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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-4135

JOHNNY R. MARTINEZ, APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

MEREDITH, *Judge*: The pro se appellant, Johnny R. Martinez, appeals a May 17, 2019, Board of Veterans' Appeals (Board) decision that denied his motion to reverse or revise on the basis of clear and unmistakable error (CUE) (1) a March 1980 rating decision that denied entitlement to disability compensation for right wrist pain and dislocation, and failed to adjudicate disability compensation claims for spondylosis of the thoracic spine without radiculopathy, right hip degenerative joint disease (DJD), left knee DJD, left ankle DJD, asthma, gastroesophageal reflux disease (GERD), erectile dysfunction, and a dental condition affecting tooth #3; (2) a February 2009 rating decision that denied entitlement to disability compensation for spondylosis of the thoracic spine without radiculopathy, right hip DJD, left knee DJD, left ankle DJD, asthma, GERD, erectile dysfunction, and tinnitus; and granted service connection for bilateral hearing loss with a 0% disability rating, but denied an earlier effective date based on the alleged failure to adjudicate the claim in the March 1980 rating decision; (3) an October 2012 rating decision that granted service connection for tinnitus with a 10% disability rating, but denied an earlier effective date based on the alleged failure to adjudicate the claim in the March 1980 rating decision; and

(4) an October 2015 rating decision that denied entitlement to disability compensation for a dental condition affecting tooth #3.¹ Record (R.) at 4-22.

This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will set aside the Board's decision finding no CUE in that part of the February 2009 rating decision that assigned a 2008 effective date for the grant of service connection for bilateral hearing loss and direct the Board to remand that matter to the VA regional office (RO) for adjudication in the first instance; vacate the Board's decision finding no CUE in the October 2015 rating decision and direct the Board to remand the matter of entitlement to service connection for a dental condition to the RO to issue a Statement of the Case (SOC) in response to the appellant's February 2016 Notice of Disagreement (NOD), which placed the issue in appellate status, *see Manlincon v. West*, 12 Vet.App. 238, 240-41 (1999); and vacate the Board's findings that the appellant did not file a claim for hearing loss and a dental condition in 1980. The Court will otherwise affirm the Board's decision finding no CUE in the March 1980, February 2009, and October 2012 rating decisions.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from February 1977 to February 1980. R. at 1215. Upon separation, he filed a formal application for disability compensation for a "[d]islocated . . . right wrist." R. at 1210-11. On the same date, VA received DA Form 664, which reflects that the appellant's service medical records (SMRs) were also sent to VA. R. at 709; *see* R. at 1208, 1212.

His December 1976 entrance examination and reported medical history reflect a pre-service injury to the left eye, a pre-service left ear infection, cavities of the teeth, occasional leg cramps, occasional low back pain on exercise, and ganglia or bone injury of the right hand with complaints of wrist pain and swelling. R. at 814-15, 818-19; *see* R. at 821. His SMRs indicate complaints of right wrist pain in November 1977, R. at 803; and treatment for ingrown toenails, a pulled muscle in the low back, gastritis, and various dental treatment, R. at 796-98, 802, 820,

¹ The Court notes that, although the Board did not list CUE in the October 2015 rating decision as a matter on appeal or mention it in its findings of fact or conclusions of law, *see* R. at 4-7, the substance of the Board decision reflects that it adjudicated this matter, R. at 17.

833-38. The appellant's October 1979 separation examination, however, revealed no abnormalities. R. at 810-11, 816-17.

The RO denied entitlement to disability compensation for a right wrist condition in the March 1980 rating decision; the RO found no evidence of residuals of his in-service complaints of pain or a dislocated right wrist. R. at 1196-99. The appellant did not appeal that decision.

In September 2008, he filed disability compensation claims for hearing loss; tinnitus; low back pain; erectile dysfunction; asthma; degenerative changes in the right hip, left ankle, and left knee; and GERD. R. at 1144; *see* R. at 1123-34. The evidence at that time included a January 1999 private treatment record noting a history of trauma and pain to the left knee and left ankle with diagnosed degenerative changes confirmed on x-ray, R. at 1105; a June 2004 private treatment record indicating treatment for severe gastritis with GERD and diarrhea, R. at 1122; an October 2005 private x-ray report of the right hand and left ankle that showed no evidence of fractures or dislocations, R. at 991; a May 2008 private treatment record noting a history of low back and bilateral hip pain, after being thrown from a horse a few months earlier, and x-rays of the right hip revealing early degenerative changes, R. at 1120; and a December 2008 x-ray report finding no fractures or defined bone lesions following a left leg injury, R. at 946.

