

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

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No. 21-5125

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PAT A. HATFIELD,

Appellant

v.

DENIS MCDONOUGH,  
Secretary of Veterans Affairs,

Appellee.

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**SUPPLEMENTAL BRIEF OF THE APPELLANT**

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## ARGUMENTS

In its August 1, 2022, Order, the Court noted that the jurisdictional hook for it to act is a decision of the Board on the specific issue of CUE so it must establish that the CUE arguments raised before the Court are the same as those raised before the Board. Order at 1. The Court was concerned that Ms. Hatfield's arguments appear to turn on 38 C.F.R. § 3.358 and whether it included informed consent as a basis for compensation but the Board's decision on appeal found that Ms. Hatfield's CUE motion does not reference section 3.358 whatsoever. *Id.* As such, the Court ordered the parties to file supplemental briefs addressing their positions on the Court's jurisdiction to consider Ms. Hatfield's CUE motion and the impact of recent case law from the Court and the Supreme Court regarding a change in interpretation of relevant law on the case at bar. Order at 1-2.

**1. The Court has jurisdiction to hear this appeal because Ms. Hatfield did not raise a new theory of CUE at the Court.**

When the Court reviews a Board decision regarding CUE, the necessary jurisdictional "hook" for the Court to act is a decision of the Board on the specific issue of CUE. *Russell v. Principi*, 3 Vet. App. 310, 315 (1992).

In her CUE motion to the Board, Ms. Hatfield asserted that revision of the Board's 1980 decision was necessary because the law in effect at the time of the decision (38 U.S.C. §§ 351 and 4131 and 38 C.F.R. § 17.34) entitled a veteran to compensation when he/she suffered an additional disability or death due to VA medical treatment that was provided without obtaining the veteran's informed consent. R-196-201.

The Board found that Ms. Hatfield's September 2020 CUE motion satisfies the procedural requirements for a CUE motion set forth at 38 C.F.R. §§ 20.1404(a) and (b).<sup>1</sup> R-8. As such, the Board addressed the merits of the motion. R-8-12. The Board noted Ms. Hatfield's basis for CUE but "disagree[ed] with the legal interpretation" and concluded that the laws in effect at the time of the Board's 1980 decision did not authorize payment of compensation for violations of the informed consent requirements. R-9, 11. Thus, the Board addressed Ms. Hatfield's specific CUE motion, thereby conferring jurisdiction on this Court. *Russell*, 3 Vet. App. at 315.

The confusion was created by the reasons or bases the Board provided to support its denial. The Board determined that Ms. Hatfield's later filed claim was granted due to a change in the law stating that "The statutes and regulations that now govern benefits under the section now codified at 38 U.S.C. § 1151 have *substantially changed* since the time of the Board's decision in October 1980." R-10 (emphasis added). The Board went on to cite the Court's recent decision in *Hatfield v. McDonough*, 33 Vet. App. 327 (2021) and state that "It is clear that the law as it now stands affirmatively requires informed consent in this context." R-6, 10. The Board then discussed the requirements of 38 U.S.C. §§ 351 and 1151 as well as their respective implementing regulations 38 C.F.R. §§ 3.358 and 3.361

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<sup>1</sup> 38 C.F.R. § 20.1404(a) requires that the CUE motion be in writing, include the name of the veteran or claimant and applicable VA file number, the date of the Board decision to which the motion relates, identify the specific issue(s) to which the motion relates, and be signed by the claimant or the claimant's representative. 38 C.F.R. § 20.1404(b) requires that the CUE motion set forth clearly and specifically the alleged CUE error(s) in the Board decision, the legal or factual basis for the allegation, and why the result would be manifestly different but for the alleged error.

and reiterated that the statute and regulation regarding informed consent (38 U.S.C. § 4131 and 38 C.F.R. § 17.34) were in effect at the time of the Board's 1980 decision but they did not reference the statute or regulation regarding compensation (38 U.S.C. § 351 and 38 C.F.R. § 3.358) for death due to VA medical care *like they do today*. R-10-11.

