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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-6044

ERIC C. ELDER, 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*: Air Force veteran Eric C. Elder appeals through counsel a September 7, 2017, Board of Veterans' Appeals decision that denied (1) a motion for revision based on clear and unmistakable error (CUE) in a February 1976 regional office (RO) decision that denied service connection for residuals of viral meningoencephalitis (meningitis); (2) an effective date earlier than February 21, 2008, for granting service connection for panhypopituitarism¹ (PHP) with hypothyroidism as residuals of viral meningitis; and (3) a total disability rating based on individual unemployability (TDIU) earlier than February 21, 2008. This 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).

We are asked to decide whether the Board erred in determining that there was no CUE in the February 1976 rating decision and whether it provided inadequate reasons or bases for this determination. We are also asked to decide whether the Board erred in finding that February 21, 2008, was the earliest effective date and provided inadequate reasons or bases for its determination. Because the Court lacks jurisdiction to consider the veteran's CUE argument, we will dismiss that

¹ Panhypopituitarism is generally defined as an insufficient thyroid and adrenal cortical function. *See* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1348-49 (32d ed. 2012).

portion of the September 2017 Board decision. We will affirm the part of the Board decision denying earlier effective dates for the PHP and TDIU claims, because the Board provided adequate reasons or bases that facilitate judicial review, and the veteran's arguments are otherwise vague and unsupported.

I. BACKGROUND

Mr. Elder served on active duty from 1966 to 1976 and from July 1979 to August 1990. Record (R.) at 7022. In January 1976, after his first separation from service, he filed a claim for service connection for epididymitis and prostatitis, viral meningitis, and kidney inflammation. R. at 7028. In a February 1976 rating decision, an RO granted service connection for chronic prostatitis and recurrent right epididymitis and denied service connection for viral meningitis and a kidney condition. R. at 7026. Mr. Elder did not appeal.

In August 1991, Mr. Elder filed a claim for service connection for viral meningitis, R. at 6475, which the RO denied in a January 1992 rating decision, R. at 6421. In February 2008, the veteran filed a claim for service connection for a pituitary gland condition and residuals. R. at 5705. In an August 2009 decision, the RO granted the claim and assigned an effective date of February 21, 2008. R. at 4140. In a November 2009 statement, Mr. Elder claimed CUE as to the 1976 RO decision because "the [viral meningitis] is directly related to the [PHP], and the [Board] has ruled [that] the PHP is service connected." R. at 4347. In April 2016, the RO issued a Statement of the Case, R. at 885-919; and, in May 2016, the veteran filed an appeal, R. at 858. In a September 2017 decision, the Board found no CUE in the 1976 rating decision that denied service connection for residuals of viral meningitis and found that February 21, 2008, was the earliest date that the veteran filed a claim for PHP. This appeal followed.

II. ANALYSIS

A. CUE

Mr. Elder argues that the Board erred in finding that there was no CUE in the February 1976 rating decision because it overlooked favorable evidence that his original claim was filed on January 22, 1976; the correct facts were not before the rating specialist; and the RO failed to apply the benefit of the doubt. Appellant's Brief (Br.) at 13-14. The Secretary urges the Court to affirm

the Board decision because the veteran raises these new CUE theories for the first time on appeal. Secretary's Br. at 7.

It is well settled that "each 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." *Jarrell v. Nicholson*, 20 Vet.App. 326, 333 (2006) (en banc). Moreover, "each 'specific' assertion of CUE constitutes a [matter] that must be the subject of a decision by the [Board] before [this] Court can exercise jurisdiction over it." *Andre v. Principi*, 301 F.3d 1354, 1361 (Fed. Cir. 2002); see *Russell v. Principi*, 3 Vet.App. 310, 315 (1992) (en banc) (when the Court reviews a Board decision regarding CUE, "[t]he necessary jurisdictional 'hook' for this Court to act is a decision of the [Board] on the specific issue of '[CUE]']"). A claimant asserting CUE bears the burden of presenting specific allegations of error. *Livesay v. Principi*, 15 Vet.App. 165, 178 (en banc). If the "appellant raises a new theory of CUE for the first time before the Court, the Court must dismiss for lack of jurisdiction." *Acciola v. Peake*, 22 Vet.App. 320, 325 (2008) (citing *Sondel v. Brown*, 6 Vet.App. 218, 219-20 (1994)).