The appellant underwent a VA audiological examination in December 2008; the examiner diagnosed bilateral sensorineural hearing loss, which she opined was at least as likely as not related to in-service military noise exposure, but also noted that the appellant denied tinnitus, dizziness, vertigo, history of head injury, or skull fracture. R. at 1079-81. The appellant also underwent a VA spine examination in January 2009. R. at 1061-64. The examiner noted the appellant's military history as a truck mechanic and in-service treatment for low back pain after slipping off a tank; a 17-year postservice history working as a mechanic and rancher; and a postservice injury in 2007 when he was thrown off a horse. R. at 1061-62. The examiner diagnosed spondylosis of the thoracic and lumbar spine, multilevel degenerative disk disease, and disk bulging of the lumbar spine, and provided a negative nexus opinion. R. at 1063-64.

In the February 2009 rating decision, the RO denied entitlement to disability compensation for spondylosis of the thoracic spine, claimed as low back pain; right hip, left knee, and left ankle DJD; tinnitus; asthma; GERD; and erectile dysfunction. R. at 1040-43, 1045-52. The RO granted entitlement to disability compensation for bilateral hearing loss and assigned a 0% disability rating

effective September 23, 2008, the date of the claim. R. at 1040, 1048-49. The appellant did not appeal that decision.

He subsequently filed a claim for an increased disability rating for bilateral hearing loss and a request to reopen a claim for tinnitus in February 2012, R. at 1029, and underwent VA audiological examinations in June and September 2012, R. at 864-73, 1008-17. The June 2012 examination report reflects that he did not report tinnitus, R. at 1015; but, in September, he reported bilateral and constant tinnitus that began in 1977 and the examiner opined that tinnitus is at least as likely as not a symptom of his hearing loss, R. at 871-72.

The RO issued an October 2012 rating decision that granted entitlement to disability compensation for bilateral tinnitus and assigned a 10% disability rating effective February 29, 2012, the date of the claim, and continued the 0% rating for bilateral hearing loss. R. at 849-59. The appellant did not appeal that decision.

In September 2015, he filed a motion to reverse or revise on the basis of CUE the March 1980, February 2009, and October 2012 rating decisions. R. at 587-97. In this regard, he argued that the prior decisions overlooked the original date that he filed a claim for benefits, citing DA Form 664 dated February 14, 1980, and suggested that his initial claim included a request for benefits for all conditions noted in his SMRs. R. at 587. He thus contended that it was CUE in March 1980 not to adjudicate claims for spondylosis of the thoracic spine without radiculopathy, right hip DJD, left knee DJD, left ankle DJD, asthma, GERD, erectile dysfunction, a dental condition affecting tooth #3, hearing loss, and tinnitus, including on a presumptive basis. R. at 587, 590. He also argued that the RO, in 1980, failed to note the evidence considered in its decision and that the RO was required to explain why service connection on presumptive or secondary bases was not warranted. R. at 596.

As for the February 2009 rating decision, he also asserted, with regard to his claims for spondylosis of the thoracic spine without radiculopathy, right hip DJD, left knee DJD, left ankle DJD, asthma, GERD, erectile dysfunction, hearing loss, and tinnitus, that the RO failed to correctly apply the regulatory and statutory criteria for presumptive service connection. R. at 590. He further maintained that it was CUE not to assign a 100% disability rating for bilateral hearing loss, contending that the December 2008 VA examiner did not weigh "aggravation caused by service[-]connected tinnitus." R. at 589. He additionally pointed to a June 2015 medical record and argued that he was entitled to an overall 100% combined rating due to bouts of vertigo and tinnitus.

R. at 589-90. In support of his contention that it was CUE to deny presumptive service connection for spondylosis of the thoracic spine on the bases of chronicity or continuity of symptomatology, R. at 591, he asserted that the VA medical opinion was not entitled to any weight and that the rating decision failed to note his 1976 separation examination reflecting occasional leg cramps and low back pain, a January 2009 medical record verifying in-service back pain in 1978, and treatment in January 1999 and from 2003 to 2007, R. at 591-92.

Additionally, he argued that it was CUE in February 2009 to deny his claims for left knee, left ankle, and right hip DJD on the bases that the SMRs showed no diagnosis or treatment; he averred that he was entitled to presumptive service connection given that he filed his claims within the 1-year presumptive period, evidence showed treatment after service, and the VA examiner's rationale and opinion were not entitled to any weight. R. at 593. He further suggested that the evidence established that these conditions were secondary to, and aggravated by, his in-service low back pain and bilateral toenail pain. R. at 593.

