IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

DEMETRIUS L. SMITH,

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

DEMETRIUS L. SMITH,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet.App. No. 18-7265
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

ISSUE PRESENTED

Should the Court affirm the November 15, 2018, decision of the Board of Veterans' Appeals (Board) that declined to find clear and unmistakable error (CUE) in a January 13, 1988, rating decision?

STATEMENT OF CASE

I. Nature of the Case

Appellant, Demetrius L. Smith, appeals the November 15, 2018, decision of the Board that declined to find CUE in a January 13, 1988, rating decision that reduced the evaluation of Appellant's service-connected left knee disability. [Record Before the Agency [R.]. at 4 (1-16)].

The Board also granted service connection for (1) degenerative joint disease (DJD) of the lumbar spine, as secondary to service-connected left knee disability, and (2) DJD of the right knee, as secondary to service-connected left knee disability. [R. at 4]. These favorable findings should not be disturbed. *Medrano v. Nicholson*, 21 Vet.App. 165 (2007).

II. Statement of Facts and Procedural History

Appellant served on active duty from September 1983 to December 1985. [R. at 2453]. Appellant was medically separated due to a left knee injury. *See* [R. at 1195-201]. The report of the medical board noted that Appellant underwent a January 1985 arthroscopy of the left knee. [R. at 1198]. Following that procedure, but prior to separation, Appellant continued to have pain despite physical therapy and anti-inflammatory medication, and he was unable to squat, negotiate stairs, or perform the required three-mile run. [R. at 1198-99].

In January 1986, Appellant sought service connection for his left knee injury. [R. at 2468-71]. Appellant was scheduled for a Department of Veterans Affairs (VA) examination in connection with his claim but failed to report. [R. at 2457-58]. In May 1986, the regional office (RO) granted service connection for left knee injury and assigned a 10% rating, effective December 1985, under Diagnostic Code (DC) 5259. [R. at 2446-48]. The RO noted that, "[a]lthough [Appellant] failed to report for [the VA examination], [service medical records] are adequate for rating purposes. Future exam[ination] for anticipated improvement." [R. at 2446]. The RO noted that the medical board examination report "show[ed]

left knee is within limits of normal except for a range of motion on the left side of 0-135 degrees," "tenderness and complained of pain at flexion past 135 degrees," "peripatellar tenderness on the left side with some mild pain to compression," "a 1 [centimeter] atrophy of the left thigh," and an inability "to flex down fully on the left side doing a squat." [R. at 2446].

In December 1987, Appellant underwent a VA examination. [R. at 2429-34]; *see* [R. at 2436-41]. An x-ray report noted an impression of "no radiological abnormalities of the knee demonstrated, status post meniscectomy." [R. at 2432]. The examiner noted hearing a "click" when Appellant walked and finding tenderness at "the juncture of the lower end of the patella and the patella tubercle." [R. at 2433]. The examiner observed no swelling on examination. *Id*. The examiner noted that Appellant reported he rode "a 10-speed bike to work" and that "it bothers him if it is cold" but "[a]s it warms up it gets less painful." *Id*. The examiner recorded extension to 0 degrees and flexion to 130 degrees. *Id*.

In January 1988, the RO reduced Appellant's rating from 10% to 0%. [R. at 2420-22; 2425] (citing 38 C.F.R. 3.105(e)). The RO stated that the "[f]indings on [the December 1987] exam demonstrate that a compensable evaluation [under DC 5259] is no longer supported by the evidence of record." [R. at 2425].

In January 2009, Appellant sought to revise the January 1998 rating decision based on CUE. [R. at 2316; 2320]. Appellant's CUE submission referenced the December 1987 VA examination; the January 1988 rating decision; and 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5259. [R. at 2316].

Appellant alleged that "[the December 1987 VA examination] shows by subjective and objective evidence that [his] left knee condition was symptomatic." [R. at 2320]. Appellant asserted that "[t]he reduction of [his] left knee evaluation to a non[-]compensable rating on the VA rating decision of January 13, 1988, is a [CUE]." *Id*. Appellant argued that "[t]he evidence of record at the time of the decision clearly displays [that his] knee condition was symptomatic, thus warranting a [10%] evaluation." *Id*.

In June 2009, the RO concluded that no revision based on CUE of the January 1988 rating decision was warranted. [R. at 2304 (2301-06)]. The RO explained that "[a] review of the record does not support a finding of [CUE] that would be considered undebatable." [R. at 2305]. "In the judgement of the rating specialist, a clicking sound did not represent a finding of symptomatology." *Id*. Appellant filed a timely notice of disagreement (NOD), [R. at 2296-97], and the RO issued a December 2017 statement of the case (SOC) continuing to find revision was not warranted, [R. at 156-79].

