

Vet. App. No. 19-4135

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

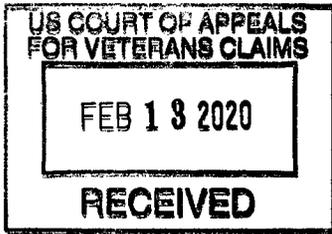
JOHNNY R. MARTINEZ
Pro-se Appellant

v.

ROBERT L. WILKIE
Secretary, of Veterans Affairs
Appellee

APPELLANT REPLY IN RESPONSE TO APPELLEE BRIEF

JOHNNY R. MARTINEZ
16861A W. FM 117
DILLEY, TEXAS 78017



UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS
625 INDIANA AVENUE, NW SUITE 900
WASHINGTON, D.C. 20004

JOHNNY R. MARTINEZ
Appellant

Vet. App. #19-4135

v.

ROBERT L. WILKIE
Secretary, of Veterans Affairs,
Appellee

**APPELLANT REPLY IN RESPONSE TO APPELLEE BRIEF
DATE JANUARY 23, 2020 PURSUANT TO RULE 28 (C)**

Appellant (Johnny R. Martinez) pursuant to Rule of Practice and Procedures file the following reply in response to Appellee brief dated January 23, 2020 in accordance with Rule 28 (c).

Pertinent Legal Criteria

“VA’s duty to sympathetically read a veteran’s pro se CUE motion to discern all potential claims is antecedent to a determination of whether a CUE claim is pled with specificity.” *Andrews v. Nicholson*, 421 F.3d at 1283 (Fed.Cir.2005). 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,” but does not require the Secretary to “imagine ways in which the original decision might be defective.” *Acciola v. Peake*, 22 Vet. App. 320, 326-27 (2008).

Board determinations regarding proper disability evaluations and effective dates are both factual determinations subject to review under the clearly erroneous standard. See, *Pierce v. Principi*, 18 Vet. App. 440, 443 (2004); see *Gilbert v. Derwinski*, 1 Vet. App. 49, 52-53 (1990).

Court note that Board statement of reasons or bases must explain the Board's reasons for discounting favorable evidence; See, *Thompson v. Gober*, 14 Vet. App. 187, 188 (2000), discuss all issues raised by the claimant or the evidence of record, See, *Robinson v. Peake*, 21 Vet. App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1335 (Fed. Cir. 2009); and discuss all provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record," See, *Schafrath v. Derwinski*, 1 Vet. App. 589, 592 (1991).

Court's jurisdiction is confined to the review of final Board decision(s) which are adverse to the claimant." See, *Medrano v. Nicholson*, 21 Vet. App. 165, 170 (2007); see also, *Bond v Derwinski*, 2 Vet. App. 376, 377 (1992) (per curiam order).

REBUTTAL ARGUMENT

Appellee [**Br.at pg.8-9**] Summary of the Arguments note that Court should Affirm Board of Veterans Appeals May 2019 decision because the Board adequately addressed and clarified misunderstandings of the law and why past rating decisions contained no CUE, where Board determined that the correct facts, as known at the time, were

vacated, 565 U.S. 802 (2011), *reinstated as modified*, 26 Vet. App. 31 (2012) (per curium order), *aff'd*, 732 F.3d 1351 (Fed. Cir. 2013) .

Appellee {Br.at pg.10} Argue that the Secretary note that the Court's review and this appeal is limited to the May 2019 Board decision and not the December 5, 2017 SOC; CONTRARY to Appellee [Br.at pg.7] Statement of Relevant Facts: concede [CUE] was denied in a January 2016 rating decision that resulted in a February 2016 [NOD] that continued until RO December 2017 [SOC] statement of the case {perfected appeal} that resulted in further argument in a February 2019 statement regarding other claims not yet adjudicated; BUT were not part of the 11 claims certified to the Board, that were eventually denied {finalized} in a May 2019 decision; established Court jurisdiction pursuant to Appellee cited 38 USC section 7252(a). It should be noted that it is the Appellee arguments, and not Court review, that is limited to Board decision as follow:

“[I]t is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so.” See, *Evans v. Shinseki*, 25 Vet. App. 7, 16 (2011). The Court will not accept the Secretary’s reasoning in place of a silent Board decision. See, *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 156 (1991) (“[L]itigating positions’ are not entitled to deference when they are merely....counsel’s ‘post hoc rationalization’ for agency action, advanced for the first time in the reviewing court.”)