With regard to GERD, he argued that evidence demonstrating a January 2009 diagnosis of GERD, in-service treatment for gastritis, and continuity of symptomatology thereafter warranted a grant of presumptive service connection. R. at 593-94. In addition to contending that his asthma and erectile dysfunction were entitled to presumptive service connection, R. at 590, he maintained that these conditions, in combination with GERD, were secondary to his low back pain. R. at 594-95. Finally, with regard to the October 2012 rating decision, he asserted that it was CUE not to assign an effective date from February 1980 for bilateral tinnitus. R. at 588-89.

In October 2015, the RO declined to adjudicate the motions seeking to revise prior decisions on the basis of CUE, indicating that the claims needed to be submitted on a standardized form, and denied a June 2015 claim for a dental condition, claimed as tooth #3 (inner piece left in root canal), R. at 563-64, 578, 581; the RO found that the dental condition was not considered disabling. R. at 581; *see* R. at 563-81, 745-51. The RO further noted:

You also claimed a clear and unmistakable error was made during your dental treatment in military service. The Department of Veteran[]s Affairs processes claims for clear and unmistakable errors that were made in previous rating decisions. Before today, this issue has never been rated, therefore your claim for clear and unmistakable error cannot be addressed.

R. at 581. The appellant filed a statement in support of his claim, disagreeing with the RO's refusal to consider his allegations of CUE; he also reasserted his allegations of CUE in the March 1980, February 2009, and October 2012 rating decisions. R. at 533-57.

In a January 2016 rating decision, the RO declined to reverse or revise on the basis of CUE (1) the March 1980 rating decision that denied disability compensation for right wrist pain and dislocation, R. at 518-19; (2) the February 2009 rating decision that denied disability compensation for left ankle, left knee, and right hip DJD; asthma; erectile dysfunction; spondylosis of the thoracic spine; and GERD, and assigned a disability rating of 0% for bilateral hearing loss, R. at 515-18; (3) the October 2012 rating decision that assigned an effective date of February 29, 2012, for the grant of service connection for tinnitus, R. at 514-15; and (4) the October 2015 rating decision denying disability compensation for tooth #3, R. at 519; *see* R. at 492-523.

The appellant disagreed with the rating decision, perfected his appeal to the Board, and, in February 2019, submitted a brief in support of his appeal. R. at 23-39 (Feb. 2019 brief), 107-23 (Dec. 2017 Substantive Appeal), 127-81 (Dec. 2017 SOC), 472-88 (argument in support of NOD), 489-90 (Feb. 2016 NOD). In the May 2019 decision on appeal, the Board found no CUE in the March 1980 rating decision, February 2009 rating decision, or October 2012 rating decision. R. at 4-22. This appeal followed.

II. ANALYSIS

A. Law

On appeal to this Court, the appellant "always bears the burden of persuasion." *Berger v. Brown*, 10 Vet.App. 166, 169 (1997); *see Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). However, when an appellant is proceeding pro se, the Court will liberally interpret his or her informal brief. *See De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992).

A request to revise a final RO decision based on CUE is a collateral attack on that decision. *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 698 (Fed. Cir. 2000). CUE is established when the following conditions are met: First, either (1) the correct facts in the record were not before the adjudicator or (2) the statutory or regulatory provisions in existence at the time were incorrectly applied. *Damrel v. Brown*, 6 Vet.App. 242, 245 (1994). Second, the alleged error must be "undebatable," not merely "a disagreement as to how the facts were weighed or evaluated." *Russell v. Principi*, 3 Vet.App. 310, 313-14 (1992) (en banc); *see Hillyard v. Shinseki*, 24 Vet.App. 343, 349 (2011), *aff'd* 695 F.3d 1257 (Fed. Cir. 2012). Finally, the commission of the alleged error must have "manifestly changed the outcome" of the decision being attacked on the basis of CUE at the

time that decision was rendered. *Russell*, 3 Vet.App. at 313-14; see *Bustos v. West*, 179 F.3d 1378, 1380-81 (Fed. Cir. 1999) (expressly adopting the "manifestly changed the outcome" language in *Russell*); see also *King v. Shinseki*, 26 Vet.App. 433, 442 (2014) ("Whether it is reasonable to conclude that the outcome would have been different is not the standard that must be met for a motion alleging CUE to succeed . . . , the error must be 'undebatable' and . . . must have 'manifestly changed the outcome' of the decision." (citing *Russell*, 3 Vet.App. at 313)), *aff'd sub nom. King v. McDonald*, 599 F. App'x 957 (Fed. Cir. 2015).

