Vet. App. No. 19-4135

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JOHNNY R. MARTINEZ,
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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ON APPEAL FROM THE
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BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS

I. ISSUES PRESENTED

1. Whether the Court should affirm the May 17, 2019, decision of the Board of Veterans' Appeals (the Board), which found no clear and unmistakable error (CUE) in a March 1980 rating decision denying entitlement to service connection for right wrist pain and dislocation.

2. Whether the Court should affirm the May 17, 2019, decision of the Board, which found no CUE in a March 1980 rating decision in not addressing a spondylosis of the thoracic spine claim, or in a February 2009 rating decision denying entitlement to service connection for spondylosis of the thoracic spine without radiculopathy.

3. Whether the Court should affirm the May 17, 2019, decision of the Board, which found no CUE in a March 1980 rating decision in not addressing a right hip claim, or in a February 2009 rating decision denying entitlement to service connection for right hip degenerative joint disease (DJD).

4. Whether the Court should affirm the May 17, 2019, decision of the Board, which found no CUE in a March 1980 rating decision in not addressing a left knee claim, or in a February 2009 rating decision denying entitlement to service connection for left knee DJD.

5. Whether the Court should affirm the May 17, 2019, decision of the Board, which found no CUE in a March 1980 rating decision in not addressing a left ankle claim, or in a February 2009 rating decision denying entitlement to service connection for left ankle DJD.

6. Whether the Court should affirm the May 17, 2019, decision of the Board, which found no CUE in a March 1980 rating decision in not addressing an asthma claim, or in a February 2009 rating decision denying entitlement to service connection for asthma.

7. Whether the Court should affirm the May 17, 2019, decision of the Board, which found no CUE in a March 1980 rating decision in not addressing a gastroesophageal reflux disorder (GERD) claim, or in a February 2009 rating decision denying entitlement to service connection for GERD.

8. Whether the Court should affirm the May 17, 2019, decision of the Board, which found no CUE in a March 1980 rating decision in not addressing an erectile dysfunction claim, or in a February 2009 rating decision denying entitlement to service connection for erectile dysfunction.

9. Whether the Court should affirm the May 17, 2019, decision of the Board, which found no CUE in a March 1980 rating decision in not addressing a dental claim, or in a February 2009 rating decision denying entitlement to service connection for #3 tooth.

10. Whether the Court should affirm the May 17, 2019, decision of the Board, which found no CUE in a February 2009 rating decision granting service connection for bilateral hearing loss at 0%; and denied entitlement to an earlier effective date based on an alleged failure in the March 1980 rating decision to adjudicate a hearing loss claim.

11. Whether the Court should affirm the May 17, 2019, decision of the Board, which found no CUE in a February 2009 rating decision denying service connection for tinnitus, or in an October 2012 rating decision granting service connection for tinnitus at the maximum 10%

rating; and denied entitlement to an earlier effective date based on an alleged failure in the March 1980 rating decision to adjudicate a tinnitus claim.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252(a), which grants the Court of Appeals for Veterans Claims exclusive jurisdiction to review final decisions of the Board.

B. Nature of the Case

Appellant, Johnny R. Martinez, appeals the May 17, 2019, Board decision, [R. at 1-22], that denied his motion seeking to reverse or revise March 1980, February 2009, and October 2012 rating decisions on the basis of CUE, pertaining to the denial of service connection for a right wrist condition, spondylosis of the thoracic spine, right hip DJD, left knee DJD, left ankle DJD, asthma, GERD, erectile dysfunction, a dental condition affecting tooth #3, and the denial of increased ratings and/or earlier effective dates for hearing loss, rated 0% disabling, and tinnitus, rated 10% disabling. *See* Appellant's Informal Brief (App. Inf. Br.) at 13-17.

C. Statement of Relevant Facts

Appellant served in active service from February 1977 to February 1980. [R. at 1215]. Upon separation, in February 1980, Appellant filed a claim seeking

entitlement to service connection for a "[d]islocated right wrist." [R. at 1210 (1210-11)]; *see also* [R. at 709].

Appellant's service treatment records were received by VA shortly thereafter in February 1980. [R. at 1212]. His December 1976 entrance examination noted pre-service injury to the left ear, pre-service left ear infection, cavities of the teeth, occasional leg cramps, occasional low back pain on exercise, and ganglia or bone injury of the right hand with complaints of wrist pain. [R. at 815 (814-15)]; [R. at 819 (818-19)]; *see also* [R. at 821] (regarding pre-service right wrist pain). His service treatment records note in-service complaints of right wrist pain on or around November 1977, but x-rays taken at the time were normal. *See* [R. at 803]; [R. at 821]. The records also noted treatment for various complaints during service, including treatment for ingrown toenails, a pulled muscle in the low back, gastritis, and various dental treatment. [R. at 796]; [R. at 797]; [R. at 798]; [R. at 802]; [R. at 820]; [R. at 833-38]. Appellant's October 1979 separation examination, however, revealed no abnormalities. [R. at 810-11]; [R. at 816-17].

