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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-4419

CHARLIE L. BUCKNER, APPELLANT,

V.

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

Before ALLEN, *Judge*.

MEMORANDUM DECISION

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

ALLEN, *Judge*: Appellant Charlie Buckner served the Nation honorably in the United States Army. In this appeal, which is timely and over which the Court has jurisdiction,[1] he contests a June 13, 2019, decision of the Board of Veterans' Appeals that denied a motion to revise on the basis of clear and unmistakable error (CUE) a December 1973 Board decision that had denied service connection for mitral insufficiency.[2] Because appellant's argument that the Board erred in its 2019 decision when it denied his CUE motion is squarely foreclosed by binding precedent, we must affirm.

I. ANALYSIS

"CUE is a very specific and rare kind of 'error' . . . of fact or 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."[3] Specifically, CUE is

[1] *See* 38 U.S.C. §§ 7252(a), 7266(a).

[2] Record (R.) at 5-15.

[3] *Evans v. McDonald*, 27 Vet.App. 180, 185 (2014) (omission in original) (citation and internal quotation marks omitted).

established when the following components are met: (1) Either the correct facts as they were known at the time were not before the adjudicator, the adjudicator made an erroneous factual finding, or the statutory or regulatory provisions extant at the time were incorrectly applied; (2) the alleged error is "undebatable," not merely a "disagreement as to how the facts were weighed or evaluated"; and (3) the error "manifestly changed the outcome" of the prior decision.[4]

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."[5] Our overall review of a Board decision finding no CUE in a prior, final Board decision is limited to determining whether the Board's decision finding no CUE in the December 1973 decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[6] The components that lead to a valid CUE finding, however, are subject to review under the standards applicable to each component.[7]

Here, appellant raised a single argument that the December 1973 Board decision contained CUE. Specifically, he contended that the Board in 1973 misapplied the statutory presumption of soundness by shifting to him the burden to show that his heart condition, which had not been noted upon entry to service, was not aggravated during service.[8] He presses this same argument on appeal when he argues that the 2019 Board decision did not recognize this shift in burden as CUE.[9] He bases his argument principally on the Federal Circuit's decision in *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004).[10] In *Wagner*, the Federal Circuit held that the Government did indeed have the burden to show by clear and unmistakable evidence that a condition not listed on a veteran's entrance examination was not aggravated during service in order to rebut the presumption.[11]

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[4] *Russell v. Principi*, 3 Vet.App. 310, 313-14, 319 (1992) (en banc); *see Simmons v. Wilkie*, 30 Vet.App. 267, 274 (2018).

[5] *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).

[6] 38 U.S.C. § 7261(a)(3)(A); *see Evans*, 27 Vet.App. at 186.

[7] *See Hopkins v. Nicholson*, 19 Vet.App. 165, 167-68 (2005).

[8] R. at 1083-87 (appellant's CUE motion).

[9] *See* Appellant's Brief at 3-4.

[10] *See id*. at 5-6.

[11] *Wagner,* 370 F.3d at 1096. The Government also had the burden to show by clear and unmistakable evidence that the condition had preexisted service. *Id*.

If this is all the law said about this matter, appellant would be well positioned to prevail on his CUE motion. But that is not the state of affairs. In *George v. Wilkie*,[12] this Court held that *Wagner* does not apply retroactively, meaning that a failure to abide by its interpretation of what is required to rebut the presumption of soundness cannot form the basis of CUE.[13] *George* is dispositive. Whatever *Wagner* said about rebutting the presumption of soundness when the Federal Circuit decided that case did not apply in 1973 when the Board denied appellant service connection. Therefore, the Board's 1973 decision could not be CUE and the 2019 Board did not err in denying the motion to revise that earlier decision.

One final note. We are disturbed that appellant did not cite *George* in his brief even though the decision issued a year before he filed his brief. And when the Secretary argued that *George* was dispositive, appellant elected not to file a reply brief. Whether *George* was correctly decided or not, it is the law. Ignoring this binding decision simply is not an option for a lawyer appearing before this Court.

II. CONCLUSION

For these reasons, the Court AFFIRMS the Board's June 13, 2019, decision.

DATED: May 15, 2020

Copies to:

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VA General Counsel (027)

[12] 30 Vet.App. 364, 373-74 (2019).

[13] *Id*. at 373-74.