NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

LEROY O. WILLIAMS,
Claimant-Appellant

v.

PETER O'ROURKE, ACTING SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2017-2186

Appeal from the United States Court of Appeals for Veterans Claims in No. 16-1126, Chief Judge Robert N. Davis.

JUDGMENT

JONATHAN BRYAN KELLY, Jonathan Kelly & Associates, Raleigh, NC, argued for claimant-appellant.

AGATHA KOPROWSKI, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by CHAD A. READLER, ROBERT E. KIRSCHMAN, JR., MARTIN F. HOCKEY, JR.; BRIAN D. GRIFFIN, CHRISTINA

LYNN GREGG, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (MOORE, CHEN, and HUGHES, *Circuit Judges*).

AFFIRMED. *See* Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

June 7, 2018
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-1126

LEROY O. WILLIAMS, APPELLANT,

V.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before DAVIS, *Chief Judge.*

MEMORANDUM DECISION

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

DAVIS, *Chief Judge*: U.S. Army veteran Leroy O. Williams appeals through counsel a December 9, 2015, Board of Veterans' Appeals (Board) decision that denied his motion for revision on the basis of clear and unmistakable error (CUE) in an October 7, 1985, Board decision that denied compensation for a seizure disorder. For the following reasons, the Court will affirm the Board's December 2015 decision.

I. ANALYSIS

Mr. Williams argues that the Board's December 2015 decision, finding no CUE in an October 1985 decision, was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Appellant's Brief (Br.) at 2. He contends that the Board misapplied the law in the October 1985 decision and erred "by deciding his claim at a point when it was both legally incomplete and required remand as a matter of law" to obtain a VA examination. *Id.* at 4. Specifically, he argues that the Board misapplied 38 C.F.R. §§ 3.327(a) and (b) (dealing with reexaminations for disability rating purposes), 3.326(c) (accepting private physician statements as examinations for rating purposes), and 19.182 (requiring remand when additional information is necessary). *Id.* at 7. He contends that the

Board's error "would manifestly change the outcome of the case," as it would result in remand. *Id.* at 10. He further argues that the Board's decision "lacked rationale" for applying *Cook v. Principi*, 318 F.3d 1334 (Fed. Cir. 2002), as that case "was decided well after the 1985 Board decision at issue." *Id.* at 5. The Court does not agree.

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 (2016). Generally, a successful CUE movant must demonstrate either that "the correct facts, as they were known at the time, were not before the adjudicator or the statutory 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 based on the record or law at the time of the decision. *Id.* at 313-14. Therefore, a mere disagreement as to how the previous adjudicator weighed or evaluated the facts may not constitute CUE. *Id.*; *see also* 38 C.F.R. § 20.1403(d). Furthermore, any failure by VA to satisfy the duty to assist cannot amount to CUE. *See Cook*, 318 F.3d at 1344 ("[A] breach of the duty to assist necessarily implicates evidence that was not before the [regional office] at the time of the original decision. . . . Evidence that should have been part of the record, but was not (because of a breach of the duty to assist), may not be considered [during a CUE analysis].").

The Court's review of Board decisions as to CUE is limited to whether the Board decision is arbitrary, capricious, an abuse of discretion, or not in accordance with law, and whether it is supported by adequate reasons or bases. *Livesay v. Principi*, 15 Vet.App. 165, 174 (2001) (en banc); *see also Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (Board's statement "must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court").

Mr. Williams's arguments are based on VA's failure to obtain a VA examination in conjunction with the 1985 Board denial of his seizure disorder claim. As noted above, a duty to assist error cannot constitute CUE, as "any additional evidence that may have been obtained had the 1985 Board decision remanded the seizure disorder claim was necessarily not before the Board at the time of the 1985 decision and cannot be an 'outcome-determinative' error." Secretary's Br. at 11 (citing *Cook*, 318 F.3d at 1346). Although Mr. Williams argues that *Cook* should not be applied

because it was not in effect at the time of the 1985 decision, the 1985 Board decision did not determine whether CUE existed at that time but rather whether service connection for a seizure disorder was warranted. It was the Board in its December 2015 decision that applied the law pertaining to CUE in determining whether the laws governing service connection at the time of the 1985 decision were correctly applied, and the Court holds that the Board properly applied *Cook* in this decision. *See* 38 C.F.R. § 20.1403.

