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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-3104

ANDREW ELIAS, APPELLANT,

V.

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

Before FALVEY, *Judge*.

MEMORANDUM DECISION

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

FALVEY, *Judge*: Army veteran Andrew Elias appeals through counsel a January 11, 2019, Board of Veterans' Appeals decision finding no clear and unmistakable error (CUE) in a March 2016 Board decision, which denied an effective date earlier than March 18, 1999, for service connection for schizophrenia, paranoid type. The appeal is timely, the Court has jurisdiction to review the Board decision, and single-judge disposition is appropriate. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

Because the Board's finding that the March 2016 Board decision did not contain CUE was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and because Mr. Elias's arguments either cannot establish CUE or are unpersuasive, the Court will affirm the January 2019 Board decision.

I. FACTS

In September 1991, Mr. Elias filed a claim for service connection for an anxiety disorder and depression. Record (R.) at 4332. In January 1993, a regional office (RO) denied these claims, finding that the evidence did not show that the veteran had a chronic anxiety disorder or depression that was incurred during his period of honorable service. R. at 4000-01 (noting that service medical

records were not available). In February 1993, Mr. Elias stated that, in response to the January 1993 decision denying his benefits for a nervous condition, he wanted to "re-open his claim" because he was being treated for schizophrenia and there was no consideration given to that fact. R. at 3977. In March 1994, the RO found that, although evidence submitted was new, it was not material because it did not establish service connection for a nervous condition and thus denied the claim. R. at 3923 (noting that June and July 1993 hospital records indicated that he was suicidal, depressed, and hearing voices). Mr. Elias did not appeal this decision.

In November 1995, the veteran sought disability compensation for depression and schizophrenia. R. at 3916. In October 1996, the RO declined to reopen the depression claim and denied the schizophrenia claim. R. at 3893-94. In March 1997, Mr. Elias requested service connection for "PTSD (depressive nervous disorder)." R. at 3889. In December 1998, the RO denied the claim for service connection for post-traumatic stress disorder (PTSD) because there was no diagnosis of that condition. R. at 3750.

In March 1999, the veteran stated that, although the December 1998 decision denied a claim for PTSD, his claim was for schizophrenia. R. at 3742. In February 2000, the RO construed this as a request to reopen a claim for service connection for psychiatric conditions, including anxiety, depression, and schizophrenia, and declined to reopen the claim because new and material evidence had not been submitted. R. at 3727. In March 2000, Mr. Elias filed a Notice of Disagreement (NOD), *see* R. at 3691, and, later that month, the RO issued a Statement of the Case (SOC) continuing to decline to reopen the claim, R. at 3700. In April 2000, the veteran perfected his appeal. R. at 3676.

In April 2004, the Board reopened the claim for service connection for a psychiatric disability other than PTSD. R. at 2978. After further proceedings, in February 2010 the RO granted service connection for chronic schizophrenia, paranoid type, with a 100% rating effective March 18, 1999, the date VA received the request to reopen the claim for a psychiatric disorder other than PTSD. R. at 1953, 1956. In July 2010, Mr. Elias filed an NOD as to the effective date, stating that he was entitled to benefits from 1991, when he filed his original claim. R. at 1913.

After further proceedings, in March 2016 the Board denied an effective date earlier than March 18, 1999, for schizophrenia. R. at 1652. The Board found that Mr. Elias's February 1993 statement in support of the claim did not express disagreement with the January 1993 RO decision or express a desire to appeal the result. R. at 1646 (noting that he requested to "re-open" his claim

because consideration had not been given to his schizophrenia treatment). The Board thus concluded that the February 1993 statement did not constitute an NOD and that no other correspondence was received within 1 year of the January 1993 decision that expressed disagreement or a desire to appeal. *Id*. Therefore, the Board found that the veteran had not appealed that decision and it became final. R. at 1647. The Board also noted that Mr. Elias did not appeal the March 1994 and October 1996 RO decisions and those also became final. *Id*.