In a March 1980 rating decision, the Regional Office (RO) denied Appellant's claim seeking entitlement to service connection for a right wrist condition. [R. at 1196-99]. Appellant did not appeal this decision.

In September 2008, Appellant filed claims seeking entitlement to service connection for hearing loss, tinnitus, low back pain, erectile dysfunction, asthma, a right hip condition, a left ankle condition, GERD, and a left knee condition. [R. at 1144]; [R. at 1123-34]. The evidence at that time included a January 1999

private treatment record indicated a history of trauma and pain to the left knee and left ankle with diagnosed degenerative changes confirmed on x-ray. [R. at 1105]. A June 2004 private treatment record indicated treatment for severe gastritis with GERD and diarrhea. [R. at 1122]. An October 2005 private x-ray report of the right hand and left ankle that showed no evidence of fractures or dislocations. [R. at 991]. A May 2008 private treatment record noting treatment for low back and bilateral hip pain, status-post being thrown from a horse a few months earlier. [R. at 1120]. That private examination revealed early degenerative changes, but otherwise was unremarkable. *Id.* And a December 2008 private treatment record that noted no abnormalities status-post a left leg injury. [R. at 946].

Appellant was afforded a VA audiological examination in December 2008. [R. at 1079-81]. Appellant indicated he was employed as a heavy equipment operator on a cattle ranch with exposure to hazardous noise. [R. at 1079-80 (1079-81)]. He also reported military noise exposure, to include artillery, power tools, and generators. [R. at 1080 (1079-81)]. Appellant was found to have bilateral sensorineural hearing loss, but, at that time, denied tinnitus, dizziness, vertigo, history of head injury, or skull fracture. [R. at 1079-81]. The examiner opined Appellant's hearing loss was at least as likely as not related to in-service military noise exposure. [R. at 1081 (1079-81)]. No nexus opinion was provided about tinnitus because, at that time, Appellant denied any tinnitus. *Id.*

In January 2009, Appellant was also afforded a VA spine examination. [R. at 1061-64]. The examiner at that time noted Appellant's military history as a track

mechanic and in-service treatment for low back pain after slipping off a tank. [R. at 1061 (1061-64)]. The examiner also noted Appellant's 17-year post-service history working as a mechanic and rancher and a post-service injury where he was thrown off a horse. *Id.* After a review of the claims file and a physical examination, the examiner diagnosed Appellant with spondylosis of the thoracic spine, multilevel degenerative disk disease, and disk bulging of the lumbar spine. [R. at 1063 (1061-64)]. The examiner found these diagnoses not likely related to Appellant's military service or in-service treatment for muscle strain in the back given Appellant's lengthy post-service history without any problems of back pain, his labor-intensive post-service job, and the post-service history of being thrown from a horse. [R. at 1064 (1061-64)].

Based on all the evidence of record, in a February 2009 rating decision, the RO denied Appellant's low back, right hip, left knee, left ankle, tinnitus, asthma, GERD, and erectile dysfunction claims. [R. at 1040-43; 45-52]. He was granted entitlement to service connection for bilateral hearing loss, assigning a 0% rating, effective September 23, 2008, the date of Appellant's claim. *Id.* Appellant did not appeal this decision and no correspondence was received from him until February 2012. [R. at 1029]. At that time, Appellant filed a claim seeking an increased rating for his hearing loss and service connection for tinnitus. *Id.*

In June 2012, the RO afforded Appellant a new VA audiological examination. [R. at 1008-17]. Appellant again denied tinnitus and, therefore, a nexus opinion was not provided. [R. at 1015 (1008-17)]. Appellant was provided

another VA audiological examination in September 2012 where the examiner was specifically asked to provide a tinnitus nexus opinion. [R. at 864-73]. The examiner opined that tinnitus was a symptom of Appellant's hearing loss. [R. at 872 (864-73)].

Based on this new medical evidence, in an October 2012 rating decision, the RO granted Appellant's claim seeking entitlement to service connection for tinnitus. [R. at 849-54]. A 10% rating was assigned for tinnitus, effective February 29, 2012, the date of the new claim, and the 0% rating for hearing loss was continued. [R. at 856 (849-59)].

In September 2015, Appellant filed a CUE claim alleging errors with the March 1980, February 2009, and October 2012 rating decisions. [R. at 587-97].

Thereafter, the RO received VA dental treatment from December 2012 and April 2015. [R. at 745-50]; [R. at 751]. Based on the evidence of record, in an October 2015 rating decision, the RO denied service connection for the claimed dental condition. [R. at 563-81]. Appellant filed his notice of disagreement as to this denial in December 2015 and, also, reasserted his CUE contentions. [R. at 533-57]. In a January 2016 rating decision, the RO denied Appellant's CUE claims. [R. at 492-523]. Appellant filed a February 2016 notice of disagreement. [R. at 489-90]; *see also* [R. at 472-88]. The RO continued the denial in a December 2017 statement of the case (SOC). [R. at 127-81]. Appellant perfected his appeal in December 2017. [R. at 107-23]. He made further arguments in a February 2019 statement, including alleging that there were reasonably raised claims of vertigo

and Meniere's disease. [R. at 23-39]. As such, Appellant was afforded a VA examination for Meniere's disease in February 2019. [R. at 53-56]; [R. at 58].

