C, evaluated as 0% disabling, effective March 2004. R. at 319-24. The RO continued its denial of service connection for hepatitis B because it found that the 1991 denial was not the product of CUE. R. at 320-21. The appellant filed a Notice of Disagreement, asserting that he had *not* been tested for hepatitis C in

service, and that had he been tested, he would have been diagnosed with hepatitis C instead of hepatitis B. R. at 308-10. He requested a disability rating of 30%, retroactive to 1991. *Id.*

In January 2006, the appellant repeated his request for a higher disability rating and again asserted CUE in the RO's 1991 decision. R. at 282-85. In May 2006, the RO continued its noncompensable disability rating (R. at 264 -77) and again determined that the 1991 decision was not the product of CUE "because the decision was properly based on the available evidence of record at the time and the rules then in effect" (R. at 244-47). The appellant reiterated his assertion that his "case was decided incorrectly from the start" in his May 2007 Substantive Appeal. R. at 236-37.

The appellant underwent another VA medical examination in October 2007. R. at 174-79. The examiner noted that the appellant's liver functions were normal, and that his last screening was negative for hepatitis B and positive for hepatitis C. R. at 177. The examiner opined that the appellant "was misdiagnosed in the Navy and did not have hepatitis B," adding that it was his "firm belief that [the appellant] actually had hepatitis C while he was in the Navy and continued to suffer for it for a couple of years after his discharge." R. at 177-78.

Based on this examiner's opinion, the RO granted an effective date of November 5, 2001, for service connection for hepatitis C. R. at 153-57. In November 2007, the RO determined that an effective date prior to November 2001 was not warranted (R. at 148-49) and continued the 0% disability rating for hepatitis C, as well as the denial of service connection for hepatitis B (R. at 126-27). The appellant appealed to the Board in January 2008. R. at 71-77.

At a February 2009 Board hearing, the appellant testified that he did not know that he had the right to appeal after his claim was initially denied in 1991. R. at 24, 29. He stated that after his discharge from service, he was too ill to work and that he moved in with his parents in 2000. R. at 25. After 2000, he "started working several jobs again," but his illness caused him to change jobs. *Id.* He learned that he had hepatitis C in 2003, was treated successfully in 2004, has had "very few symptoms of [] hepatitis C" since that time, and is currently asymptomatic. R. at 25-26.

In its April 17, 2009, decision here on appeal, the Board denied entitlement to an initial compensable disability rating for hepatitis C because it found that the appellant's "condition has not met the requirements for a compensable rating at any time since the filing of his claim in November 2001." R. at 8-11. The Board denied entitlement to an earlier effective date for the grant of service

connection for hepatitis C because it found that the RO's December 1991 denial of service connection "does not rise to the level of CUE because the RO applied the correct facts as they were known at the time." R. at 12-17. This appeal followed.

## II. ANALYSIS

### A. Entitlement to an Initial Compensable Disability Rating

In his informal brief, the appellant argues that he is entitled to a 30% disability rating for his service-connected hepatitis C from August 1991 to June 2004, and 100% for the year of treatment from June 2004 to June 2005. Appellant's Brief (Br.) at 3. In his reply brief, however, he asserts the he should receive a 100% disability rating "back to November 5, 2001," based on the medical evidence of record. Reply at 2-3. The Secretary argues that the Board correctly found that "the medical evidence does not meet the criteria for the assignment of a higher disability rating." Secretary's Br. at 13-16.

Hepatitis C (or non-A, non-B hepatitis) that is nonsymptomatic is assigned a 0% disability rating. 38 C.F.R. § 4.114, Diagnostic Code (DC) 7354 (2010). A 10% evaluation is warranted where the condition causes "intermittent fatigue, malaise, and anorexia, or; incapacitating episodes (with symptoms such as fatigue, malaise, nausea, vomiting, anorexia, arthralgia, and right upper quadrant pain) having a total duration of at least one week, but less than two weeks, during the past 12-month period." *Id.* The rating schedule describes the escalating criteria that would warrant disability ratings of 20%, 40%, 60%, and 100%. *Id.*

In a rating-increase claim, the present level of disability is the primary focus of the claim. *Francisco v. Brown*, 7 Vet.App. 55 (1994). However, staged ratings may be appropriate in claims for a rating increase. *Hart v. Mansfield*, 21 Vet.App. 505, 510 (2007). The Board's consideration of a staged rating is triggered "when the factual findings show distinct time periods where the service-connected disability exhibits symptoms that would warrant different ratings." *Id.* The Board's assignment of a disability rating is a finding of fact that the Court reviews under the "clearly erroneous" standard of review. *See Johnston v. Brown*, 10 Vet.App. 80, 84 (1997). A finding of material fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with

the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

As always, the Board must provide a statement of the reasons or bases for its determination, adequate to enable an appellant to understand the precise basis for its decision, as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *see Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57. To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

