IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

ANDREW ELIAS,

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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IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

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v.	)	Vet. App. No. 19-3104
ROBERT L. WILKIE, Secretary of Veterans Affairs, Appellee.	)	

ON APPEAL FROM THE
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I. ISSUE PRESENTED

Whether the Board of Veterans' Appeals (BVA or Board) reasonably found that the previous March 2016 Board decision, denying an effective date prior to March 1999 for the grant of service connection for schizophrenia, paranoid type, should not be revised on the basis of clear and unmistakable error (CUE).

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

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

B. Nature of the Case

Appellant seeks revision of the March 2016 Board decision, denying an earlier effective date for the grant of service connection for schizophrenia, on the basis of CUE. However, this CUE motion was denied in the decision now on appeal (Record (R.) at 1-13), and Appellant fails to carry his burden of demonstrating that the Board's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

C. Statement of Facts and Procedural History

Appellant had active military service from December 1976 to December 1979 (R. at 112), and in September 1991 he sought service connection for an anxiety disorder and depression and noted that these conditions began in 1981, three years after separation. (R. at 4332 (4331-34)). These claims were denied in a January 1993 Regional Office (RO) rating decision, reflecting, "The evidence does not show that the veteran has a chronic anxiety disorder or depression that was incurred during his honorable period of active military service." (R. at 4000 (4000-01)). Although Appellant did not appeal this decision, he subsequently sought to reopen his claim the following month and noted that he was treated for schizophrenia. (R. at 3977). And, after the RO received additional evidence, reflecting, *inter alia*, a diagnosis of schizophrenia (R. at 3986 (3981-90)), it determined, in March 1994, "Service connection for a nervous condition is not established." (R. at 3923 (3921-24)).

In November 1995, Appellant sought disability compensation for depression and paranoid schizophrenia (R. at 3916 (3916-19)), and the RO received additional medical evidence. (R. at 3902-08). In October 1996, however, the RO issued a rating decision denying service connection for schizophrenia and finding that new and material evidence was not submitted to reopen the claim for service connection for depression. (R. at 3893 (3891-94)). Appellant did not appeal this decision, but, in March 1997, he submitted a statement requesting service connection for "PTSD (depressive nervous disorder)" (R. at 3889), which was later denied in a December 1998 rating decision. (R. at 3750 (3748-51)).

The following year, in March 1999, Appellant submitted a statement, asserting, "Please be informed that my claim was for schizophrenia, continuous paranoid type. However[,] the [December 1998] decision stated that I was denied for PTSD." (R. at 3742). He continued, "Again I am claiming service connection for schizophrenia." (R. at 3742 (3741-47)). The RO construed Appellant's statement as a request to reopen his claims for service connection for schizophrenia and denied this request in a February 2000 rating decision. (R. at 3726-28). The RO explained, "The evidence submitted in connection with the current claim does not constitute new and material evidence because it essentially duplicates evidence [that] was previously considered and is merely cumulative or redundant." (R. at 3727). In this regard, the RO further explained that the evidence of record is "negative for a medical relationship to any condition treated in service." (*Id*.). In response, Appellant submitted his notice of disagreement (NOD), and the

RO issued a statement of the case (SOC) in March 2000. (R. at 3690-3702). The next month, Appellant submitted his VA Form 9, perfecting his appeal. (R. at 3676-77).

The agency subsequently transferred this case to the Board, and, after Appellant presented for a Board hearing in September 2001 (R. at 3583-90), the Board remanded his claim for another review of the record. (R. at 3155-58). Accordingly, this case returned the RO, and, after the RO issued a Supplement SOC (SSOC) in December 2003 (R. at 3022-39), the case returned to the Board. In April 2004, the Board found that new and material evidence was submitted to reopen a claim for service connection for a psychiatric disorder other than PTSD and remanded this claim for further development. (R. at 2978, 2980 (2973-80)).

The agency subsequently received additional evidence, to include service department records (R. at 2892-2915), and another SSOC issued in July 2006 denying a grant of service connection. (R. at 2823-35). Afterwards, this case again returned to the Board, and, after Appellant presented for another Board hearing in May 2007 (R. at 2734-58), the Board issued a decision in August 2007 denying service connection for an acquired psychiatric disorder, other than PTSD. (R. at 2699-2712). However, Appellant appealed to the Court, and the parties agreed to a joint motion for remand (JMR) in April 2008, agreeing that "the Board erred by failing to articulate adequate reason and bases as to why Appellant was not entitled to a psychiatric examination." (R. at 2640 (2640-45)). Consistent with this JMR, the Board subsequently remanded this case in October 2008 for further

development, to include an examination (R. at 2524 (2520-26)), to which Appellant presented in January 2009. (R. at 2108-13). Here, the examiner provided a diagnosis of "Schizoaffective Disorder – Depressed Type" (R. at 2110), and opined, "The claimant reported he developed psychiatric symptoms during his early 20's, and notes in his files support this contention. The average age of onset of thought disorders among males is 18-20 years. As such, the examiner believes the probability the veteran's symptoms arose during his military service is high." (R. at 2111). The RO obtained an addendum to this opinion in March 2009, reflecting diagnoses of schizophrenia and PTSD and the opinion that "[b]oth conditions started in the service and both conditions were aggravated beyond normal progression of both diseases, by stressful situations in the service." (R. at 2071 (2068-72)).