Aside from vertigo/Meniere's disease, which had not yet been adjudicated by the RO, the other 11 claims were certified to the Board and denied in a May 2019 decision. [R. at 85-86]; [R. at 1-22]; *see also* [R. at 91-92]. The Board found no CUE in the March 1980 rating decision, February 2009 rating decision, or the October 2012 rating decision. [R. at 1-22]. As such, all 11 claims were denied. This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's May 2019 decision because Appellant has not raised any errors with the determination in which reversal or remand can be granted.

Appellant's informal brief largely rests on a fundamental misunderstanding that VA's receipt of his service treatment records in and of itself constitutes a claim for any and all conditions that may be noted therein and, also, entitles him to *presumptive* service connection. *See generally* App. Inf. Br. at 18-28. The Board adequately addressed and clarified these misunderstandings of the law and why past rating decisions contained no CUE. Appellant's arguments also challenge a December 2017 SOC, which the Board properly found was not a final decision subject to a CUE motion. [R. at 10 (1-22)].

The Board determined that the correct facts, as known at the time, were before the RO when it issued the March 1980, February 2009, and October 2012

rating decisions, and there is no showing that the RO misapplied the law as it existed at those times. [R. at 10-12 (1-22)]. Appellant's arguments amount to a mere disagreement with the Board's determination.

To the extent Appellant is seeking for the Court to directly review the past, final March 1980, February 2009, and/or October 2012 rating decisions (as opposed to the May 2019 Board decision), this the Court cannot do. That is, in the context of an appeal of a Board decision that determined that CUE was not committed in an earlier final decision, the Court may not directly review the disputed final decision for clear and unmistakable evidence and instead is limited in its review to the narrow question of whether the Board's determination that CUE was not committed is arbitrary, capricious, an abuse of discretion or not otherwise in accordance with the law. *Joyce v. Nicholson*, 19 Vet.App. 36, 45 (2005).

For these reasons, and as argued below, the Board's decision should be affirmed.

IV. ARGUMENT

At the outset, the Secretary is mindful of the obligation to "give a sympathetic reading" to Appellant's pro se filings in order to determine "'all potential claims raised by the evidence, applying all relevant laws and regulations[,]'" *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (quoting *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001). Even so, it is well-established that Appellant still carries the burden of presenting coherent arguments and adequately supporting those arguments. *See Mayfield v.*

Nicholson, 19 Vet.App. 103, 111 (2005) (noting that "every appellant must carry the general burden of persuasion regarding contentions of error"), *rev'd* 444 F.3d 1328 (Fed. Cir. 2006); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) ("An appellant bears the burden of persuasion on appeals to this Court.") *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

In this case, Appellant has not carried his burden and fails to raise any cognizable Board error. At a minimum, the Board's May 2019 decision should be affirmed as it is supported by a plausible basis in the record and a correct application of the law.

A. The December 2017 SOC Is Not On Appeal Here And The Board Properly Found The December 2017 SOC Was Not a Final Decision Subject To a CUE Motion

Most of Appellant's arguments are phrased as disputes with the reasons and bases found in a December 5, 2017, SOC. *See generally* App. Inf. Br. at 18-28. The Secretary notes that the Court's review and this appeal is limited to the May 2019 Board decision and not the December 5, 2017, SOC. *See* 38 U.S.C. § 7252(a) (granting the Court jurisdiction to review final Board decision).

Appellant filed a claim in September 2015 alleging CUE with various rating decisions, including those dated in March 1980, February 2009, and October 2012. [R. at 587-97]. These CUE claims were denied in a January 2016 rating decision. [R. at 492-23]. Appellant filed a timely NOD in February 2016. [R. at 489-90]. The

RO then issued a December 2017 SOC, [R. at 127-81], and Appellant perfected his appeal to the Board, [R. at 107-23].

The Board properly considered *de novo* Appellant's CUE arguments as they pertained to the March 1980, February 2009, and October 2012 rating decisions. [R. at 1-22]. Regarding the December 2017 SOC, the Board found that the SOC was not subject to CUE motions. [R. at 10 (1-22)]. While the finality of a rating decision can potentially be overcome based on a CUE motion, in this case, the December 2017 SOC was not a final rating decision. *See Cook v. Principi,* 318 F.3d 1339 (Fed. Cir. 2002) (en banc); 38 C.F.R. § 20.1103 (indicating that an AOJ determination is considered final when the appeal is not perfected to the Board); 38 C.F.R. §§ 20.200, 20.302 (explaining what constitutes a perfected appeal).

Thus, the Board properly found that the December 2017 SOC was not a final decision and, therefore, could not be the subject of a CUE motion. [R. at 10 (1-22)]. Appellant's arguments directly challenging the December 2017 SOC should be rejected by the Court as outside the scope of this appeal and the Court's jurisdiction. *See* 38 U.S.C. § 7252(a).