The Board found it notable that Ms. Hatfield's motion did not reference 38 C.F.R. § 3.358 which provides that compensation is payable for the usual or unusual after results of approved medical care properly administered when it is shown that the disability proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of the VA. *Id.* The Board also noted that subsequent to its 1980 decision, the Supreme Court's invalidated 38 C.F.R. § 3.358 as inconsistent with 38 U.S.C. § 1151 in *Brown v. Gardner*, 513 U.S.C. 115, 115 S. Ct. 552 (1994) but found that the version of 38 C.F.R. § 3.358 in existence at the time of its 1980 decision explicitly precluded payment of compensation unless there is a showing that the disability proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault of the VA. *Id.*

Thus, it was the Board, not Ms. Hatfield, that brought up and relied on the substantial changes in the law, the understanding of the law "as it now stands," the Court's recent precedent in *Hatfield v. McDonough*, the 1994 Supreme Court decision in *Brown v. Gardner*, and the difference between the former 38 C.F.R. § 3.358 in place at the time of the Board's 1980 decision and the current 38 C.F.R. § 3.361 in place today. R-10-11. Ms. Hatfield never asserted to the Board that there were no changes to the law or that the current law is the same as it was understood at the time of the Board's 1980 decision. R-195-201.

Rather, it was the Board that focused on the substantial change in the statutes and regulations since its 1980 decision to deny Ms. Hatfield's CUE motion because the current understanding of the law is not the same as it was at the time of its 1980 decision R-10 (citing *George v. McDonough*, 991 F.3d 1227, 1232 (Fed. Cir. 2021)).

In response to the portion of the Board's decision that "disagree[ed] with the legal interpretation" and concluded that the laws in effect at the time of the Board's 1980 decision did not authorize payment of compensation for violations of the informed consent requirements (R-9, 11), Ms. Hatfield argued in her briefs to the Court that the Board erred because the law at the time of the Board's 1980 decision required compensation for VA medical care that was performed negligently and it was well established through caselaw and the law in effect at the time of the Board's 1980 decision that failure to obtain informed consent prior to rendering medical care constitutes negligence. App. Br. at 10-11; Reply at 4, 6-7.

In her briefs Ms. Hatfield also directly responded to the issues raised by the Board regarding a change in the law and the Secretary's defense of the Board's decision relying on the same change-in-law analysis. App. Br. at 7-9; App. Reply at 2-3, 4-6. She argued that contrary to the Board's conclusion there was no substantial change in the law that existed from the time of the Board's 1980 decision to the present because there is no meaningful difference between the plain language of the former 38 U.S.C. § 351 and the current 38 U.S.C. § 1151, the former 38 C.F.R. § 17.34 and the current 38 C.F.R. § 17.32, or in the former 38 C.F.R. § 3.358 and the current 38 C.F.R. § 3.361. App. Br. at 7-9; App. Reply at 1-3.



Therefore, Ms. Hatfield did not raise new CUE claims at the Court that were not addressed by the Board, but rather she raised her same CUE arguments *and* directly responded to the issues raised within the matter by the Board. In briefing to the Court, Ms. Hatfield addressed the Board's reliance on the perceived difference between 38 C.F.R. 3.358 and 38 C.F.R. § 3.361 to further demonstrate that the Board's decision contained errors that rendered its decision arbitrary, capricious, and abuse of discretion, and not supported by an adequate statement of reasons or bases. In short, she is not presenting a new CUE claim involving a retroactive application of section 3.361 to interpret section 3.358 at the time of the Board's decision, but was merely discussing section 3.358 in the context of the Board's decision to show the Court that the Board improperly relied on a change in the law when she in fact, was arguing that the law as it existed and was understood at the time of the Board's 1980 decision was misapplied. As such, this Court has jurisdiction over the present appeal. *Russell*, 3 Vet. App. at 315; *Young v. Shinseki*, 25 Vet. App. 201, 202-203 (2012) (Because the Court has jurisdiction over the Board decision denying a part of the claim, it has the authority to "decide all relevant questions of law" that arise with regard to the denied claim).