After obtaining these medical opinions, the RO issued a rating decision in February 2010 granting service connection for schizophrenia paranoid type, with a 100% evaluation from March 1999. (R. at 1953 (1946-59)). The RO explained that the effective date was from March 1999, the "date we received your reopened claim for service connection for a claimed innocently acquired psychiatric disorder other than post-traumatic stress disorder as that claim has remained open due to your appeal of this issue." (R. at 1956). In response, however, Appellant filed his NOD, arguing, "I disagree with the date you awarded my compensation, you should have awarded my benefits from the original filing date of July 1991 to Feb 2010." (R. at 1913 (1913-15)).

Appellant's request for an earlier effective date was initially denied in a February 2011 rating decision (R. at 1894 (1891-97)), and, after Appellant submitted a statement requesting the traditional appeal process (R. at 1887), the RO issued an SOC in August 2012 continuing the denial of an earlier effective date. (R. at 1852-69). In October 2012, Appellant submitted his VA Form 9, perfecting his appeal, and this new iteration of the case was transferred to the Board. (R. at 1829-30).

After Appellant presented for a Board hearing in March 2015 (R. at 1707-15), the Board, in March 2016, issued the decision that is the subject of the instant dispute. (R. at 1640-54). In this decision, the Board denied an effective date prior March 1999 for the grant of service connection for schizophrenia. (R. at 1652). The Board explained that the previous adjudications of the psychiatric disorder claims were finally denied, that NODs were not submitted in response to these previous decisions, and that new and material evidence was not "received within a one year period following any of the prior denials which would allow for those claims to remain pending." (R. at 1646-48). The Board also explained that, although Appellant received treatment for schizophrenia regularly, "the Board is not able to accept the Veteran's VA treatment records as an informal claim for benefits because there was no intent to file for VA benefits." (R. at 1650). Lastly, the Board concluded, "Regarding the Veteran's assertion that he has suffered from a psychiatric disability since at least 1991, and therefore he deserves to be

compensated on an equitable basis, the Board is bound by the laws and regulations that apply to veterans claims." (*Id*.).

Later that year, in November 2016, Appellant submitted correspondence, requesting "Service Connection for depression, anxiety, *and* to consider Mr. Elias's Claim . . . for an Earlier Effective Date (EED), based on Clear and Unmistakable Error . . . of Mr. Elias's 1991 disability claim." (R. at 400 (400-03)). In this regard, he explained that it was his desire "that his CUE and Claim for Entitlement to Service Connection for schizophrenia, depression, anxiety, and Post-traumatic Stress Disorder (PTSD) be simultaneously adjudicated." (*Id*.). He further argued that the Board, in denying an earlier effective date, clearly and unmistakably erred by ignoring "well established modern medicine in their decision to apply an erroneous effective date for a claim that had been put in approximately eight years prior." (R. at 401). He also argued that his psychiatric conditions existed at the time of his original claim in September 1991; that "[m]edical knowledge in the late 1970s was limited;" and that his schizophrenia is related to his anxiety, depression, and PTSD. (R. at 402).

Appellant submitted more correspondence in July 2018 requesting, "An earlier effective date of September 9, 1991 for Mr. Elias' 100% disability rating for Schizophrenia," on the basis of CUE. (R. at 99 (99-110)). He argued that he was diagnosed with schizophrenia in 1991 (R. at 102) and, "It was clear and unmistakable error when the VA failed to consider that Mr. Elias' active duty

service coincided with the average age of onset of schizophrenia in males." (R. at 105). He concluded,

> In 1999[,] there was no additional information submitted. There was no new diagnosis or new medical discovery. In 1999, the ratings officials did what should have been done in 1991. That failure was a clear and unmistakable error. Mr. Elias requests that you correct that error and award an earlier effective date of September 1991 and award him back pay.

(R. at 107).

In January 2019, the Board issued the decision that is currently on appeal. (R. at 1-13). In this decision, the Board determined that its previous, March 2016, decision, denying an effective date prior to March 1999 for the grant of service connection for schizophrenia, should not be revised on the basis of CUE. (R. at 5). In making this determination, the Board found, "The correct facts, as known at the time, were before the Board in March 2016 and the statutory and regulatory provisions extant at the time were correctly applied by the Board." (*Id*.).