Appellee [**Br.at pg.8-9**] Summary of the Arguments concede that Board “adequately addressed and clarified misunderstandings of the law and why past rating decisions contained no CUE, where 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 decision(s), and there is no showing that the RO misapplied the law as it existed at those times;” WHERE Appellee failed to provide any credible arguments explaining as to how Appellee determined the following Appellant CUE allegations to be broad; as opposed to specific:

Department of Veterans Affairs November 7, 2008 letter reference 362/TRNG/IJB noted rating specialist working on Veteran application that listed: [**R.at pg. 1089**] & [**R.at pg.1092**]

*Erectile dysfunction, *Bilateral Tinnitus; *Asthma;
*Left knee degenerative; *Hearing Loss, bilateral;
*Low back pain; *Right hip, degenerative; *Left
ankle, degenerative; *GERD, Severe stomach;

request stated needed evidence showing conditions existed from military service to present time; noted on page 4 "Your claim for benefits was received on September 23, 2008; YET, also referenced receipt of:

Copy of Service treatment records from Service records department received by Houston VA. on February 1980; AND review of VA Outpatient treatment records; X-rays from Tri-City Comm. Hospital; Copy of DD-214 .{**R.at pg. 1105 to 1124**}

RO February 23, 2009 decision letter reference 362/21/RC and February 21, 2009 rating decision {**R. at pg.1053-1060**} for claim received September 23, 2008 committed clear and unmistakable error [CUE] incorrectly *applied regulatory and statutory provisions* as defined under 38 CFR section 3.307 {Presumptive Service Connection} denying Veteran presumption of service connection for the following 01/22/2009 C&P claimed CONDITIONS: [**R.at pg. 1061-1081**]

*Erectile dysfunction, *Bilateral Tinnitus;
*Asthma; *Left knee degenerative; *Hearing
Loss, bilateral; *Low back pain {spondylosis
Of the thoracic spine; *Right hip, degenerative;
*Left ankle, degenerative; *GERD, severe
stomach;

where rating specialist conceded in an RO November 7, 2008 letter reference 362/TRNG/IJB on pg. 4 [R.at pg.1092] bold paragraph: **We Have Received The Following:**

Listed receipt of Service Records Department dated February 1980 DA Form 664 {Service Member 's Statement Concerning Application for Compensation From the Veterans Administration (VA Form 21-526e)} Application for VA Benefits, & provided service treatment records that included: *Health Records: SF 88 (Report of Medical Examination [entry & separation]; SF 99 Report of Medical History [entry]; SF 600 Health Record-Chronical Report of Medical Care; SF 603 Health Record-Dental; Stamp Dated as Received by Houston, R.O. on February 22, 1980 VA Form 60-4582.

RO February 21, 2009 rating decision conceded the following facts establishing veteran is entitled presumptive service connection for the following claimed conditions: [R.at pg. 1061-1070]

RO wrongfully denied veteran entitled presumptive service connection for condition currently **diagnosed by VA January 22, 2009 as Spondylosis of the thoracic spine {claimed as low back pain}; where the following evidence in the record met the required title 38 CFR section 3.303(b) chronicity & continuity provision's applicable, in substantiating a claim: (1) the condition is observed during service, (2) continuity of symptomatology is demonstrated thereafter and, (3) competent evidence relates the present condition to that symptomatology; shown by the following statement of the facts:

RO 2/21/09 rating decision {R.at pg.1047-1057} "evidence" section failed to list actual date Veteran file claim for benefits was

within the required one year period after separation from service {according to service department records (DA Form 664) dated February, 1980} and confirmed in [**] RO February 2009 Reasons for Decision conceding to have reviewed the following service department treatment records dating from:

February, 1977 through February, 1980, YET, failed to note Service December 17, 1976 Report of Medical History Physician Summary SF-93 listing conditions: ***Occasional Leg cramps; Occasional low back pain;** AND C&P Orthopedic Evaluation dated January 22, 2009 verifying in service complaint of ***back pain*** due to slipping off a tank & heavy lifting mechanic work injury dated September 1978; where rating specialist reason for decision conceded [**] Continued treatment after service for back pain on January 9, 1999 Tri-City Community Hospital Jourdanton, Tx. & Dr. Blair M.D.; treated for back pain on December 27, 2003 to March 12, 2007 by Community General Hospital Dilley, TX.; establish required service connection elements;

demonstrating RO **wrongfully** denied veteran entitled “presumptive” service connection allegedly because rating specialist concluded: “no permanent residual or chronic disability subject to service connection is shown by the service medical records or demonstrated by evidence;” where VA examiner rational and opinion is not entitled to any weight where it contained only data and conclusions. See, Nieves-Rodriguez, 22 Vet. App. at 304.

