Vet. App. No. 19-4419

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

CHARLIE L. BUCKNER,
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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	)	
v.	)	Vet. App. No. 19-4419
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	)	
Appellee.	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

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I. ISSUE PRESENTED

Does Appellant fail to show that the Board of Veterans' Appeals (Board) arbitrarily found no clear and unmistakable error (CUE) in a final 1973 Board decision, where he argues only that the 1973 Board failed to apply an interpretation of the presumption of soundness that did not apply at the time of the prior final denial?

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction under 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, Charlie L. Buckner, appeals the Board's June 13, 2019, decision denying his motion for reversal or revision of a December 1973 Board decision denying service connection for mitral insufficiency, on the basis of CUE. [Record Before the Agency (R.) at 4-15].

C. Statement of Relevant Facts

Appellant served in the United States Army from April 1968 to April 1970. [R. at 2162]. After service, he filed a claim for compensation for mitral insufficiency, which the Veterans Administration (VA)[1] Regional Office (RO) denied in July 1973. [R. at 2054-56, 2085-88]. Appellant appealed that decision to the Board. *See* [R. at 2052 (September 1973 notice of disagreement (NOD)), 2036-39 (September 1973 statement of the case (SOC)), 2033-34 (October 1973 substantive appeal)].

In December 1973, the Board denied the claim. [R. at 2021-25]. The Board concluded that Appellant's mitral insufficiency clearly and unmistakably existed prior to service. [R. at 2025]; *see* [R. at 2040] (private medical record noting that

[1] In March 1989, the Agency became the Department of Veterans Affairs (also VA).

Appellant had a heart condition "before going to the Army"). The Board also noted that the preexisting condition was not aggravated by service. [R. at 2025].

In August 2013, Appellant filed a request for revision of the final December 1973 Board decision. [R. at 1083-87]. He asserted that the Board clearly erred because it misapplied the presumption of soundness, which allegedly required VA to show both that the condition preexisted service and was not aggravated by service. [R. at 1086]. The RO denied the request for revision in August 2014. [R. at 220-27]. Later that month, Appellant filed an NOD. [R. at 200]. And after the RO issued an SOC continuing to deny the request for revision, [R. at 169-91], Appellant perfected his appeal to the Board, [R. at 167-68].

Appellant testified before the Board in May 2016, at which time he was represented by his current counsel. [R. at 100-34]. His attorney testified that "[i]n the 2003 – 2004 time frame" the "way that the VA interprets the presumption of soundness" changed. [R. at 130] (stating that, to rebut the presumption of soundness, VA must now show both preexistence of a disability and that service did not aggravate the disability). His attorney stated that the 1973 Board decision was "from before – the change in the interpretation of law" but asserted that the new interpretation should apply. *Id.*; *see also* [R. at 123] (Appellant testifying that he "was born with" the mitral valve insufficiency).

Subsequently, the Board dismissed the appeal of the RO's August 2014 rating decision because it found that the RO had no jurisdiction over the CUE motion. [R. at 80 (77-83)]. The Board explained that it had received the CUE motion

and would issue its own decision on the merits. *Id.* The Board then issued its June 2019 decision finding no CUE in the December 1973 Board decision denying service connection for mitral insufficiency. [R. at 4-15]. This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's decision. At the time of the final December 1973 Board decision, the Board could rebut the presumption of soundness with only clear and unmistakable evidence of preexistence. The subsequent *Wagner* interpretation of the presumption of soundness, requiring the Secretary to rebut the presumption by also showing no in-service aggravation, did not apply to the 1973 Board. As this Court has held, the *Wagner* interpretation does not apply retroactively and cannot defeat prior final decisions. Thus, by arguing that the 1973 Board did not correctly apply the aggravation prong of the presumption of soundness, Appellant fails to identify any legal error in the final Board decision. He also fails to show that he was prejudiced by any inadequacy in the current Board's discussion of the aggravation prong.

IV. ARGUMENT

A. Standard of review

CUE is a collateral attack on a final Board or RO decision and is "a very specific and rare kind of error." 38 C.F.R. § 20.1403. To establish CUE, a claimant must show either that (1) the correct facts known at the time of the decision were not before the adjudicator or (2) the statutory or regulatory provisions in effect at the time were incorrectly applied. *Russell v. Principi*, 3 Vet.App. 310, 313 (1992)

(en banc). The error must be undebatable, and one that would have manifestly changed the outcome of the prior decision based on the record or law at the time of the decision. *Id.*

The Court's review of a Board decision regarding an allegation of CUE in a prior decision is limited to whether the Board's decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and whether the decision is supported by an adequate statement of reasons or bases. 38 U.S.C. §§ 7261(a)(3)(A), 7104(d)(1); *see also Livesay v. Principi*, 15 Vet.App. 165, 174 (2001) (en banc). To render an adequate statement of reasons or bases for its factual findings and conclusions of law, the Board must analyze the probative value of evidence, account for evidence it finds persuasive or unpersuasive, and explain why it rejected evidence materially favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995); *see Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

B. The *Wagner* interpretation of the presumption of soundness does not apply retroactively to final decisions, and thus Appellant fails to show the Board's decision denying CUE is not in accordance with the law

The December 1973 Board was not required to rebut the presumption of soundness by showing that Appellant's mitral insufficiency was not aggravated by service because, at that time, the Secretary was required to rebut the presumption by showing only clear and unmistakable evidence that a disability preexisted service. Thus, Appellant fails to show that the current Board decision arbitrarily found no CUE in the 1973 Board's application of the presumption of soundness because it did not meet its burden to show no in-service aggravation.