B. The May 17, 2019, Board Decision Should Be Affirmed Because the Board Adequately Determined That CUE was Not present In The RO Decisions Dated March 1980, February 2009, and October 2012, For Any of the Claimed Conditions

Once a rating decision becomes final, a claimant may only attempt to overcome its finality by requesting a revision of the decision based on CUE or by filing a claim to reopen based upon new and material evidence. *Cook,* 318 F.3d

1339. Appellant never filed a claim to reopen any of the service connection issues on appeal based upon new and material evidence. Rather, he solely seeks to revise past, final rating decisions on the bases of CUE. *See* [R. at 587-97].

CUE is a very specific and rare kind of error. It is the kind of error, of fact or law, 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. The alleged error must be "undebatable," not merely "a disagreement as to how the facts were weighed or evaluated." *Russell v. Principi*, 3 Vet.App. 310, 313-14 (1992) (en banc). The error must have "manifestly changed the outcome" of the decision being attacked on the basis of CUE at the time that decision was rendered. *Id.*; *see also Bustos v. West*, 179 F.3d 1378, 1380-81 (Fed. Cir. 1999) (expressly adopting "manifestly changed the outcome" language in *Russell*).

Generally, either the correct facts, as they were known at the time, were not before the adjudicator, or the statutory and regulatory provisions existing at the time were incorrectly applied. *See Damrel v. Brown*, 6 Vet.App. 242, 245 (1994); 38 C.F.R. § 20.1403(a). Review for CUE must be based on the record and the law that existed when the decision was made. 38 C.F.R. § 20.1403(b).

Examples of situations that are not CUE include: (1) a new medical diagnosis that “corrects” an earlier diagnosis considered in a Board decision; (2) a failure to fulfill VA’s duty to assist the Veteran with the development of facts

relevant to his claim; or (3) a disagreement as to how the facts were weighed or evaluated. 38 C.F.R. § 20.1403(d).

As noted above, all Appellant's arguments in his informal brief reflect a fundamental misunderstanding of the law. He argues that merely because the VA received his service treatment records in February 1980, that he was entitled to *presumptive* service connection for any and all conditions noted therein. *See generally* App. Inf. Br. at 18-28.

This basic premise formed the bases of all Appellant's arguments, which can essentially be grouped into three categories: (1) the March 1980 rating decision contains CUE because the RO failed to adjudicate reasonably raised claims of hearing loss, tinnitus, asthma, erectile dysfunction, asthma, low back pain, a right hip condition, a left ankle condition, a left knee condition, a dental condition, and GERD; (2) the March 1980 and February 2009 rating decisions contain CUE because the RO failed to properly apply the law; and (3) the February 2009 and October 2012 rating decisions are contradictory to each other and therefore are clearly and unmistakably erroneous. App. Inf. Br. at 18-28.

The Board properly addressed all of these arguments explaining the misunderstanding of law and how none of the final rating decisions contained CUE. The Board's determination that CUE was not present in the RO's March 1980, February 2009, or October 2012 rating decisions was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. And the Board's May 2019 decision was supported by a satisfactory explanation for its decision that

included rational connections between the facts found and the choice made. *Cf. Lane v. Principi*, 16 Vet.App. 78, 83 (2002). For these reasons, the Board's decision should be affirmed.

1. The Board Properly Found No CUE With The March 1980 Rating Decision For Not Adjudicating Claims of Hearing Loss, Tinnitus, Asthma, Erectile Dysfunction, Asthma, Low Back Pain, a Right Hip Condition, a Left Ankle Condition, a Left Knee Condition, a Dental Condition, and GERD

With regard to the majority of the claims on appeal, and liberally reading his informal brief, Appellant appears to argue that the RO erred in March 1980 by failing to adjudicate any and all disorders reasonably raised within his service treatment records, to include spondylosis of the thoracic spine, a right hip disorder, a left knee disorder, a left ankle disorder, asthma, GERD, erectile dysfunction, a dental condition, hearing loss, and tinnitus. App. Inf. Br. at 18-28.

The Board addressed this argument and found there were no communications from Appellant in 1980 indicating any intent to apply for benefits other than the right wrist condition nor were there any reasonably raised claims for any other conditions. [R. at 11, 13, 15, 16, 17, 18, 19 (1-22)]; *see* [R. at 1210 (1210-11)]. As such, the Board found there was no CUE because the RO simply adjudicated the only claim raised at that time. *Id.*; *see also* [R. at 1196-99].

The Board's decision in this regard should be affirmed. A February 14, 1980, claim form indicated Appellant was filing a claim for "dislocated right wrist." [R. at 1210-11]. Appellant contends, however, that the Board "overlooked" a form for VA

benefits also dated February 1980, which should have been reasonably construed to include anything within his service treatment records even if not explicitly raised. App. Inf. Br. at 3-5; *see also* [R. at 709]. The form cited by Appellant in his informal brief, however, was merely confirmation of a claim submission and does not include any other issues. [R. at 709].

