APPELLANT'S BRIEF

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Vet. App. No. 19-3104

ANDREW ELIAS,
Appellant
v.
ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee

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TABLE OF CONTENTS

TABLE OF AUTHORITIES……....ii
ISSUES PRESENTED FOR REVIEW……..……...1
STATEMENT OF CASE……..……...1
SUMMARY OF ARGUMENT……4
STANDARD OF REVIEW…….5
ARGUMENT……...…6

I. The Board's finding that Appellant is not entitled to an earlier effective date earlier than March 18, 1999 for the grant of service connection for schizophrenia, paranoid type, must be reversed as clearly erroneous……...…….....6

II. The Board's finding that Appellant is not entitled to an earlier effective date earlier than March 18, 1999 for the grant of service connection for schizophrenia, paranoid type, must be reversed because the ruling was arbitrary, capricious, and was not in accordance with 38 C.F.R. 3.159……14

III. The Board improperly viewed the Appellant's communications in the least favorable light to negate an earlier effective date for service connection……17

IV. The Board improperly limited allegations of improper treatment as a failure of the duty to assist to negate relief pursuant to the CUE claim……22

V. The Board misstates the equitable argument raised and thereby disregards proper consideration of an earlier effective date for service connection……26

VI. The Board failed to address all aspects of the CUE claim and claim for service connection……27

CONCLUSION……..29

TABLE OF AUTHORITIES

CASES

Andre v. West, 14 Vet. App. 7, 11-12 (2000)……..28
Beasley v. Shinseki, 709 F.3d 1154, 1157 (Fed. Cir. 2013)…….6,15
Brokowski v. Shinseki, 23 Vet. App. 79 (2009)……11
Butts. v. Brown, 5 Vet. App. 532,539 (1993) (*en banc*)…….....6,15
Collette v. Brown, 82 F.3d 389, 393 (1996)……...11
Foreman v. Shulkin, 29 Vet. App. 146, 151 (2018)……5
Green v. Derwinski, 1 Vet.App. 121,124 (1991)……..3,8
Ingraham v. Nicholson, 21 Vet. App. 232 (2007)……..17,18
Jaquay v. Principi, 304 F. 3d at 1276 (Fed. Cir. 2002)……..14
Jordan v. Brown, 10 Vet. App. 171, 175 (1997)…….....28
Lane v. Principe, No. 99-1769 (Vet. App. 2002)…….27,28
Layno v. Brown, 5 Vet. App. 465, 469 (1994)……..10
Lennox v. Principi,, 353 F.3d 941, 944 (Fed. Cir. 2003)…….5,6,15
Livesay v. Principi, 15 Vet. App. 165, 174 (2001) (*en banc*)……...27
Mayfield v. Nicholson, 444 F.3d 1328, 1333 (Fed. Cir. 2006)……23
Moore v. Derwinski, 1 Vet. App.. 401, 406 (1991)…….....25
Motor Vehicle Mfrs. Ass'n, 463 U.S. 29, 43 (1983)……...15
Nieves-Rodriguez v. Peake, 22 Vet. App. 295, 301 (2008)……3,8
Phillips v. Brown, 10 Vet. App. 25, 30 (1997)……..28
Russell v. Principi, 3 Vet. App. 310, 313 (1992)..……...……4,27
Scott v. Shinseki, 2009 U.S. App. Vet. Claims LEXIS 723, 30-31…….9
Stefl v. Nicholson, 21 Vet.App. 120, 124 (2007)……..3,8
Summers v. Gober, 225 F.3d 1293, 1297 (Fed. Cir. 2000)……11
Suttman v. Brown, 5 Vet. App. 127, 132 (1993)……9
United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)……...6
Velez v. Shinseki, 23 Vet. App. 199, 204 (2009)…….19
Young v. Brown, 9 Vet. App. 141, 143 (1996)……..15

STATUTES

38 U.S.C. § 1154(a)……..10
38 U.S.C. § 7104(d)(1)…….27
38 U.S.C. § 7261(a)(3)……6,13,15,27,28
38 U.S.C. § 7261(a)(4)……5,6

REGULATIONS

38 CFR § 3.1(p) (2008)……17
38 CFR §3.155(a)……17
38 C.F.R. § 3.159(a)(1)……14
38 CFR § 3.159(a)(3)……....17
38 C.F.R. § 3.303(a)……11
38 C.F.R. § 3.307(b)……11
38 C.F.R. § 20.1403(d)……22

CITATIONS TO RECORD BEFORE AGENCY

R. at 5 (5-11)(Board Decision – January 2019)……21
R. at 7-8 (5-11)(Board Decision – January 2019)……7
R. at 356 (356-365)(2018 CUE Claim)……..……21
R. at 398 (398-403) (2017 Renewed CUE Claim)……...……..21
R. at 416 (VA Medical Record discussing first episode)……8
R. at 463 (463-466) (2016 CUE Claim)……21
R. at 1631 (1626-1637) (Board Decision – March 2016)……..……..18
R. at 1635 (1626-1637) (Board Decision – March 2016)……..19,26
R. at 1753-54 (Letter re: First Lady Michelle Obama Inquiry)…….……20
R. at 2033 (Health Summary Page)…….……10
R. at 2658-9 (2646-2684) (Appellant's Brief No. 07-2563)…...…….22
R. at 2709 (2699-2711) (Board Decision – August 2007)…….……25
R. at 2823 (2823-2835) (Supplemental Statement of the Case – July 2006).....…….13,28
R. at 3079 (3062-3080) (Supplemental Statement of the Case - December 2003)……...….9
R. at 3176-3177 (VA Request for Information)……...……14
R. at 3225 (3225-3226) (VA Discharge Summary 7/14/92)……..……..5
R. at 3227 (3227-3228) (VA Discharge Summary 2/12/92)..…….8
R. at 3700-1 (3691-3702) (Supplemental Statement of the Case – March 2000)...……11
R. at 3753 (3753-3757) (Response to Request for Information-1999)...…….8
R. at 3977 (Statement in Support of Claim – February 1993)……...12,18
R. at 4120-22 (Mental Status Examination 1992)..……3,15,16
R. at 4134 (Routing Slip 1992)….……..2
R. at 4137-8 (Deferred Rating Sheet) ……2
R. at 4163-4 (Request for Compensation and Pension Exam – October 1991)……..2

