

**PAT A. HATFIELD,**  
*Appellant,*  
v.  
**DENIS MCDONOUGH,**  
*Secretary of Veterans Affairs,*  
*Appellee.*

Appellee, Denis McDonough, Secretary of Veterans Affairs, submits this response to the Court's August 1, 2022, Order, which instructed the Secretary to file a supplemental brief stating the Secretary's position on the Court's jurisdiction to consider Appellant's clear and unmistakable error [CUE] motion and, if this Court does have jurisdiction, recent caselaw discussing CUE.

This Court has jurisdiction to consider Appellant's CUE motion. When the Court reviews a Board decision regarding CUE, the necessary jurisdictional hook for this Court to act is a decision of the Board on the specific issue of CUE. *George v. Wilkie*, 32 Vet.App. 318, 323-24 (2020). If the appellant raises a new theory of CUE for the first time before the Court, the Court must dismiss for lack of jurisdiction. *Id.* at 324. An appellant bears the burden of demonstrating that the Court has jurisdiction over an appeal. *Id.*

Appellant's allegation of CUE, made in her September 2020 motion, asserted that the October 1980 Board decision "failed to apply 38 U.S.C. § 351, 38 U.S.C. § 4131 (1976) and 38 C.F.R. § 17.34 (1976), which requires entitlement to compensation benefits when the VA renders treatment without first obtaining the veteran's informed consent and that treatment results in disability or death." [R. at 198 (195-201)]; see [R. at 5 (5-12) (finding that "[t]he sole basis for revision of the October 1980 Board decision identified in the September 2020 motion is the argument that the lack of documentation in the record of informed consent for cancer treatment as a matter of law entitled the appellant to compensation under 38 U.S.C. § 351")]. The Board addressed this CUE theory and found that "[t]he law regarding compensation under 38 U.S.C. § 351, as it was known at the time of the October 1980 Board decision, did not require documentation of informed consent for the underlying medical care." [R. at 6]. Appellant is pursuing this same CUE theory on appeal to this Court, arguing that the Board's 2021 decision "incorrectly determined that the law in effect at the time of the [1980] decision did not provide for compensation for failure to obtain informed consent." [Appellant's Initial Brief at 12].

Thus, Appellant is not raising a new theory of CUE for the first time before this Court. To the extent that the Board found "it notable that the September 2020 motion does not reference [38 C.F.R. § 3.358] whatsoever," the Secretary does not interpret this language as a finding that Appellant presented a new theory of CUE that was not previously presented. [R. at 11]. Instead, the Secretary

understands this language to be a indication of the weakness of Appellant's CUE argument or even a comment on counsel's failure to acknowledge contrary relevant authority. As the Board explained,

While the September 2020 motion in large part correctly describes [38 U.S.C. §§ 351, 4131 (1976) and 38 C.F.R. § 17.34 (1976)], it asserts without any citation to any section whatsoever of the United States Code or the Code of Federal Regulations that failure to obtain that consent for a procedure that results in additional disability or death entitles a beneficiary to compensation under 38 U.S.C. § 351 as a matter of law.

. . . .

The regulation in effect at the time of the October 1980 Board decision contained none of this language regarding consent. At that time, the implementing regulation of 38 U.S.C. § 351 was set forth at 38 C.F.R. § 3.358. That regulation also contained a provision regarding determining whether VA medical care or hospitalization caused additional disability or death. It explained 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." 38 C.F.R. § 3.358(C)(3). Nowhere in this regulation is there any mention of 38 U.S.C. § 4131 or 38 C.F.R. § 17.34, or any reference to informed consent.

The Board finds it notable that the September 2020 motion does not reference this regulation whatsoever. . . . .

Rather, the September 2020 motion merely states, without citation to any statutory or regulatory support, that the law in effect in October 1980 required payment of compensation when VA provided medical care without documenting informed consent for that care. As shown above, 38 C.F.R. § 3.358 (1980) did not include such a

requirement. The applicable versions of 38 U.S.C. §§ 351 and 4131 and 38 C.F.R. § 17.34 also contained no such language.

[R. at 9, 11, 12]. In other words, section 3.358 (1980)—the implementing regulation of 38 U.S.C. § 351 (1980) that does not contain any reference to informed consent (or mention any statutes or regulation regarding informed consent)—controlled the outcome of the CUE motion and counsel's failure to make any reference to the regulation in the motion showed that the most important regulation was ignored by Appellant and authority contrary to counsel's argument was not provided. [R. at 11-12; 201]. To be clear, the Secretary does not contest this Court's jurisdiction in this case.