Appellant perfected his appeal in January 2017. [R. at 126-28]. In his substantive appeal, Appellant alleged inadequacies in the December 1987 VA examination, including that "[t]he condition of [his] left knee was clearly misrepresented during [his] December 7, 1987[,] exam" and "[t]he person that documented the exam clearly wrote partial truths in which ultimately le[]d to my reduction in benefits." [R. at 127]. In a March 2018 brief to the Board, Appellant's representative reiterated the substance of the January 2009 CUE

motion, arguing that "the [agency of original jurisdiction] committed CUE when it reduced [Appellant's] service-connected left knee disability from 10 percent disabling to 0 percent" and "[the clicking observed on the December 1987 VA examination] should have been interpreted as symptomatic and the 10 percent evaluation should have been maintained and not reduced." [R. at 53-54 (46-54)].

On November 12, 2018, the Board declined to find CUE in a January 1988 rating decision. [R. at 4]. The Board found that Appellant's CUE contention was that the December 1987 VA examination "shows subjective and objective evidence that his left knee was symptomatic," [R. at 11], and that Appellant's January 2018 substantive appeal alleged that the December 1987 VA examination was incomplete and inadequate, [R. at 11-12]. The Board also found that Appellant "makes no contention as to [the] application of the reduction procedures in the January 1988 rating decision based on the provisions at that time." [R. at 12] (citing 38 C.F.R. § 3.105(e) (1988)).

The Board reviewed the December 1987 VA examination and the January 1988 rating decision, and it found that, because "no swelling or abnormality was found on imaging," "a reasonable mind could conclude tenderness at the lower end of the patella and patella tubercle and clicking upon ambulation were not indicative of functional impairment." [R. at 12]. The Board concluded that it "cannot say that [Appellant's] left knee clearly and unmistakably was symptomatic based on the facts that were before the rating board at the time of the January 1988 rating decision" and that "[r]easonable minds could differ on

[the] weighing of the evidence that improvement was affirmatively shown." [R. at 12-13].

The Board also noted that "reasons or bases, including listing all of the laws and facts considered, was not required in RO rating decisions at the time [of the January 1988 rating decision," [R. at 13] (citing *Natali v. Principi*, 375 F.3d 1375 (Fed. Cir. 2004)), and that "the January 1988 rating decision included a doctor on the rating board who could competently consider whether the left knee condition was symptomatic at the time and whether improvement was affirmatively shown, [R. at 13] (citing *Macklem v. Shinseki*, 24 Vet.App. 63 (2010)).

This appeal followed.

ARGUMENT

The Court should affirm the Board's because Appellant has failed to show CUE in the January 1988 rating decision. *See Shinseki v. Sanders,* 556 U.S. 396, 409 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant bears the burden of demonstrating error). Appellant's brief presents new theories of CUE, including that the January 1988 RO did not apply regulations governing reductions of ratings and that the RO incorrectly applied DC 5259, but these theories were not presented to or adjudicated by the RO or the Board. Because the Court does not have jurisdiction over the new CUE

theories presented in Appellant's brief, the Court should decline to entertain these new CUE theories.

CUE is a collateral attack on a final Board or RO decision and is "a very specific and rare kind of error." 38 C.F.R. § 20.1403. To establish CUE, a claimant must show either that (1) the correct facts known at the time of the decision were not before the adjudicator or (2) the statutory or regulatory provisions in effect at the time were incorrectly applied. *Russell v. Principi*, 3 Vet.App. 310, 313 (1992) (en banc). The error must be undebatable, and one that would have manifestly changed the outcome of the prior decision based on the record or law at the time of the decision. *Id.*

The Court's review of a Board decision about an allegation of CUE in a prior decision is limited to whether the Board's decision is "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. 38 U.S.C. §§ 7261(a)(3)(A), 7104(d)(1); *see also Livesay v. Principi*, 15 Vet.App. 165, 174 (2001) (en banc). To provide an adequate statement of reasons or bases for its factual findings and conclusions of law, the Board must analyze the probative value of evidence, account for evidence it finds persuasive or unpersuasive, and explain why it rejected evidence materially favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995); *see Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990).

