Vet. App. No. 18-6606

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

JIM A. ADAMS,
Appellant,
v.

ROBERT L. WILKIE
Secretary of Veterans Affairs,

Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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v.	)	Vet. App. No. 18-6606
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	)	
Appellee.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the July 31, 2018, decision of the Board of Veterans' Appeals (Board) that denied revision of a March 9, 2005, rating decision based on clear and unmistakable error (CUE) should be affirmed.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over this appeal pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Appellant, Jim A. Adams, appeals the Whether the July 31, 2018, Board decision that denied revision of a March 9, 2005, rating decision based on clear and unmistakable error. Record Before the Agency (RBA) at 1-17.

C. Statement of Facts

The facts relevant to the arguments raised by Appellant on appeal are generally not in dispute.

Appellant service on active duty in the United States Army from October 1966 to July 1969. RBA at 781. He initially sought service connection for posttraumatic stress disorder (PTSD) in July 1982. RBA at 2830. The claim was denied by the Regional Office in January 1983 because the evidence did not show that Appellant had PTSD. RBA at 2705. The Board affirmed the denial in December 1984. RBA at 2406-11. Appellant did not appeal.

In September 1989, the Board again denied the claim because the evidence failed to show that Appellant had a diagnosis of PTSD linked to a corroborated stressor. RBA at 1733-1741.

In October 1989, Appellant sought to reopen his claim. The Regional Office denied the request in March 1991 because new and material evidence had not been received. RBA at 1672. Appellant appealed the decision, and, in March 1991, the Board concluded that the evidence received in support of the request to reopen did not establish that Appellant had PTSD and denied the claim. RBA at 1362 (1629-33). Thereafter, in March 1991, the parties executed a Joint Motion

for Remand, and the issue was remanded back to the Board for further adjudication. RBA at 1585-88.

In June 1993, a report was received from the U.S. Army & Joint Services Environmental Support Group (Environmental Support Group) in response to a request for information concerning Appellant's alleged in-service stressors. RBA at 1373-75. The report showed that the ammunition storage area near where Appellant was stationed was attacked by enemy forces. *Id.*

Later that month, after receipt of the report, the Regional Office issued a decision in which it continued the denial of service connection for PTSD. RBA at 1372. The Regional Office found that the Environmental Support Group report was new and material evidence because it established that the area where Appellant was assigned came under enemy attack on several occasions. *Id.* However, it concluded that the report did not provide adequate verification that Appellant had experienced stressors sufficient to support a grant of service connection.[1] *Id.* Appellant appealed.

In July 1994, the Board denied Appellant's claim. RBA at 1317-1330. Specifically, after considering the evidence, to include the Environmental Support Group report, the Board concluded that, "while the veteran has been diagnosed with post-traumatic stress disorder, the preponderance of the evidence is against

[1] In its decision on appeal, the Board found that, after these service departments were received, the Regional Office reconsidered Appellant's claim. RBA at 7.

a finding that the stressor events cited by him did in fact occur." *Id.* at 1328. The Board found the evidence did not verify the occurrence of a stressor sufficient to have caused Appellant's PTSD and thus found that service connection for PTSD was not warranted. *Id.* at 1319. Appellant did not appeal the decision.

In September 1995, the Regional Office again declined to reopen Appellant's claim. RBA at 1267; RBA at 1270. Appellant appealed the decision to the Board, RBA at 1251, and, in April 2001, the Board found that new and material evidence had not been submitted since its July 1994 decision and likewise declined to reopen the claim. RBA at 710-17. Appellant did not appeal that decision.

On June 24, 2003, Appellant submitted another request to reopen his claim. RBA at 585. The request was initially denied by the Regional Office in February 2004. RBA at 548-550. Appellant initiated an appeal of the decision in February 2005. RBA at 417. Thereafter, he was provided with a psychiatric examination. RBA at 355-61. Based on the opinion of the examiner who diagnosed Appellant with PTSD and linked it to a January 1986 mortar attack of the ammunition storage area, in March 2005, the Regional Office issued a decision in which it reopened and granted Appellant's claim, effective June 24, 2003. RBA at 344-52. Appellant did not appeal the decision.

In March 2010, Appellant (via his current counsel) submitted a request for revision of the March 2005 rating decision, RBA at 266-70, arguing that the Regional Office failed to correctly apply the provisions of 38 C.F.R. § 3.156(c) and

as such failed to acknowledge his potential entitlement to an effective date of July 6, 1986, for the grant of service connection, *id.* at 266.

