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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-6606

JIM A. ADAMS, 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 Jim A. Adams appeals a July 31, 2018, Board of Veterans' Appeals decision that declined to revise a March 9, 2005, regional office (RO) decision based on clear and unmistakable error (CUE). This appeal is timely, the Court has jurisdiction to review the Board's 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 finding no CUE in the 2005 RO decision. Among other things, Mr. Adams argues that the Board applied the wrong version of 38 C.F.R. § 3.156(c). Because the Board addressed the current version of § 3.156(c) and not the version applicable at the time of the 2005 RO decision, its statement of reasons or bases is inadequate. We therefore will set aside the Board's July 31, 2018, decision and remand the matter for further proceedings.

I. ANALYSIS

CUE is a collateral attack on a final Board decision and is a "very specific and rare kind of error." 38 C.F.R. § 20.1403 (2019). For CUE to exist, either "the correct facts, as they were known at the time, were not before the adjudicator or regulatory provisions extant at the time were

incorrectly applied." *Russell v. Principi*, 3 Vet.App. 310, 313 (1992) (en banc). The error must be "undebatable," and one that would have "manifestly changed the outcome" of the prior decision. *Id*. at 313-14. "A determination that there was a '[CUE]' must be based on the record and the law that existed at the time of the prior . . . decision." *Id*. at 314.

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); *see Archer v. Principi*, 3 Vet.App. 433, 437 (1992). Instead, we review a Board decision regarding CUE to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and supported by an adequate statement of reasons or bases. 38 U.S.C. § 7261(a)(3)(A); *Livesay v. Principi*, 15 Vet.App. 165, 174 (2001) (en banc). The Board's statement of reasons or bases is adequate when it explains the Board's determination well enough "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).

Mr. Adams's CUE motion is based on the alleged failure of the RO in 2005 to apply 38 C.F.R. § 3.156, which addresses when the Secretary will readdress a previously denied claim. Generally, a previously denied claim will be reopened upon the presentation of new and material evidence. 38 C.F.R. § 3.156(a) (2019); *see also* 38 C.F.R. § 3.156 (a) (2005). However, § 3.156(c) provides an exception when the new evidence consists of service records. At the time of the RO's 2005 decision, § 3.156(c) stated the following:

> Where the new and material evidence consists of a supplemental report from the service department, received before or after the decision has become final, the former decision will be reconsidered by the adjudicating agency of original jurisdiction. This comprehends official service department records which presumably have been misplaced and have now been located and forwarded to the Department of Veterans Affairs. Also included are corrections by the service department of former errors of commission or omission in the preparation of the prior report or reports and identified as such. The retroactive evaluation of disability resulting from disease or injury subsequently service connected on the basis of the new evidence from the service department must be supported adequately by medical evidence. Where such records clearly support the assignment of a specific rating over a part or the entire period of time involved, a retroactive evaluation will be assigned accordingly except as it may be affected by the filing date of the original claim.

38 C.F.R. § 3.156(c) (2005). In contrast, subsection (c) currently reads as follows:

> (1) Notwithstanding any other section in this part, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding paragraph (a) of this section. Such records include, but are not limited to:
>
> > (i) Service records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name, as long as the other requirements of paragraph (c) of this section are met;
> >
> > (ii) Additional service records forwarded by the Department of Defense or the service department to VA any time after VA's original request for service records; and
> >
> > (iii) Declassified records that could not have been obtained because the records were classified when VA decided the claim.
>
> (2) Paragraph (c)(1) of this section does not apply to records that VA could not have obtained when it decided the claim because the records did not exist when VA decided the claim, or because the claimant failed to provide sufficient information for VA to identify and obtain the records from the respective service department, the Joint Services Records Research Center, or from any other official source.
>
> (3) An award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim.
>
> (4) A retroactive evaluation of disability resulting from disease or injury subsequently service connected on the basis of the new evidence from the service department must be supported adequately by medical evidence. Where such records clearly support the assignment of a specific rating over a part or the entire period of time involved, a retroactive evaluation will be assigned accordingly, except as it may be affected by the filing date of the original claim.

38 C.F.R. § 3.156(c) (2019).

We agree with Mr. Adams that the Board applied the wrong version of § 3.156(c). In discussing CUE, the Board repeatedly referred to §§ 3.156(c)(1) and (c)(3) and addressed cases that were based on those subsections. At the time of the RO's 2005 decision, however, there were no numbered subsections to § 3.156(c). *Compare* 38 C.F.R. § 3.156(c) (2019) *with* 38 C.F.R. § 3.156(c) (2005); *see Cline v. Shinseki*, 26 Vet.App. 18, 22–23 (2012). Subsections 3.156(c)(1) and (c)(3) were not added until 2006. *See Cline*, 26 Vet.App. at 22-23. The Board did not acknowledge the version of the regulation applicable in 2005, or explain why it relied on cases based on the current regulation. As we explained in *Russell*, "[a] determination that there was a '[CUE]' must be based on the record and the law that existed at the time of the prior . . . decision."

3 Vet.App. at 314. The Board thus erred in failing to apply the version of § 3.156(c) that was applicable at the time of the 2005 RO decision. *See id*. And, its failure to explain why it did not apply the correct version frustrates judicial review. *See Allday*, 7 Vet.App. at 527; *see also Livesay*, 15 Vet.App. at 174. Thus, remand is warranted. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is appropriate "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

Because the claim is being remanded, the Court need not address Mr. Adams's additional arguments that would result in no broader remedy than a remand. *See Mahl v. Principi*, 15 Vet.App. 37, 38 (2001) (per curiam order) ("[I]f the proper remedy is a remand, there is no need to analyze and discuss all the other claimed errors that would result in a remedy no broader than a remand."). In pursuing his claim on remand, the veteran will be free to submit additional argument and evidence as to the remanded matter, and he has 90 days to do so from the date of the postremand notice VA provides. *See Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92, 97 (2018). The Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *see also Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991) ("A remand is meant to entail a critical examination of the justification for the decision.").

III. CONCLUSION

Based on the above, the Board's July 31, 2018, decision is SET ASIDE and the matter is REMANDED for further adjudication.

DATED: May 15, 2020

Copies to:

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