A CUE motion must describe the alleged error "with some degree of specificity" and must "provide persuasive reasons as to why the result would have been manifestly different but for the alleged error." *Pierce v. Principi*, 240 F.3d 1348, 1355 (Fed. Cir. 2001) (citing *Fugo v. Brown*, 6 Vet.App. 40, 44 (1993)). The Secretary must sympathetically read a claimant's pro se CUE motion and "fill in omissions and gaps that an unsophisticated claimant may leave in describing his or her specific dispute of error," but the Secretary "cannot supply a theory that is absent" or "imagine ways in which the original decision might be defective." *Acciola v. Peake*, 22 Vet.App. 320, 326-27 (2008). Further, "each wholly distinct and different CUE theory underlying a request for revision is a separate matter and . . . 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." *Jarrell v. Nicholson*, 20 Vet.App. 326, 333 (2006). Accordingly, "[w]hen an appellant raises a new theory of CUE for the first time before the Court, the Court must dismiss for lack of jurisdiction." *Acciola*, 22 Vet.App. at 324-25; *see also Archer v. Principi*, 3 Vet.App. 433, 437 (1992) (explaining that, in reviewing a Board decision finding no CUE in a prior final decision, the Court must not conduct a plenary review of the merits of the final decision).

The CUE allegations about the misapplication of law raised in Appellant's brief were not raised or adjudicated below. Before the agency, Appellant alleged that "[t]he reduction of [his] left knee evaluation to a non[-]compensable rating on the VA rating decision of January 13, 1988, is a [CUE]." [R. at 2320]. Appellant

argued that "[t]he evidence of record at the time of the decision clearly displays [that his] knee condition was symptomatic, thus warranting a [10%] evaluation." *Id*. And after the RO issued a June 2009 rating decision finding no CUE in the January 1988 rating decision, Appellant alleged inadequacies in the December 1987 VA examination, including that "[t]he condition of [his] left knee was clearly misrepresented during [his] December 7, 1987[,] exam" and "[t]he person that documented the exam clearly wrote partial truths in which ultimately le[]d to my reduction in benefits." [R. at 127]. Appellant's representative also argued to the Board that "the [agency of original jurisdiction] committed CUE when it reduced [Appellant's] service-connected left knee disability from 10 percent disabling to 0 percent" and "[the clicking observed on the December 1987 VA examination] should have been interpreted as symptomatic and the 10 percent evaluation should have been maintained and not reduced." [R. at 53-54].

These submissions, as the Board here stated, show that Appellant previously contended that the December 1987 VA examination "shows subjective and objective evidence that his left knee was symptomatic," [R. at 11], and that the December 1987 VA examination was incomplete and inadequate. [R. at 11-12]. But, as the Board correctly explained, Appellant's contention that the December 1987 VA examination was inadequate cannot form the basis of a CUE claim. [R. at 11]; *see King v. Shinseki*, 26 Vet.App. 433 (2014) (explaining that a duty-to-assist error cannot be CUE). The Board also found that the RO did not undebatably err by relying on the December 1987 VA examination because "a

reasonable mind could conclude that tenderness at the lower end of the patella and patella tubercle and clicking upon ambulation were not indicative of functional impairment" and "[it] cannot say that [Appellant's] left knee clearly and unmistakable was symptomatic based on the facts that were before the rating board at the time of the January 1988 rating decision." [R. at 12-13]. Thus, the Board explained that "[r]easonable minds could differ on weighing the evidence that improvement was affirmatively show," which "cannot constitute CUE." [R. at 13]; *see Livesay*, 15 Vet.App. 165 (explaining that CUE is more than just a disagreement with how the evidence was weighed).

In other words, the Board construed that Appellant's submissions about CUE in the January 1988 rating decision as contending that the evidence of record--the December 1987 VA examination--at the time of the January 1988 rating decision showed that his left knee disability was symptomatic such that a 10% rating should have been maintained under DC 5259. *Compare* [R. at 2320] ("The evidence of record at the time of the decision clearly displays the veteran's knee condition was symptomatic, thus warranting a ten percent evaluation."), with [R. at 11] (Appellant's January 2009 CUE submission alleged "that the December 1987, on which the reduction was based, shows subjective and objective evidence that his left knee was symptomatic."). The Board's view of Appellant's CUE theory is consistent with the RO's interpretation in its June 2009 rating decision that declined to find CUE in that January 1988 rating decision based on that theory. [R. at 2305] ("In the judgement of the rating specialist, a

clicking sound [noted in the December 1987 VA examination] did not represent a finding of symptomology."). These interpretations were consistent with the both the language of Appellant's CUE submissions and the context of the substance of the submissions, which included summaries of and references to the December 1987 VA examination and contentions that the examination shows a symptomatic left knee injury. *See* [R. at 53-54; 126-27; 2316; 2320]. Thus, the Board and the RO reasonably and sympathetically construed Appellant's allegation of CUE as a disagreement with January 1988 RO's consideration of the December 1987 VA examination as to whether his left knee condition was symptomatic.

