IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-877

ROGER C. ELLIOT,

Appellant,

v.

ROBERT L. WILKIE,

Secretary of Veterans Affairs,

Appellee.

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. This Court Has Jurisdiction Over Whether the Board Erred in Failing to Identify Appellant's Reasonably Raised CUE Motion to the RO.

In the principal brief, Appellant argued that the Board erred in failing to construe his November 2013 Notice of Disagreement and his October 2015 correspondence as a reasonably raised motion to revise the January 2012 rating decision (**R. 690-97**) based on "clear and unmistakable error" (CUE). At the very least, he contended that the Board failed to provide an adequate statement of its reasons and bases as to why Appellant had not specifically alleged CUE in the January 2012 rating decision. *See* Appellant's Brief ("App. Br.") at 6 et seq. The Secretary first responds that, irrespective of whether either of those documents qualify as a valid CUE motion, "because the RO has not ruled on any such motion, the Board had no jurisdiction over any CUE matters raised in those motions." *See* Secretary's Brief ("Sec. Br.") at 6. Consequently, "[b]ecause the Board's October 2018 decision addressed no CUE issues on the merits, the Court has no jurisdiction over any such issues." *Id*.

The Secretary misstates the issue on appeal. Appellant is not arguing that the Board erred in not adjudicating the *merits* of any CUE motion. The issue in this appeal is simply whether Appellant's 2013 and 2015 statements constitute a request for revision based on CUE that the Board failed to identify as an issue reasonably raised to the Regional Office (RO) by the record. *See* App. Br. at 6-7, citing *Fugo v. Brown*, 6 Vet. App. 40 (1993), and *Crippen v. Brown*, 9 Vet. App. 412, 420 (1996) (describing how to determine when a CUE motion is reasonably raised). While the Secretary argues that the October 2013 rating

decision did not address any issues of alleged CUE and could not have conferred on the Board jurisdiction over any CUE matters, this is incorrect. *See* Sec. Br. at 8. The Board had jurisdiction to address whether Appellant reasonably raised an allegation of CUE in the RO decision because his 2013 notice of disagreement (NOD) was submitted to the RO and construed as an NOD. *See* App. Br. at 7-8 (arguing that he reasonably raised CUE in his 2013 NOD because it contended that the RO had the same evidence before it at the time of the earlier 2012 denial as it did in the current grant), citing **R. 643** (NOD received by RO in November 2013); *see also* Sec. Br. at 7-8 (referring to Appellant's 2013 statement as an NOD).

Here, the RO construed Appellant's 2013 statement as an NOD, and the Board itself undertook the question of whether a CUE motion had been raised as to the January 2012 rating decision. *See* **R. 6 (4-10)** ("the Veteran and his representative have not specifically alleged CUE in the January 2012 rating decision" and "the Board concludes that the January 2012 rating decision was final, and there is no outstanding CUE motion"). But it failed to address whether Appellant's 2013 NOD, along with his 2015 statement, constituted a CUE motion as to the 2012 rating decision that was reasonably raised to the RO. *See Robinson v. Shinseki*, 557 F.3d 1355, 1359-62 (Fed. Cir. 2009) (explaining that VA is obligated to sympathetically read a claimant's filings and adjudicate all issues and potential claims reasonably raised by the evidence of record); *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001).

Finally, the Court has recently addressed a similar argument by the Secretary. In *Baker v. McDonald*, 2015 U.S. App. Vet. Claims LEXIS 572[1], the Court rejected the Secretary's argument that the Court did not have jurisdiction because the veteran's CUE motion was first presented to the Board. *Id*. at *4. Even though the Board lacked jurisdiction to address whether the issue of CUE in a prior rating decision, the Court still had jurisdiction over the Board's decision *Id*.

II. The Board Erred in Failing to Construe Appellant's 2013 Statement as a CUE Motion Reasonably Raised to the RO.

The issue of whether an appellant has presented a valid CUE allegation is a question of law that the Court reviews de novo. *See Bowen v. Shinseki*, 25 Vet. App. 250, 254 (2012); *Andrews v. Principi*, 18 Vet. App. 177, 182 (2004); *Phillips v. Brown*, 10 Vet. App. 25, 30 (1997). The Secretary argues that, if the Court does address the Board's decision with respect to Appellant's CUE motion, the Court should "reject Appellant's arguments and hold that neither Appellant's NOD nor his October 2015 statement qualify as a CUE motion as a matter of law." Sec. Br. at 10. With respect to the November 2013 NOD, the Secretary argues that Appellant failed to allege the particular error the RO made in 2012. Sec. Br. at 11. To the Secretary, the Board "would have had to do more than fill in the blanks to treat this document as a CUE motion. It would have had to supply an absent CUE theory." *Id*., citing *Acciola v. Peake*, 22 Vet. App. 320, 326 (2008) ("[A] sympathetic

[1] Pursuant to CAVC Rule 30, Appellant is not citing this case for precedential purposes. Appellant submits that the facts of this case resembles that of the present case, and, as such, it is submitted for its persuasive value. There do not appear to be precedential cases directly on point.

reading of a CUE motion can fill in details where the theory is not fully fleshed out, but it cannot supply a theory that is absent.").