ISSUES PRESENTED FOR REVIEW

In an October 16, 2008 decision, the Board of Veteran's Appeals (hereinafter, the "Board") remanded the case for a medical examination and opinion in order to address whether Mr. Elias's (hereinafter, "Appellant") psychiatric conditions were connected to his service. The examination conducted established service connection for Appellant's schizophrenia, which had been diagnosed and treated by the VA since 1991. The resulting 2010 decision letter, which established service connection as of 1999, noted that the reviewing official did not review the Appellant's service treatment records and the claim would be reconsidered if/when found. The effective date was appealed back to the Board, and it was upheld in both 2016 and 2019 on the basis of earlier decisions being finalized without proper notices of disagreements, new evidence, or appeals. The issue presented is whether the Board erred when it failed to grant Appellant an effective date earlier than March 18, 1999 for the award of service connection for schizophrenia and whether this decision must be reversed as clearly erroneous.

STATEMENT OF THE CASE

The effective date applied in Appellant's case is clear and unmistakable error in that Appellant submitted no additional evidence specific to his service connection beyond that which should have been included in his 1991 claim through competent medical care, but it took the VA eight years to adhere to the accepted medical principles regarding age of onset of schizophrenia.

Appellant enlisted in the United States Army in December 1976 and served honorably for the duration of his initial contract ending in 1979. In the midst of this period of service,

Appellant experienced psychiatric issues, which manifested in the form of hostility with his leadership, paranoia, and an attempted suicide. He immediately re-enlisted and continued until his Bad Conduct discharge in 1981. His symptoms progressed, and he responded by taking unauthorized absences, which were the ultimate reason for his punitive discharge. The cause of these symptoms was Appellant's schizophrenia, depression, anxiety, and PTSD. The Army physicians failed to diagnose and treat Appellant for these conditions, and accordingly, his behavior became erratic and uncontrollable. In fact, despite having a suicide attempt during his honorable period of service, Appellant was not referred for mental health treatment.

Appellant's symptoms persisted following his discharge, and increased to the point of specific auditory hallucinations, which actively commanded him to commit suicide. One such instance prompted Appellant to drive his car into a brick pillar. When the hallucinations progressed to this degree, Appellant sought treatment from the VA in the hopes that they could help him. Appellant was diagnosed with schizophrenia in 1991 at the VA, and while admitted, the personnel assisted him in filing claims for disability. When this claim was filed, C&P examinations were requested; however, it is unclear what was done in this regard based upon a review of the record.[1] While Appellant remained in in-patient treatment, rather than conduct this examination, the focus shifted to determining his eligibility based upon the characterization of his discharge.[2] As of June of 1992, the medical center was still trying to verify the delay with evaluating Appellant and issuing a decision.[3] A mental status examination was conducted in August 1992 at which point a psychologist ruled that Appellant was

[1] R. at 4163-4
[2] R. at 4137
[3] R. at 4134

exaggerating his symptoms and malingering because otherwise he would be unemployable and virtually unable to manage his own affairs.[4] The problem with this assessment is the fact that Appellant was actively receiving Social Security disability and had already been deemed unemployable based upon his diagnosis of schizophrenia. The doctor's disregard of these background facts shows a clear departure from the standard of care. This decision was later used to justify the lack of service connection ultimately resulting in the CUE claim and current allegation of clear error in the Board decisions. While this exam was conducted by a psychologist, he failed to justify his conclusions given the diagnosis and unemployability determination preceding this evaluation, thus calling into question the legal adequacy of this exam.[5]

Despite diagnosing him with schizophrenia, the original claim was submitted with VA assistance as anxiety and depression. This claim was denied in a January 1993 rating decision, and Appellant submitted a request to re-open this claim in February 1993 by requesting service connection for schizophrenia and a nervous condition. This was again denied, likely due to the rating official overlooking the accepted scientific principles that schizophrenia generally

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[4] R. at 4120

[5] *See Green v. Derwinski,* 1 Vet.App. 121,124 (1991) (The VA is obligated to provide a thorough medical examination by a competent medical expert, and to provide an adequate report that evaluates the C&P exam results within the context of the claimant's total medical history); *Nieves-Rodriguez v. Peake,* 22 Vet. App. 295, 301 (2008) ("[A] medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two"); *Stefl v. Nicholson,* 21 Vet.App. 120, 124 (2007) ("A medical nexus opinion [from a C&P examiner] finding a condition is not related to service because the condition is not entitled to presumptive service connection, without clearly considering direct service connection, is inadequate on its face. Without a medical opinion that clearly addresses the relevant facts and medical science, the [BVA] is left to rely on its own lay opinion, which it is forbidden from doing")

presents itself in males between their late teenage years and early twenties. Appellant submitted yet another claim for service connection for schizophrenia and depression in 1995 and added PTSD in 1997. These claims were all denied. Appellant submitted one additional claim for schizophrenia in 1999 indicating that he incorrectly listed PTSD in 1997, and amidst the appellate process he was granted service connection for his schizophrenia with an effective date of March 1999.

The problem with this effective date, as indicated above, is that Appellant provided no new evidence regarding service connection, yet it took another eight years to establish service connection. There was also no change in the law regarding this entitlement or Appellant's eligibility thereto. Appellant appealed the effective date, and after failing to achieve a favorable result, he retained new counsel and filed clear and unmistakable error (CUE) claims regarding the effective date. Clear and unmistakable error can be shown when either the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions existent at the time were incorrectly applied.[6] Appellant's service connection was ultimately granted after the Board remanded his case for a medical examination that confirmed the onset of Appellant's schizophrenia as occurring during his honorable service, a conclusion reached after reviewing the records that had been available to the VA when Appellant's original claim was decided in 1993.