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's determination because it reasonably found that there was no CUE in the March 2016 Board decision, denying an earlier effective date for schizophrenia. Additionally, Appellant fails to demonstrate that the Board's determination was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Indeed, his arguments primarily assert CUE in previous agency decisions, not the March 2016 Board decision, and he

fails to point to any known facts or relevant law that would manifestly change the outcome of the Board's March 2016 denial of an earlier effective date.

IV. ARGUMENT

The Court Should Affirm the Board's Decision, Because Appellant Fails To Demonstrate that Its Determination Was Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance With the Law

Appellant seeks revision, on the basis of CUE, of the March 2016 Board decision denying an effective date prior to March 1999 for the grant of service connection for schizophrenia. A motion seeking revision on the basis of CUE is a collateral attack on a final agency decision and "is the sort of error which, had it not been made, would have manifestly changed the outcome." *Russell v. Principi*, 3 Vet.App. 310, 313 (1992); *see* 38 C.F.R. § 20.1403. In order to demonstrate CUE in a final agency decision, the claimant must prove that (1) either the facts known at the time were not before the adjudicator or that the law then in effect was incorrectly applied; (2) that an error occurred based on the record and the law that existed at the time the decision was made; and (3) had the error not been made, the outcome would have been manifestly different. *Garcia v. Shulkin*, 29 Vet.App. 47, 53 (2017); *Grover v. West*, 12 Vet.App. 109, 112 (1999). Additionally, a change in diagnosis or a challenge as to how facts were previously weighed or evaluated cannot rise to the level of CUE. *See* 38 C.F.R. § 20.1403(d); *Crippen v. Brown*, 9 Vet.App. 412, 418 (1996); *Henry v. Derwinski*, 2 Vet.App. 88, 90 (1992). Moreover,

each specific allegation of CUE constitutes a separate CUE challenge that must be subject to a decision by the Board before the Court can exercise jurisdiction of such motion. *Andre v. Principi*, 301 F.3d 1354, 1361 (Fed. Cir. 2002); *see Ingram v. Nicholson*, 21 Vet.App. 232, 241 (2007); *Jarrell v. Nicholson*, 20 Vet.App. 326, 332 (2006). The Court's review of the Board's finding of no CUE in one of the Secretary's prior final decisions is limited to determining whether the Board's conclusion in that regard is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *See* 38 U.S.C. § 7261(a)(3); *Hillyard v. Shinseki*, 24 Vet.App. 343, 349 (2011).

Appellant fails to carry his burden of demonstrating that the Board's decision finding no CUE in its previous determination was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) ("An appellant bears the burden of persuasion on appeals to this Court."). In March 2016, the Board denied an earlier effective date for the grant of service connection for schizophrenia, because the evidence of record did not demonstrate that Appellant appealed the January 1993, March 1994, October 1996, or December 1998 rating decisions, and because the record did not reflect that new and material evidence was submitted, such that any of the earlier claims remained open and pending. (R. at 1646-48). The Board also explained that service connection was granted in February 2010 on the basis of Appellant's March 1999 correspondence (R. at 1647-48), and that Appellant did not file a relevant claim between December 1998 and March 1999, to warrant an

earlier effective date. (R. at 1648). In the decision now on appeal, the Board reviewed this analysis and reasonably found that the correct facts were known to the Board and that the laws and regulations relevant to appeals, finality, and claims to reopen were correctly applied in its previous effective-date determination. (R. at 10-11); *see* 38 C.F.R. §§ 3.156, 3.400, 20.302(a). Indeed, consistent with the Board's findings, the record does not reflect any NOD, or evidence purporting to be new and material, filed in response to the January 1993 (R. at 4000-01), March 1994 (R. at 3923-24), October 1996 (R. at 3893-94), or December 1998 rating decisions. (R. at 3749-51). And, the March 1999 claim, which is the first claim received after the December 1998 rating decision, led to the grant of benefits and now serves as the effective date in this case. Therefore, contrary to Appellant assertions, the Board's finding of no CUE in the previous decision was reasonable and accurately based on the evidence of record.

Instead of attacking the Board's March 2016 effective-date analysis, Appellant's CUE motion, and arguments now on appeal, assert CUE in the previous rating decisions that denied service connection for various psychiatric disorders. (Appellant's Brief (App.Br.) at 4-30); (*see* R at 99-110, 400-03). He argues that the previous decisions denying service connection were improper (App.Br. at 5, 20, 26-27), that the VA officials did not properly perform their duties in obtaining evidence and providing notice regarding the previous claims (App.Br. at 7, 13, 22-24), that medical principles were ignored during the development and adjudication of the earlier claims (App.Br. at 7-8), that "the law was misapplied in

the early decisions" (App.Br. at 9, 20), that the lay evidence was not properly considered at the time of the earlier decisions (App.Br. at 10-11, 24-25), that he was not provided with "appropriate care and treatment" (App.Br. at 14), and that VA failed "to properly conduct a thorough medical exam including psychological testing with a documented history" in 1991. (App.Br. at 14-16). These arguments are nothing more than one collective red herring.