Here, there is no indication that Mr. Elder raised these CUE theories in his November 2009 motion. The 2009 motion raises only a CUE argument as to how the RO's decision did not correctly consider whether the veteran's viral meningitis was related to PHP, see R. at 4347 ("The viral [meningitis] is directly related to the [PH] and the [Board] has ruled [that PHP] is service connected."), and it is otherwise silent as to the arguments he now raises on appeal—that the Board overlooked favorable evidence, the correct facts were not before the RO specialist, and the RO failed to apply the benefit of the doubt. Appellant's Br. at 13-14. Because Mr. Elder never raised these CUE theories to VA, the Court lacks jurisdiction to consider them. See *Jarrell*, 20 Vet.App. at 333. Thus, the proper course is for the Court to dismiss his appeal as to these new CUE theories. See *Acciola*, 22 Vet.App. at 325.

B. Earlier Effective Date

Mr. Elder also argues that the Board erred in its effective date determination because it failed to adjudicate claims for service connection for PHP and TDIU. Appellant's Br. at 9-10. He points to several documents that he argues should have been considered informal claims to reopen his previously denied claim for viral meningitis. *Id.* Specifically, he argues that his August 1991 claim for service connection for multiple disabilities reasonably encompassed a claim for viral

meningitis, which the January 1992 RO decision failed to discuss and, therefore, it remains pending and adjudicated. *Id.*

The general rule for assessing the effective date for an award of benefits provides that "the effective date of an evaluation . . . will be the date of receipt of the claim or the date entitlement arose, whichever is the later." 38 C.F.R. § 3.400 (2019); *see* 38 U.S.C. § 5110(a) (instructing that, generally, "the effective date of an award . . . shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application"). The Board's determination of the effective date for a service-connected disability is a finding of fact that the Court reviews under the "clearly erroneous" standard set forth in 38 U.S.C. § 7261(a)(4). *See Evans (Billy) v. West*, 12 Vet.App. 396, 401 (1999); *Hanson v. Brown*, 9 Vet.App. 29, 32 (1996).

As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990).

Here, the Board found that Mr. Elder was entitled to an effective date of February 21, 2008, the date that VA received his claim for service connection for PHP with hypothyroidism. The Board acknowledged the veteran's contention that an earlier effective date is warranted because these claims were eventually found to be residuals of viral meningitis, but explained that the veteran failed to point to a specific non-final claim for residuals of viral meningitis received before February 21, 2008. Although Mr. Elder argues that the Board failed to address whether the August 1991 or May 1992 application for service connection should be considered requests to reopen his viral meningitis claim, the Court fails to discern why the Board was obligated to discuss this information and the veteran does not answer this question.

The veteran argues that he submitted a claim for viral meningitis that remained adjudicated, Appellant's Br. at 15, but even so, the Court fails to understand how this became a secondary service-connection claim for PHP or TDIU. Thus, we agree with the Secretary that this argument is too vague and unsupported to permit judicial review. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments); *Evans (Walter) v. West*, 12 Vet.App. 22, 31 (1998) (the Court will give no consideration to a "vague assertion" or an "unsupported contention"). We find that the Board decision is not clearly erroneous and the Board's reasons or bases are understandable and facilitate judicial review. *See*

Allday, 7 Vet.App. at 527. To the extent that Mr. Elder makes additional assertions of Board error, the Court finds them too vague or unsupported by evidence and argument to permit judicial review. *See Locklear*, 20 Vet.App. at 416; *Evans (Walter)*, 12 Vet.App. at 31.

III. CONCLUSION

Based on consideration of the foregoing, we will DISMISS Mr. Elder's argument that there was CUE in the February 1976 RO decision for lack of jurisdiction. The portion of the September 7, 2017, Board decision that denied an earlier effective date for PHP with hypothyroidism and TDIU is AFFIRMED.

DATED: May 13, 2020

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