SUMMARY OF THE ARGUMENT

The Board erred when it failed to grant Appellant an effective date earlier than March 18, 1999 for the award of service connection for schizophrenia, paranoid type. This decision

[6] *Russell v. Principi*, 3 Vet. App. 310, 313 (1992)

must be reversed, as it is clearly erroneous. The finding that there was insufficient evidence of service connection is unsupported by applicable rules, regulations, and statutes and was therefore arbitrary, capricious, and not in accordance with law. Appellant was properly diagnosed with schizophrenia by the VA in 1991 at which time the VA assisted him in filing his initial claim. Based upon the accepted medical principles regarding the age of onset of this disease coupled with Appellant's lay statements as to his symptoms while in the service, the original decision denying service connection was improper. Appellant noted while hospitalized in 1992 that he did not feel good about himself and that these symptoms arose every now and then. He specifically stated, "I had the same situation in the service."[7] The determination that this evidence was sufficient to establish service connection was later confirmed by the decision to grant service connection based upon the originally available evidence. Because of the lack of new evidence, changes in medical principles, and statutory entitlement, an effective date of September 1991 for the award of service connection for schizophrenia, paranoid type, is clearly warranted.[8]

STANDARD OF REVIEW

The Board's determination regarding a veteran's claim for service connection is a finding of fact subject to the "clearly erroneous" standard of review.[9] "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire

[7] R. at 3225 (3225-26)
[8] *See Foreman v. Shulkin*, 29 Vet. App. 146, 151 (2018)
[9] 38 U.S.C. § 7261(a)(4); *Lennox v. Principi,,* 353 F.3d 941, 944 (Fed. Cir. 2003)

evidence is left with the definite and firm conviction that a mistake has been committed."[10] This Court may hold a clearly erroneous finding unlawful and set it aside or reverse it.[11]

The Court reviews claims of legal error by the Board under the de novo standard of review.[12] The Board's interpretation of statutes and regulations is a legal ruling to be reviewed without deference by the Court.[13] The scope of the duty to assist is a question of law.[14] A conclusion of law shall be set aside when that conclusion is determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or unsupported by adequate reasons or bases."[15]

ARGUMENT

I. THE BOARD'S FINDING THAT APPELLANT IS NOT ENTITLED TO AN EARLIER EFFECTIVE DATE EARLIER THAN MARCH 18, 1999 FOR THE GRANT OF SERVICE CONNECTION FOR SCHIZOPHRENIA, PARANOID TYPE, MUST BE REVERSED AS CLEARLY ERRONEOUS.

The Board properly cites the three-pronged test used to determine whether CUE exists in a prior decision; however, the Board fails to properly apply this test. The Board cites the implementing regulations as examples of situations that are not CUE in a Board decision including,

> (1) a new medical diagnosis that "corrects" an earlier diagnosis considered in a Board decision; (2) the Secretary's failure to fulfill the duty to assist, or; (3) a disagreement as to how the facts were weighed or evaluated. CUE does not include the otherwise correct application of a statute or regulation where,

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[10] *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)
[11] 38 U.S.C. § 7261(a)(4)
[12] *Butts. v. Brown*, 5 Vet. App. 532,539 (1993) (*en banc*)
[13] *See*, *Lennox*, 353 F.3d at 945
[14] *Beasley v. Shinseki*, 709 F.3d 1154, 1157 (Fed. Cir. 2013)
[15] 38 U.S.C. § 7261(a)(3)

> subsequent to the Board decision challenged, there has been a change in the interpretation of the statute or regulation (*internal citations omitted*).[16]

While the citation is proper, these three examples are inapplicable to the instant case.

First, Appellant's diagnosis of schizophrenia was established in 1991 at the time he filed his initial VA claim, so there is no "new" or "corrected" diagnosis upon which to base the delay in service connection. Second, there is no allegation that the Secretary failed to fulfill his duty to assist; however, there is an allegation that personnel failed to perform their duties competently and that pertinent medical principles were ignored in order to justify the denial of service connection. Third, the appeal is not alleging that the facts were not weighed properly, but rather that the medical provider failed to properly take into consideration both the existence of lay evidence and the evidence accepted within the medical community that the onset schizophrenia in males is in their early twenties.

The scientific studies attesting to the age of onset for schizophrenia were accepted and widely available at the time of the original claim, and yet despite the diagnosis, the VA staff failed to document the pertinent information from the client that would establish service connection. Appellant was hospitalized for his schizophrenia at the time of his original claim and was aided in its submission by the VA staff. While they may not have had a duty to assist, they undertook this responsibility and deficiently performed it by having Appellant submit the claim for anxiety and depression rather than schizophrenia. Further, they failed to properly annotate the background details of Appellant's condition, which showed that his symptoms began while he was on active duty. They noted that he served from 1976 to 1981, that he had

[16] R. at 7-8 (5-11)

problems with his supervisor while in the service, and that he expressed some paranoid ideation that he was treated improperly, but they failed to draw the nexus between these symptoms and Appellant's psychiatric condition.[17] This information was relevant to his inpatient treatment as well as to his service connection, but it is not contained in his records at that time despite being discussed by Appellant as part of his medical history. As discussed above, this is clear error and is further exacerbated by the requirement to base the medical examination results upon a full review of the entire medical history and relevant science.[18] Finally, the appeal does not allege that a change in the interpretation of a statute is the basis for the CUE, but instead, that the law supports retroactive service connection based upon the errors permeating the case from its inception.

Appellant enlisted at age 21 and served honorably for three years with an outburst which resulted in an Article 15 and an attempted suicide prompting him to be taken to the dispensary where they did not afford him mental health treatment.[19] Appellant was unaware that he was experiencing symptoms of schizophrenia at the time. His medical records indicate that he experienced auditory hallucinations whereby he would hear music while nothing was playing and would hear voices although he did not frequently understand what they were saying.[20] Appellant re-enlisted for a period of four years during which time he began to exhibit more significant signs and symptoms of schizophrenia (disorganized behavior, aggression, agitation, compulsive behavior, social isolation, thought disorder, delusion, disorientation,

[17] R. at 3227 (3227-28)
[18] *See Green*, at 124; *Nieves-Rodriguez*, at 301; *Stefl*, at 124
[19] *See* R. at 3753
[20] R. at 416

general discontent, paranoia, depression, persecutory delusion, etc.)[21] These symptoms manifested themselves in outbursts and eventually unexcused absences resulting in his punitive discharge. Despite the drastic increase in symptoms that contradicted his prior honorable service, there was no inquiry into Appellant's mental health condition, and instead he was labeled for life with a bad conduct discharge.

