Vet.App. No. 18-6044

IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

ERIC C. ELDER,
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

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

RICHARD A. DALEY
Deputy Chief Counsel

ALEXANDER M. PANIO
Appellate Attorney
Office of General Counsel (027E)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
202-632-5157

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Code

Code of Federal Regulations

RECORD BEFORE THE AGENCY CITATIONS

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

ERIC C. ELDER,	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 18-6044
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
Appellee.	)	

ON APPEAL FROM
THE BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE
SECRETARY OF VETERANS AFFAIRS

I. ISSUES PRESENTED

Whether the Court should affirm the September 7, 2017, Board of Veterans' Appeals (Board) decision that denied (1) revision of a February 1976 rating decision on the basis of clear and unmistakable error (CUE); (2) an effective date prior to February 21, 2008, for the grant of service connection for panhypopituitarism (PHP); and (3) a total disability rating based on individual unemployability due to service-connected disabilities (TDIU) prior to February 21, 2008.

II. STATEMENT OF THE CASE

A. Jurisdiction

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

B. Nature of the Case

Eric C. Elder (Appellant) appeals the September 7, 2017, Board decision that denied (1) revision of a February 1976 rating decision denying service connection for viral meningoencephalitis due to CUE; (2) an effective date prior to

February 21, 2008, for the grant of service connection for PHP; and (3) TDIU prior to February 21, 2008. (*See* Record ((R.) at 2-18 (Board decision)). Appellant requests remand of the Board's determinations. The Secretary seeks affirmance.

C. Statement of Relevant Facts

Appellant served on active duty from June 1966 to January 1976 and from July 1979 to August 1990. (R. at 7022-23). Following Appellant's separation from his initial period of service in January 1976 he filed a claim for service connection for epididymitis and prostatitis, viral meningitis, and kidney inflammation. (R. at 7028-7029). A February 1976 rating decision granted service connection for chronic prostatitis and recurrent right epididymitis and denied service connection for viral meningitis and a kidney condition. (R. at 7026). Appellant was notified of this decision the same month and did not appeal. (R. at 7019).

Following Appellant's second period of service, he filed a claim for service connection for, *inter alia*, viral meningitis in August 1991. (R. at 6475, 6475-80). The Regional Office (RO) denied the claim in a January 1992 rating decision and informed Appellant of the same in a March 1992 letter. (R. at 6421, 6431-33).

In May 1992, Appellant filed to have his retirement pay changed to disability pension and attached a copy of his service-connection claim from August 1991. (R. at 6417, 6413-17). His pension was established and reconciled with his retirement payments in May 1992. (R. at 6392-94).

In February 2008, Appellant filed a claim for service connection for a pituitary gland condition and residuals. (R. at 5705-07). Appellant's claim was ultimately

granted in an August 2009 Board decision. (R. at 4942-52). The RO subsequently assigned an effective date of February 21, 2008. (R. at 4140-43). In a statement received November 2, 2009, Appellant claimed that there was CUE in the 1976 rating decision because "the viral menigo-encephalitis is directly related to the [PHP,] and the BVA has ruled the [PHP] is service connected." (R. at 4347 (4345-48)). In an April 2016 SOC, the RO addressed Appellant's claim for an earlier effective date for PHP and CUE in the 1976 rating decision. (R. at 885-919). Appellant filed a timely substantive appeal in May 2016. (R. at 858-59). He testified before the Board in January 2017. (R. at 580-625).

In the September 2017 Board decision now on appeal, the Board found that there was no CUE in the 1976 rating decision. (R. at 6-10). The Board further found that Appellant had not filed a claim for service connection for PHP prior to February 2008 and that no earlier effective date was therefore warranted as to that claim. (R. at 10-13). Finally, the Board found that TDIU was not warranted prior to February 2008. (R. at 13-18). This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's decision. The Board's determination that there was no error rising to the level of CUE in the 1976 rating decision was not arbitrary or capricious, supported by the evidence of record, and premised on an adequate statement of reasons or bases. The Board plausibly found that the correct facts and law were before the adjudicators at the time of the decision and explained as much. The Board also directly addressed Appellant's contentions in

that regard. Likewise, the Board's conclusion that an earlier effective date for the grant of service connection for PHP was not warranted is plausible and adequately explained. The Board plausibly found that Appellant had not identified any non-adjudicated claim for service connection for PHP or to reopen a previously denied claim for service connection for residuals of viral meningoencephalitis prior to February 21, 2008. The Board considered the material evidence of record and provided an adequate statement of reasons or bases for its decision. There is a plausible basis in the record for the Board's determinations. Appellant fails to show that the Board's findings of fact are clearly erroneous, that the Board misapplied the law or that any inadequacy in the Board's reasons or bases is preclusive of judicial review. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). Thus, Appellant has failed to meet his burden of demonstrating error in the Board's decision. *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 (1991).