In its decision on appeal, the Board acknowledged that new service records were received in June 1993 after Appellant's claim was initially denied by the Board in December 1984 because the evidence did not show that Appellant had PTSD linked to a corroborated in-service stressor. RBA at 4. The Board found that, after the new service records were received, the Regional Office reconsidered Appellant's service connection claim, which was then denied by the Board in July 1994 because there was insufficient evidence that Appellant's reported in-service stressors actually occurred. RBA at 4. The Board further found that subsequent attempts to reopen the claim were denied by the Board in April 2001 and 2003, and that Appellant's claim was ultimately reopened and granted by the Regional Office in March 2005. RBA at 4-5.

The Board concluded that the March 2005 decision did not contain clear and unmistakable error in failing to reconsider Appellant's claim, or assign an effective date earlier than June 24, 2003, under the provisions of 38 C.F.R. § 3.156(c). RBA at 9. While the Board acknowledged that receipt of the Environmental Support Group report in 1993 triggered the obligation to reconsider Appellant's claim, it disagreed with Appellant's argument that such reconsideration was required to take place in March 2005. *Id.* To that end, the Board found that Appellant's claim had in fact been reconsidered in light of the report by the Regional Office in June

1993 and then by the Board in July 1994 when it denied entitlement to service connection for PTSD after considering the evidence. *Id.* at 12.

III. ARGUMENT

A final decision may not be reversed or revised in the absence of clear and unmistakable error, "a very specific and rare kind of error . . . that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error." 38 C.F.R. § 20.1403. To establish such error, a claimant must show that (1) either the facts known at the time of the decision being attacked were not before the adjudicator or that the law then in effect was incorrectly applied, (2) an error occurred based on the record that existed at the time, and (3) the outcome of the decision would have been "manifestly different" had the error not been made. *Stallworth v. Nicholson*, 20 Vet.App. 482, 487 (2006).

Appellant contends that the Board failed to correctly apply the provisions of 38 C.F.R. § 3.156(c) when it concluded that the March 2005 rating decision that granted him service connection for posttraumatic stress disorder did not contain clear and unmistakable error[2]; that the March 2005 decision contained clear and unmistakable error; and that the outcome of that decision would have been

[2] Appellant contends that the Board relied on a version of the regulation that was not in place at the time of that decision. He appears to argue that the version of the regulation in place at the time of the March 2005 decision was that which was in place in May 1993. (App. Br. at 10).

manifestly different had his original claim been reconsidered under the provisions of § 3.156(c) and not reopened under the provisions of § 3.156(c). (App. Br. at 5-6).[3] The arguments are baseless and misdirected.

Even assuming the premise of the arguments to be true—that the January 1983 decision was never reconsidered and that there is a relevant distinction between reconsideration of a claim based on receipt of a newly received service department record and the readjudication of a reopened claim based on the receipt of new and material evidence—the target of Appellant's challenge is misdirected. After the Environmental Support Group report was received, it was considered by the Regional Office, which, in June 1993, issued a decision that continued the denial of service connection because the report did not provide adequate verification of a stressor sufficient to support a grant. RBA at 1372. Thereafter, in June 1994, the Board considered the report (as well as the other relevant evidence of record) and issued a decision in which it denied service connection. RBA at 1328-29 (1316-29).

Even if both the Regional Office and the Board failed to properly apply the provisions of § 3.156(c) in their respective decisions, Appellant did not appeal the

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[3] *See also* (App. Br. at 7-8), (App. Br. at 8-22), (App. Br. at 22-25). In view of these arguments, he submits that this case presents "three questions of law:" (1) which version of § 3.156(c) was applicable to the review of the March 2005 rating decision for clear and unmistakable error; (2) whether it is clear and unmistakable error to reopen a claim under § 3.156(a) rather than to reconsider it under § 3.156(c); and (3) whether such error inherently produces a manifestly different outcome. (App. Br. at 5).

subsuming Board decision and it became final. *See Bingham v. Nicholson*, 421 F.3d 1346, 1349 (Fed. Cir. 2005) ("Even if the Board's decision to deny a claim had been based on an incomplete or erroneous analysis of law or fact . . . it would still be an adjudication of that claim to which the rule of finality attaches."). In other words any failure to properly apply the provisions of § 3.156(c) would have been made in the June 1993 and June 1994 Regional Office and Board decisions, and those errors would have become final when Appellant failed to appeal the latter.

However, Appellant does not challenge the June 1994 decision on the basis of clear and unmistakable error. Instead, he ignores the legal effect of that decision (as well as other intervening final decisions made with respect to this claim[4]) and asserts clear and unmistakable error in the March 2005 rating decision. His challenge is misdirected and thus his arguments on appeal here are misdirected and must be denied.