"The Board must 'review the claim, supporting documents, and oral testimony in a liberal manner to identify and adjudicate all reasonably related claims.'"[22] When looking back at the claim and subsequent decisions denying the effective date of service connection as 1991, the Board was to review the claim, supporting documents, and testimony in a liberal manner, but there was a failure to consider lay testimony in lieu of missing service medical records. It is clear that the law was misapplied in the early decisions, as it was noted "service medical records for the period of your active duty period could not be obtained for review…since we are unable to obtain your service medical records, in the absence of proof of a diagnosis in the service, we ***cannot*** make any decision for establishment of service connection for schizophrenia."[23] This statement is a clear misapplication of the law, as a diagnosis during service is not required if the veteran is otherwise able to prove symptoms during the period of service which would support the connection. The decision here shows an unwillingness to consider the lay evidence, which was clearly erroneous and warrants relief.

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[21]https://www.mayoclinic.org/diseases-conditions/schizophrenia/symptoms-causes/syc-20354443

[22] *Scott v. Shinseki*, 2009 U.S. App. Vet. Claims LEXIS 723, 30-31 *citing Suttman v. Brown*, 5 Vet. App. 127, 132 (1993)

[23] R. at 3079 (3062-3080) (*emphasis added*)

Between 1991 and 1999, the only change was that the providers and reviewing officials took note of Appellant's reported symptoms dating back to the 1970s. He reported auditory hallucinations, paranoia, conflicts with leadership, etc., and he was competent to report such symptoms because a Veteran suffering from service related illnesses is capable of lay observation.[24] In 2009, the provider conducting Appellant's examination found,

> Claimant reported he developed psychiatric symptoms during his early 20's, and notes in his files support this contention. The average age of onset of thought disorders among males is 18-20 years. As such, the examiner believes the probability the veteran's symptoms arose during his military service is high...[25]

This finding confirms two important aspects of the clear error that has pervaded this case: 1) that his file supports his symptoms began in his 20s and had persisted since, and 2) that the average age of onset corroborates the lay testimony of Appellant. The provider in 2009 confirms that Appellant's file previously contained sufficient evidence to establish service connection, and while this examination resulted in that finding, the notes were disregarded in assessing the CUE claim.

The Appellant's case was to be reviewed pursuant to the requirements of 38 U.S. Code § 1154(a) which requires taking into account the "places, types, and circumstances of each veteran's service as shown by his service record, the official history of the organization in which he served, the veteran's medical records, and all pertinent medical and lay evidence." As discussed above, Appellant presented lay testimony to the VA providers while he was undergoing inpatient treatment. The physicians and staff did not properly document his lay testimony at the time, but it is littered throughout the remainder of his VA record signaling it

[24] *Layno v. Brown*, 5 Vet. App. 465, 469 (1994)
[25] R. at 2033

being a necessary part of the admission and treatment process. Instead of properly applying the statute, the Reviewing Officials merely noted that there was no diagnosis or specific evidence of a mental health issue while Appellant was serving on active duty.[26] This is a clear indication of the Reviewing Official's disregard for the requirement to liberally review lay evidence as part of the assessment.

Appellant offered "satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease;" and (2) evidence that was "consistent with the circumstances, conditions, or hardships of such service."[27] Finally, after years of attempts, it was concluded in the February 24, 2010 rating decision (on remand from the Board) that Appellant's schizophrenia was service connected based on his symptoms appearing while on active duty and the generally accepted age of onset for this condition.

The Board was required to adjudicate all issues reasonably raised by a liberal reading of…all documents and oral testimony in the record prior to the Board's decision.[28] Veterans' benefits statutes should be construed in a liberal, pro-claimant fashion.[29] "The factual basis [for establishing a chronic disease] may be established by medical evidence, *competent lay evidence* or both….Lay evidence should describe the material and relevant facts as to the veteran's disability observed within such period, not merely conclusions based upon opinion."[30] Further, 38 C.F.R. § 3.303(a) provides that each disabling condition for which a veteran seeks service connection, "must be considered on the basis of . . . all pertinent medical and *lay*

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[26] *See* R. at 3700-1 (3691-3702)
[27] *Collette v. Brown*, 82 F.3d at 389, 393 (1996)
[28] *Brokowski v. Shinseki*, 23 Vet. App. 79 (2009)
[29] *Summers v. Gober*, 225 F.3d 1293, 1297 (Fed. Cir. 2000)
[30] 38 C.F.R. § 3.307(b) (*emphasis added*)

evidence." As these provisions make clear, lay evidence is one type of evidence that must be considered, if submitted, when a veteran's claim seeks disability benefits. Nothing in the regulatory or statutory provisions described above require both medical and competent lay evidence; rather, they make clear that competent lay evidence can be sufficient in and of itself.

If this Court determines that the Appellant's prior psychological history was not sufficiently of record in 1991 this was due to the deficient performance of VA providers and staff, and it should have been so in 1993 when the rating decision was published as well as a month later when Appellant filed his claim for schizophrenia. His original claim was not denied until 1993, and while the Board held that the claim in 1993 was a new claim, we contend that under a liberal view of the evidence, this was actually a notice of disagreement and/or appeal of the 1991 decision as noted in the statement in support of the claim.[31] Appellant filed by correctly noting his diagnosis and providing access to his medical records that had resulted since the previous claim's closure. It is clear that this evidence fits within the statutes' meaning of new and material evidence, as it included additional lay testimony included in the VA files. It further afforded the VA evaluators another opportunity to weight all evidence and scientific principles in reaching a conclusion as to service connection and severity of the condition. Therefore, if lay evidence is one type of evidence that must be considered, Appellant consistently reported that his symptoms had continued since they began during his service.

The conclusion that the Appellant's evidence presented in his 1993 request for service compensation did not constitute new and material evidence within one year of the 1993 rating

[31] R. at 3977

decision was "arbitrary, capricious, and otherwise not in accordance with law."[32] The refusal of the Board to consider correcting these original decisions based upon the CUE claims filed between 2016 and 2018 is also arbitrary, capricious, and contrary to law and policy. This is especially true given the specific mention of applying the original date of a claim when the service treatment records become available.[33] By providing contradictory guidance on what was Appellant's responsibility and what was being handled by the VA, the Board's contention that CUE did not exist because there is no duty to assist is a manipulation of the law and contrary to the intent of this policy.