The Secretary is required to review all communications in the record that may be interpreted as formal or informal claims and to consider whether, in the context of the record, they reasonably raise a claim for benefits. *Brannon v. West*, 12 Vet.App. 32, 35 (1998). For a document to meet the threshold requirement to be considered a claim, however, it must at a minimum contain an expression of intent to apply for benefits and identify the benefits sought. *Brokowski v. Shinseki*, 23 Vet.App. 79, 88 (2009); *see also* 38 C.F.R. § 3.155 (1980) (recognizing, at that time, an informal claim for benefits as any "communication or action, indicating an intent to apply for one or more benefits."). The Court has recognized that the Secretary, "has no duty to read the mind of the claimant" but should "construe a claim based on the reasonable expectations of the non-expert, self-represented claimant and the evidence developed in processing that claim." *Clemons v. Shinseki*, 23 Vet.App. 1, 4-5 (2009).

It is well-settled law that medical records do not themselves constitute an informal claim for service connection benefits. *See MacPhee v. Nicholson*, 459 F.3d 1323, 1326-27 (Fed. Cir. 2006); *Criswell v. Nicholson*, 20 Vet.App. 501, 504 (2006); *Brannon v. West*, 12 Vet.App. 35, 35 (1998) (the mere presence of medical

evidence does not demonstrate an intent on the part of the claimant to seek service connection). Thus, Appellant's service treatment records alone could not constitute an informal claim for service connection benefits. *Id.*

Here, on February 14, 1980, Appellant filed two forms simultaneously: a "DA Form 664" indicating "I have filed an application for such compensation on VA Form 21-526e," and VA Form 21-526e, indicating a claim for "dislocated right wrist." [R. at 709]; [R. at 1210 (1210-11)]. There was nothing in the February 1980 forms that showed an intent to apply for any benefit other than a "dislocated right wrist." *See* [R. at 1210-11]; [R. at 709]; *see also Boggs v. Peake*, 520 F.3d 1330, 1335 (Fed. Cir. 2008) (holding that absent any intent from Appellant, "VA is not required to conjure up issues not raised by the claimant.").

The context of the procedural history is instructive here. Both forms were filed on the same day; "VA Form 21-526e" only identified a right wrist disorder claim; and "DA Form 664" referenced his claim filed on "VA Form 21-526e." [R. at 709]; [R. at 1210-11]. The record does not contain any other submissions from Appellant in 1980, nor does Appellant cite any such submission. Thus, the Board reasonably and plausibly found that there were no communications from Appellant in 1980 indicating any intent to apply for benefits other than the right wrist condition nor were there any reasonably raised claims for any other conditions. [R. at 11 (1-22)].

It is worth adding that aside from hearing loss,[1] all of these claims were subsequently denied in final, unappealed rating decisions. In a final, unappealed February 2009 rating decision, the RO adjudicated and denied claims seeking service connection for spondylosis of the thoracic spine without radiculopathy, asthma, left knee degenerative joint disease, right hip degenerative joint disease, left ankle degenerative joint disease, GERD, tinnitus, and erectile dysfunction. [R. at 1048 (1040-50)]. In October 2015, moreover, the RO adjudicated and denied a claim seeking service connection for tooth #3 (claimed as inner piece left in root canal). [R. at 564 (563-81)]. Appellant does not dispute the fact that he did not appeal either of these denials. *See generally* App. Inf. Br. Accordingly, at a minimum, these subsequent final decisions served as an "implicit denial" for any and all earlier claims of the identical issue. *See Munro v. Shinseki*, 616 F.3d 1293 (2010) (even if a past claim is not addressed, a subsequent denial of the identical claim is an "implicit denial" of the earlier claim); *see also Cogburn v. Shinseki*, 24 Vet.App. 205 (2010).

In short, Appellant filed a claim in February 1980 for only a right wrist dislocation. *See* [R. at 1210-11]; *see also* [R. at 709]. There are no other statements prior to the March 1980 rating decision that can be reasonably construed as an intent to file for a back condition, right hop, left knee, left ankle,

[1] A subsequent February 2009 rating decision granted service connection for hearing loss and assigned a non-compensable (0%) rating, effective September 23, 2008. [R. at 1048 (1040-50)].

asthma, GERD, erectile dysfunction, hearing loss, tinnitus, or a dental condition. Any potentially "pending" identical claims, moreover, were "implicitly denied" by the subsequent rating decisions. For these reasons, the Board decision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," but rather was supported by a satisfactory explanation for its decision and, therefore, should be affirmed. 38 U.S.C. § 7104(d)(1); *Lane*, 16 Vet.App. at 83.

2. The Board Properly Found No CUE With The Denied Right Wrist Claim In a March 1980 Rating Decision or the Denied Spondylosis of the Thoracic Spine, Asthma, Left Knee, Right Hip, Left Ankle, GERD, or Erectile Dysfunction Claims in a February 2009 Rating Decision

The March 1980 rating decision denied a right wrist claim finding no evidence of a current right wrist condition on the last examination. [R. at 1199 (1196-99)]. Appellant did not appeal this decision and, indeed, no further claims were filed by Appellant until September 2008. [R. at 1144]; [R. at 1123-34].