The Court finds that the Board did not adequately discuss the potential application of staged ratings in this case. The Board noted that the appellant was diagnosed with hepatitis C in February 1999; that "he complained of right upper quadrant pain, nausea[,] and vomiting" at that time; and that he weighed 117 pounds. R. at 10. The Board also noted the August 2000 medical report, which showed "complaints of nausea and vomiting" and indicated that the appellant weighed 119 pounds. *Id.* The next medical report the Board discussed is from June 2004, when the appellant weighed 139 pounds. *Id.* Although the appellant stated that he was treated between 1996 and 2002 and requested treatment records from that time, the only medical evidence of record from that period is a blood test report from 1999, an abdominal ultrasound report from 1999, and the August 2000 treatment note. R. at 599, 637, 640-42, 652-53. Given the appellant's complaints in the 1999 and 2000 medical records and the dramatic change in his weight between 2000 to 2004, it would appear that the appellant's condition improved in that time period. The appellant himself testified that he has not had symptoms since his treatment in 2004. R. at 26. The absence of medical evidence pertaining to the appellant's treatment between 2001 and 2004, and the Board's failure to address this period, casts a shadow over the Board's determination that the appellant's condition did not warrant a compensable rating "at any time" since November 2001. R. at 11. The Court finds, therefore, that the Board failed to adequately explain this determination and that remand is warranted. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the

Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

On remand, the Board should obtain the medical records identified by the appellant in his May 2002 statement, and then reconsider whether staged ratings are warranted in this case. R. at 637; *see also* 38 U.S.C. § 5103A(b)(1) (stating that the Secretary's duty to assist includes making "reasonable efforts to obtain relevant records," as long as the claimant "adequately identifies" those records to the Secretary and authorizes the Secretary to obtain them). The appellant is free to submit additional evidence and argument on the remanded matter, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court has held that "[a] remand is meant to entail a critical examination of the justification for the decision." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). The Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring Secretary to provide for "expeditious treatment" of claims remanded by the Court).

#### B. Entitlement to an Earlier Effective Date

The appellant argues that he is entitled to an earlier effective date for the grant of service connection for hepatitis C because the December 1991 RO decision was the product of CUE. Appellant's Br. at 3; Reply at 3-6. The Secretary argues that the Board correctly determined the earliest effective date and also correctly found that the 1991 RO decision was not the product of CUE. Secretary's Br. at 17-21.

As a general rule, a claimant may not challenge a decision that has become final as a result of his failure to appeal it. *See DiCarlo v. Nicholson*, 20 Vet.App. 52, 55 (2006) ("Except as provided by law, when a case or issue has been decided and an appeal has not been taken within the time prescribed by law, the case is closed, the matter is ended, and no further review is afforded."); *see also Sutton v. Nicholson*, 20 Vet.App. 419, 424-25 (2006) (holding that, where the appellant receives notice of a decision and a fair opportunity to appeal it, there is no basis to abate the finality of the decision). If a decision has become final, a claimant may pursue one of the statutory exceptions to its finality. *See DiCarlo*, 20 Vet.App. at 56-57 (discussing the ways to challenge a final decision by

the Secretary). One way to challenge the finality of a decision is through a properly raised CUE motion. *See* 38 U.S.C. § 7111 (allowing for revision of a final Board decision on the basis of CUE). "[A]bsent a showing of CUE, [the veteran] cannot receive disability benefits for a time frame earlier than the application date of his claim to reopen, even with new evidence supporting an earlier disability date." *Leonard v. Nicholson*, 405 F.3d 1333, 1337 (Fed. Cir. 2005).

CUE can be established by meeting the following conditions. First, either (1) the correct facts contained in, or constructively contained in, the record were not before the adjudicator, or (2) the statutory or regulatory provisions in effect at the time were misapplied. *See Damrel v. Brown*, 6 Vet.App. 242, 245 (1994). Second, the alleged error must be "undebatable," not merely "a disagreement as to how the facts were weighed or evaluated." *Russell v. Principi*, 3 Vet.App. 310, 313-14 (1992) (en banc). Finally, the error must have "manifestly changed the outcome" of the decision being attacked on the basis of CUE at the time that decision was rendered. *Id.* at 313-14, 320; *see Bustos v. West*, 179 F.3d 1378, 1380-81 (Fed. Cir. 1999) (expressly adopting the "manifestly changed the outcome" language in *Russell, supra*). When the Court reviews a Board determination that there was no CUE in a prior final decision, the Court's review is limited to determining whether the Board's conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 38 U.S.C. § 7261(a)(3)(A), and whether it is supported by adequate reasons or bases, 38 U.S.C. § 7104(d)(1). *See Eddy v. Brown*, 9 Vet.App. 52, 57 (1996).