To further expand upon the argument that this was a failure of a specific duty rather than a failure to assist is the fact that the VA routinely noted it was seeking records and would advise what Appellant needed to do when issues arose. This then raises the question of whether they properly performed the duties they had undertaken on Appellant's behalf. It is clear from the record that they did not. This is seen first through the loss of the records, which were alleged to have been delivered to a Regional VA office in California in the 1980s when they were assessing whether or not Appellant was entitled to VA benefits. After the "loss" of these records, the VA contends that they are continuing to seek records from all available sources and began to ask Appellant to provide details to assist.[34] While this may sound like due diligence by the VA, the actual records requested were limited to specific clinics

[32] 38 U.S.C. § 7261(a)(3)
[33] R. at 2823
[34] The loss of his records also violates the Federal Records Act of 1950 as implemented by the VA to safeguard patient records

rather than to all medical facilities in the area.[35] Even more interesting was that the requests were for "active duty inpatient clinical records" despite Appellant noting that he was never afforded true mental health treatment.[36] The chances of him having "inpatient" records versus notes of outpatient visits is highly improbable based upon every assertion he made to the VA personnel, and despite his assertions, the only files requested were those that were unlikely to exist. This further calls into question whether the VA met its duty in providing appropriate care and treatment to Appellant both with respect to actually treating his condition as well as assessing it for service connection.

For all of these reasons, the decisions of the Board in denying an earlier effective date for service connection were clearly erroneous and contrary to law and policy.

II. THE BOARD'S FINDING THAT APPELLANT IS NOT ENTITLED TO AN EARLIER EFFECTIVE DATE EARLIER THAN MARCH 18, 1999 FOR THE AWARD OF SERVICE CONNECTION FOR SCHIZOPHRENIA, PARANOID TYPE, MUST BE REVERSED BECAUSE THE RULING WAS ARBITRARY, CAPRICIOUS, AND WAS NOT IN ACCORDANCE WITH 38 C.F.R 3.159.

The veteran's benefits system is one of mass and ideally accelerated justice. The process was designed to permit a veteran to navigate it without the assistance of an advocate. It is the VA that has the statutory duty to assist veterans by informing them of the benefits available to them and assisting them in developing and substantiating claims to receive their entitlements.[37] This includes providing a medical examination when necessary.[38] The VA

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[35] Specifically, the VA submitted requests to the Baumholder clinic rather than to multiple facilities in Europe despite Appellant noting he was also treated in Landstuhl.
[36] R. at 3176-3177
[37] *Jaquay v. Principi*, 304 F. 3d at 1276 (Fed. Cir. 2002)
[38] 38 C.F.R. § 3.159(a)(1)

failed Appellant in 1991 by failing to properly conduct a thorough medical exam including psychological testing with a documented history.[39] The Court reviews claims of legal error by the Board under the de novo standard of review.[40] The Board's interpretation of statutes and regulations is a legal ruling to be reviewed without deference by the Court.[41] The scope of the duty to assist is a question of law.[42] A conclusion of law shall be set aside when that conclusion is determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or unsupported by adequate reasons or bases."[43] In order to uphold the decision, this Court must find that the Board decision was "premised upon a rational basis and supported by appropriate and relevant facts which [are] properly articulated."[44] In the instant case, the facts were misstated regarding Appellant's medical history, filing of claims versus appeals, etc. As indicated above, the only way to justify the ultimate decision is to allow the Board to say on one hand that Appellant never provided new and material evidence while at the same time saying that the original decision based upon the same evidence was not CUE. The Board has attempted to couch the decision on technicalities being applied against Appellant, but has failed to prescribe any fault to the VA employees who lost records, failed

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[39] R. at 4120-22
[40] *Butts v. Brown*, 5 Vet. App. 532,539 (1993) (*en banc*)
[41] *See*, *Lennox*, 353 F.3d at 945
[42] *Beasley v. Shinseki*, 709 F.3d 1154, 1157 (Fed. Cir. 2013)
[43] 38 U.S.C. § 7261(a)(3)
[44] *Young v. Brown*, 9 Vet. App. 141, 143 (1996); *see also Motor Vehicle Mfrs. Ass'n,* 463 U.S. 29, 43 (1983) (explaining arbitrary and capricious as "[R]elied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view of the product of agency expertise")

to consider lay testimony, etc. As discussed in the preceding section, this analysis has produced an arbitrary and capricious result that is inconsistent with the record and should be overturned.

The judicially created presumption of competence flies in the face of the VA's duty to assist generally, and specifically with the VA's duty to provide competent medical care to Veterans. When Appellant filed his original claim in the 1991, there were no safeguards on the competence of medical examiners, which left veterans like Appellant left, to suffer the consequences of being denied benefits to which they are entitled, and the already byzantine veterans' benefits system was made even more opaque and difficult to navigate. Appellant should have undergone a full battery of psychological testing in 1991 since he had raised a claim for mental health conditions while simultaneously being treated through inpatient care for schizophrenia. Unfortunately, this was not done, or if it was, it was not documented and therefore not relied upon in assessing Appellant's claim for service connection. When looking at the examination conducted in August 1992, there was no reference to acceptable scientific testing, but instead, a reference to a mental status examination (MSE) where the patient presented as "totally withdrawn…virtually catatonic…behavior."[45] This led the examiner to conclude that he was exaggerating his symptoms causing malingering and noncompliance diagnoses. *Id.* The summary and prognosis that followed attempts to explain the doctor's findings; however, in reality, it calls it into question even more as it shows that the provider did not review Appellant's file. Further, the provider himself notes that in his professional opinion, a proper diagnosis and evaluation could only be reached through an in-patient observation period. *Id.* Therefore, the ruling that Appellant should not be granted an earlier

[45] R. at 4122

effective date for schizophrenia should be set as side because it was not in accordance with law and amounts to an arbitrary and capricious decision.

III. THE BOARD IMPROPERLY VIEWED THE APPELLANT'S COMMUNICATIONS IN THE LEAST FAVORABLE LIGHT TO NEGATE AN EARLIER EFFECTIVE DATE FOR SERVICE CONNECTION.