IV. ARGUMENT

A. The Board's Finding That There Was No CUE in the February 1976 Rating Decision Is Supported by the Evidence of Record and an Adequate Statement of Reasons or Bases

A claimant bears a high burden in establishing CUE in a previous decision. To establish CUE, a claimant must show that either the facts known at the time were not before the adjudicator or the law then in effect at the time was incorrectly applied. *Russell v. Principi*, 3 Vet.App. 310, 313-14 (1992) (en banc); 38 C.F.R. §

3.105(a). Additionally, the alleged error must be "undebatable," not merely "a disagreement as to how the facts were weighed or evaluated" and the error must have "manifestly changed the outcome" of the decision. *Id.*; *Bustos v. West*, 179 F.3d 1378, 1380 (Fed. Cir. 1999). A review for CUE must be based on the record and law that existed when that decision was made. *Russell*, 3 Vet.App. at 314.

The Court's review of a Board finding of no CUE in a prior final decision is limited to determining whether the Board's finding was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 38 U.S.C. § 7261(a)(3)(A); *Russell*, 3 Vet.App. at 315; *see also Lane v. Principi,* 16 Vet.App. 78, 83-84 (2002). Under the "arbitrary and capricious" standard, there need only be a rational connection between the facts found and the choice made. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). To the extent that Appellant couches his arguments as a failure to provide an adequate statement of reasons or bases, the Board's statement of "reasons or bases" need only be adequate to enable the claimant to understand the basis for its decision and to facilitate judicial review. *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

The Board found that no CUE was shown in the February 1976 rating decision and that the correct law and facts, as they were known at the time, were before the adjudicator in that decision. (R. at 3). It further found, "The medical records in the claims file at that time do not reveal any diagnosis of PHP; hypothyroidism or any other endocrinopathy; and/or, or any other residuals of viral

meningoencephalitis." (R. at 10). The Board addressed Appellant's contention that PHP was a "hidden disease" that could not have been detected until later MRI technology, but found that this further confirmed that PHP could not have been diagnosed at the time of the 1976 rating decision and that therefore no CUE as to PHP could have been committed, as the outcome could not possibly have been manifestly different. (R. at 10). The Board also noted that the ultimate grant of service connection for PHP was based on "a wealth of evidence that was not before the AOJ in 1976," including a diagnosis of such condition. (R. at 10-11). The Board addressed the theories of CUE advanced by Appellant and provided their reasons for rejecting such theories. The Board's findings are supported by evidence and its explanation is clear.

Appellant raises theories of CUE that were not presented to the Board and fails to demonstrate any error that could be considered CUE or that the Board's decision in this regard was arbitrary, capricious, or preclusive of judicial review. Appellant's November 2009 CUE motion stated that,

> in view of BVA decision[,] the VARO made a clear and unmistakable error in its 1976 decision. The viral meningo-encephalitis is directly related to the [PHP] and the BVA has ruled [PHP] is service connected. It is clear that the BVA accepted my argument that my pituitary was destroyed while I was hospitalized at Litzenburg Memorial Hospital.

(R. at 4347). Appellant now advances two arguments regarding CUE, neither of which were contained in his original motion.

Appellant's first argument is that "the rating specialist(s) errantly indicated that the Veteran's original claim was received January 22, 1976," and that the "Board failed to even acknowledge the 1976 rating decision's misstatement of this fact." As noted, the issue of date of receipt of claim was not raised at any point below and is a new theory of CUE. "When an appellant raises a new theory of CUE for the first time before the Court, the Court must dismiss for lack of jurisdiction." *Acciola v. Peake*, 22 Vet.App. 320, 324 (2008); *Vanerson v. West,* 12 Vet.App. 254, 262 (1999) (holding that the Court does not have jurisdiction to consider claims of clear and unmistakable error in the first instance).