Further, the Board found that, although Mr. Elias's March 1999 statement in support of the claim was submitted within 1 year of the December 1998 RO decision, and despite his displeasure with how VA characterized his psychiatric disorder, the statement did not express disagreement with the decision or a desire to appeal the result. *Id*. Thus, the Board found that the March 1999 statement was not an NOD, that the December 1998 RO decision had therefore become final, and that the RO had instead properly interpreted his statement as a new claim for service connection for a psychiatric disorder. *Id*.

In addition, the Board found that, although additional medical evidence had been submitted from 1991 to 1999, this evidence was not material because it did not relate to an unestablished fact necessary to substantiate the claim; rather, it only showed that the veteran continued to have current psychiatric diagnoses. R. at 1648. The Board then noted that, even if it considered the PTSD claim and schizophrenia claims to be entirely separate claims, then the most recent denial of schizophrenia would have been the October 1996 RO decision. But, the Board concluded that there had been no submissions between October 1996 and March 1999 that could be interpreted as a claim for benefits or evidence substantiating an element missing from the October 1996 decision. R. at 1648-49. The Board also found that, although clinical records from the veteran's service were obtained in 2005, these records did not note complaints of or treatment for a psychiatric disability, were thus not relevant to the issue being decided, and therefore could not provide a basis for reconsideration of the assigned effective date. R. at 1651.

Finally, the Board stated that, regarding the veteran's assertion that he suffered from a psychiatric disability since at least 1991 and therefore deserved to be compensated on an equitable basis, the Board is "bound by the laws and regulations that apply to veterans claims," and, pursuant to those laws, had no option but to deny an effective date earlier than March 18, 1999. R. at 1650.

In the January 2019 decision on appeal, the Board found no CUE in the March 2016 Board decision that denied an effective date earlier than March 18, 1999, for schizophrenia. R. at 5.

II. ANALYSIS

A request to revise a final Board 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). Finally, the commission of the alleged error must have "manifestly changed the outcome" of the decision being attacked based on 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 change[d] the outcome" language in *Russell*).

The Court's review of a Board decision as to CUE in a prior, final Board decision is limited to determining whether the Board's 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 is supported by an adequate statement of reasons or bases, *see Jordan v. Principi*, 17 Vet.App. 261, 267 (2003), *aff'd sub nom. Jordan v. Nicholson*, 401 F.3d 1296 (Fed. Cir. 2005). In reviewing Board decisions evaluating allegations of CUE in prior final decisions, the Court "cannot conduct a plenary review of the merits of the original decision." *Andrews v. Principi*, 18 Vet.App. 177, 181 (2004) *aff'd sub nom. Andrews v. Nicholson*, 421 F.3d 1278 (Fed. Cir. 2005).

A. Duty to Assist Arguments and Disagreements with VA's Weighing of Evidence

Initially, the Court notes that Mr. Elias generally does not explain how the Board's January 2019 decision that there was no CUE in the March 2016 Board decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Rather, most of his arguments are allegations that VA previously failed to fulfill its duty to assist or disagreements with how VA weighed the evidence. Appellant's Brief (Br.) at 6-16. But, even if he intended for these arguments to be challenges to the January 2019 Board decision's findings and the Court was able to review them, such contentions cannot constitute CUE. *See Hillyard*, 24 Vet.App. at 349; *Baldwin v. West*, 13 Vet.App. 1, 5 (1999); 38 C.F.R. § 20.1403(d)(3) (2019).

Mr. Elias, by recharacterizing his assertions, attempts to overcome the legal reality that VA's failure to fulfill its duty to assist or a disagreement with VA's weighing of evidence does not

amount to CUE. *See id*. For example, he states that "there is no allegation that the Secretary failed to fulfill his duty to assist; however, there is an allegation that personnel failed to perform their duties competently and that pertinent medical principles were ignored." *Id*. at 7. He also contends that he is "not alleging that the facts were not weighed properly, but rather that the medical provider failed to properly take into consideration both the existence of lay evidence and the evidence accepted within the medical community." *Id*.

