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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 19-0877

ROGER C. ELLIOT, APPELLANT,

V.

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

Before BARTLEY, *Chief Judge*.

MEMORANDUM DECISION

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

BARTLEY, *Chief Judge*: Veteran Roger C. Elliot appeals through counsel an October 30, 2018, Board of Veterans' Appeals (Board) decision that denied entitlement to an effective date earlier than February 21, 2013, for the award of service connection for coronary artery disease (CAD), status post myocardial infarction (MI). Record (R.) at 4-8. For the reasons that follow, the Court will affirm the October 2018 Board decision.

I. FACTS

Mr. Elliot served honorably on active duty in the U.S. Army from March 1969 to November 1971, including service in the Republic of Vietnam; from August 1981 to August 1984; and from January to March 1994, with additional periods of inactive duty for training. R. at 988, 1018, 1143.

In March 2011, Mr. Elliot filed, inter alia, a claim for service connection for a heart condition due to exposure to Agent Orange. R. at 864, 872.[1] At that time, he submitted

[1] As relevant, ischemic heart disease (IHD) is considered a disease associated with herbicide exposure. 38 C.F.R. § 3.309(e) (2019). As defined in § 3.309(e), IHD includes, as relevant, "acute, subacute, and old myocardial infarction [and] atherosclerotic cardiovascular disease including [CAD]." *Id*. IHD does not include hypertension, peripheral manifestations of arteriosclerosis, or any other condition that does not qualify within the generally accepted medical definition of IHD. *Id*. at Note (2).

contemporaneous private medical records, including a cardiac stress test report documenting no ischemia noted upon electrocardiogram, echocardiogram, or treadmill testing. R. at 866-71.

Upon VA examination in September 2011, the examiner indicated that Mr. Elliot did not present with a diagnosis of IHD. R. at 735. The examiner stated that Mr. Elliot reported a history of pericarditis and that he was told he had had an MI. R. at 738. However, the examiner, after reviewing the March 2011 private medical records, noted no evidence to confirm a diagnosis of IHD. *Id*.

Also in September 2011, Mr. Elliot submitted private emergency department records from 1991, which reflect that he presented with complaints of chest pain and was treated with nitroglycerine. R. at 775-76. The hospital records reflect that, although testing was normal, Mr. Elliot's presentation was suggestive of cardiac pain due to several risk factors, that he responded to nitroglycerine, and that a cardiac source of his pain needed to be ruled out. R. at 776; *see* R. at 777-83.

In January 2012, a VA regional office (RO), inter alia, denied service connection for a heart condition. R. at 692-97. Mr. Elliot did not appeal the adverse RO decision.

On February 21, 2013, Mr. Elliot submitted a VA Form 21-0960A-1, IHD Disability Benefits Questionnaire (DBQ), completed by his private treating physician. R. at 673-75. On the DBQ, the physician indicated that Mr. Elliot did not have a diagnosis of IHD, but demonstrated evidence of an old MI. *Id*. Specifically, he indicated that March 2011 private medical records reflected an "[i]ncidental area of perfusion abnormality indicating [an] old inferior MI." R. at 675; *see* R. at 676 (March 2011 myocardial perfusion imaging report reflecting no ischemia, but "a small to medium[-]sized area of infarction in the inferior wall").

Upon VA examination in October 2013, a VA examiner diagnosed IHD, specifically CAD following an MI. R. at 666. In her discussion of the veteran's diagnosis, the examiner specifically referred to the March 2011 perfusion imaging report. R. at 666-67. Following examination, the RO granted service connection for CAD status post MI, effective February 21, 2013. R. at 662-64.

In November 2013, Mr. Elliot filed a Notice of Disagreement (NOD), "[r]equesting [an] earlier effective date of [March 9], 2011." R. at 643. He argued that "[t]he same medical evidence was used in the current rating [decision] which was earlier used and denied" in the January 2012 decision. *Id*.

In September 2014, the RO issued a Statement of the Case, R. at 595-610, noting, in part, that the March 2011 perfusion imaging report showing an old infarct was not submitted within the 1-year appeal period of the January 2012 decision, R. at 610. In November 2014, Mr. Elliot perfected an appeal to the Board. R. at 592-93.

In October 2015, Mr. Elliot submitted correspondence to VA requesting an effective date in March 2011. R. at 577-80. At that time, he argued that he submitted the perfusion imaging report to VA along with the other March 2011 private medical records considered in conjunction with the January 2012 decision and it was unclear why VA did not consider the perfusion imaging report at that time. R. at 577-78.