"CUE is a very specific and rare kind of 'error' . . . of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error." *Fugo v. Brown*, 6 Vet.App. 40, 43 (1993) (emphasis omitted). "If it is not absolutely clear that a different result would have ensued," based upon the facts and law that were understood at the time of the decision, then any error that may have occurred in a final Board or RO decision is not clear and unmistakable. *Fugo*, 6 Vet.App. at 44. The Court's review of the Board's determination on the existence of CUE is limited to whether that conclusion was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or unsupported by adequate reasons or bases. 38 U.S.C. §§ 7104(d)(1), 7261(a)(3); see *Eddy v. Brown*, 9 Vet.App. 52, 57 (1996). That standard of review, however, "contemplates de novo review of questions of law," including whether an applicable law or regulation was correctly applied. *Joyce v. Nicholson*, 19 Vet.App. 36, 43 (2005) (quoting *Kent v. Principi*, 389 F.3d 1380, 1384 (Fed. Cir. 2004)).

To establish entitlement to disability compensation, a veteran generally must show (1) a current disability, (2) incurrence or aggravation of a disease or injury in service, and (3) a nexus between the claimed in-service injury or disease and the current disability. See *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004). At the time of the decisions being challenged for CUE and today, 38 C.F.R. § 3.303(b) provides two alternative routes to service connection for chronic diseases. Chronicity is established if a claimant demonstrates the existence of a chronic disease in service, or within the presumptive period under 38 C.F.R. § 3.307, and present manifestations of the same disease. 38 C.F.R. § 3.303(b) (2019). "For the showing of chronic disease in service[,] there is required a combination of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time, as distinguished from merely isolated findings or a diagnosis including the word 'Chronic.'" 38 C.F.R. § 3.303(b). Continuity of

symptomatology is established if a claimant demonstrates that a condition was "noted" during service; evidence of postservice continuity of the same symptoms; and evidence of a nexus between the present disability and the postservice symptoms. 38 C.F.R. § 3.303(b).

The U.S. Court of Appeals for the Federal Circuit has explained that § 3.303(b)

refers to chronic diseases that are either "shown in service," meaning clearly diagnosed beyond legitimate question, or not so shown in service. When a "condition noted in service" is not sufficient to warrant the conclusion that the chronic disease is "shown to be chronic" in service, continuity of symptomatology may suffice to establish that the veteran incurred a chronic disease in service.

Walker v. Shinseki, 708 F.3d 1331, 1339 (Fed. Cir. 2013).

B. CUE in the March 1980 Rating Decision

1. Failure to Adjudicate

The appellant argues that the Board erred when it found that he did not file a claim in 1980 for any disabilities, other than his right wrist, and asserts that the Board overlooked DA Form 664 submitted with his application. Appellant's Informal Brief (Br.) at 1, 3, 13-16. He further asserts that, because VA received his SMRs within 1 year after his separation from service, he was entitled to presumptive service connection for all conditions noted in his SMRs. Appellant's Informal Br. at 13-17.

The Secretary asserts that the Court should affirm the Board's determination that there were no communications from the appellant in 1980 indicating an intent to file a claim for benefits, other than for the right wrist. Secretary's Br. at 14-18. The Secretary further maintains that DA Form 664 merely confirmed the submission of a claim and did not reflect an intent to apply for benefits other than for the right wrist. Secretary's Br. at 15-16 (citing R. at 709). Additionally, with the exception of hearing loss, the Secretary notes that claims for the remaining disabilities were denied in subsequent final RO decisions and thus served as a denial of any earlier pending claim. Secretary's Br. at 17.

In the decision on appeal, the Board addressed the appellant's contention that the RO in 1980 failed to adjudicate claims for spondylosis of the thoracic spine without radiculopathy, right hip DJD, left knee DJD, left ankle DJD, asthma, GERD, erectile dysfunction, hearing loss, tinnitus, and a dental condition affecting tooth #3, but found that his February 22, 1980, application requested benefits for a right wrist condition only and that the appellant provided no reasons as to why the RO should have adjudicated claims for additional disabilities. R. at 10-11; *see* R. at 12-19.

The Board further found that no other communications were received in 1980 indicating an intent to apply for benefits. R. at 11.

Contrary to the Board's finding, the record reflects that the appellant argued below that DA Form 664 demonstrated that his 1980 claim was not limited to the right wrist. R. at 587. The Board's statement of reasons or bases does not expressly address this form, and the Secretary's contention that the form did not raise a claim for disabilities allegedly identified in the SMRs is a post hoc rationalization that the Court will not accept. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("[A]gency 'litigating positions' are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action, advanced for the first time in the reviewing court."); *Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011) ("[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.").