On September 22, 2020, this Court issued an en banc decision in *Perciavalle v. McDonough*, 35 Vet.App. 11 (2020). *Perciavalle* involved a CUE challenge to a decision that denied separate ratings for a knee disability. *Id.* at 24. A majority of the Court found that the Board erred in (1) misstating Appellant's CUE motion, (2) failing to sympathetically construe Appellant's motion, (3) failing to adjudicate the Veteran's challenge to the prior application of the law, (4) incorrectly barring Appellant's motion because of a later change in interpretation; and (5) misunderstanding separate disabilities or manifestations from a single injury. *Id.* at 29-40. A separate majority of the Court found the error harmless or concurred in the judgment affirming the Board's decision. *Id.* at 40-49.

*Perciavalle* is factually dissimilar from the instant case. In *Perciavalle*, the Board relied on 38 C.F.R. § 20.1403(e) to deny the claimant's CUE motion. *Id.* at

24. Section 20.1403(e) provides that “[c]lear and unmistakable error does not include the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a change in the interpretation of the statute or regulation.” 38 C.F.R. § 20.1403(e). In contrast, in the instant case, the Board did not find that there had been a change in the interpretation of a statute or regulation; the Board found instead that the statutes and regulations “have substantially changed since the time of the Board’s decision in October 1980.” [R. at 10]. Compare 38 C.F.R. § 3.358 (1980), with 38 C.F.R. § 3.361 (2022). Furthermore, none of the other Board errors recognized in *Perciavalle* are present in the instant case. *Perciavalle*, 35 Vet. App at 29-40.

On June 15, 2022, the Supreme Court of the United States issued a decision in *George v. McDonough*, 142 S. Ct. 1953 (2022). *George* involved a CUE challenge to a decision that denied a claim for service connection based on a statutory presumption of sound condition. *Id.* at 1958. The issue addressed in *George* was whether a later invalidation of a VA regulation could support a CUE claim attacking a final decision issued prior to the regulation’s invalidation. *Id.* After reviewing the law and arguments of the parties, the Court found that “[t]he invalidation of a VA regulation after a veteran’s benefits decision becomes final cannot support a claim for collateral relief based on [CUE].” *Id.* at 1963.

The *George* decision was based on the conclusion that the later invalidation of a VA regulation after a VA benefits decision becomes final cannot support a claim for CUE. *Id.* at 1963. Such an argument was not raised or addressed in the

instant case. [R. at 5-12; 195-201]. To the extent that the Board cited and considered 38 C.F.R. § 3.358 (1980), the law in effect at the time of the prior adjudication, but which the Board acknowledged had later been invalidated, the Board's discussion is consistent with the Supreme Court's decision in *George*. See [R. at 5-12]; *George*, 142 S. Ct. at 1963.

Both *George* and *Perciavalle* provide comprehensive discussions of the law and analysis applicable to CUE claims that are helpful in resolving the instant case. The *Perciavalle* decision explained that "the focal point of the CUE landscape is the state of the facts and law when the rating decision was made." *Perciavalle*, 35 Vet.App. at 27. Additionally, changes in the law subsequent to the original adjudication do not provide a basis for revising a finally decided case. *Id.* at 33-34 (citing *Russell v. Principi*, 3 Vet.App. 310, 313 (1992)). Likewise, the *George* decision emphasized that "authorities dating back to 1928 confirm that [a] determination that there was clear and unmistakable error must be based on the record and the law that existed at the time of the prior [VA] decision." *George*, 142 S. Ct. at 1959 (citations and internal quotation marks omitted). Additionally, only the law that existed at the time of the prior adjudication can be considered. *Id.* (citation omitted).

In light of this authority, Appellant's attempts to compare the 1980 regulations to the current regulations are misplaced. See [Appellant's Initial Brief at 7] ("there is no meaningful difference between the two statutes"); [Appellant's Initial Brief at 8] ("the Board has no[t] shown any substantial changes");

[Appellant's Initial Brief at 9] ("today's regulation is congruous with the language in effect in section 3.358"). In other words, Appellant's attempt to interpret the 1980 regulations by comparing them to the current regulations is misguided. Appellant's approach is contrary to the analysis described in *Perciavalle* and *George*, as well as existing case law regarding CUE.

The Board's approach was proper. The Board looked to the implementing regulation of 38 U.S.C. § 351, set forth in 38 C.F.R. § 3.358. [R. at 11]. The regulation explained that compensation under § 351

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.

[R. at 11]. The Board noted that nowhere in this regulation is there any reference to informed consent. [R. at 11]; see 38 C.F.R. § 3.358 (1980). The Board's analysis, focusing strictly on the law in effect at the time of the 1980 decision, is consistent with *Perciavalle* and *George*.

### **CONCLUSION**

For the foregoing reasons, the Secretary respectfully requests that the Court affirm the Board's decision.

Respectfully submitted,

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