A claim of entitlement to VA benefits is a written communication requesting a determination of entitlement or evidencing a belief in entitlement to a benefit.[46] Any communication indicating an intent to apply for one or more benefits under the laws administered by the VA is considered a request for an application form for benefits and shall prompt the Secretary to notify the claimant of the information necessary to complete the application. Such informal claim must identify the benefit sought."[47] Thus, it follows (1) an intent to apply for benefits, (2) an identification of the benefits sought, and (3) a communication in writing are the essential requirements of any claim, whether formal or informal.[48] Although the Board must interpret a claimant's submissions broadly, the Board is not required to conjure up issues that were not raised by the claimant. However, a claimant's identification of the benefit sought does not require technical precision.[49]

In 1993, Appellant filed a VA claim seeking service connection for a schizophrenia, the condition for which he was seeking treatment when he filed his original claim in 1991. While the VA did not accept this as an appeal, it was clear that he was trying to submit an appeal, as seen in his statement in support of his 1993 claim which said, "I wish to re-open my claim at

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[46] 38 CFR § 3.1(p) (2008)
[47] 38 CFR §3.155(a)
[48] 38 CFR § 3.159(a)(3)
[49] *Ingraham v. Nicholson*, 21 Vet. App. 232 (2007)

this time because you stated that the evidence did not establish service connection for neurosis however, I was being treated for schizophrenia and there was no consideration given to the fact that schizophrenia is a form of neurosis."[50] The same issue arose again in 1995 and 1997 in terms of Appellant expressing dissatisfaction with the denial and re-raising a claim for mental health issues. In each case, Appellant was requesting service connection for a psychiatric condition, which he alleged had been bothering him since he was serving on active duty in the 1970s. The 2016 Board decision contends the Appellant's statement noting he wished to re-open his claim did not clearly "express[ed] dissatisfaction or disagreement with the January 1993 rating decision or a desire to appeal the result."[51] This finding is directly contrary to the holding in *Ingraham*, and while that case applied to initial claims, the same principle should be applied to the intent to appeal those determinations.

The Appellant's identification of the benefit sought at that time did not require any technical provision.[52] Since he filed a claim in 1991 seeking service connection for mental health conditions, which was denied in 1993, Appellant contends that he filed an informal appeal for benefits and service connection in his February 1993 submission.

A veteran should not be required to appeal with proper terminology and such specificity in order to have their case properly heard, provided that it is clear what is being contested. It is clear that between 1991 and 1999, Appellant repeatedly submitted the same claim (while worded differently) in the hopes of obtaining service connection for his mental health conditions. From 1991 forward, Appellant sought and received treatment from the VA

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[50] R. at 3977
[51] R. at 1631 (1626-1637)
[52] *Ingraham v. Nicholson*, 21 Vet. App. 232 (2007)

for schizophrenia, and any claim for service connection for mental health conditions should have triggered an evaluation of this condition based upon a review of his medical records. In *Velez v. Shinseki*, 23 Vet. App. 199, 204 (2009), the Court held that if a new claim is not based upon a diagnosed disease or injury that is distinct from a claim previously considered, then VA must evaluate whether the evidence submitted since the last final decision on that claim tends to substantiate an element of a previously adjudicated matter. This holding reflects the Court's intent to allow appeals despite the language used by the Applicant in order to avoid arbitrary decisions that place an increased burden on the Applicant. Per the policy, the VA was required to consider all evidence including medical records, service records, as well as lay evidence to determine the connection. Because the rating official pigeon-holed each claim to the specific issue raised and relied solely upon the military medical records instead of the lay evidence, an arbitrary and capricious decision was reached and was upheld in the 2016 and 2019 decisions. This is clear and unmistakable error warranting reversal.

The 2016 decision notes that VA treatment records alone will not be considered as informal claims, as there is no intent shown that the patient intended to file a claim.[53] While this may be proper in some cases, when the patient in question has filed continuous claims requesting service connection for the same or similar conditions during the time period in which he or she is also seeking treatment, to hold that he or she has not expressed an intent to file a claim is disingenuous. In the instant case, the Board noted that Appellant sought continued treatment between 1991 and 1999 for schizophrenia and related mental health conditions. The only basis for denying an earlier effective date was the contention that

[53] R. at 1635 (1626-1637)

Appellant did not file notices of disagreement or submit new evidence within one year of the previous decision. This finding disregards the continuous actions of Appellant in seeking treatment and attempting to file claims. It was clear that throughout this entire period, Appellant was seeking service connection and disagreed with the rating official's decision to deny such a connection.

If this evidence was immaterial to the missing factor in connecting Appellant's condition to his service, then this further supports the determination that the original denial was clear and unmistakable error. Alternatively, this evidence was relevant to the missing factor and should be considered as an extension of the previous claim thus justifying the earlier date for service connection. In the instant case, the Board has tried to have the best of both worlds by denying the relevance of the evidence and the clarity of the intent, and yet at the same time alleging that the previous decisions were correct. The facts do not support such a conclusion, as it is contrary to common sense and logic.

The file supports the contention that the VA made decisions based upon a narrow interpretation of the statutory authority to grant entitlement as well as procedural technicalities. While such interpretation may not normally be the subject of a CUE claim, in the instant case this justifies the finding of CUE, as the original results are contrary to the evidence and applicable policies. A prime example of this narrow and technicality-based review method occurred in 2012 when Appellant was notified that his VA Form 9 was not timely filed and was therefore not being considered.[54] This conclusion was erroneous in that Appellant was required to postmark his appeal by October 14th, which he had done. Despite

[54] R. at 1753-54

complying with the clear guidance provided pursuant to statute, the VA alleged that Appellant failed in his obligations to pursue his claim. While this was later corrected, it is through actions such as this that Appellant has been denied meaningful relief and an appropriate assessment of his effective date for nearly thirty years, as various reviewing officials have either misapplied the law or misstated the Appellant's intent.

