

*Not published*

**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 21-5125

PAT A. HATFIELD,

APPELLANT,

v.

DENIS McDONOUGH,  
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before ALLEN, *Judge*.

**ORDER**

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

On August 2, 2021, appellant filed a Notice of Appeal challenging a June 4, 2021, decision of the Board of Veterans' Appeals that declined to revise an October 1980 Board decision that denied compensation under 38 U.S.C. § 351 on the basis of clear and unmistakable evidence (CUE).<sup>1</sup> In order to review the June 2021 Board decision, the Court requires additional information from the parties.

First, "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].'"<sup>2</sup> Thus, we must establish that the CUE arguments raised before the Court are the same as those raised before the Board. On appeal, appellant's arguments appear to turn on 38 C.F.R. § 3.358, the regulation implementing section 351, and whether it included informed consent as a basis for compensation.<sup>3</sup> In the decision on appeal, the Board found that appellant's "September 2020 [CUE] motion does not reference [§ 3.358] whatsoever."<sup>4</sup> Neither party addressed this Board finding and its potential impact on this Court's jurisdiction in their briefs.

Additionally, since the June 2021 Board decision, both this Court and Supreme Court have issued precedential decisions discussing CUE and the impact of a change in interpretation of

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<sup>1</sup> Section 351 has been recodified as 38 U.S.C. § 1151 and allows for compensation of a disability that results from treatment provided by VA.

<sup>2</sup> *George v. Wilkie*, 32 Vet.App. 318, 323-24 (2020) (quoting *Russell v. Principi*, 3 Vet.App. 310, 315 (1992) (en banc)).

<sup>3</sup> Today, § 3.358 is codified at 38 C.F.R. § 3.361.

<sup>4</sup> Record (R.) at 11.

relevant law.<sup>5</sup> If this Court has jurisdiction to review the Board's decision of appellant's CUE motion, then the parties should discuss the impact of this recent caselaw on this matter.

Accordingly, it is

ORDERED that within 30 days of the date of this order, the parties file supplemental briefs stating their positions on the Court's jurisdiction to consider appellant's CUE motion and, if this Court does have jurisdiction, on recent caselaw discussing CUE. The parties' briefs shall be no more than 15 pages.

DATED: August 1, 2022

BY THE COURT:



MICHAEL P. ALLEN  
Judge

Copies to:

Adam R. Luck, Esq.

VA General Counsel (027)

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<sup>5</sup> See *George v. McDonough*, \_\_ U.S. \_\_, 142 S. Ct. 1953, \_\_ L.Ed.2d \_\_ (2022); see also *Perciavalle v. McDonough*, 35 Vet.App. 11 (2021).