But, these are nevertheless allegations that VA failed to fulfill its duty to assist. Asserting that VA did not "competently" perform its duties is simply another way of stating that VA did not fulfill such duties. Further, the duty to assist may include providing a medical examination and, if one is provided, ensuring that it is adequate. *See* 38 U.S.C. § 5103A(d). Mr. Elias's arguments—that medical providers did not consider lay evidence or pertinent medical principles or that VA did not provide psychological testing—are assertions that an adequate examination was not provided and that VA thus did not fulfill its duty to assist. *See* Appellant's Br. at 7-16 (stating that VA failed to "properly conduct a thorough medical exam").

The duty to assist also includes helping veterans develop their claims, which may consist of obtaining records. *See* 38 U.S.C. § 5103A(a)-(c). Mr. Elias's arguments—that VA staff did not annotate the background details of his condition or "deficiently" assisted him in filing his claim or seeking records—are, again, contentions that VA did not satisfy its duty to assist. *See* Appellant's Br. at 7, 13-14, 22. And, as stated, any such failures do not constitute CUE. *See Hillyard*, 24 Vet.App. at 349; *Baldwin*, 13 Vet.App. at 5. Further, the veteran's argument that VA did not notify him in 1991 that it was unable to obtain his service records, Appellant's Br. at 22-23, also does not amount to CUE, *see Cook v. Principi*, 318 F.3d 1334, 1344 (Fed. Cir. 2002) (overruling a prior decision that had held that VA's failure to notify movant of its failure to obtain requested records could constitute CUE).

Similarly, the veteran's argument that VA did not liberally construe his claims, lay statements, and supporting documents, Appellant's Br. at 9, 12, 24-25, is simply a disagreement with how VA weighed the evidence. In other words, he believes that VA did not weigh such evidence in a liberal manner. This disagreement also may not constitute CUE. *See Hillyard*, 24 Vet.App. at 349; § 20.1403(d)(3). The Court further notes that Mr. Elias's assertion that the RO misapplied 38 U.S.C. § 1154(a), which requires that VA consider "all pertinent medical and lay evidence," is yet another attempt to recharacterize both his duty to assist argument and his

disagreement with how VA weighed the evidence, *see* Appellant's Br. at 10-11 (again stating that VA did not properly document or consider his lay testimony), and, as stated, does not amount to CUE. Therefore, to the extent that these arguments are intended to be challenges to the January 2019 Board decision's findings, the Court finds them unpersuasive.

B. Finality of Prior Decisions

Next, Mr. Elias argues that his February 1993 statement was an appeal of the January 1993 RO decision and the "access to his medical records" he provided, which "included additional lay testimony," was new and material evidence received within 1 year of that decision. Appellant's Br. at 12-13, 17-20. He asserts that the Board's March 2016 finding that his February 1993 submission was neither an appeal nor new and material evidence received within 1 year was contrary to the holding in *Ingraham v. Nicholson*, 21 Vet.App. 232 (2007) (a claimant's identification of the benefit sought does not require technical precision), and was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id*. He contends that, because the January 2019 Board decision did not correct the original decision and upheld the March 2016 Board decision, its finding was also arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id*.[1]

In the March 2016 decision, the Board found that Mr. Elias's February 1993 statement did not express disagreement with the January 1993 RO decision or a desire to appeal the result. R. at 1646 (noting that he requested that VA "re-open" his claim because consideration had not been given to his schizophrenia treatment). The Board thus noted that the February 1993 statement did not constitute an NOD and that no other correspondence was received within 1 year of the January 1993 decision that expressed disagreement or a desire to appeal. *Id*. Therefore, the Board found that the veteran had not appealed that decision and it became final. R. at 1647. In addition, the