In February 2009, the RO denied, among other things, service connection claims for spondylosis of the thoracic spine, asthma, left knee, right hip, and left ankle degenerative joint disease, GERD, and erectile dysfunction. [R. at 1048 (1040-52)]. With regard to the thoracic spine, although in-service complaints of low back pain were noted, based on the evidence of record, a January 2009 VA examiner found his diagnosis more likely related to his post-service history working as a mechanic and rancher for 17 years and a post-service injury where he was thrown off a horse. [R. at 1061 (1061-64)]. Similarly, in-service treatment for

gastritis was noted, but the evidence did not show his current GERD was linked to his military service or in-service gastritis treatment. [R. at 1051 (1040-52)]. The remaining claims were denied because asthma, a left knee condition, a right hip condition, a left ankle condition, and erectile dysfunction were not shown in service nor was there medical evidence linking current diagnoses to military service. [R. at 1050-51 (1040-52)]. Appellant did not appeal the February 2009 rating decision, and, in fact, no correspondence was received from him until February 2012. [R. at 1029].

Before the Board, Appellant argued CUE in the March 1980 and February 2009 rating decisions claiming that the RO misapplied 38 C.F.R. §§ 3.307 and 3.309 and failed to identify "each and every veteran VA treatment date(s) reviewed by RO dated between February 1980 through January 2008." [R. at 11 (1-22)].

The Board found Appellant's broad CUE allegations did not substantiate a CUE claim, but, in any case, amounted to a mere disagreement with the way the evidence was weighed. [R. at 11-16 (1-22)]. The Board found that the RO properly applied the law and considered all relevant evidence in making the decisions. [R. at 11 (1-22)].

Appellant has not shown the Board's May 2019 decision finding no CUE in a March 1980 rating decision or a February 2009 rating decision was "arbitrary, capricious, an abuse of discretion or not otherwise in accordance with the law." *Joyce*, 19 Vet.App. at 45. The Board decision articulated a satisfactory explanation

for its decision and, therefore, should be affirmed in all respects. *Cf. Lane*, 16 Vet.App. at 83.

Presumption of Service Connection for Chronic Conditions

The common link in Appellant's arguments here is that the March 1980 and February 2009 rating decisions were erroneous because they misapplied 38 C.F.R. §§ 3.307 and 3.309. App. Br. at 20-28. Specifically, he contends his service treatment records show treatment for right wrist pain, low back pain (he claims related to his thoracic spine and right hip conditions), ingrown toe nails (he claims are related to the left knee and left ankle conditions), gastritis, and dental conditions.[2] *Id.* While Appellant does not seem to dispute the fact that none of his current conditions were diagnosed until after service, he further contends that regardless of when his conditions were diagnosed post-service, he should have been granted presumptive service connection. App. Inf. Br. at 20-28. But Appellant's argument reflects a misunderstanding of the law.

Again, the Court cannot directly review the final rating decision challenged. *See Joyce*, 19 Vet.App. at 45. The Board acknowledged these arguments in its May 2019 decision but found that the RO properly applied the law and Appellant merely disagreed with the outcome. [R. at 8-9 (1-22)].

Under the relevant provisions of law at the time of the March 1980 and February 2009 decision, a "chronic" disease was subject to presumptive service

[2] Appellant's dental condition was denied in a final October 2015 rating decision and not the March 1980 or February 2009 rating decisions. [R. at 563-81].

connection if became manifest to a degree of 10% or more within one year of service. 38 C.F.R. § 3.307(a)(3) (1980); 38 C.F.R. § 3.307(a)(3) (2009). Under 38 C.F.R. § 3.309(a), which read the same in 1980 and 2009, chronic diseases including "arthritis." 38 C.F.R. § 3.309(a) (1980); 38 C.F.R. § 3.309(a) (2009).

The Board found the chronic disease presumption was inapplicable to Appellant's right wrist, thoracic spine, GERD, asthma, erectile dysfunction, and dental conditions because none of those conditions were listed under the relevant regulation as a "chronic disease." [R. at 11, 12, 13, 16, 17 (1-22)]. While degenerative joint disease of the left ankle, left knee, and right hip were considered "chronic" under § 3.309, the evidence did not show manifestation of these disabilities for many years after service and, therefore, the presumption was found inapplicable. [R. at 15 (1-22)]. For these reasons, the Board found the March 1980 and February 2009 rating decisions properly applied the law. Appellant's arguments about continuity of symptoms merely amounted to a disagreement in how the evidence was weighed, which could not support a CUE motion. [R. at 10-12 (1-22)]; *see also* 38 C.F.R. § 20.1403(d)(3). Thus, the Board denied his CUE claims.