Appellant's case is further aggravated by the VA's overall lack of due diligence in processing nearly every aspect of his case. After the Board issued its decision in 2016, Counsel filed a CUE claim and request for service connection for three additional mental health conditions.[55] Approximately a year later, no response had been provided prompting Counsel to re-submit the CUE claim and request that it be given its original place in the queue given the improper delay.[56] Approximately a year later, the Board had still taken no action, Appellant's attorney left the firm, and a new counsel submitted yet another CUE claim – in the Spring of 2018.[57] It was not until January 2019 that a decision was issued, which declined to express upon which CUE claim it was based.[58] This is yet another example of the veteran suffering under the bureaucratic system, which purports to serve him. Beyond delaying a decision for nearly three years, the Board also issues an arbitrary and capricious decision not in line with law or policy causing the veteran to continue to be plagued by the errors in his case.

[55] R. at 463 (463-466)
[56] R. at 398 (398-403)
[57] R. at 356 (356-365)
[58] R. at 5 (5-11)

IV. THE BOARD IMPROPERLY LIMITED ALLEGATIONS OF IMPROPER TREATMENT AS A FAILURE OF THE DUTY TO ASSIST TO NEGATE RELIEF PURSUANT TO THE CUE CLAIM.

While 38 C.F.R. § 20.1403(d) indicates that a failure of a duty to assist cannot serve as the basis for a CUE claim, when VA personnel have undertaken this assistance, they must do so competently. In the instant case, Appellant's file is littered with incompetent actions by VA personnel beginning with a failure to adequately document Appellant's past mental health history for use in his claim for service connection. This was followed by a failure of the personnel to accurately document his diagnosis as the condition being requested in his initial claim. As previously noted, Appellant was undergoing inpatient treatment when he filed his original claim, an act which was actively assisted by a VA social worker. Appellant noted that the employee listed his condition as depression and anxiety rather than his properly diagnosed condition of schizophrenia. This claim was denied due to a lack of proof of diagnosis of a mental health condition while on active duty, but as previously discussed, this is an improper application of law, as a diagnosis during active duty service is not required to establish service connection.

Appellant was also not advised between 1991 and 1993 that the VA was unable to obtain his military service treatment records and was therefore basing this decision on the lack of any evidence rather than an actual review of his file. As raised in Appellant's previous brief to this Court, the VA failed in their notice requirement, which prejudiced the Appellant.[59] While previously raised to highlight the deficiency in the 2006 Supplemental Statement of the Case, we contend that this deficiency pervaded Appellant's entire processing at the VA. Had

[59] R. at 2658-9 (2646-2684)

he been advised in 1991 that his records had not been located and further advised of what he could do in an attempt to obtain these records, Appellant could have potentially pursued this and submitted new and material evidence for consideration while preserving the date of his original claim. By not raising this information to Appellant's attention, the VA failed in their duty to provide sufficient notice of Appellant's rights and responsibilities. In fact, a review of the record would show that the thrust of efforts to obtain Appellant's service medical records did not occur until 2002. This was through no fault of Appellant, and the lack of sufficient notice persisted through the 2006 Supplemental Statement of the Case. The decision to grant an effective date back to 1999 does not take into account the failure of the VA to comply with regulatory requirements in the preceding eight years.

The Board relies heavily upon the fact that with each decision denying service connection, Appellant was advised of his right to submit a notice of disagreement or appeal. This reliance is improper when the VA itself failed to properly and timely advise him of his obligation to locate the records of which Appellant was never informed were missing and would not be considered. By not advising Appellant that the record would continue to be decided on the current evidence only and that he would be ultimately responsible for locating and providing the missing evidence, the VA failed to satisfy their notice requirements.[60] This is further aggravated by the VA's insistence in relying only upon his service medical records rather than lay evidence establishing symptomology while on active duty, especially given

[60] *See Mayfield v. Nicholson,* 444 F.3d 1328, 1333 (Fed. Cir. 2006) (holding that the duty to notify is not satisfied by post-decisional notice)

Appellant's assertions that he was never diagnosed on active duty and did not undergo official mental health treatment.

In addition to the failure to properly assist in the filing of Appellant's original claim, document his history of psychiatric symptoms, and provide sufficient notice of the missing records and Appellant's obligation to obtain them, the reviewing official also failed to properly consider the lay testimony in resolving the issue of service connection. As articulated throughout this brief, Appellant has continuously been clear that he suffered from auditory hallucinations, outbursts of anger, paranoia, a desire for isolation, and similar symptoms since the mid-1970s. He was unaware that he was suffering from a mental health condition at the time. He corroborated the onset of voices as being while he was stationed in Germany and working with various munitions. He would hear voices that caused him to be fearful for his life and constantly on guard. These voices later became more specific and pronounced and by the 1990s were explicit commands advising Appellant to obtain a gun to kill himself.

While Appellant may not be qualified to diagnose himself, he is certainly capable of testifying as to his personal symptoms, and he did so with sufficient specificity as to place the timeframe during his period of honorable service.[61] This information served as the basis to later grant service connection in the absence of his service treatment records, and is in line with accepted medical principles regarding the average onset for thought disorders in males. His timeline for the onset of his condition was also corroborated by his family members who submitted letters attesting to a change in his behavior between his entry into the service and

[61] Appellant was stationed in Germany during his first enlistment which was honorable in nature.

his leave in 1978. These letters were referenced in the 2007 decision which maintained he failed to prove service connection despite his personal testimony, corroboration by his family members, and corroborative evidence of symptoms arising and persisting through his second period of service.[62] This decision again relied upon the need for him to provide a diagnosis during his period of service and disregarded all lay testimony and accepted scientific principles.

The failure to consider the lay evidence in the 1991 decision pertaining to service connection was clear and unmistakable error, and the refusal of the board to consider this argument in reaching the 2019 decision is a perpetuation of that error. While the failure to properly consider lay statements was the basis for a remand in 2008, that is no longer appropriate, as it has already been resolved that there is sufficient evidence linking Appellant's condition to his military service. Between the medical treatises which support the onset of such conditions being while Appellant was serving on active duty and his lay testimony about his symptoms, there was sufficient information for a mental health provider to reach this finding in 2008. The only question remaining is whether it was clear and unmistakable error for this to have not occurred earlier.