However, should the Court entertain this new theory, it still fails to establish CUE for multiple reasons. First, as Appellant notes, "there is a clear date received stamp that indicates receipt on January 22, 1976." (App. Br. at 13 (noting R. at 7029 (7028-29))). This alone prohibits a finding of CUE, as there is a fully plausible basis for finding the document was received on the date that it was stamped received. Moreover, Appellant's theory that he signed the document in January 1975 is both irrelevant (claims are effective the date they are received) and would have meant that he filed his claim a year before separating from service, which he has never contended. Indeed, Appellant has himself stated that he filed the claim in 1976.[1] (R. at 4572). Additionally, Appellant provides no explanation as to how such an error would manifestly change the outcome of the decision, since the

[1] Appellant also notes the day he separated from service in the application as January 15, 1976. (R. at 7028).

merits of the issue do not turn in any way on the date of the claim. Finally, as this argument was not raised in Appellant's CUE claim, the Board was not obligated, even under a liberal reading of the claim, to discuss it. *Fugo v. Brown*, 6 Vet.App. 40, 44 (1993) (holding that CUE must be pled with some degree of specificity as to what the alleged error is and that the claimant must give persuasive reasons as to why the result of the prior determination would have been manifestly different but for the alleged error); *Acciola*, 22 Vet.App. at 326 (holding that, while "a sympathetic reading of a CUE motion can fill in details where the theory is not fully fleshed out, . . . it cannot supply a theory that is absent").

Appellant next argues, "The rating specialist(s) also stated that the Veteran's viral meningoencephalitis was 'not found on last examination' and errantly indicated that it 'was shown as recovered at the time of discharge [from the hospital].'" (App. Br. at 13). Appellant's argument here is both unclear and not a basis for CUE. To the extent the rating decision found "residuals of Viral meningoencephalitis not shown in last examination and separation exam (12-19-1975)" (R. at 7026), Appellant cites to nothing in the record showing otherwise. There was indeed no finding of viral meningoencephalitis or residuals at Appellant's separation examination. (R. at 6721-22). Thus, the rating decision is correct in that regard. Appellant also takes issue with the characterization of his 1972 report of hospitalization and contends that he was not fully recovered, but only asymptomatic. (App. Br. at 13-14). However, this is Appellant's unsubstantiated lay opinion, and it is based only on his interpretation of the 1972

hospitalization report, which the RO specifically cited and evaluated. This argument is entirely a disagreement with how the RO evaluated and weighed the evidence at the time of the 1976 rating decision. Such an argument does not demonstrate error in the Board's decision and cannot constitute CUE in the 1976 rating decision. *Russell,* 3 Vet.App. at 313-14 ("The claimant . . . must assert more than a disagreement as to how the facts were weighed or evaluated."); *Damrel v. Brown*, 6 Vet.App. 242, 246 (1994) (recognizing that a mere disagreement with how the facts were weighed or evaluated is insufficient to sustain a claim of clear and unmistakable error).

Appellant asserts that the correct facts, as they were known at the time, were not before the rating specialist and that the Board apparently erred in that it "accepted the 1976 rating decision's misstatement of this fact." (App. Br. at 13-14). However, the correct facts were clearly before the RO, as both the rating decision and Appellant cite to the same August 1972 service treatment record to support their conclusions. (R. at 7016-17, 7026) (App. Br. at 13-14). Appellant's argument is only with how the RO interpreted the findings in that report. As to the Board's finding that, "[f]ollowing discharge from the hospital in August 1972, it appears that his viral meningoencephalitis condition resolved," Appellant does not point to any specific evidence other than his opinion of the August 1972 record to indicate otherwise. (R. at 10).[2]

---

[2] As Appellant notes, an October 1991 VA examination report makes the same finding as the Board and diagnoses a history of meningitis. (R. at 549 ("While in

Moreover, the 1976 rating decision correctly noted that no viral meningo-encephalitis or residuals were detected at Appellant's separation examination. Thus, even if the condition had not completely resolved by the time of Appellant's 1972 discharge, the RO had evidence that it had resolved by the time of his separation. Appellant does not identify any particular evidence that refutes this or any evidence that was not of record at the time of the decision; he again merely gives his own interpretation of what the evidence suggests. Even if Appellant's contention is correct, this does not establish CUE, as it concerns how the evidence of record was evaluated, and he has not demonstrated that any error would have manifestly changed the outcome of the decision.

Appellant also argues that "the rating decision failed to account for these discrepancies or discuss the benefit[-]of[-]the[-]doubt doctrine." (App. Br. at 13). However, RO decisions issued prior to February 1, 1990, were not required to identify the evidence considered or provide an adequate statement of reasons or bases – as we know that term to mean today – because 38 U.S.C. § 5104(b) had not been enacted in its current form. *Natali v. Principi*, 375 F.3d 1375, 1380-81 (Fed. Cir. 2004) (holding that statements of reasons and bases were not required in RO decisions prior to Pub. L. No. 101-237, 103 Stat. 2062 (1988)). Moreover, a failure to accord the benefit of the doubt cannot constitute CUE. *Fugo v. Brown*, 6 Vet.App. 40, 44 (1993).