In support of his CUE claim, the appellant makes several assertions that have not been addressed by the RO or the Board. First, he asserts that he did not appeal the 1991 decision because he had not been informed of his appellate rights. Appellant's Br. at 3. He also asserts that he has never been allowed access to his complete claims file. *Id.*; Reply at 5. It appears that the appellant made these assertions in an attachment to his January 2006 VA Form 9. R. at 284. To the extent that he believes he is raising these assertions as CUE theories, the appropriate course of action would be to raise these issues to the RO. *See Jarrell v. Nicholson*, 20 Vet.App. 326, 333 (2006) (en banc) (holding that "each wholly distinct and different CUE theory . . . is a separate matter and, when attacking a prior RO decision, each must be presented to and adjudicated by the RO in the first instance and, if not, the Board lacks jurisdiction over the merits of the matter"); *DiCarlo, supra*.

The appellant also appears to assert that he was initially granted a 30% disability rating – for "non-service connection" for the disease" – in a September or October 1991 decision. Appellant's Br. at 3; Reply at 3-4. However, the only RO decision from 1991 that the Board addresses here on appeal is the RO's December 1991 decision, which indicates that the appellant was not in receipt of a compensable rating for his other two service-connected conditions. R. at 686-87. The December 1991 RO decision is the only rating decision of record from this period. To the extent that the appellant is raising an argument relating to another RO decision, he needs to raise that argument to the RO. *DiCarlo, supra*.

Finally, the appellant argues that the RO "did not follow the regulations of 'service connection'" and that his condition "clearly fits the criteria for 'service connection.'" Appellant's Br. at 3. The appellant asserts that the RO committed CUE by basing its denial on its finding that his in-service condition was "acute, was treated, and there were no residual effects," because such a finding is not "a deciding factor" in determining entitlement to service connection, but rather is a factor in determining the assignment of a disability rating. *Id.* In his reply brief, the appellant argues that "[t]he symptoms of a disability cannot be used to determine whether a disability is service or non[service] connected, but only to assign a disability rating to that disability by law." Reply at 4. The Board noted the RO's finding that the appellant's condition was "acute and transitory," and found that the RO's initial consideration and denial of "service connection for hepatitis was not egregious or fatally flawed – that is, when considering the evidence of record at that particular time in question and the existing, laws, regulations, and precedent cases." R. at 16-17.

The Court cannot find the Board's determination here to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See Eddy, supra*. The Court first notes that describing a condition as "acute" bears on the nature of that condition, and not on its symptoms. Second, the acute nature of a condition is precisely the sort of factor to be considered in determining entitlement to service connection. *See, e.g., Grover v. West*, 12 Vet.App. 109, 112 (finding no CUE in an RO's denial based on the acute and transitory nature of the condition in question); *Butts v. Brown*, 5 Vet.App. 532, 536 (1993) (en banc) (affirming the Board's denial of service connection because its finding that the appellant's condition "was acute and transitory has a plausible basis in the record"); *Abbott v. Brown*, 5 Vet.App. 197, 203 (1993) (same); *Kronberg v. Brown*, 4 Vet.App.



399, 401 (1993) (finding no CUE in an RO denial that was based on the "acute and transitory" nature of the appellant's condition).

Moreover, as the Board noted, in order to establish CUE, a claimant must present more than a disagreement with the RO's determination. R. at 16; *see Russell*, 3 Vet.App. at 313. The Board found that the evidence before the RO in its December 1991 decision consisted of the appellant's SMRs, which indicated a diagnosis of and treatment for hepatitis B that had resolved, and the appellant's separation examination report, which also indicated that he had recovered after being treated for hepatitis B. R. at 8, 16, 358, 373. The Board stated that the later discovery that the initial "diagnosis may have been in error . . . cannot be a basis of CUE because only the evidence of record at the time of the prior December 1991 decision may be considered, not additional evidence obtained years later." R. at 16. Thus, the Board found no CUE in RO's denial of service connection, and the Court finds that this decision is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." R. at 16-17; *see Eddy, supra*. The Court will, therefore, affirm the Board's denial of an earlier effective date based on the appellant's argument that the RO committed CUE when it considered the "acute and transitory" nature of his condition in rendering its decision.

The Court sympathizes with the appellant's frustration. He has a medical opinion stating that he was misdiagnosed in service, but this opinion cannot be considered in assessing his CUE claim because it was not of record at the time of the December 1991 decision. *Damrel, supra*. However, while the Court is sympathetic, this is not a court of equity, and we cannot ignore the law to correct unfairness. *See Fritz v. Nicholson*, 20 Vet.App. 507, 511 (2006) (conceding that the appellant "is a victim of unfortunate timing," but finding that this Court "cannot provide equitable relief" (quoting *Moffitt v. Brown*, 10 Vet.App. 214, 225 (1997))).

### III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the April 17, 2009, Board decision is AFFIRMED, IN PART, and VACATED, IN PART, and the vacated matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: April 19, 2011

Copies to:

Malcolm H. Melancon, Jr.

VA General Counsel (027)