Furthermore, the regulations that Mr. Williams contends were misapplied, specifically 38 C.F.R. §§ 3.327 and 3.326, apply to disabilities that are already service connected when a claimant is seeking a higher disability rating. As for 38 C.F.R. § 19.182, it involves remanding a matter for additional information, which directly relates to the Board's duty to assist, addressed above.

Even if the Board erred in the 1985 decision by not remanding the matter for a VA examination, the Court holds the decision should not be revised on the basis of CUE because the error was not outcome determinative. *See Crippen v. Brown*, 9 Vet.App. 412, 422 (1996) (holding that CUE is the sort of error "'which, had it not been made, would have manifestly changed the outcome'" (quoting *Russell*, 3 Vet.App. at 313)). Mr. Williams has not demonstrated that if a VA examination had been provided his claim would have been granted. Thus, he has not met his burden of demonstrating prejudicial error. *See Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (the Court must take due account of prejudicial error); *see also Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (appellant bears burden of demonstrating error on appeal).

As the Board did not err in finding that duty-to-assist errors cannot constitute CUE, the Board's conclusion that there was no CUE in the 1985 decision is not arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law. *See Livesay*, 15 Vet.App. at 174. Furthermore, the Board's reasons for rejecting the assertions of CUE are understandable and facilitate judicial review. *See Allday*, 7 Vet.App. at 527.

II. CONCLUSION

On consideration of the foregoing, the Court AFFIRMS the Board's December 9, 2015, decision.

DATED: March 27, 2017

Copies to:

Jonathan B. Kelly, Esq.

VA General Counsel (027)

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

LEROY O. WILLIAMS,
Claimant-Appellant

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2017-2186

Appeal from the United States Court of Appeals for Veterans Claims in No. 16-1126, Chief Judge Robert N. Davis.

ON PETITION FOR REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

PER CURIAM.

O R D E R

Appellant LeRoy O. Williams filed a petition for rehearing en banc. The petition was first referred as a

petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

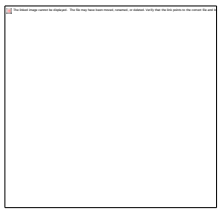
The petition for rehearing en banc is denied.

The mandate of the court will issue on August 29, 2018.

FOR THE COURT

August 22, 2018
Date

/s/Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court



BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE MATTER OF THE MOTION OF LEROY O. WILLIAMS

SS [redacted]

DOCKET NO. 15-04 741) DATE *December 9, 2015*
) *CMT*
)

THE ISSUE

Whether there was clear and unmistakable error (CUE) in an October 7, 1985, Board of Veterans' Appeals (Board) decision denying entitlement to service connection for a seizure disorder.

REPRESENTATION

Moving party represented by: Jonathan B. Kelly, Attorney

ATTORNEY FOR THE BOARD

J. Tittsworth, Associate Counsel

[redacted]

INTRODUCTION

The moving party is a Veteran who served on active duty from November 1972 to March 1979. This matter is before the Board from the moving party's December 2014 motion for revision of an October 7, 1985 Board decision (which denied entitlement to service connection for a seizure disorder) on the basis of CUE.

This appeal has been advanced on the Board's docket pursuant to 38 C.F.R. § 20.900(c). 38 U.S.C.A. § 7107(a)(2) (West 2014).

FINDINGS OF FACT

1. On October 7, 1985, the Board issued a decision that denied entitlement to service connection for a seizure disorder.

2. The correct facts, as known at the time, were before the Board when it issued the October 7, 1985 decision.

3. There is no showing that the Board misapplied the law as it existed at the time of the October 7, 1985 determination.

CONCLUSION OF LAW

The criteria for revision or reversal of the October 7, 1985 Board decision, which denied entitlement to service connection for a seizure disorder, on the basis of CUE, have not been met. 38 U.S.C.A. §§ 5107, 5110, 7105, 7111 (West 2014); 38 C.F.R. §§ 20.1400-140 4 (2015).