However, under the circumstances of this case, the Court concludes that remand is not required because the appellant has not demonstrated that any error in failing to address that document was prejudicial. *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the harmless-error analysis applies to the Court's review of Board decisions and that the burden is on the appellant to show that he or she suffered prejudice as a result of VA error). Under this Court's caselaw, a claim remains pending if the Secretary fails to act on it, and a pending unadjudicated claim may serve as the basis for an earlier effective date. *See Ingram v. Nicholson*, 21 Vet.App. 232, 241 (2006) (per curiam) (stating that, as part of an appeal of an effective-date decision, an appellant may raise the fact that he filed an original claim for the same disability at an earlier date than the claim that was subsequently granted). This Court has held that a claim remains pending until there is a final adjudication of the claim. A final adjudication may occur through either (1) a recognition of the substance of the claim in an RO decision from which a claimant may deduce that the claim was adjudicated, or (2) an explicit adjudication of a later claim for the same disability. *Ingram*, 21 Vet.App. at 243. "[A] subsequent final adjudication of a claim which is identical to a pending claim that had not been finally adjudicated terminates the pending status of the earlier claim. The later disposition, denying the claim on the merits, also decides that the earlier identical claim must fail." *Williams v. Peake*, 521 F.3d 1348, 1351 (Fed. Cir. 2008).

Hence, even assuming that VA, in 1980, failed to explicitly recognize claims for spondylosis of the thoracic spine without radiculopathy, right hip DJD, left knee DJD, left ankle DJD, asthma, GERD, erectile dysfunction, hearing loss, and tinnitus,² the RO finally adjudicated subsequent claims for the same disabilities in the February 2009 rating decision that is also being challenged for CUE. Pursuant to established caselaw, the subsequent final adjudication of the appellant's 2008 claims would have terminated the pending status of the claims allegedly filed in 1980. Accordingly, in the absence of demonstrating CUE in the February 2009 rating decision, the appellant cannot establish entitlement to service connection, including a 1980 effective date, based on his allegations that VA failed to adjudicate his 1980 claims for the same disabilities.

The Board, in the 2019 decision on appeal, found no CUE in the February 2009 rating decision, including the effective date assigned for the grant of service connection for hearing loss. R. at 10-19. As discussed below, except for the assignment of a 2008 effective date for hearing loss, the appellant has not demonstrated that the Board's decision regarding the 2009 rating decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, nor has he demonstrated that the Board provided inadequate reasons or bases for that determination. Therefore, with the exception of the appellant's alleged claims for hearing loss and a dental condition, the Court concludes that any error in the Board's decision concerning the failure to adjudicate claims in 1980 is harmless. *See Simmons v. Wilkie*, 30 Vet.App. 267, 278-79 (2018) (explaining that the Court's statutory mandate to account for prejudicial error requires the Court to assess whether any Board error in concluding that there was no CUE in the underlying decision was prejudicial to the claimant).

2. The Right Wrist

As for his right wrist, the appellant argued below that the RO incorrectly applied §§ 3.303(b), 3.307, and 3.309, when it denied his claim. Appellant's Informal Br. at 3, 23. His arguments were based in part on the fact that his SMRs reflect an injury to the right wrist and that he filed his claim within 1 year after his separation from service. Appellant's Informal Br. at 17, 23-24.

The Board considered the appellant's arguments, but found that filing a claim within the presumptive period does not necessarily lead to a grant of benefits; the RO in 1980 found that his

² The appellant's assertion that his 1980 claim also included a claim for a dental condition affecting tooth #3 will be addressed below.

SMRs did not show a dislocated wrist or right wrist residuals; there was no indication that the RO misapplied the law; and the appellant's arguments essentially amount to a disagreement with the RO decision. R. at 12. The Board additionally found that, to the extent that the appellant argued that the RO failed to fully explain its decision, the law in 1980 did not require RO decisions to identify all the evidence or the reasons for the decision. R. at 13; *see* R. at 596; *see also Joyce*, 19 Vet.App. at 46 ("To establish CUE in a pre-February 1990 RO decision, it must be clear from the face of that decision that a particular fact or law had not been considered in the RO's adjudication of the case."); *Crippen v. Brown*, 9 Vet.App. 412, 420 (1996) (noting that "RO decisions . . . rendered before February 1, 1990, when 38 U.S.C. § 5104(b) was added to require RO decisions to specify the evidence considered and the reasons for the disposition . . . routinely lacked such specificity").

Although the appellant generally disagrees with the denial of his motion to revise the March 1980 decision, he raises no specific argument contesting any aspect of the Board's decision. Instead, he argues that the December 2017 SOC "fails to list each and every VA treatment date[] reviewed by [the] RO dated between February 1980 through January 2008." Appellant's Informal Br. at 24. The Court thus concludes that he has not shown that the Board's decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, nor has he demonstrated that the Board provided inadequate reasons or bases for its determination. *See Eddy*, 9 Vet.App. at 57; *see also Hilkert*, 12 Vet.App. at 151; *Berger*, 10 Vet.App. at 169.