But even assuming that the duty to reconsider a claim based on the receipt of a previously unassociated service department record is not absorbed into, or terminated by, the first final adjudicative decision issued after (and upon acknowledgement of) the receipt of that record, the Board in this case specifically found that both the Regional Office in June 1993 and the Board in June 1994

[4] For example, a September 1995 rating decision declined to reopen Appellant's claim. RBA at 1267; RBA at 1270. Appellant appealed that decision to the Board which concluded that in April 2001 that new and material evidence had not been submitted since its July 1994 decision and likewise declined to reopen the claim. RBA at 710-17. Appellant did not appeal that decision and thus it became final.

considered Appellant's claim in light of the Environmental Support Group report. RBA at 12. Indeed, as the Board explained, the June 1994 Board decision specifically concluded after a review of the evidence that service connection for posttraumatic stress disorder was not warranted.[5] RBA at 1329 (1317-29). Appellant fails to show that the Board's conclusions in this regard are clearly erroneous.[6]

Indeed, his protracted discussion of whether the term "reconsidered" is "synonymous with the term reopening" as used respectively in sections 3.156(c) and 3.156(a) is irrelevant. (App. Br. at 12) (emphasis removed).[7] While the standard for when a claim must be reconsidered based on a newly received service department record may be different than the standard for when a claim must be reopened based on new and material evidence, neither standard is

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[5] To be sure, the Board identified the issue on appeal as entitlement to service connection for post-traumatic stress disorder, RBA at 1317, found that the claim had been reopened by the Regional Office, RBA at 1318, and based its decision on a review of the entire evidentiary record, RBA at 1319.

[6] While the regulation in place in 1993 provided that, upon receipt of a supplemental report from the service department, "the former decision will be reconsidered," Appellant fails to explain the significance of a distinction between reconsideration of a decision on a claim and a reconsideration of the claim itself. *Cf.* 38 C.F.R. § 3.156(c) (1993). Indeed, he himself uses the phrase "claim" in lieu of "decision" when referring to the agency's reconsideration obligations after receipt of a new service department record: "In the final rule, the Secretary made it clear that these amendments are not intended to be substantive changes to VA's well-established practice of reconsidering claims based on newly discovered service department records . . . ." (App. Br. at 12).

[7] *See also* (App. Br. at 10, 11, 12, 13, 14, 15, 16, 17, 18, 19).

relevant here because the Board, in its June 1994 decision, conducted a *de novo* review and readjudicated Appellant's claim on merits. RBA at 1317-29. To the extent that reconsideration of a claim under § 3.156(c) provides any greater benefit to a claimant than readjudicating a claim that has been reopened under § 3.156(a), that benefit exists only if the claim is granted. Here, it was not. The Board, in its June 2004 decision specifically denied the claim. In other words, while Appellant makes a big deal about the potential distinction between the terms "reconsideration" and "reopening," he fails to explain the significance of any such distinction once a claim is reopened, readjudicated and denied.

As stated above, as the record shows and the Board found, in June 1994, the Board reviewed the evidence, to include the Environmental Support Group report received in June 1993 and rendered a decision on the merits of Appellant's claim. RBA at 1329. *See also id.* at 1328 (explaining that "while the veteran has been diagnosed with post-traumatic stress disorder, the preponderance of the evidence is against a finding that the stressor events cited by him did in fact occur"). In short, because the Board, in June 1994, readjudicated Appellant's claim and denied it on the merits after and in light of the receipt of the Environmental Support Group report, any distinction between "reconsideration" and a "reopening" is irrelevant and any failure to correctly apply the provisions of § 3.156(c) would at most be harmless.[8]

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[8] Appellant also appears to take issue with the version of § 3.156(c) that the Board applied in reviewing his challenge to the March 2005 rating decision. (App. Br. at

In sum, Appellant fails to demonstrate that the Board committed prejudicial error in denying revision of the March 2005 rating decision on the basis of clear and unmistakable error. Accordingly, the decision should be affirmed.

V. CONCLUSION

WHEREFORE, in light of the foregoing, the Court should affirm the July 31, 2018, decision of the Board of Veterans' Appeals that denied revision of a March 9, 2005, rating decision based on clear and unmistakable error.

Respectfully submitted.

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5, 14). Specifically, in its discussion of the regulation, the Board appears to have relied on the regulation's current version. RBA at 10. Appellant contends that the applicable version of the regulation was the version extant in 2005. *Compare* 38 C.F.R. § 3.156(c) (2019) *with* 38 C.F.R. § 3.156(c) (2005). Even assuming that the Board applied the incorrect version of the regulation, Appellant fails to explain how he was impacted by that error, let alone prejudiced. Indeed, as discussed above, the regulation itself was inapplicable at the time of the March 2005 decision and so no prejudice could have resulted from any error associated with the version of the regulation relied on by the Board.

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