RO 2/21/09 rating decision [R.at pg1050-51] committed [CUE] clear and unmistakable error wrongfully denied veteran entitled presumptive service connection and secondary service condition aggravation for:

***Left Knee, *Left Ankle, & *Right Hip**

presumptive claimed condition(s) aggravated due to in-service (Rt & Lft) bilateral toenail pain and removal treatment from June, 1977 through December 1979.

December 17, 1976 Report of Medical History Physician Summary SF-93 listing injury to left eye, Left ear Infection, Cavity in teeth; ***Occasional Leg cramps; Occasional low back pain;*** December 17, 1976 Report of Medical Exam SF-88 Pain & Discomfort Right hand Radiating pain to elbow; Right wrist – x-ray WNL may have joint sprain; March 8, 1977 Record of Medical Care Wedge 5th digit Left foot, nail Left foot; June 5, 1977 Injury Right hand; July 1, 1977 ingrown toenail left foot, wedged excision to boarder great trunk left foot; November 22, 1977 Remove toenail left foot; pain Rt. Wrist; April, 1978 follow-up Group A BETA Hemolytic Strep treated with pen.VK; August 9, 1978 Tow Bar fell on hand pain & swelling (1st & 4th PIP joint, fracture); December 13, 1978 Bruised toe, blueish skin around toe, ROM WNL; March 19, 1979 discomfort left great toe – toenail removed; July 5, 1979 dispense Kaopectate for diarraha; December 11, 1979 Change dressing on toenail removed right foot;

THEN, ***erroneously concluding*** “ service treatment records show no diagnosis of or treatment for: DJD, Left Knee, DJD, Left Ankle, & DJD, Right Hip condition(s); **AND** failed to weigh {presumptive service-connection} where Veteran file claim for conditions within the required presumptive one year period after separation from service, and evidence of record verified required severity [**] Continued treatment after service for:

DJD on January 9, 1999 Tri-City Community Hospital Jourdanton, Tx. & Dr. Blair M.D.; treated for pain on December 27, 2003 to March 12, 2007 by Community General Hospital Dilley, TX.; establish required service connection elements demonstrating RO wrongfully denied veteran entitled “presumptive” service connection and secondary service aggravation allegedly because rating specialist concluded:

“no diagnosis of or treatment of degenerative joint disease(s) within one year of veteran release from military service;”

where VA examiner rational and opinion is not entitled to any weight where it contained only data and conclusions. See, Nieves-Rodriguez, 22 Vet. App. at 304: AND where the following medical facts of record met the required chronicity provision applicable, in substantiating a claim:

(1) the condition {in-service *chronic bilateral toe disorder*} & {in-service *Occasional Leg cramps; Occasional low back pain*} is observed during service, (2) continuity of symptomatology and aggravation of {ankle, knee, hip, spine} is secondary condition part of February, 1980 presumptive claim, thereafter and, (3) competent {medical treatment records} relate the present condition to in-service aggravation and symptomatology; shown to result in {ankle, knee, hip, spine} degenerative joint disease aggravation.

RO 2/21/09 rating decision [R.at pg.1051] committed [CUE] clear and unmistakable error wrongfully denied veteran entitled presumptive service connection and secondary service condition aggravation for:

*Gastroesophageal reflux/severe stomach,
*erectile dysfunction; and *Asthma;

RO wrongfully denied veteran entitled presumptive service connection for condition currently **diagnosed by VA January 22, 2009 as Gastroesophageal reflux {claimed as severe stomach but diagnosed in-service on May 1979 as “gastritis”}; where *erectile dysfunction & *asthma in combination with GERD are also entitled to secondary aggravation linked to Note#5 thoracolumbar and cervical spine (claimed low back pain) }; where the following evidentiary facts on the record meet the required chronicity provision’s applicable, in substantiating a claim showing: (1) the condition is observed during service, (2) continuity of symptomatology is demonstrated thereafter and, (3) competent evidence relates the present condition to that symptomatology; shown by the following statement of the facts:

RO 2/21/09 “evidence” section [**R.at pg.1048**] failed to list actual date Veteran file claim for benefits was **within the required one year period after separation from service {according to service department records (DA Form 664) dated February, 1980} and confirmed in [**] RO February 2009 Reasons for Decision conceding to have reviewed service department treatment records from February, 1977 through February, 1980, AND