The issue before Board in March 2016 involved entitlement to an earlier effective date for the grant of service connection, and there was no CUE motion pending before the Board in March 2016 that would allow Appellant's arguments to gain traction. The Board's analysis properly focused on determining finality and ascertaining the earliest date of claim for service connection, not CUE. *See Foreman v. Shulkin*, 29 Vet.App. 146, 151 (2018) ("The general rule for assessing the effective date for an award of benefits provides that, '[e]xcept as otherwise provided, the effective date of an evaluation . . . will be the date of receipt of the claim or the date entitlement arose, whichever is the later.'"). Appellant spills a lot of ink asserting problems in the adjudication and development of the previous claims, to include problems with satisfying the duty to assist and the agency's consideration of lay evidence, which cannot rise to the level of CUE. None of these allegations of CUE was before the Board in March 2016, has the potential of demonstrating CUE in that decision, or is properly before this Court. Indeed, his arguments constitute separate allegations of CUE. *See Jarrell*, 20 Vet.App. at 332. Moreover, to the extent that Appellant believes that the March 2016 Board decision

should be revised because he had schizophrenia at the time of his original claim in 1991 (App.Br. at 5, 7, 10 (noting that his symptoms began when he was in his 20s), 27), he fails to explain how any of the Board's findings regarding finality of the previous agency decisions was in error. (*See* R. at 1646-47).

He argues that the Board "viewed Appellant's communications in the least favorable light" (App.Br. at 17-21) but fails to recognize that a disagreement as to how the facts were weighed or evaluated cannot rise to the level of CUE. 38 C.F.R. § 20.1403(d)(3). Additionally, he argues that, in March 2016, the Board improperly found that Appellant did not file an NOD in response to the January 1993 rating decision. (App.Br. at 12, 17-19, 29); (*see* R. at 3977 (February 1993 correspondence)). Specifically, he argues, without any explanation or development of this assertion, that the finding that no NOD was filed is contrary to the Court's holding in *Ingram v. Nicholson*, 21 Vet.App. 232 (2007). (App.Br. at 18). Yet Appellant's argument – that the March 2016 Board decision contained CUE because it did not properly consider the February 1993 response to the January 1993 rating decision – was not raised before the Board and would constitute a separate allegation of CUE that is, again, not properly before this Court. *See Andre*, 301 F.3d at 1361. At no point did Appellant challenge the March 2016 Board decision on this basis. And, even if this allegation were a part of the CUE motion now on appeal, it would still be nothing more than a challenge as to how the Board weighed the evidence, which does not have the potential of establishing CUE. *See* 38 C.F.R. § 20.1403. Indeed, Appellant argues that his

February 1993 submission is an NOD, based on a "liberal view of the evidence." (App.Br. at 12). Similarly, he argues that lay evidence should have been considered new and material in response to the original rating decision in 1993. (*Id*.). Yet, such an allegation is also separate from the CUE allegations now in question and merely challenges how the Board weighed the lay evidence of record. He also argues that the Board's finding that the treatment records did not evince the intent to file an earlier claim was disingenuous. (App.Br. at 19). Yet, again, this allegation was not a part of the CUE motion before the Board and is a challenge as to how the Board weighed the evidence. He also fails to explain how this alleged error compels a manifestly different outcome. *See* 38 C.F.R. § 20.1403(a). As such, the Court should reject these arguments.

Next, Appellant argues that his "case is further aggravated by [] VA's overall lack of due diligence in processing nearly every aspect of his case," and he asserts that there was a long wait between the filing and adjudication of his CUE motion. (App.Br. at 21). Yet, this complaint has no bearing on whether there was CUE in the March 2016 Board decision. Similarly, he argues that the Board did not adjudicate the claims for service connection for depression, anxiety, and PTSD (App.Br. at 28); but, he fails to recognize that his assertion of pending claims filed in November 2016 (*see* R. at 400) would also have no bearing on whether there was CUE in a March 2016 Board decision. Succinctly stated, none of Appellant's arguments demonstrates that the Board's determination was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Therefore,

because the Board properly considered the evidence of record and arrive at an arbitrary or capricious decision, and because Appellant's arguments are without merit, the Court should affirm this part of the Board's decision now on appeal.

V. CONCLUSION

WHEREFORE, the Court affirm the Board's January 11, 2019, decision now on appeal.

Respectfully submitted,

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