CASE NO. 19-4419

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

CHARLIE L. BUCKNER,
Claimant / Appellant

v.

ROBERT L. WILKIE, Secretary,
U.S. DEPARTMENT OF VETERANS
AFFAIRS; Agency / Appellee

Appeal from the Board of Veterans Appeals

BRIEF OF APPELLANT

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STATEMENT OF ISSUES

Appellant, Charlie L. Buckner ("Buckner" or the "Veteran"), hereby appeals the June 13, 2019 decision from the Board of Veterans Appeals ("BVA" or "Board"), that denied his claim for clear and unmistakable error ("CUE") that attacked an earlier December 4, 1973 Board decision, in which the Board denied Buckner's claim for heart condition due to a mitral valve insufficiency. (R. at 5-13).

STATEMENT OF THE CASE

Nature of the case: Service medical records verify that Army doctors identified Buckner suffered from a heart murmur. (R. at 1102-1105 (1089-1110)). On March 13, 1973, Buckner made a claim for "Mitral Insuffiency" on a VA Form 21-526. (R. at 2085-2088). On July 31, 1973, the VA regional office denied Buckner's claim. (R. at 2054-2056). Buckner submitted two doctor's notes that (1) diagnosed the Veteran's condition and (2) provided a NEXUS statement that Army service aggravated the condition. (R. at 2040 & 2050). On September 17, 1973, the VA regional office issued a Statement of the Case to affirm the denial of Buckner's claim. (R. at 2037-2039). On September 24, 1973, Buckner filled out a VA Form 1-9 to describe that his heart condition predated military service, but that military service aggravated the condition and made it worse. (R. at 2033). On December 4, 1973, the BVA affirmed the denial of Buckner's claim. (R. at 2022-2025). On July 19, 2013, Buckner filed his

CUE motion to attack the Board's December 4, 1973 decision. (R. at 1083-1087).

Course of the Proceedings: On August 20, 2014, the VA regional office issued a rating decision that denied Buckner's CUE claim for Mitral Valve Insufficiency. (R. at 201-211 & 220-234). On August 27, 2014, Buckner submitted a notice of disagreement. (R. at 200). On October 21, 2014, the VA regional office issued a Statement of the Case to affirm the denial of Buckner's CUE claim. (R. at 169-191). On October 26, 2014, Buckner submitted a VA Form 9 to request a BVA hearing. (R. at 167). On May 26, 2016, Buckner appeared and testified at a BVA Travel-Board hearing. (R. at 100-134). On April 13, 2018, the BVA issued a decision that dismissed Buckner's direct appeal of the CUE motion, but promised a separate decision was pending on Buckner's motion to reconsider. (R. at 77-81).

Disposition: On June 13, 2019, the Board denied Buckner's CUE motion, that attacked the Board's December 4, 1973 decision, in which the Board denied Buckner's March 13, 1973 claim for heart condition due to a mitral valve insufficiency. (R. at 5-13).

ARGUMENT

A. SUMMARY: The June 13, 2019 decision from the Board of Veterans Appeals should be reversed or remanded for the following reasons:

1. The findings made by the Veterans Law Judge were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. (38 U.S.C. §7261(a)(3)(A)).

B. PRINCIPAL ARGUMENTS FOR REMAND OR REVERSAL

PROPOSITION NO. I

THE BOARD COMMITTED ERRORS OF LAW WHEN IT DID NOT VACATE THE DECEMBER 4, 1973 DECISION AND REMAND THE CASE FOR CORRECT APPLICATION OF THE PRESUMPTION OF SOUNDNESS.

Buckner's July 19, 2013 motion pleaded a claim for CUE according to three elements:

1. Either the facts known at the time were not before the adjudicator, or the law in effect was incorrectly applied;

2. An error occurred based on the record in existence at the time; and,

3. Had the error not been made the outcome would be manifestly different.

Bouton v. Peake, 23 Vet.App. 70, 71 (2008). The brief in support of Buckner's motion cited Quirin v. Shinseki, 22 Vet.App. 390 (2009) and Wagner v. Principi, 370 F.3d 1089 (Fed. Cir. 2004) for the proposition that 38 U.S.C. § 1111, the Presumption

of Soundness, places a *burden* on the Government to prove by "clear and unmistakable evidence" both (1) that the condition pre-existed military service, and (2) that military service did not aggravate the condition. Quirin, at ¶ 19. Buckner's brief argued that correct application of the statute and precedent indicated there is a *burden-shift* from the claimant to the agency by operation of law. Moreover, if the Government failed to meet its shifted burden, it does not deserve to prevail. (R. at 1083-1087).

The Board's June 13, 2019 decision made an error of law because it failed to apply the burden against the Government. Instead, the BVA held the burden against Buckner and ruled against him. The BVA decision stated:

> Although the Board did not apply the clear and unmistakable standard with regard to the second prong [an error occurred based on the record in existence at the time], it cannot be found that such evidence undebatedly *compels* a finding of in-service aggravation.

(R. at 12 (5-13)). The quote identifies the Board's legal mistake because the BVA has continued to hold the burden against Buckner in violation of the burden-shift, because the shifted burden required the VA to prove by clear and unmistakable evidence that military service did not cause aggravation. Accordingly Buckner was not under a burden at that point in the legal analysis.

a. THE WAGNER INTERPRETATION OF 38 U.S.C. § 1111 IS RETROACTIVE.

The Board's decision acknowledged that, pursuant to Patrick v. Shinseki, 668 F.3d 1325, 1329 (Fed. Cir. 2011), the interpretation of 38 U.S.C. § 1111, found in Wagner v. Principi, 370 F.3d 1089 (Fed. Cir. 2004) is considered retroactive. (R. at 11 (5-13)). In Patrick the Federal Circuit stated the plain meaning of the statute always required the VA to prove "by clear and unmistakable evidence that a preexisting condition was not aggravated by service." Patrick, 668 F.3d at 1331.

The Patrick case gives us the proper remedy for Buckner's case. In Patrick, the Federal Circuit vacated the lower court decision and remanded it so the VA could apply the correct burden:

> we vacated the court's decision and again remanded for a determination of whether the government could rebut section 1111's presumption of soundness by providing clear and unmistakable evidence that Patrick's rheumatic heart disease had not been aggravated by military service.

Id. at 1329, citing Patrick v. Nicholson, 242 Fed.Appx. 695, 698 (Fed. Cir. 2007). This precedent comes from a case that is very similar to the present one. In both cases the issue was whether the Veteran's military service had aggravated a latent heart defect. Moreover, in both cases the VA and the BVA made the same error by applying a burden against the claimant when the burden was against the VA. According to the similarity between these cases it seems sure that the reviewing court

should provide the same remedy and vacate the case for proper application of the burden of proof against the VA, not the Veteran.

CONCLUSION

Veteran, Charlie L. Buckner, hereby prays that the United States Court of Appeals for Veterans Claims will reverse the decision that denied his claim for clear and unmistakable error and remand his case back to the Board of Veterans Appeals with instructions that the Board apply the burden of proof against the VA rather than against the claimant.

The Federal Circuit held that the plain meaning of the statute, 38 U.S.C. § 1111 required the BVA and the VA to apply the burden of proof against the government to prove "by clear and unmistakable evidence that a preexisting condition was not aggravated by service." So when the BVA ruled "it cannot be found that such evidence undebatedly *compels* a finding of in-service aggravation," the Board did not properly shift the burden as the statute required.

Respectfully submitted;

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