---

service in 1970 he contracted probable viral meningitis from which he completely recovered.")).

If the basis of the Board decision can be ascertained, its statement of reasons or bases is adequate. *See Johnson v. Shinseki*, 26 Vet.App. 237, 247 (2013) ("A Board statement should generally be read as a whole, and if that statement permits an understanding and facilitates judicial review of the material issues of fact and law presented on the record, then it is adequate."). Appellant does not contend that the Board's conclusions are clearly erroneous and does not explain how the Board's statement of reasons or bases is preclusive of judicial review. As he has not established CUE in the 1976 rating decision or any remandable error in the Board's decision, it should remain undisturbed.

B. Appellant Did Not File a Claim for Service Connection for PHP Prior to February 21, 2008.

The Board plausibly found that there was no non-adjudicated claim for service connection for PHP prior to February 2008 and thus that no earlier effective date was warranted for the grant of service connection. (R. at 11-13). Appellant argues that the Board should have considered whether a host of documents constituted informal claims, but Appellant's argument is underdeveloped and is not supported by law or fact. The Board's conclusion that no earlier effective date was warranted is supported by the evidence of record and clearly explained.

Except as otherwise provided, the effective date of grant of service connection based on an original claim or a claim reopened after final disallowance is the date of receipt of the claim or date entitlement arose, whichever is later. *See* 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400. "A Board determination of the proper

effective date is a finding of fact." *Bingham v. Principi*, 18 Vet.App. 470, 473 (2004). Factual determinations by the Board will not be overturned unless found to be clearly erroneous. *Butts v. Brown*, 5 Vet.App. 532, 534 (1993) (en banc) (holding that the Court reviews findings of fact under the "clearly erroneous" standard of review). Under the "clearly erroneous" standard, the Court cannot overturn the Board's factual finding if supported by a plausible basis, even if the Court may not have reached the same factual determination. *Forcier v. Nicholson*, 19 Vet.App. 414, 421 (2006); *Gilbert*, 1 Vet.App. at 53.

The Board initially noted that VA received a claim for service connection for PHP on February 21, 2008. (R. at 11, 5705-07). The Board found that this is the first document in the file that asserts entitlement to service connection for that condition and that Appellant had not pointed to any specific statement prior to that point that could be construed as a claim for service connection for PHP. (R. at 12). Appellant alleges no clear error as to this conclusion, and it is a straightforward finding.

The Board next addressed Appellant's contention that he specifically argued, "because PHP was a 'hidden disease' that was a result of his viral meningoencephalitis during service, that he should be awarded service connection earlier than has been assigned." (R. at 11). The Board noted, however, that again Appellant had not pointed to any specific non-adjudicated claim for residuals of viral meningoencephalitis that was received prior to February 21, 2008. (R. at 12). The Board considered whether an unadjudicated informal claim for PHP or viral

meningoencephalitis residuals had been submitted and found that it had not. (R. at 12). The Board plausibly concluded that, as no unadjudicated claim for PHP or residuals of viral meningoencephalitis had been received prior to 2008, an earlier effective date was not warranted. (R. at 12-13).

The Board considered the applicable provisions of the relevant regulations, and Appellant's contention as to why an earlier effective date was warranted, and it clearly explained why it found as it did. 38 C.F.R. §§ 3.155, 3.400. Appellant does not argue how the Board's finding was clearly erroneous, and there is little ambiguity in the Board's conclusion that no claim had been received prior to February 21, 2008, upon which to premise an earlier effective date.

Appellant contends that the Board failed to adjudicate all his claims (App. Br. at 7-10) and that it provided an inadequate statement of reasons or bases in finding that no claim for residuals of viral meningoencephalitis had been received prior to February 2008. (App. Br. at 14-15). However, he misrepresents the Board's findings in this regard. Appellant states, "The Board also failed to provide adequate reasons or bases for its determination that there was not a 'claim for residuals of viral meningoencephalitis that was received prior to February 21, 2008.'" (App. Br. at 14). However, what the Board actually said was that "he [Appellant] *has not pointed to a specific non-final* claim for residuals of viral meningoencephalitis that was received prior to February 21, 2008." (R. at 12). Appellant does not cite to anything in the record showing otherwise. To the contrary, in a January 2011 statement, Appellant specifically stated that he filed to

reopen his claim for viral meningoencephalitis in October 2009. (R. at 3893-94). He does not reference any correspondence prior to that point or allege that he had previously attempted to reopen such a claim. (*Id.*). His theory that all these documents are informal claims was not advanced prior to the briefing stage of these proceedings.