In his brief to the Court, Appellant raises new CUE theories. First, he contends that "the January 1988 RO did not apply the regulations governing reductions of ratings that had been in effect fewer than five years." *See* Appellant's Brief (App. Brf.) at 10-17 (relying on *Brown v. Brown*, 5 Vet.App. 413, 420 (1993)). Appellant argues that his CUE submissions sufficiently raised this CUE theory because, despite never referencing any of the regulations that he now asserts should have been applied by the January 1988 RO, "his explicit argument that the reduction itself was erroneous was sufficient." App. Brf. at 17 (referencing [R. at 53-54; 127; 2320]). In other words, Appellant contends that his generalized assertion that January 1988 RO erred in reducing his rating encompasses every regulation that pertains to reductions of ratings that have been in effect fewer than five years, despite never referencing these regulations

and otherwise ignoring the language and context of his CUE submissions. Second, Appellant contends that January 1988 RO misapplied DC 5259. *See* App. Brf. at 23-27. Although Appellant has not previously presented any CUE theory related to the misapplication of law, he appears to believe that the Court may consider such newly raised CUE theory on the merits.

But Appellant's newly raised CUE theories are not before the Court, and his assertions to the contrary are both factually and legally tenuous. The Board did not construe Appellant's CUE submissions as encompassing any theory relating to a misapplication of law; it construed that Appellant's CUE theory as he articulated it to the RO, "[t]he evidence of record at the time of the decision clearly displays [that his] knee condition was symptomatic, thus warranting a [10%] evaluation." [R. at 2320]; *see* [R. at 11-14]. There is also no legal support for Appellant's contention that his submissions should encompass any CUE theory relating to a misapplication of law that was not specifically presented. As this Court has explained, each "distinct and different CUE theory . . . is a separate matter," and VA cannot supply a theory that Appellant does not present or imagine ways that the prior rating decision is defective. *Jarrell*, 20 Vet.App. at 333; *see Acciola*, 22 Vet.App. at 326-27.

Contrary to Appellant's suggestion that the Board showed an understanding of his newly raised theory of CUE by reviewing the January 1988 RO's weighing of the evidence, *see* App. Brf. at 18 (citing [R. at 13]), the Board instead showed an understanding that Appellant's theory was based on an

evaluation of the evidence at the time of the January 1988 rating decision, not a misapplication of law. The Board noted that Appellant "makes no contention as to [the] application of the reduction procedures in the January 1988 rating decision based on the provisions at that time." [R. at 12] (citing 38 C.F.R. § 3.105(e) (1988)). While the Board does not expressly note the numerous regulations that Appellant contends were overlooked by the January 1988 RO, the Board's statement evidences its understanding that the CUE alleged was not legal in nature but factual, as shown by the remainder of its analysis about the RO's weighing of the evidence. *See* [R. at 12-14].

As the new CUE theories were not presented or adjudicated below, and because the Court's review of a Board decision regarding a CUE allegation is limited to whether the Board decision on appeal is arbitrary, the Court does not have jurisdiction over the merits of the newly raised CUE theories. *See Livesay*, 15 Vet.App. at 174; *Archer*, 3 Vet.App. at 437 (explaining that the Court does not conduct a plenary review of the merits of the final decision that allegedly contains CUE). Accordingly, the Court should decline to entertain these new theories in the first instance. *Acciola*, 22 Vet.App. at 324-25.

Alternatively, if the Court finds that Appellant's CUE submissions can be sympathetically read to include misapplications of law, in addition to his recognized contention about the RO's view of the December 1987 VA examination was CUE, then remand, not reversal is appropriate, as the RO and the Board did not have the opportunity to adjudicate these theories of CUE. *See*

App. Brf. at 21-22; *Gutierrez v. Principi,* 19 Vet.App. 1, 10 (2004) (reversal is an appropriate remedy only in the narrow circumstances where the sole permissible view of the evidence is contrary to the Board's decision). Unlike *Sorakuba v. Principi*, 16 Vet.App. 120 (2002), where the Court reversed the finding of no CUE where the Board acknowledged that the RO did not address a relevant regulation but concluded that the regulation did not apply, *see* App. Brf. at 21, here, the Board has not had the opportunity to even consider the alleged overlooked regulations in the first instance in the context of CUE. Thus, remand, not reversal, would be appropriate, if the Court finds that Appellant's CUE submissions included both errors of fact and, now, law.