Importantly, Ms. Hatfield notes that nowhere in her CUE motion did she argue for a retro-application of the law as it is currently understood. R-195-201. In fact, she did not mention 38 C.F.R. 3.361, 38 U.S.C. § 1151, or any case dated after the Board's 1980 decision that interpreted that body of law in her CUE claim. *Id.* As noted above, it was the Board that relied on the difference between section 3.358 and section 3.361, *Hatfield v. McDonough*, and *Gardner v. Brown* find that Hatfield's most recent claim was granted

based on a change in the law rather than determining if it committed CUE in its 1980 decision based on the law as it was understood at the time of the decision. R-10-11. As a result, Ms. Hatfield had to discuss the Board's decision to include its reliance on a change in the law to show the Court how the Board erred. In essence, Ms. Hatfield's arguments show the Court that not only did the Board err by failing to analyze the law as it was understood at the time of its 1980 decision but also that denying her claim based on a purported change in the law and its conclusion that the law changed were errors as well.

The Secretary reiterated the Board's reliance on a change in the law rather than how the law was understood at the time of the 1980 Board decision, arguing that the "critical difference" is that the current plain language of 38 C.F.R. § 3.361 shows that proximate causation is established when VA fails to obtain the veteran's informed consent while, in 1980, 38 C.F.R. § 3.358 only provided for compensation when there is a showing that the disability proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of the VA. Sec. Br. at 12. The Secretary further echoed the Board's reliance on *Brown v. Gardner* to show a change in the law. *Id.*

Again, Ms. Hatfield responded to the Secretary's specific arguments in defense of the Board's decision and did not attempt to raise a new theory of CUE. The Secretary, like the Board, relied on a change in the law rather than focusing on the plain meaning of the law at the time of the 1980 Board decision or how the law was understood back then. In this regard, the difference between section 3.358 and section 3.361, *Brown v. Gardner*, *Hatfield v. McDonough*, and Section 1151 should not have entered into the Board's

analysis, but because it did, Ms. Hatfield felt it necessary to address those issues in her briefing to the Court. *See Bernard v. Brown*, 4 Vet. App. 384, 389-92 (1993) (All questions within a single claim are encompassed within the “matter.”). In fact, Ms. Hatfield argued to the Court that that the Board’s and the Secretary’s reliance on any “change” in the regulation interpreting 38 U.S.C. § 351 or 1151 is “immaterial” because her claim is based on the law as it was understood at the time of the Board’s 1980 decision. Reply at 5.

Additionally, Ms. Hatfield notes that this Court also has jurisdiction because the Board’s error in her case is the same as its error in *Perciavalle v. McDonough*, 35 Vet. App. 11 (2021). In *Perciavalle*, the veteran alleged that a 1971 rating decision was the product of CUE because the Regional Office misapplied the regulation as it existed at the time of his decision in 1971. *Id.* at 24. The Board erroneously recategorized the veteran’s CUE allegation as one for revision based on the retroactive application of a later interpretation of law. *Id.* at 29-30. The veteran argued to the Court that the Board incorrectly concluded that there was a change in the law and that his CUE motion is based on the law in existence of the time of his original decision. *Id.* at 25. The Court noted that changes in the relevant law subsequent to the original adjudication do not provide a basis for revising a finally decided case but that the VA *does* commit CUE if fidelity to the law is lacking and the error is both undebatable and outcome determinative. *Id.* at 33-34, 37. The Court further held that “a motion alleging the VA’s interpretation of the plain meaning of the law at the time of the rating decision was clearly and unmistakably erroneous states a valid CUE challenge.” *Id.* at 39.