[redacted]

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Duties to Notify and Assist

The United States Court of Appeals for Veterans Claims (Court) has held that the Veterans Claims Assistance Act of 2000 (VCAA) does not apply to claims of CUE in prior Board decisions. *See Parker v. Principi*, 15 Vet. App. 407, 412 (2002). Therefore, further discussion of the VCAA is unnecessary. Nevertheless, the Board notes that the moving party has been accorded ample opportunity to present his contentions, and there is no indication he has further argument to present.

Legal Criteria

Motions for review of prior Board decisions on the grounds of CUE are adjudicated pursuant to the Rules of Practice of the Board, at 38 C.F.R. Part 20. Rule 1403 of the Rules of Practice, found at 38 C.F.R. § 20.1403, relates to what constitutes CUE.

Clear and unmistakable error is a very specific and rare kind of error. It is the kind of error, of fact or of 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. Generally, either the correct facts, as they were known at the time, were not before the Board, or the statutory and regulatory provisions extant at the time were incorrectly applied. *See* 38 C.F.R. § 20.1403.

A determination of CUE in a prior Board decision must be based on the record and the law that existed when that decision was made. 38 C.F.R. § 20.1403(b)(1). Subsequently developed evidence may not be considered in determining whether CUE existed in the prior decision. *See Porter v. Brown*, 5 Vet. App. 233, 235-36 (1993). To warrant revision of a Board decision on the grounds of CUE, there must have been an error in the Board's adjudication of the appeal which, had it not been made, would have manifestly changed the outcome when it was made. If it is not absolutely clear that a different result would have ensued, the error complained of

[redacted]

cannot be clear and unmistakable. 38 C.F.R. § 20.1403(c). CUE "are errors that are undebatable, so that it can be said that reasonable minds could only conclude that the original decision was fatally flawed at the time it was made." *Russell v. Principi*, 3 Vet. App. 310, 313 (1992).

Rule 1403 offers the following examples of situations that are not CUE - (1) Changed diagnosis - A new medical diagnosis that "corrects" an earlier diagnosis considered in a Board decision; (2) Duty to assist - The Secretary's failure to fulfill the duty to assist; (3) Evaluation of evidence - A disagreement as to how the facts were weighed or evaluated. 38 C.F.R. § 20.1403(d).

Moreover, CUE 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).

The mere misinterpretation of facts does not constitute CUE. *Thompson v. Derwinski*, 1 Vet. App. 251, 253 (1991). "It is a kind of error, of fact or of law, that when called to the attention of later reviewers, compels the conclusion, to which reasonable minds cannot differ, that the results would have been manifestly different but for the error." *Fugo v. Brown*, 6 Vet. App. 40, 43 (1993). The Court also held in *Fugo* that allegations that previous adjudications had improperly weighed and evaluated the evidence can never rise to the stringent definition of CUE. *Id*. at 44. Further, the "benefit of the doubt" rule of 38 U.S.C.A. § 5107(b) does not apply to a Board decision on a motion to revise a Board decision due to CUE. 38 C.F.R. § 20.1411(a).

A motion for revision of a Board decision based on CUE must be in writing and must be signed by the moving party or that party's representative. The motion must include the name of the Veteran, the name of the moving party if other than the Veteran, the applicable Department of Veterans Affairs file number, and the date of the Board decision to which the motion relates. If the applicable decision involved more than one issue on appeal, the motion must identify the specific issue, or issues, to which the motion pertains. Motions which fail to comply with the requirements

[redacted]

set forth in this paragraph shall be dismissed without prejudice to refiling under this subpart. 38 C.F.R. § 20.1404(a).

A motion must set forth clearly and specifically the alleged clear and unmistakable error, or errors, of fact or law in the Board decision, the legal or factual basis for such allegations, and an explanation of why the result would have been manifestly different but for the alleged error. Non-specific allegations of failure to follow regulations, failure to give due process, failure to apply the benefit-of- the-doubt or any other general, non-specific allegations of error are insufficient to satisfy the requirement of the previous sentence. Motions which fail to comply with these requirements shall be dismissed without prejudice to refiling under this subpart. 38 C.F.R. § 20.1404(b).

Analysis

The moving party alleges there was CUE in an October 7, 1985 Board decision denying entitlement to service connection for a seizure disorder. In his motion, the moving party asserts the following instances of CUE: (1) failure to provide a VA examination; (2) failure to address entitlement to service connection for heat intolerance and a mental disorder; and (3) evaluating the Veteran's claim under the wrong diagnostic code.