C. February 2009 Rating Decision

In the decision on appeal, the Board concluded that the February 2009 rating decision was not clearly and unmistakably erroneous. R. at 7. In reaching this determination, the Board reviewed the bases for the RO's 2009 rating decision and, upon consideration of the appellant's contentions, determined that they in part amounted to a disagreement with the RO's weighing of the evidence and did not establish that the correct facts were not before the adjudicator or that the statutory or regulatory provisions in effect at the time were incorrectly applied. R. at 10-19.

1. *Effective Date for Hearing Loss*

As an initial matter, the Court must address an issue affecting its jurisdiction. The Board is vested with jurisdiction to review "[a]ll questions in a matter which under section 511(a) of . . . title [38] is subject to decision by the Secretary." 38 U.S.C. § 7104(a). However, the Board generally lacks jurisdiction to adjudicate "a claim that was never presented to and adjudicated by

the RO." *Jarrell v. Nicholson*, 20 Vet.App. 326, 331 (2006) (en banc); see *Godfrey v. Brown*, 7 Vet.App. 398, 408-10 (1995). "It is well settled that the Court has jurisdiction to determine whether the Board had jurisdiction to take the action it takes in a decision," *Young v. Shinseki*, 25 Vet.App. 201, 203 (2012) (en banc order), and "the Court exercises de novo review over Board determinations that are critical to its jurisdiction," *Evans v. Shinseki*, 25 Vet.App. 7, 10 (2011). Further, because the Court's jurisdiction is limited to review of final Board decisions, 38 U.S.C. §§ 7252(a), 7266, "[i]t follows that where the Board does not have . . . jurisdiction, then neither does the Court," *King v. Nicholson*, 19 Vet.App. 406, 409 (2006); see *Ledford v. West*, 136 F.3d 776, 779 (Fed. Cir. 1998) ("[T]he court's jurisdiction is premised on and defined by the Board's decision concerning the matter being appealed.").

Here, the Board found that the appellant did not file a claim for hearing loss in 1980 and adjudicated whether it was CUE in February 2009 to assign a September 2008 effective date for the grant of service connection for hearing loss. R. at 17-18. However, review of the January 2016 rating decision and December 2017 SOC reflects that the RO adjudicated only whether the assigned disability rating was CUE and not the proper effective date. See R. at 169-70 (Dec. 2017 SOC), 515 (Jan. 2016 rating decision). Because "each wholly distinct and different CUE theory underlying a request for revision is a separate matter," and the RO did not adjudicate whether the effective date assigned in 2009 was the product of CUE, the Court will set aside the Board's decision as to that matter and instruct the Board on remand to direct the RO to adjudicate it in the first instance. See *Jarrell*, 20 Vet.App. at 333. Additionally, because the Board failed to address whether DA Form 664 reasonably raised a claim for hearing loss in 1980, and that issue forms the basis for the appellant's CUE allegation regarding the correct effective date, the Court will vacate the Board's factual finding that the appellant did not file a claim for hearing loss in 1980. R. at 17-18; see *Eddy*, 9 Vet.App. at 57.

2. CUE in the Remainder of the 2009 Decision

The appellant does not raise any specific arguments concerning the Board's determination that the 2009 rating decision is not the product of CUE. Instead, his arguments are directed at the RO's reasons or bases provided in the December 2017 SOC. Appellant's Informal Br. at 18-28. However, the Court's appellate jurisdiction is governed by 38 U.S.C. §§ 7252(a) and 7266(a) and is limited to review of final decisions of the Board. See 38 U.S.C. § 7252(a) (the Court "shall have exclusive jurisdiction to review decisions of the Board"); 38 U.S.C. § 7266(a) ("In order to obtain

review by the Court of Appeals for Veterans Claims" a claimant must appeal "a final decision of the Board"). Although the Court cannot directly review the December 2017 SOC, to the extent that any of the appellant's allegations of error in the SOC might support similar allegations as to the Board's statement of reasons or bases in the decision on appeal, the Court has considered those contentions and concludes that they do not demonstrate that the Board's decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or supported by inadequate reasons or bases for its determination. *See Eddy*, 9 Vet.App. at 57; *see also Hilkert*, 12 Vet.App. at 151; *Berger*, 10 Vet.App. at 169.