But the Secretary himself admits that Appellant's 2013 statement "alleges that the January 2012 and March 2011 [sic] rating decision were *based on the same evidence*." Sec. Br. at 11, citing **R. 643** (emphasis added). Clearly, in seeking an earlier effective date, when Appellant stated that the "same medical evidence was used in the current rating which was earlier used and denied in the notification letter dtd 24 January 2012," this asserts an error of fact in the prior decision because the record held the same evidence at that time compelling service connection. *See* App. Br. at 8-9, citing *Russell v. Principi*, 3 Vet. App. 310, 313 (1992) (en banc). Appellant pointed out that his October 2015 correspondence reiterated this basis with additional detail (**R. 577-80**), and the Secretary acknowledges this. Sec. Br. at 11. Appellant stated that the March 9, 2011 imaging study, and thus, the evidence of his prior myocardial infarction, was before the RO at the time of the January 2012 rating decision. **R. 577 (577-80)** ("using the same evidence that I had previously submitted," "since you had the 3-9-11 records"). It is difficult to understand how much clearer Appellant had to be regarding the specific error basis he was presenting to meet the Secretary's standard, but the Court should find that Appellant's 2013 NOD met the standard legally required here given his identification of error with the 2012 rating decision and the specific theory on which that decision was incorrect. *See Acciola*, 22 Vet. App. at 326 ("Rather a sympathetic reading of a CUE motion requires the Secretary to fill in omissions and gaps that an unsophisticated claimant may leave in describing his or her

specific dispute of error with the underlying decision."). The Secretary apparently concedes that this much can be gleaned from Appellant's statements. *See* Sec. Br. at 11.

The Secretary attempts to invite the Court to address the merits of the CUE motion by asserting that the "glaring problem here is that the record fails to show that March 9, 2011, study was in the record before the adjudicator in 2012." Sec. Br. at 12. The Secretary continues, "[t]hus, if the Board (or the RO upon referral from the Board) had addressed this CUE theory on the merits, it would have been required to deny it, given that, to constitute CUE, the error must have been based on the record and law that existed at the time of the prior decision." *Id*. The obvious fallacy with the Secretary's argument is that the issue on appeal that must be resolved first is whether Appellant's 2013 NOD constitutes a CUE motion that the Board failed to identify as reasonably raised to the RO. If the Court finds that Appellant reasonably raised a CUE motion before the RO and the Board, remand of the CUE motion to the Board and the RO for adjudication of the merits is required, including any fact-finding relevant to the issues. *See Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000). Notably, the Board failed to address or mention at all Appellant's 2013 and 2015 statements in its current decision, which disputed this in contrast to the 2014 statement of the case. **R. 595-610.**

The only issues on appeal are whether Appellant's 2013 and 2015 statements reasonably raised the issue of CUE in the record, which the Board failed to address, and whether the Board provided an adequate statement of its reasons and bases that Appellant did not so raise any motion where its statement fails to even acknowledge either statement.

Appellant has specifically argued factual error in the 2012 RO decision that, if true, would manifestly change the outcome of that decision.

The Secretary next argues that Appellant has failed to establish prejudice from the Board's decision because he can file a CUE motion at any time with the RO. Sec. Br. at 12 ("Given that Appellant may file a CUE motion at any time, and given the jurisdictional bars discussed above, it is unclear to the Secretary why Appellant sought an appeal in this case rather than filed a sufficiently pleaded CUE motion to the RO.") *Id*. at 13. But the disagreement here is that Appellant *did* plead such a CUE motion, but the RO and the Board failed to identify this reasonably raised issue in the record. To the extent that the Secretary argues Appellant should have re-filed with sufficient specificity after the Board's decision, he does not explain how Appellant would have known what was lacking in his motion given the Board's cursory statement on CUE, even assuming *arguendo* that the Board found it insufficiently pleaded. But more fundamentally, the Board found no outstanding CUE motion here. The issue is that it failed to identify this reasonably raised matter.

Through Appellant's November 2013 NOD (**R. 643**), and his October 2015 correspondence (**R. 577-80**), Appellant plainly asserted an error of fact in the January 2012 rating decision that the RO had not considered the evidence in the record at that time upon which his claim was later granted. Appellant's theory satisfies the requirements of a reasonably raised CUE motion. *See Robinson*, *Roberson*, *supra*; *Fugo v. Brown*, 6 Vet. App. 40 (1993). As such, remand is required for the Board to remand Appellant's CUE motion to the RO for adjudication.

CONCLUSION

For the reasons articulated above and in his principal brief, Appellant respectfully requests that the Court set aside the Board's decision of October 30, 2018, and remand this matter for readjudication consistent with the points discussed in his briefs.

Respectfully submitted,

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February 3, 2020

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