With respect to assertion number (1) above, the Board notes that an allegation that VA failed to comply with its duty to assist cannot constitute CUE. *See* 38 C.F.R. § 20.1403(d)(2); *Cook v. Principi*, 318 F.3d 1334, 1344-45 (Fed. Cir. 2002). Consequently, to the extent the moving party's assertion of CUE rests upon his assertion that the Board failed to order a VA examination, the motion is denied.

With respect to assertion number (2) above, the moving party contends the medical evidence which existed at the time of the Board's decision raised informal claims for entitlement to service connection for heat intolerance and a mental disorder, and that the Board committed CUE by failing to address these additional issues. However, the Board observes that the only issue on appeal before the Board when it issued its October 7, 1985 decision was entitlement to service connection for a

[redacted]

seizure disorder. To the extent the moving party had outstanding claims not yet decided by the RO, the Board did not have jurisdiction to adjudicate them.

To warrant revision of a Board decision on the grounds of CUE, there must have been an error *in the Board's adjudication of the appeal* which, had it not been made, would have manifestly changed the outcome when it was made. 38 C.F.R. § 20.1403(c) (emphasis added). Because the Board did not have jurisdiction to adjudicate entitlement to service connection for heat intolerance and a mental disorder at the time of the December 7, 1985 decision, failure to address these issues cannot constitute CUE.

The Board acknowledges the Court's holding in *Clemons v. Shinseki*, insofar as a claim of entitlement to service connection for a specific psychiatric disorder includes any mental disability that may be reasonably encompassed by a Veteran's description of the claim, reported symptoms, and the other information of record. 23 Vet. App. 1 (2009). However, the holding in *Clemons* was not legal precedent at the time of the October 7, 1985 decision, and the Board had no duty to adjudicate the Veteran's appeal beyond the issues certified by the RO. Moreover, there is no clear indication in the documents before the Board at that time that the Veteran was claiming service connection for psychiatric impairment. The claim was clearly for seizures, for which he was first treated in 1982.

Finally, with respect to (3) above, the moving party claims the wrong diagnostic code was utilized when the Board denied entitlement to service connection for a seizure disorder. In support of his assertion, the moving party cites Title 38, Chapter 1, Part 4 of the Code of Federal Regulations, and argues the Veteran should have been evaluated under diagnostic code 8914, Psychomotor Epilepsy or Non-Neurological Epilepsy, as opposed to diagnostic code 8910, General Epilepsy.

The moving party's assertion has no merit because the Board did not consider *any* diagnostic code when it denied entitlement to service connection for a seizure disorder. Title 38, Chapter 1, Part 4 of the Code of Federal Regulations is not relevant when deciding entitlement to service connection for disabilities. Rather, Part 4 contains the schedule for rating disabilities which are *already* service-

[redacted]

connected. Because Part 4 had no impact whatsoever on the Board's decision to deny entitlement to service connection for a seizure disorder, the moving party's claim that CUE was committed due to an incorrect diagnostic code is denied. The use of the diagnostic code on a rating sheet if for administrative purposes, and did not enter into the decision on the merits.

The Board has considered the possibility that the moving party's argument may be interpreted broadly such that the Board should have considered entitlement to service connection for a psychiatric disorder, as opposed to a seizure disorder. However, even assuming the moving party's motion raises this argument, the motion is nonetheless denied because no competent evidence whatsoever existed at the time of the October 7, 1985 decision establishing a nexus between the Veteran's military service and a psychiatric disorder. Thus, the facts do not reveal that it is absolutely clear that a different result would have ensured, or that the result would have been manifestly different, but for the Board allegedly failing to consider service connection for a psychiatric disorder. 38 C.F.R. § 20.1403(c).

In sum, for reasons addressed above, the Board finds there was no CUE in the December 7, 1985 decision denying entitlement to service connection for a seizure disorder, and the moving party's motion is denied.

ORDER

The December 7, 1985 Board decision did not contain clear and unmistakable error in denying entitlement to service connection for a seizure, and the motion to revise or reverse that decision is denied.