It is clear from the evidence that the lay testimony was present, or should have been present through a competent medical evaluation, since 1991, as Appellant has offered no new records from his military service. The record is clear that the VA was unable to locate Appellant's service treatment records, and in such situations, it is the VA's duty to heighten their consideration of the benefit of the doubt.[63] Rather than expand consideration of

[62] R. at 2709 (2699-2711)
[63] *See Moore v. Derwinski*, 1 Vet. App.. 401, 406 (1991)

Appellant's claim under the benefit of the doubt, the VA purported to increase the burden by advising that Appellant needed medical corroboration in order to process the claim. Of additional consideration on whether the VA properly considered Appellant's original claim, it should be noted that the medical treatises had resolved the average age of onset for thought disorders prior to 1991. We therefore contend that the original rating decision in this case was clear and unmistakable error, and Appellant's lack of appeal should not be a bar to his receipt of this effective date given the deficient notice of his responsibilities to provide evidence, which had been lost through no fault of his own. This is especially true when the provider documented the need to provide a diagnosis during service rather than highlighting the ability to make the connection through alternative methods. By ignoring the facts, the reviewing officer misapplied the law, and such error cannot be deemed harmless, as Appellant has been denied approximately eight years' worth of benefits and compensation due to this error.

V. THE BOARD MISSTATES THE EQUITABLE ARGUMENT RAISED AND THEREBY DISREGARDS PROPER CONSIDERATION OF AN EARLIER EFFECTIVE DATE.

The Board states, "regarding the Veteran's assertion that he has suffered from a psychiatric disability since at least 1991, and therefore he deserves to be compensated on an equitable basis, the Board is bound by the laws and regulations that apply to veterans claims."[64] This statement shows how narrowly the Board assessed this case, as it is clear that Appellant is claiming that he suffered from schizophrenia since approximately 1977. He noted having auditory hallucinations, an inability to control his impulses, irritability, depression, etc. all while serving in the United States Army. He notes that these symptoms progressed over the years

[64] R. at 1635 (1626-1637)

to the point where Appellant was suicidal and finally sought treatment in 1991. To somehow claim that this is when he first suffered from a disability disregards a decade of symptoms.

Appellant is not requesting equitable relief in terms of when his disability began, as that would trigger service connection and benefits as of 1981. Appellant did not initially file a claim, as he was not diagnosed in service and was unaware that his symptoms were manifestations of schizophrenia. Appellant is, however, claiming that given the circumstances associated with his case, there is clear evidence as of 1991 when he filed his initial claim that his psychiatric condition was both disabling and incurred during his honorable active service. The rating officials, however, have viewed each claim and piece of evidence in the most narrow light in order to justify the earlier denial and effective date. It is for these reasons that the effective date should be designated as September 1991, as the evidence shows an arbitrary and capricious decision that is unsupported by the evidence, policies, and accepted medical principles.

VI. THE BOARD FAILED TO ADDRESS ALL ASPECTS OF THE CUE CLAIM AND CLAIM FOR SERVICE CONNECTION.

The Court's review of Board decisions evaluating allegations of CUE is limited to whether the Board's evaluation of CUE was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and whether the decision is supported by an adequate statement of reasons or bases.[65] If the Board articulates a satisfactory explanation for its decision including a rational connection between the choice made and the facts found, the

[65] 38 U.S.C. §§7261 (a)(3)(A), 7104(d)(1); *see Livesay v. Principi,* 15 Vet. App. 165, 174 (2001) (*en banc*); *Russell*, 3 Vet. App. At 315; *Lane v. Principe*, No. 99-1769 (Vet. App. 2002)

Court must affirm.[66] This Court has consistently held that the question of whether the BVA erred in determining that a prior decision did not contain CUE is reviewed by this Court under the 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' standard of review."[67]

In the instant case, the Board failed to address that the original CUE claim filed in 2016 expressed a request to not only submit a CUE claim but also to allege a new claim for service connection for depression, anxiety, and PTSD. While the Board purports to apply the arbitrary, capricious, and abuse of discretion standard to the CUE claim, the Board fails to take into account the evidence of record, which clearly indicated that Appellant was entitled to an earlier effective date.

> Numerous attempts have been made in order to obtain additional service medical records, but to date, no additional service medical records have been received. If additional service medical records are later received that provide a basis for a grant of service connection for an acquired psychiatric disorder, other than post-traumatic stress disorder, the effective date of grant would be date of receipt ***of your original claim*** for service connection for an acquired psychiatric disorder.[68]

This statement issued by the VA clearly indicates their knowledge of their burden to obtain the necessary records and the need to compensate Appellant for their failure to do so during the initial claims process. The missing records are either in the possession of the U.S. Government or were lost through no fault of Appellant, but it was later shown through consideration of the documentation provided that service connection was appropriate based

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[66] *See Jordan v. Brown*, 10 Vet. App. 171, 175 (1997)
[67] *Lane,* 99-1769 (Vet. App. 2001); 38 U.S.C. § 7261 (a)(3)(A); *see Phillips v. Brown*, 10 Vet. App. 25, 30 (1997); *see also Andre v. West*, 14 Vet. App. 7, 11-12 (2000)
[68] R. at 2823

upon the applicable standards. Further, the Board noted that additional service records were provided during this time, but the Board deemed them irrelevant to the inquiry on service connection. This determination is clear error, as any reference to issues during service could be used to show symptomology as noted by the providers. Accordingly, the Board's decision is unsupported by the facts, which warrant backdating the effective date of service connection to the date of the original claim. The Board's failure to consider all aspects of Appellant's appeal and properly conduct a full review of his case is clearly erroneous and therefore warranting relief.

CONCLUSION

The Board erred when it failed to grant Appellant an effective date earlier than March 18, 1999 for the award of service connection for schizophrenia, paranoid type, and this decision must be reversed since it is clearly erroneous. The decision that Appellant did not submit new and material evidence within one year of the 1993 rating decision was arbitrary, capricious, and otherwise not in accordance with law. The decision that Appellant's actions after each denial could not be viewed as notices of disagreement is contrary to the liberal review mandate afforded to Applicants. Further, it is the VA that has the statutory duty to assist veterans by informing them of the benefits available to them and assisting them in developing and substantiating claims to receive their entitlements. This includes providing medical examinations when necessary. When Appellant sought psychological treatment in 1991, the VA failed to perform sufficient testing and document his history and thereby the exam appears to have been conducted by incompetent medical examiners. Accordingly, the

ruling that Appellant should not be granted an earlier effective date for schizophrenia, paranoid, type, should be set as side because it was not in accordance with law.

Respectfully submitted,

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