[1] The Court acknowledges the Secretary's assertion that Mr. Elias's argument that the March 2016 Board decision contained CUE because it did not properly consider the February 1993 response to the January 1993 rating decision was not raised before the Board and thus constituted a separate allegation of CUE not before the Court. Secretary's Br. at 13; *see also* R. at 463-66 (November 2016 CUE motion stating that the veteran was entitled to an effective date of September 1991, when he filed his original claim). But, the Secretary also argues that, consistent with the Board's findings, the record does not reflect any NOD or evidence purporting to be new and material filed in response to the January 1993 rating decision and that, therefore, contrary to Mr. Elias's assertions, the Board's finding of no CUE in the previous decision was reasonable and accurately based on the evidence of record. Secretary's Br. at 11. Further, in the January 2019 decision, the Board itself reviewed the March 2016 Board decision's findings as to appeals, finality, and reopening claims and determined that there was no CUE in that decision. Thus, to the extent that the CUE allegation regarding finality of the January 1993 RO decision is before the Court, we analyze that allegation below.

Board found that, although additional medical evidence had been submitted from 1991 to 1999, this evidence was not material because it did not relate to an unestablished fact necessary to substantiate the claim; rather, it only showed that the veteran continued to have current psychiatric diagnoses. R. at 1648. Finally, the Board found that, although clinical records from the veteran's service were obtained in 2005, these records did not note complaints of or treatment for a psychiatric disability, were thus not relevant to the issue being decided, and therefore could not provide a basis for reconsideration of the assigned effective date. R. at 1651.

In the January 2019 decision, the Board stated that, as the March 2016 Board decision had noted, the prior RO decisions became final because the veteran did not file an NOD; new and material evidence was not included in the claims file within 1 year of the issuance of the decisions; and, although service department records were included in the claims file following the final decisions (in 2005), these previously excluded records did not contain "relevant" information regarding a psychiatric disability and were not "related to a claimed in-service event, injury, or disease." R. at 10. The Board further stated that its decision was not a de novo review of the March 2016 decision, nor was it an assessment of whether that decision was perfect. *Id*. Rather, it addressed whether the correct facts were before the Board in March 2016 and whether, in its application of relevant statutory and regulatory provisions, the Board committed CUE. The January 2019 Board decision found that the correct facts were known to the Board in March 2016 and that it correctly applied the laws and regulations pertaining to appeals, finality, and claims to reopen. R. at 11.

As stated, we are limited to reviewing whether the January 2019 Board's decision that there was no CUE in the March 2016 Board decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. We find that it was not. It may be that the March 2016 Board decision's explanation for why Mr. Elias's February 1993 statement did not express disagreement with the January 1993 RO decision was lacking. However, the proper remedy to resolve any such error would have been to appeal the March 2016 Board decision, which the veteran did not do. Thus, the Board in January 2019 was limited to reviewing whether there was CUE in that final March 2016 decision. R. at 10 (noting that it was not conducting a de novo review of the prior Board decision).

The January 2019 Board decision found that the correct facts were known to the Board in March 2016 and that it correctly applied the laws and regulations pertaining to appeals, finality,

and reopening claims. *Id*. Mr. Elias points to no facts of record that were not before the Board in March 2016 and the Court is unaware of any. Further, it was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law for the January 2019 Board decision to find that the March 2016 Board decision correctly applied the laws and regulations regarding appeals, finality, and reopening of claims, where the March 2016 Board decision cited the applicable statutes and regulations and then discussed whether statements filed shortly after RO decisions expressed disagreement with those decisions such that they were not final, whether there was any new and material evidence received within 1 year of those decisions, or whether service records later associated with the claims file could provide a basis for reconsideration of the assigned effective date. R. at 1646-51.