With regard to the March 1980 rating decision in particular, the Board added that, "merely filing a claim within the presumptive period does not necessarily lead to a grant of service connection." [R. at 15 (1-22)]. With regard to the right hip claim in particular, the Board further found that because the thoracic spine condition was not service-connected, it was not CUE for the February 2009 rating

decision to deny the right hip claim premised as secondary to the spine. [R. at 15 (1-22)]; *see also* 38 C.F.R. § 3.310 (2009).

Appellant has not articulated any reason why the May 2019 Board decision should be disturbed. Rather his informal brief raises the same arguments raised before the Board.

In short, the Board found no misapplication of law in either the March 1980 or the February 2009 rating decision. [R. at 10-19 (1-22)]. The Board's decision should be affirmed because even under a liberal reading of Appellant's arguments, he has not alleged or shown that the Board's decision in this case was arbitrary, capricious, or otherwise contrary to law. *See Stallworth*, 20 Vet.App. at 487.

Consideration of the Evidence of Record

Appellant also argues that the March 1980 and February 2009 rating decisions were erroneous because they "fail[ed] to list each and every veteran VA treatment date(s) reviewed by RO dated between February 1980 through January 2008." App. Inf. Br. at 21 and 24.

The Board found this argument insufficient to support a finding of CUE. [R. at 11 (1-22)]. That is, the Board indicated that the RO was not required to specifically list every piece of evidence in the file and Appellant had not alleged or otherwise shown that the RO did not consider a relevant fact. [R. at 11 (1-22)].

Appellant's argument on appeal is the same as before the Board. App. Inf. Br. at 21, 24. Again, the Court cannot directly review the final rating decision(s) challenged and Appellant fails to allege any error with the Board's May 2019

finding. *See Joyce*, 19 Vet.App. at 45. Appellant's informal brief does not explain what correct fact(s), as they were known at the time, were not before the adjudicator. *See Damrel*, 6 Vet.App. at 245; 38 C.F.R. § 20.1403(a); *see also* App. Inf. Br. at 21, 24.

It is Appellant who bears the burden of alleging CUE with specificity. *See Baldwin v. West*, 13 Vet.App. 1, 5 (1999). Without more explanation, Appellant's arguments here fail. The Board correctly concluded that Appellant's arguments related to the consideration of evidence merely equated to expressing disagreement with how the RO weighed the evidence at that time. [R. at 12-18 (1-22)]. Thus, the decision should be affirmed. *See* 38 C.F.R. § 20.1403(d)(3).

Alleged Duty-to-Assist Error

Regarding Appellant's left ankle and left knee claim, his informal brief also alleges that the "rating specialist…fail[ed] to provide the required VA initial medical opinion…." App. Inf. Br. at 21.This argument was not raised before the Board and, therefore, was not specifically addressed by the May 2019 decision on appeal. *See generally* [R. at 1-22]. Nevertheless, it is well-settled law that a claimed duty to assist error, such as "failing to provide a medical opinion on the issue," cannot support a CUE claim. 38 C.F.R. § 20.1403(d)(2). "[T]he requirements that a clear and unmistakable error be outcome determinative and be based on the record that existed at the time of the original decision make it impossible for a breach of the duty to assist to form the basis for a CUE claim." *Cook*, 318 F.3d at 1346. As such, Appellant's argument, fails as a matter of law.

Dental Condition

Regarding the dental condition, this condition was not part of the March 1980 or February 2009 rating decision. Rather, his dental condition was denied in a final, October 2015 rating decision. [R. at 563-81].The dental issue is nonetheless mentioned in Appellant's informal brief, and, therefore, reading his brief liberally, the Secretary will address it as it pertains to the May 2019 Board decision on appeal. App. Inf. Br. at 26-27.

In addition to the arguments already addressed above pertaining to consideration of evidence and the application of 38 C.F.R. § 3.307, the law pertaining to dental disabilities was the same in 2015 as it is today. Namely, service connection for a dental disability involves specific statutory and regulatory provisions in addition to the general service-connection principles. *See* 38 U.S.C. § 1712; 38 C.F.R. §§ 3.381, 4.150, 17.161-17.166. Particularly, service connection for dental conditions for compensation purposes are limited to disabilities involving the loss of substance of the body of the maxilla, ramus, or mandible. *See* 38 C.F.R. § 4.150. Furthermore, 38 C.F.R. § 3.381 provides, in pertinent part, that "[t]reatable carious teeth, replaceable missing teeth, dental or alveolar abscesses, and periodontal disease will be considered service-connected solely for the purpose of establishing eligibility for outpatient dental treatment as provided in § 17.161." 38 C.F.R. § 3.381(a).

The Board found Appellant first applied for a dental condition in June 2015, which was denied in an October 2015 rating decision because the condition was

not deemed to be a "disability" for VA purposes. [R. at 15 (1-22)]; *see also* [R. at 563-81]. The Board found the decision to be an accurate application of VA's regulations on dental conditions and, therefore, found no CUE with the decision, but rather that Appellant was expressing disagreement with the denial. [R. at 15 (1-22)].