**conceded that on May 1979 was diagnosed with “gastritis” and that **private treatment records from Dr. Ganeshappa M.D. dated June 17, 2004 esophagastro endoscopy diagnosed Gastroesophageal reflux; AND General rating formula for disease and injuries of the spine Note # 5 include gastrointestinal symptoms; breathing limited to diaphragmatic respiration, and neurological symptoms-contributing to erectile dysfunction}; ** met the required chronicity provision’s applicable, in substantiating a claim showing: (1) the condition is observed during service or within one year after separation

from service, (2) continuity of symptomatology or related dysfunction is demonstrated thereafter and, (3) competent evidence {not opinion} relates the present condition to that symptomatology and/or dysfunction.

RO December 13, 2012 decision letter [**R.at pg.844-872**] reference 372/CR7/AH and October 2, 2012 rating decision committed clear and unmistakable error [CUE] incorrectly *applied regulatory and statutory provisions* as defined under 38 CFR section 3.400(b)(2) {effective date} wrongfully assigned Veteran for “**Recurrent Tinnitus**” a February 29, 2012 effective date and maximum 10% percent service connection rating, where record show Veteran filed initial claim in DA Form 664 {Service Member ‘s Statement Concerning Application for Compensation From the Veterans Administration (VA Form 21-526e)} dated February 14, 1980 Application for VA Benefits, and then refiled claim again received by RO on September 23, 2008, according to Houston, R.O. November 7, 2008 reference letter 362/TRNG/IJB.

RO is required to pay Veteran retroactive benefits entitled at a rate of 10% percent effective as of February 14, 1980 date of Department of Veterans Affairs receipt of Veteran claim for compensation benefits, where RO November 7, 2008 letter conceded February 1980 to be the date RO received copy of veteran service treatment records from the Service Records Department.

RO February 23, 2009 decision letter and February 21, 2009 rating decision denied veteran at least 100% percent service connection rating based on a single examination that assigned Veteran a noncompensable service connection rating [**R.at pg.1080**] for Bilateral Hearing Loss because of a *Left ear* avg. hearing loss of 55 descibles with word recognition test result of 96 percent; *Right ear* avg. hearing loss of 44 decibles with word recognition test result of 96; BUT where RO

December 19, 2008 VA examination diagnosed veteran with bilateral hearing loss, AND failed to weigh aggravation caused by service connected tinnitus, evidence by the following 2015 ENT examination.

South Texas ENT Consultants [R.at pg.744] June 2, 2015 Audiometric Examination noted Left ear avg. hearing loss of 75 decibels with word recognition test results of 56; Right ear avg. hearing loss 70 decibels with word recognition test results of 52; warrant overall combined Hearing Impairment with bouts of Vertigo {dizziness} with aggravated tinnitus warrant 100% percent rating as defined at Section 4.85(b) both ears, and 4.86(b) for right ear.

CONCLUSION

WHEREFORE based on the evidence and argument presented above by the Veteran, the Court is left with the sole conclusion that a mistake has been committed, entitling Veteran to benefits sought on appeal where Board May 17, 2019 rating decision is determined to be inextricably intertwined with Director Evidence Intake Center December 5, 2017 [SOC] reasons and bases that denied Veteran entitlement to September 2015 [CUE] revision of initial RO rating decision denial of Veteran entitlement to service connection and prior presumption of service connection benefits; demonstrating that the Director Evidence

Intake Center reasons for decision continued to incorrectly apply Title 38 CFR Regulatory provisions, and Part 4 schedule for rating disabilities.

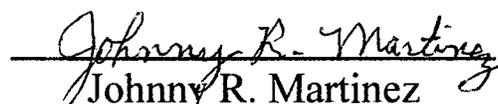
Respectfully Submitted


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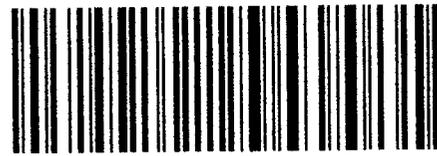
CERTIFICATE OF SERVICE

I certify that on this 8th day of February 2020 Veteran file the following reply in response to Appellee Brief with the U.S. Court of Appeals for Veterans Claims, 625 Indiana Avenue, N.W., Suite 900, Washing, D.C. 20004, with copy to the Office of the General Counsel, 810 Vermont Avenue, N.W., Washington, D.C. 20420 sent by certified mail.

Respectfully Submitted


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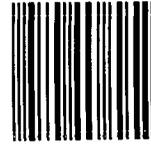
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