For example, regarding the 0% disability rating assigned for hearing loss, the appellant refers to a 2012 private treatment record and a 2015 VA examination report as evidence warranting a higher disability rating. Appellant's Informal Br. at 19-20. The Board noted, however, that allegations of CUE must be based on the evidence of record at the time of the decision being challenged for CUE and, therefore, these records cannot establish CUE in the 2009 rating decision. R. at 18; *see Damrel*, 6 Vet.App. at 245.

Regarding the claims for left ankle DJD, left knee DJD, and spondylosis of the thoracic spine, the appellant suggests, in part, that it was error not to list "each and every veteran VA treatment date[] reviewed by the RO between February 1980 and January 2008." Appellant's Informal Br. at 21-22. The Board explained, however, that this level of detail is not required because the RO is presumed to have considered all relevant evidence and, to establish CUE, the appellant must identify evidence that was before the RO and clearly not considered. R. at 11; *see Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007) (holding that the Board is presumed to have considered all evidence presented in the record). The Board found that he had not identified any such evidence and the appellant does not dispute that finding here on appeal. *See Damrel*, 6 Vet.App. at 245; *see also Hilkert*, 12 Vet.App. at 151.

Regarding GERD, erectile dysfunction, and asthma, the appellant essentially disagrees with the determination that these conditions are not subject to presumptive service connection pursuant to § 3.303(b). R. at 16, 177; *see Appellant's Informal Br.* at 24-26, 27-28. In this regard, he asserts that the evidence showed that he was diagnosed with gastritis in service and in 2004; and that he had erectile dysfunction in 1988. Appellant's Informal Br. at 24-25. Even assuming, however, that these conditions were subject to presumptive service connection in 2009, the RO denied the claim for GERD stating that, although he was treated one time in service, there was no

evidence of a permanent residual or chronic disability shown by his SMRs. R. at 1051. Additionally, the Board found that the RO in 2009 determined that there was no diagnosis of or treatment for erectile dysfunction or asthma in service. R. at 16; *see* R. at 1050-51. Because the appellant on appeal has not identified any evidence of record in 2009 contrary to those findings and not considered, he has not demonstrated that application of § 3.303(b) would have manifestly changed the outcome of the February 2009 decision, or that any alleged error by the Board is prejudicial. *See Sanders*, 556 U.S. at 411-14; *see also King*, 26 Vet.App. at 441; *Fugo*, 6 Vet.App. at 43-44.

D. October 2012 Rating Decision

The Board concluded that it was not CUE in October 2012 to assign an effective date of February 2012 for the award of service connection for tinnitus with a 10% maximum disability rating. R. at 18-19. In that regard, the Board noted that the RO assigned the date of the appellant's claim to reopen; the appellant had not established any error of fact or law with the February 2009 denial of the claim; and he had not pointed to any claim filed between 2009 and 2012. R. at 19.

Although the appellant disagrees with the Board's decision, his arguments are directed at the December 2017 SOC. Appellant's Informal Br. at 18-19. To the extent, however, that they might apply to the Board's consideration of his CUE allegations, he has not demonstrated that the Board's decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, nor has he demonstrated that the Board provided inadequate reasons or bases for its determination. *See Eddy*, 9 Vet.App. at 57; *see also Hilkert*, 12 Vet.App. at 151; *Berger*, 10 Vet.App. at 169.

E. Dental Condition Affecting Tooth #3

As indicated above, in October 2015, the RO denied the appellant's June 2015 claim for disability compensation for a dental condition. R. at 578; *see* R. at 563-81. Less than 1 year after that denial, in January 2016, the RO concluded that the October 2015 decision denying compensation for a dental condition was not the product of CUE. R. at 519. In February 2016, the appellant filed an NOD, indicating that he was seeking service connection and a 60% disability rating. R. at 490. In the decision on appeal, the Board found in relevant part that the appellant did not file a claim for a dental condition in 1980 but rather filed a claim for this condition for the first

time in June 2015 and that the appellant's arguments do not support a finding of CUE in the October 2015 decision. R. at 17.

The Court concludes that the Board erred in adjudicating whether the October 2015 denial was the product of CUE. In 2015, the statute governing appeals to the Board provided that "[a]ppellate review will be initiated by a[n NOD] and completed by a [S]ubstantive [A]ppeal after a[n SOC] is furnished." 38 U.S.C. § 7105(a). Additionally, an NOD must have been filed within 1 year from the date notice of the decision being appealed was provided. 38 U.S.C. § 7105(b)(1). Thus, in January 2016, the October 2015 decision was not final and a request for revision on the basis of CUE was premature. In this regard, the Court has previously explained that the "sole purpose of a CUE [motion] is to provide a VA claimant with an opportunity to challenge a decision that is otherwise final and unappealable." *May v. Nicholson*, 19 Vet.App. 310, 317 (2005) (emphasis omitted); *see* 19 Vet.App. at 317 (explaining that "a CUE [motion] (or any collateral attack) cannot lie as to a decision that is still open to direct review" (emphasis omitted)). Because the October 2015 decision was not final or unappealable, it was not subject to CUE. Accordingly, the Board erred in the decision on appeal when it adjudicated that matter. *See Andrews v. Principi*, 18 Vet.App. 177, 182 (2004) (stating that the Court reviews de novo "whether the appellant, as a matter of law, has presented a valid CUE allegation"), *aff'd sub nom. Andrews v. Nicholson*, 421 F.3d 1278 (Fed. Cir. 2005).