Under the presumption of soundness, when no preexisting medical condition is noted upon entry into service, a veteran is presumed to have entered service in sound condition. 38 U.S.C. § 1111. Prior to 2003, the "regulatory interpretation of the statutory presumption of soundness" required the Secretary to rebut the presumption "only with clear and unmistakable evidence that a disability preexisted service." *George v. Wilkie*, 30 Vet.App. 364, 373-74 (2019) (explaining that then-existing 38 C.F.R. § 3.304(b) required only clear and unmistakable evidence of preexistence). It was not until June 2004 that the United States Court of Appeals for the Federal Circuit determined that the Secretary was required to rebut the presumption with clear and unmistakable evidence showing *both* that a disease preexisted service (preexistence prong) and was not aggravated by service (aggravation prong). *Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed. Cir. 2004).

This Court has held that the interpretation of the presumption of soundness in *Wagner* "does not apply retroactively to final decisions" of the Board, and thus that interpretation "cannot defeat the finality of a [prior] Board decision." *George*, 30 Vet.App. at 373-74 (stating that *Wagner* did not change how the statute "was interpreted or understood before it issued"). The Court reasoned that CUE requires "application of the law as it was understood at the time" of the final decision, and that such application of law "does not become CUE by virtue of a subsequent interpretation of the statute or regulation by this Court or the Federal Circuit." *Id.* at 373. The *George* Court also noted that a contrary pronouncement by the Federal Circuit, contained in a footnote in *Patrick v. Shinseki*, 668 F.3d 1231 (Fed. Cir.

2011), "is dicta" and conflicts with precedent. *Id.* at 374 (noting that, in *DAV v. Gober*, 234 F.3d 682 (2000), the Federal Circuit recognized that the interpretation of a statute can only apply retroactively to decisions still open on direct review). Accordingly, because the final 1977 Board decision at issue in *George* "was not open for direct review when *Wagner* was decided," the Court determined that the *Wagner* interpretation of the presumption of soundness did not apply. *Id.* at 376 (considering only the preexistence prong in reviewing the Board's CUE decision).

Like the final decision in *George*, the final 1973 Board decision here was issued decades before *Wagner*. The *Wagner* interpretation of the presumption of soundness, therefore, "did not change how the law was interpreted or understood when the Board issued its final decision." *George*, 30 Vet.App. at 376. Thus, the December 1973 Board was not required to rebut the presumption of soundness by showing that Appellant's disability was not aggravated by service. *See id.* at 373-74. It was required only to rebut the presumption by finding clear and unmistakable evidence of preexistence, which it did. *See* [R. at 9] (noting that the 1973 Board explained that Appellant had a pre-existing heart condition, "had not contended otherwise," and had submitted a letter indicating that he had a heart murmur prior to service). Appellant's contention that the 1973 Board was also required to show clear and unmistakable evidence of aggravation, and his reliance on *Wagner* and *Patrick*, overlooks this Court's determinative decision in *George*. *See* Appellant's Brief (Br.) at 5 (arguing that the *Wagner* interpretation is retroactive). And because it is clear that the 1973 Board was not required to apply the *Wagner* interpretation,

Appellant fails to show that the 2019 Board "made an error of law" by not meeting its burden to "prove by clear and unmistakable evidence that military service did not cause aggravation." *Id.* at 4.

Notably, although the 2019 Board decision on appeal correctly stated that regulations in effect in 1973 "omitted the requirement of clear and unmistakable evidence of no aggravation," it incorrectly stated that "the *Wagner* opinion was retroactive" and applied at the time of the 1973 Board decision. [R. at 10-12] (finding that the 1973 Board incorrectly applied the law pertaining to the presumption of soundness but that such error was would not have manifestly changed the outcome of the decision). This misstatement of law, and any alleged inadequacy in the 2019 Board's discussion of the aggravation prong, is nonprejudicial because, by law, the 1973 Board was not required to show that Appellant's heart disability was not aggravated by service to rebut the presumption of soundness. *See George*, 30 Vet.App. at 373 (explaining that CUE requires application of the law "as it was understood at the time"); *see also* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (stating that an appellant has the burden of demonstrating prejudicial error on appeal).

The Secretary has limited his response to only those arguments raised by Appellant in his opening brief and submits that any other arguments or issues should be deemed abandoned. *See Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999).

V. CONCLUSION

WHEREFORE, for the foregoing reasons, the Secretary respectfully submits that the Board's June 13, 2019, decision should be affirmed.

Respectfully submitted,

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