In addition, even if the March 2016 Board decision had incorrectly applied the laws and regulations, that is just one of the conditions that must be met to establish CUE. *See Damrel*, 6 Vet.App. at 245. Mr. Elias offers no argument regarding the other two conditions that must be satisfied to constitute CUE—i.e., how the alleged errors are "undebatable" or how they "manifestly changed the outcome" of the decision. *See Russell*, 3 Vet.App. at 313–14. Therefore, the Court will not further entertain this contention. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (the Court will not entertain underdeveloped arguments); *Evans v. West*, 12 Vet.App. 22, 31 (1998) (the Court will give no consideration to a "vague assertion" or an "unsupported contention"); *see also Hilkert v. West*, 12 Vet.App. 145, 151 (1999) ("An appellant bears the burden of persuasion on appeals to this Court."), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

Additionally, the Court notes that Mr. Elias mentions that, like his argument regarding the February 1993 statement, "the same issue arose again in 1995 and 1997" and that "between 1991 and 1999, [he] repeatedly submitted the same claim (while worded differently) in the hopes of obtaining service connection for his mental health conditions." Appellant's Br. at 18-20. But, as the Court found above, such contentions, without further explanation or supporting authority, do not establish CUE or that the January 2019 Board decision's finding no CUE in the March 2016 Board decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See Locklear*, 20 Vet.App. at 416; *see also* Appellant's Br. at 20 (the veteran acknowledging that his arguments regarding the "narrow interpretation of the statutory authority to grant entitlement as well as procedural technicalities" "may not normally be the subject of a CUE claim").

C. VA Delay, Other Claims, and Equitable Relief

Next, although the Court sympathizes with Mr. Elias's frustrations regarding any VA delay in processing and adjudicating his claims, Appellant's Br. at 21, as the Secretary notes, this has no bearing on whether there was CUE in the March 2016 Board decision, Secretary's Br. at 14. In addition, the veteran states that the "Board failed to address that the original CUE claim filed in 2016 expressed a request to not only submit a CUE claim but also to allege a new claim for service connection for depression, anxiety, and PTSD." Appellant's Br. at 28. However, it is unclear how any such new claim relates to the CUE issue on appeal. Mr. Elias offers no further discussion or argument regarding the new claim and therefore the Court will not address it. *See Locklear*, 20 Vet.App. at 416; *Evans*, 12 Vet.App. at 31; *see also Hilkert*, 12 Vet.App. at 151.

Next, Mr. Elias asserts that the Board's statement as to equitable relief—"regarding the [v]eteran's assertion that he has suffered from a psychiatric disability since at least 1991, and therefore he deserves to be compensated on an equitable basis"—shows how narrowly the Board assessed his claim because he has suffered from schizophrenia since 1977. Appellant's Br. at 26-27. However, it does not appear that the Board had concluded that his symptoms began in 1991, as the Board stated that he suffered from a psychiatric condition since *at least* 1991—i.e., the date he filed his original claim. Moreover, to the extent that the veteran contends that the circumstances associated with his case warrant equitable relief, *id*., neither the Court nor the Board may grant such relief or review the Secretary's denial of it. *See* 38 U.S.C. § 503(a)-(b) ("the Secretary may provide such [equitable] relief"); *Eicher v. Shulkin*, 29 Vet.App. 57, 64 (2017) ("it is undisputed that the Secretary, and the Secretary alone, has the power to grant equitable relief where administrative error leads to a denial of benefits"); *id*. ("this Court's caselaw is clear that both the Board and the Court lack jurisdiction to review the grant of, or refusal to grant, equitable relief under section 503(a)").

Because the January 2019 Board decision's finding that there was no CUE in the March 2016 Board decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and because Mr. Elias's arguments are not persuasive, the Court will affirm the January 2019 Board decision. *See* § 7261(a)(3)(A); *see also Jordan*, 17 Vet.App. at 267.

III. CONCLUSION

On consideration of the foregoing, the January 11, 2019, Board decision finding no CUE in the March 2016 Board decision, which denied an effective date earlier than March 18, 1999, for service connection for schizophrenia, paranoid type, is AFFIRMED.

DATED: May 1, 2020

Copies to:

Allison R. Weber, Esq.

VA General Counsel (027)