Appellant's argument is predicated on several other mistaken presumptions and does not establish any error of fact or flaw in the explanation in the Board's decision. First, Appellant assumes that the Board granted service connection for PHP as secondary to viral meningoencephalitis. His only cited support for this conclusion is a statement from the Board's August 2009 decision that "the January and February 2009 medical statements from Drs. A.D.C. and J.D. provide a plausible basis to conclude that the Veteran's panhypopiturtarim first manifest itself during the August 1972 in-service hospitalization for viral aseptic meningoencephalitis." (R. at 4949). However, this statement in no way states that service connection for PHP was granted on a secondary basis to viral meningoencephalitis. Indeed, service connection for viral meningoencephalitis has never been granted and nowhere in the Board's August 2009 decision did it find that Appellant's PHP was caused by viral meningoencephalitis.[3] (R. at 4946-4948). This is simply not a finding of fact that has been made.

[3] Indeed, The Board noted that one of the reports it relied on in granting service connection, from Dr. J.D., opined that Appellant never truly had viral meningoencephalitis to begin with. (R. at 4947).

Appellant next assumes that any service-connection claim for viral meningoencephalitis is the same as a claim for service connection for PHP. This is also unsupported by any fact or law. Even if PHP is related to Appellant's in-service meningoencephalitis, he does not explain how a claim for one equates to a claim for the other. This is especially significant where, as here, there was no diagnosis of PHP for several decades after his in-service viral meningoencephalitis, and for several years after the documents he suggests were claims for such.[4] Even under the previous regulations governing informal claims, a claimant was still required to identify the benefit sought and demonstrate an intent to apply for that benefit. *See Brokowski v. Shinseki*, 23 Vet. App. 79 (2009); 38 C.F.R. § 3.155 (2014).

Which leads to the third problem with Appellant's argument: the assumption that any of the multiple documents he cites actually satisfies the requirements for an informal claim. In none of these documents is PHP or any other pituitary condition even mentioned, and, apart from the claims that were actually adjudicated, he does not establish how any of these passing mentions of his in-service viral meningoencephalitis demonstrates an intent to reopen his claim.

To that end, Appellant's brief incorrectly claims that his August 1991 claim for service connection for viral meningoencephalitis was not adjudicated, but it was, and Appellant was informed of such. (R. at 538-40, 6421). Appellant's brief

[4] According to Appellant, he was not diagnosed with PHP until August 2007. (R. at 5619).

also incorrectly claims that he resubmitted an application for viral meningoencephalitis in May 1992. However, this request was specifically to begin receiving VA pension benefits instead of retirement pay. (R. at 6413). Appellant did not suggest prior to now that he was submitting a new claim at that time, and the correspondence notes only that he was attaching a copy of the previous claim. (*Id.*). Indeed, several of the issues that he would have been "claiming" had just been granted. (R. at 538-40). In none of the remaining correspondences Appellant cites, which again were not identified to the Board as claims, did Appellant evince any intent to reopen a previous claim or to apply for service connection, and he does not demonstrate otherwise.

The burden is on Appellant to demonstrate error in the Board's decision. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd* 232 F.3d 908 (Fed. Cir. 2000). This cannot be accomplished simply by noting every correspondence wherein he mentioned viral meningoencephalitis and then saying that the Board erred in not discussing each one or finding that they were not informal claims. While the Board is required to consider the evidence of record, it is not required to discuss all of it. *Gonzales v. West*, 218 F.3d 1378, 1380-81 (Fed. Cir. 2000) (holding that the Board must review the entire record but does not have to discuss each piece of evidence). Appellant has not met his burden of establishing error in the Board's factual findings, which rest on a plausible basis, nor has he demonstrated that the Board's reasons and bases were so deficient as to render

its decision preclusive of judicial review. As such the Board's decision should be affirmed.

C. Appellant Has Abandoned All Issues Not Argued in His Brief

Any and all issues or arguments that have not been raised in Appellant's opening brief have been abandoned. *See Disabled Am. Veterans v. Gober*, 234 F.3d 682, 688 n. 3 (Fed. Cir. 2000) (stating that the Court would "only address those challenges that were briefed"); *Pieczenik v. Dyax Corp*., 265 F.3d 1329, 1332-33 (Fed. Cir. 2001) ("It is well settled that an appellant is not permitted to make new arguments that it did not make in its opening brief").

V. CONCLUSION

For the foregoing reasons, the Court should affirm the Board's September 7, 2017, decision in all respects.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Richard A. Daley
RICHARD A. DALEY
Deputy Chief Counsel

/s/ Alexander M. Panio
ALEXANDER M. PANIO
Appellate Attorney
Office of General Counsel (027E)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
202-632-5751

Counsel for the Secretary