In the October 2018 decision on appeal, the Board denied entitlement to an effective date prior to February 21, 2013, for the award of service connection for CAD, finding no formal or informal application to reopen service connection that was received prior to February 21, 2013. R. at 4. The Board additionally noted that an RO decision that is not timely appealed becomes final and binding in the absence of clear and unmistakable error (CUE) and noted that an allegation of CUE must be made with some degree of specificity regarding the error made by the RO with an explanation why the RO decision would have been manifestly different but for the alleged error. R. at 6. In this regard, the Board found the January 2012 RO decision was final and there was no outstanding CUE motion. *Id*. This appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

Mr. Elliot's appeal is timely and the Court has jurisdiction to review the October 2018 Board 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).

The Board's determination of the effective date for disability compensation for a service-connected disability is a finding of fact that the Court reviews under the "clearly erroneous" standard of review. *See Evans v. West*, 12 Vet.App. 396, 401 (1999); *Hanson v. Brown*, 9 Vet.App. 29, 32 (1996); *see also* 38 U.S.C. § 7261(a)(4). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

The Board must support its material determinations of fact and law with adequate reasons or bases. 38 U.S.C. § 7104(d)(1); *Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015) (en banc); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence it finds persuasive or unpersuasive, and provide reasons for its rejection of material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

III. ANALYSIS

Mr. Elliot argues that the Board erred in its October 2018 decision when it failed to construe either his November 2013 NOD or his October 2015 statement as a motion asserting CUE in the January 2012 RO decision. Appellant's Brief (Br.) at 6-10. Additionally, he argues that the Board failed to provide adequate reasons or bases for its conclusion that there was no outstanding CUE motion. *Id*. (citing R. at 6).[2] The Secretary urges the Court to affirm the Board decision, arguing that the Court does not have jurisdiction over any alleged CUE motion or, alternatively, that neither the November 2013 NOD nor the October 2015 statement constituted a sufficiently pled CUE motion as a matter of law. Secretary's Br. at 7-12. Additionally, he argues that Mr. Elliott "fails to meet his burden to demonstrate prejudicial error in the Board's decision." *Id*. at 12.

VA has a duty to "give a sympathetic reading to the veteran's filing by 'determin[ing] all potential claims raised by the evidence, applying all relevant laws and regulations.'" *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (citing *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001)); *see Robinson v. Shinseki*, 557 F.3d 1355, 1359 (Fed. Cir. 2009). This obligation applies to allegations of CUE made by unrepresented claimants. *Roberson*, 251 F.3d at 1384; *see Andrews v. Nicholson*, 421 F.3d 1278, 1282-83 (Fed. Cir. 2005). Moreover, the requirement to sympathetically read the pleadings of a pro se claimant applies even though motions alleging CUE must satisfy specific pleading requirements. *See Acciola v. Peake*, 22 Vet.App. 320, 326-27 (2008)

[2] Mr. Elliot advances no other assertions of error as to the Board's denial of entitlement to an earlier effective date. Accordingly, the Court's analysis will be limited to the arguments addressing a reasonably raised CUE motion. *See Grivois v. Brown*, 6 Vet.App. 136, 138 (1994) (explaining that the Court has discretion to deem abandoned issues not argued on appeal).

(noting that 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"); *Canady v. Nicholson*, 20 Vet.App. 393, 401 (2006) (noting that a manifestly changed outcome might be "obvious from the context of the pleadings" or "inferred from a sympathetic reading").

The Court does not have jurisdiction to address CUE allegations raised for the first time on appeal. *Jarrell v. Nicholson*, 20 Vet.App. 326, 333 (2006) (en banc); *Russell v. Principi*, 3 Vet.App. 310, 314-15 (1992) (en banc). The Court does, however, possess jurisdiction to determine whether an issue was reasonably raised by the record. *See Barringer v. Peake*, 22 Vet.App. 242, 244 (2008). Moreover, the Board made a specific finding, within the context of its decision denying entitlement to an earlier effective date, that "there is no outstanding CUE motion." R. at 6.

The Court need not address whether either of Mr. Elliot's correspondences constitutes a sufficiently pled CUE motion because the Court concludes that he fails to demonstrate that any purported error in the Board decision was prejudicial. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant has the burden of demonstrating error on appeal), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table); *see also* 38 U.S.C. § 7261(b)(2) (providing that the Court must "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 406-07 (2009). Notably, even if the Board erred in failing to construe the November 2013 NOD or October 2015 statement as a CUE motion with respect to the January 2012 RO decision, Mr. Elliot is free to raise a CUE motion before VA at any time. *See* 38 U.S.C. § 5109A(d) ("A request for revision of a decision of the Secretary based on [CUE] may be made at any time after that decision is made."); 38 C.F.R. § 3.105(a)(1) (2019) ("At any time after a decision is final, the claimant may request . . . review of the decision to determine if there was [CUE] in the decision.").