Ms. Hatfield asserts that because the Board's error in her case and her arguments to the Court in support of her CUE claim are analogous to those in *Perciavalle*, and the Court found it had jurisdiction in *Perciavalle*, it should equally find that it has jurisdiction here. *Id.* at 32-33. To explain, just as in *Perciavalle*, the Board in Ms. Hatfield's case did not find that Ms. Hatfield's CUE motion failed the specific pleading requirements of 38 C.F.R. §§ 20.1404(a) and (b). *Id.* at 32. R-8. Next, just as in *Perciavalle*, the CUE motion at issue here does not depend on the retroactive application of a later interpretation. *Percaivalle*, 35 Vet. App. at 36; R-195-201. Also, as in *Perciavalle*, the Board in Ms. Hatfield's case denied her CUE motion based on a later change in the law. *Id.* at 33-36, R-9-11. Finally, as in *Percaivalle*, and as discussed above, Ms. Hatfield submitted arguments to the Court in support of her CUE motion and directly responding to the Board's findings and determinations. *Id.* at 25. Therefore, just as it did in *Perciavalle*, the Court has jurisdiction over Ms. Hatfield's case.

**2. The recent precedent from this Court and the U.S. Supreme Court does not impact Ms. Hatfield's case because her CUE motion is based on the Board's misapplication of the law as it existed at the time of its 1980 decision and not a retroactive application of a later interpretation or change in law.**

In *Perciavalle v. McDonald*, the Court noted that *changes* in the relevant law subsequent to the original adjudication do not provide a basis for revising a finally decided case. *Id.* at 33-34. It further held that a “‘*change* in the interpretation’ necessarily requires the existence of a prior interpretation that is made different whether modified or replaced in whole; it cannot be the “‘first commentary” on a regulation or statute.” *Id.* at 34 (emphasis added). In this context, the Court stated that there can be no “*change*” in interpretation

absent an existing interpretation from which a later interpretation deviates. *Id.* 33. The Court also noted that a regulation provides the initial interpretation of the statute regardless of any inaccuracies in that interpretation later identified by the Court in a later case and that VA does not commit CUE in a benefits claim decision when it faithfully applies a regulation as it existed at the time of the decision, even if that regulation is later revised or invalidated. *Id.* at 37-38. However, the Court noted that the VA *does* commit CUE if fidelity to the regulation is lacking and the error is both undebatable and outcome determinative, even if that regulation is later validated and affirmed. *Id.* at 37. It reiterated that “a motion alleging the VA’s interpretation of the plain meaning of the law at the time of the rating decision was clearly and unmistakably erroneous states a valid CUE challenge.” *Id.* at 37 (citing *Berger v. Brown*, 10 Vet. App. 166, 170 (1997)).

Consistent with *Perciavalle*, the Supreme Court in *George v. McDonough* held that the invalidation of a VA regulation after a veteran’s benefits decision becomes final cannot support a claim for CUE because it constitutes a *change* in interpretation of law. 142 S. Ct. 1953, 1955, 1960, 213 L. Ed. 2d 265, 271, 274 (2022). Poignantly, the Court determined that a prior statutory misinterpretation is still an initial interpretation and any correction to that interpretation is a *change* that cannot be the basis of CUE. 142 S. Ct. at 1961, 213 L. Ed. 2d at 276. In short, *George* further solidifies that a CUE cannot rest on a subsequent *change* in interpretation of law. *Id.*

Thus, *Perciavalle* and *George* both establish that a *change* in understanding or interpretation of the law cannot support an allegation of CUE. However, Ms. Hatfield’s CUE motion is not rooted in or reliant on a subsequent interpretation or change in

interpretation of the law or any retroactive application thereof. In fact, she did not mention any subsequent law or interpretation thereof in her CUE motion nor did her motion argue that a subsequent determination (formal or informal) from the VA or an interpretation from an appellate court established what the law has always meant like in *George. Id.* at 1961-62. Rather she is argued that the law as it was understood at the time of the Board's 1980 decision was misapplied because it allowed for compensation when VA rendered medical care that resulted in the veteran's death without first obtaining the veterans informed consent. R-195-201. She maintained her position in her briefing to the Court and reiterates that to the extent she addressed any subsequent change or interpretation of the law in her briefing to the Court it was only in response to the Board's errors and the Secretary's defense of them.