To the extent that Appellant also alleges that the Board's decision is arbitrary because the January 1988 RO made "the erroneous factual finding that the knee was not 'symptomatic,'" App. Brf. 23-28, he improperly seeks to revaluate the evidence of record at the time of rating decision, mainly the December 1987 VA examination. A CUE must be "undebatable" and not merely "a disagreement with how the facts were weighed or evaluated." *Russell,* 3 Vet.App. at 313-14.

Initially, the Secretary highlights that Appellant's contention that the December 1987 VA examination showed a symptomatic knee disability, contrary to the January 1988 RO's assignment of a noncompensable rating, is the CUE theory raised in Appellant's submissions and adjudicated by the RO and the Board. *See* [R. at 11-13; 53-54; 127; 2305; 2316; 2320]. However, despite this

theory, Appellant previously argued that the December 1987 VA examination was inadequate, which, as noted above, cannot be a basis for CUE. *See* [R. at 127].

Here, the Board summarized the December 1987 VA examination and the relevant facts highlighted in the January 1988 rating decision. [R. at 12]. The Board concluded that the January 1988 rating decision as not the product of CUE because "the Board cannot say that [Appellant's] left knee clearly and unmistakably was symptomatic based on the facts that were before the rating board at the time of the January 1988 rating decision" and that "it is not undebatable that there is an outcome determinative error." [R. at 12-13]. The Board explained that, because the December 1987 VA examination showed no swelling or abnormality on imaging, a "reasonable mind could conclude tenderness at the lower end of the patella and patella tubercle and clicking on ambulation were not indicative of functional impairment." [R. at 12]. The Board added that "[r]easonable minds could differ on [the] weighing of the evidence that improvement was affirmatively shown" and that "[t]his cannot constitute CUE." [R. at 13] (citing *Evans v. McDonald*, 27 Vet.App. 180 (2014)).

The Board added that, at the time of the January 1988 rating decision, reasons or bases, including listing all law and facts considered was not required in rating decisions. [R. at 13] (citing *Natali*, 375 F.3d 1375). The Board also highlighted that "the January 1988 rating decision included a doctor on the rating board who could competently consider whether the left knee condition was

symptomatic at the time and whether improvement was affirmatively shown." [R. at 13] (citing *Macklem*, 24 Vet.App. at 70).

Thus, the Board properly concluded that Appellant's contention that the evidence at the time of the January 1988 rating decision showed a symptomatic knee disability was not CUE, and it supported that conclusion with an adequate statement of reasons or base. Appellant's CUE theory was not "undebatable" and merely "a disagreement with how the facts were weighed or evaluated." *Russell,* 3 Vet.App. at 313-14; *see* [R. at 12-13]. The Board also pointedly noted that a doctor was a part of the rating board for the January 1988 rating decision, *see* [R. at 2446], and that at the time of the rating decision there was no reasons or bases requirement. *See* [R. at 13]. Thus, it is not surprising that the January 1988 rating decision is not more detailed, and, because of that, the Board declined to interfere with the decision of a rating board consisting of a medically competent member. While Appellant attempts to relitigate the merits of the underlying claim in his brief, *see* App. 23-26, that should have no impact on the Board's finding that the January 1988 rating decision did not contain CUE.

Lastly, the Secretary observes that, because Appellant's brief alleges clear and unmistakable errors of both fact and law, including misapplying regulations, misapplying a DC, and making erroneous factual findings, it seems that Appellant may be uncertain about his specific theory of CUE raised in his submissions. *See* App. Brf. at 9-28. While the Secretary must sympathetically read Appellant's CUE motion, *Acciola*, 22 Vet.App. at 326-27, the motion still must describe the

alleged error "with some degree of specificity" and must "provide persuasive reasons as to why the result would have been manifestly different but for the alleged error," *Pierce*, 240 F.3d at 1355. Because Appellant's brief raises so many allegations of CUE, and not all of these theories have been adjudicated by the RO and the Board, all of these Appellant's allegations on brief cannot be successful in this appeal. Instead, CUE allegations not specifically pled must be directed by Appellant to the RO in the first instance to the extent allowable by law. *Jarrell*, 20 Vet.App. at 333. Nevertheless, as argued above, the Board properly found that there was no error in the January 1988 rating decision, as reasonably construed from Appellant's CUE submissions, that was undebatable and outcome determinative such that it constituted CUE. Thus, the Court should affirm the Board's decision.

CONCLUSION

Wherefore, for the foregoing reasons, Appellee, Robert L. Wilkie, Secretary of Veterans Affairs, respectfully urges the Court to affirm the Board's November 15, 2018, decision.

Respectfully submitted,

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