In addition, even if the Court were to conclude that the Board erred in failing to identify a reasonably raised CUE motion, the remedy would be for the Court to direct the Board to refer, not remand, the CUE motion to the RO for initial adjudication, *see Jarrell*, 20 Vet.App. at 332-33, the

same action that would be accomplished if Mr. Elliot were to file a CUE motion with the RO.[3] In his reply brief, Mr. Elliot argues that "remand is required for the Board to *remand* [his] CUE motion to the RO for adjudication." Reply Br. at 6 (emphasis added). However, he fails to explain why the Board would have appellate jurisdiction over any CUE motion that has not been addressed in the first instance by the RO. *See Jarrell*, 20 Vet.App. at 332 ("[E]ach wholly distinct and different CUE theory underlying a request for revision is a separate matter and, when attacking a prior RO decision, each must be presented to and adjudicated by the RO in the first instance and, if not, the Board lacks jurisdiction over the merits of the matter."); *see also Young*, 25 Vet.App. at 203 (explaining that where the Board lacks jurisdiction over a matter, referral is the appropriate action). Although he argues that the statements reasonably raising CUE were presented to the RO, Mr. Elliot acknowledges that the RO has not adjudicated any such CUE motion. *See* Reply Br. at 6 ("[T]he RO and the Board failed to identify this reasonably raised issue in the record.").

Moreover, if Mr. Elliot files a CUE motion with the RO that successfully results in revision of the January 2012 RO decision, the effective date would be determined based on the date from which benefits would have been payable if the error had not been made, not based on the date of the CUE motion. 38 C.F.R. §§ 3.105(a)(1)(ii), 3.400(k) (2019).

Although Mr. Elliot does not address the prejudicial effect of the Board's purported error in his opening brief, he argues, in his reply brief, that the Board's error is prejudicial because the Board did not explain the deficiencies in his CUE motion. Reply Br. at 6. His arguments mischaracterize the Board decision because the Board clearly found no outstanding CUE motion; it did not find that Mr. Elliot had filed a CUE motion but that it was insufficiently pled R. at 6.[4] If he believed that he was advancing a CUE motion in either the November 2013 NOD or the October 2015 statement, the Board decision informed him that it believed no such CUE motion had been filed or was pending. *Id.* At that point, he may direct VA to his previously filed statements and indicate that those statements went unaddressed as asserting a reasonably raised theory of CUE or

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[3] Although the right to expedited processing under 38 U.S.C. § 5109B attaches to claims remanded by the Board, the right does not attach to claims referred by the Board. *Young v. Shinseki*, 25 Vet.App. 201, 204 (2012) (en banc order).

[4] Mr. Elliot's prejudicial error argument also appears to run counter to his arguments regarding the specific error committed by the Board. Notably, he argues that the prejudice stems from the Board's failure to inform him of the deficiencies of the CUE motion; however, this argument presupposes that the Board identified a reasonably raised CUE motion.

he may file a new motion expressly alleging CUE in the January 2012 RO decision. Either way, Mr. Elliot is not prejudiced by any error on the part of the Board in failing to reasonably construe his statements as CUE motions.[5] *Accord Acciola*, 22 Vet.App. at 326 (noting the "double-edged sword" nature of sympathetically reading CUE motions, noting the "potential for broad res judicata effects as to [sympathetically read] motions that are denied").

The Board's analysis was consistent with governing law, plausible in light of the record, and sufficiently detailed to inform Mr. Elliot of the reasons for its determination that an earlier effective date was not warranted and to facilitate judicial review. *See Evans*, 12 Vet.App. at 401; *Hanson*, 9 Vet.App. at 32; *Caluza*, 7 Vet.App. at 506. Accordingly, the Court will affirm the October 2018 Board decision.

IV. CONCLUSION

Upon consideration of the foregoing, the October 30, 2018, Board decision is AFFIRMED.

DATED: April 30, 2020

Copies to:

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VA General Counsel (027)

[5] Moreover, as a Court remand directing the Board to refer the reasonably raised CUE motion for initial adjudication would not carry a right to expedited processing, *see supra* n.3, seeking redress in this Court may only serve to delay processing of his argument that the January 2012 RO decision was the product of CUE.