The Court further concludes that, although the October 2015 decision was not subject to CUE, the Board erred to the extent that it failed to recognize that, properly construed, the appellant's February 2016 NOD expressed disagreement with the denial of service connection for a dental condition and was received within the 1-year appeal period. *See* R. at 490; *Palmer v. Nicholson*, 21 Vet.App. 434, 437 (2007) (whether a document constitutes an NOD is a matter subject to de novo review); *Jarvis v. West*, 12 Vet.App. 559, 561 (1999) ("[i]n determining whether a written communication constitutes an NOD, the Court looks at both the actual wording of the communication and the context in which it was written"). Additionally, because the filing of an NOD entitled the appellant to an SOC regarding the denial of disability compensation, the Court will direct the Board to remand the matter to the RO to ensure proper procedural compliance pursuant to 38 U.S.C. § 7105(d)(1) and 38 C.F.R. §§ 19.26 (2019), 19.29 (2019), and 19.30 (effective to Feb. 18, 2019). *See Anderson v. Principi*, 18 Vet.App. 371, 375 (2004) (vacating the

Board's decision and remanding the matter when VA failed to issue an SOC after the claimant submitted a timely NOD); *Manlincon*, 12 Vet.App. at 240-41.

Finally, because the Board failed to address whether DA Form 664 reasonably raised a claim for a dental condition, the Court will vacate the Board's finding that the appellant did not file a claim for a dental condition in 1980. *See Eddy*, 9 Vet.App. at 57. Notwithstanding the above, the appellant is not without an adequate remedy; his June 2015 claim for the same disability is pending and will be remanded for further adjudication. In this regard, the Court has previously noted that, often times, it is not relevant when a claim was first raised, unless the claim is granted. *See Ingram*, 21 Vet.App. at 254 (noting that "[t]here does not need to be any decision on the issue of when the claim was first raised unless and until it actually becomes relevant to an award of benefits"). By vacating the Board's finding, nothing in this decision will prevent the appellant, if on remand he establishes entitlement to benefits, from arguing that his claim has been pending from 1980 for purposes of establishing the appropriate effective date. *See Ingram*, 21 Vet.App. at 254.

F. Remaining Arguments

As indicated above, in reviewing Board decisions evaluating allegations of CUE, the Court's review is limited to determining whether the Board's CUE finding was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 38 U.S.C. § 7261(a)(3)(A), and whether it was supported by adequate reasons or bases, 38 U.S.C. § 7104(d)(1). Thus, to the extent that the appellant's assertions of error are directed at the 1980, 2009, and 2012 rating decisions, it is well established that the Court may not conduct a plenary review of the merits of the original decision. *See Andrews*, 18 Vet.App. at 181. Additionally, the Court has considered the appellant's arguments not explicitly addressed above and finds that they are either undeveloped, *see Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) (per curiam) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments."), *vacated on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order), or insufficient to demonstrate prejudicial error in the decision on appeal, *see* 38 U.S.C. § 7261(b)(2); *Sanders*, 556 U.S. at 409.

III. CONCLUSION

After consideration of the parties' pleadings and a review of the record, the Board's May 17, 2019, decision finding no CUE in that part of the February 2009 rating decision that assigned a 2008 effective date for the grant of service connection for bilateral hearing loss is SET ASIDE; its findings that the appellant did not file a claim for hearing loss and a dental condition in 1980 and that there was no CUE in the October 2015 rating decision are VACATED; these matters are REMANDED to the Board with instruction to remand (1) the matter of CUE in the RO's assignment in February 2009 of a 2008 effective date for the grant of service connection for bilateral hearing loss to the RO for adjudication in the first instance, and (2) the matter of entitlement to service connection for a dental condition to the RO to issue an SOC in response to the appellant's February 2016 NOD, which placed the issue in appellate status. The Board's decision finding no CUE in the March 1980, February 2009, and October 2012 rating decisions is otherwise AFFIRMED.

DATED: April 28, 2020

Copies to:

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