On appeal, Appellant merely restates his arguments that he alleged before the Board. App. Inf. Br. at 26-27. The Board's decision was proper and, therefore, should be affirmed.

3. The Board Properly Found No CUE With The February 2009 Rating Decision Concerning the Grant of Bilateral Hearing Loss and the Initial 0% Rating Assigned

Appellant was granted service connection for hearing loss and assigned an initial 0% rating, effective September 23, 2008, in a February 2009 rating decision. Aside from alleging the hearing loss claim was reasonably raised in 1980 (which is already addressed in Section (C)(1) above), Appellant appears to claim that the February 2009 rating decision contained CUE because the rating assessed should have been based on the all manifestations stemming from hearing loss, to include tinnitus, vertigo, and Meniere's disease. App. Inf. Br. at 19-20.

The Board explained that the February 2009 rating decision did not contain CUE because the rating was based on the medical evidence that existed at the time. [R. at 18 (1-22)]. Tinnitus, moreover, was denied in that same decision. *See* [R. at 1051 (1040-52)]. The Board further explained that his alleged symptoms of

vertigo and Meniere's disease were being separately developed and were not service-connected at that time. [R. at 18 (1-22)]; *see also* [R. at 53-56]; [R. at 58].

Appellant has not raised any allegation of error with the May 2019 Board decision, but rather raises the same arguments alleging CUE with the underlying February 2009 rating decision that were addressed by the Board. *See* App. Inf. Br. at 19-20. Even to the extent Appellant is alleging VA should have developed his vertigo and Meniere's disease at the same time as his hearing loss claim, a failure to fulfill VA's duty to assist a veteran with the development of his claim cannot constitute CUE. 38 C.F.R. § 20.1403(d)(2). As such, Appellant's assertion must fail as a matter of law.

4. The Board Properly Found No CUE With The February 2009 and October 2012 Rating Decisions Pertaining to the Tinnitus Claim

Appellant's argument pertaining to tinnitus is based on what he perceives to be an inconsistency with a February 2009 rating decision, which denied his tinnitus claim, and an October 2012 rating decision, which granted the tinnitus claim. App. Inf. Br. at 18-19. He surmises that the February 2009 rating decision must have been based on inaccurate or inadequate evidence. *Id.*

However, Appellant was afforded a VA examination in December 2008, where Appellant denied tinnitus. [R. at 1079-81]. Thus, his claim was denied in a February 2009 rating decision on that basis. [R. at 1051 (1040-52)]. In a subsequent September 2012 VA audiological examination, Appellant reported tinnitus, which the examiner opined was a symptom associated with his service-

connected hearing loss. [R. at 872 (864-73)]. Based on this new evidence, his tinnitus claim was granted in an October 2012 rating decision. [R. at 849-59].The Board, thus, found no CUE because his grant of service connection for tinnitus, effective February 29, 2012, was based on the date his claim to reopen was received and the evidence developed with that claim to reopen. [R. at 19 (1-22)].

To the extent Appellant may be claiming that December 2008 VA examination was inadequate and the February 2009 rating decision erred by relying on it, Appellant's claim must fail as a matter of law. Once again, a failure to fulfill VA's duty to assist a veteran with the development of his claim cannot constitute CUE. 38 C.F.R. § 20.1403(d)(2). The Secretary finds no other cognizable argument pertaining to the tinnitus claim and, thus, the Board's decision should be affirmed.

C. To The Extent Appellant Seeks Direct Reversal of the March 1980, February 2009, or October 2012 Rating Decisions, His Relief Sought is Precluded By Law

It is also worth noting that the Court may not directly review a disputed final decision and certainly may not reverse or revise a disputed final decision. *Joyce v. Nicholson*, 19 Vet.App. 36, 45 (2005). Rather, in the context of an appeal of a Board decision that determined that CUE was not committed in an earlier final decision, the Court's review is limited to the narrow question of whether the Board's determination that CUE was not committed is arbitrary, capricious, an abuse of discretion or not otherwise in accordance with the law. *Id.* Under this highly

deferential standard of review, the Court "cannot conduct a plenary review of the merits of the original decision," *Stallworth v. Nicholson*, 20 Vet.App. 482, 487 (2006), and the Court must affirm the Board's decision so long as the Board articulates a satisfactory explanation for its decision, "including a rational connection between the facts found and the choice made." *Lane*, 16 Vet.App. at 83.

Thus, to the extent Appellant is seeking direct reversal of the final March 1980, February 2009, or October 2012 rating decisions, his relief sought is contrary to the law and should be denied.

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

It is axiomatic that issues not raised on appeal are 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"). Any and all other issues not addressed in Appellant's Informal Brief have therefore been abandoned.

V. CONCLUSION

For the foregoing reasons, Appellee, Robert L. Wilkie, Secretary of Veterans Affairs, respectfully submits that the May 17, 2019, decision of the Board should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On the 23rd day of January, 2020, a copy of the foregoing was mailed, postage prepaid, to:

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I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Shereen M. Marcus
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