The only impact that *Perciavalle* has on Ms. Hatfield's case is favorable because it finds error in a factually analogous Board decision that denied a veteran's CUE motion based on a subsequent change in interpretation of the law. *Perciavalle*, 35 Vet. App. at 29-30, 32-37. As noted above, the Court assumed jurisdiction over that Board decision and likewise should do so here.

As observed in the *Perciavalle*'s concurring opinion, in a CUE motion (like Ms. Hatfield's) that is based on a misapplication of the law in existence at the time of the original decision, the claimant and the Board must pretend that they exist in the time the decision allegedly containing CUE was rendered without the benefit of any later law or

interpretation. *Id.* at 52 (J. Toth and J. Allen concurring).<sup>2</sup> But the Board did not do that in Ms. Hatfield’s case. Instead, it relied on the substantial changes in the law, the understanding of the law “as it now stands,” the Court’s recent precedent in *Hatfield v. McDonough*, the 1994 Supreme Court decision in *Brown v. Gardner*, and the difference between the former 38 C.F.R. § 3.358 and the current 38 C.F.R. § 3.361. R-10-11.

Citing *George v. McDonough*, 991 F.3d 1227, 1234 (Fed. Cir. 2021), Ms. Hatfield argued to the Court in support of her CUE motion that the law as it was understood at the time of the Board’s 1980 decision required compensation for VA medical care that was performed negligently and that failure to obtain informed consent prior to rendering medical care constitutes negligence. App. Br. at 6, 9-11. In support of those arguments, she cited to caselaw in existence at the time of the Board’s 1980 decision addressing the requirement for informed consent and that failure to obtain informed consent constitutes negligence. App. Br. at 9-11. Those arguments are consistent with the understanding of the law in effect at the time of the Board’s 1980 decision. *See* U.S. Dep’t of Veterans Affairs, Op. Gen. Counsel 2-78 (Oct. 25, 1978) (analyzing the legislative history of 38 U.S.C. § 351 and its implementing regulations and concluding that Congress intended recovery for a disability deriving from either an accident or some form of negligence or fault by VA). Thus, they were merely in support of her specific CUE motion and did not raise a new theory of CUE.

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<sup>2</sup> Ms. Hatfield acknowledges that this is not the majority opinion and thus is merely persuasive rather than binding.

Her arguments also spoke directly to the Board’s erroneous legal conclusion that the law in effect at the time of the Board’s 1980 decision did not authorize payment of compensation for violations of the informed consent requirements of 38 U.S.C. § 4131 and 38 C.F.R. § 17.34 (R-9, 11) because consistent with those requirements, the plain language of 38 C.F.R. § 3.358 provides that compensation “is not payable for either the usual or the unusual after results of *approved medical care properly administered*, in the absence of a showing that the disability proximately resulted through carelessness, accident, *negligence*, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of the VA.” Under 38 U.S.C. § 4131 and 38 C.F.R. § 17.34 care cannot be “approved” and “properly administered” unless informed consent has been obtained first. Because Ms. Hatfield’s arguments to the Court are in support of her CUE motion and are consistent with her CUE motion to the Board, this Court has jurisdiction over her case. To the extent that her arguments are responsive to the Board’s errors, they do not raise separate CUE theories nor divest this Court of jurisdiction. *Russell*, 3 Vet. App. at 315; *Young*, 25 Vet. App. at 202-203; *Perciavalle*, 35 Vet. App. at 37.

## **CONCLUSION**

In sum Ms. Hatfield asserts that the Court has jurisdiction over her case and that her arguments to the Court are merely in support of her CUE motion and do not raise a separate theory of CUE that was not addressed by the Board.



Respectfully submitted on August 31, 2022 by:

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**CERTIFICATE OF SERVICE**

On August 31, 2022, a copy of the foregoing Supplemental Brief of the Appellant was filed and served via electronic filing for the United States Court of Appeals for Veterans Claims on: Attorney Mark Hamel, counsel for Appellee, Secretary of Veterans Affairs at Mark.Hamel@va.gov. I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

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