_____

MICHAEL D. LYON
Veterans Law Judge, Board of Veterans' Appeals

BOARD OF VETERANS APPEALS

Claimant Leroy Williams	)	MOTION FOR REVISION OF FINAL BVA DECISION BASED UPON CLEAR AND UNMISTAKABLE ERROR DOCKET NO. 85-24 166 OCTOBER 7, 1985

MOTION FOR REVISION OF OCTOBER 1985 BOARD OF VETERANS APPEALS DECISION DENYING ENTITLEMENT TO SERVICE CONNECTION FOR SEIZURE DISORDER BASED UPON CLEAR AND UNMISTAKABLE ERROR

Pursuant to 38 C.F.R. § 20.1400(a), Claimant Leroy Williams, through counsel, respectfully asks the Chairman of the Board to grant his motion for revision of an October 1985 Board of Veterans Appeals (Board) decision denying entitlement to service connection for Seizure Disorder based upon Clear and Unmistakable Error (CUE). Specifically, pursuant to 38 C.F.R. §19.178, Filing of requests for the procurement of medical opinions, Mr. Williams made two (2) different requests for a medical opinion related to his condition. Both requests were ignored.

Claimant asserts that the misapplication of §19.178 substantially changed the outcome of the decision and had such error not occurred prior to the October 1985 decision, Rule 82, C.F.R. §19.182, would have required remand, not denial.

FACTS

Leroy Williams served on active duty from November 1972 to March 1979. Exhibit 1, Page 2[1]. Service medical records show Mr. Williams was treated in June 1975 for a head injury that rendered him unconscious and concussed. Id. After which, records evidence Mr. Williams was treated and medicated for headaches for the ensuing 10 year period. E1, P2-3. Through the date of the 1985 decision, Mr. Williams received four (4) neurological examinations. Id. No neurological abnormalities were ever discovered.

Private physician statements show Mr. Williams was under treatment for hyperventilation syndrome in 1980. E1, P2. Additional records from 1981 to 1984 show he was treated and medicated for symptoms, which included: heat exhaustion, stomach disorders, and migraine headaches. E2, P2.

Mr. Williams applied for service connected disability compensation for Seizure Disorder in August 1982. E2. The claim was denied the following month without furnishing an evaluation. Id. The claim was reopened in November 1984 and the denial was continued the same month, again without providing a medical evaluation. Id. Mr. Williams requested an evaluation in January 1985 and again in February 1985, but was never scheduled. Id. The Board continued the denial in October 1985. E1. This reconsideration follows.

1. Error in Law – Denial Without Proper Evaluation

> It is the obligation of the Veterans Administration to assist a claimant in developing the facts pertinent to his claim and to render a decision which grants him every benefit that can be supported in law…
>
> 38 C.F.R. § 3.103(a), 37 FR 14780, July 25, 1972.

[1] Hereinafter "E_, P_"

> Where the reasonable possibility of a valid claim is indicated in any claim for disability compensation… a Veterans Administration examination will be authorized.
>
> 38 C.F.R. § 3.326(a)(1984).

> Any hospital report…from a recognized private institution…which contains descriptions, including diagnoses **and clinical and laboratory findings**…may be deemed to be the "Veterans Administration examination."
>
> 38 C.F.R. § 3.326(c)(1984) [emphasis added].

> Reexamination will be requested whenever evidence indicates there has been a material increase in disability since the last examination… It is required that at least one Veterans Administration examination be made in every case…
>
> 38 C.F.R. § 3.327(a)(b)(1984).

1982 Claim for Seizure Disorder

The Board failed to perform its statutory obligation to Mr. Williams when it denied service connection disability compensation in 1985 without providing an examination. Records show that the examination, relied upon by both the Regional Office and the Board, was hospital records dated August 6-10, 1982. E2-E3.

The applicable hospital records are inadequate for rating purposes, according to 38 C.F.R. § 3.326(c), and should not have been deemed a valid Veterans Administration examination. All records dated August 6-10, 1982, in total, contain only two (2) pages of actual information: an Inpatient Admission Registration, and a summary. E3, P3. The records are entirely void of clinical and laboratory findings, as required, and only contain general information. However, any specific information speaks not about the claimed service connected injury (Seizure Disorder) but rather a different injury, which was never adjudicated (heat intolerance). Id. In fact, the records show that the seizure activity

described as a "recent onset" was preceded by complaints of heat intolerance, which had been manifest for "six to twelve months." Id.

1985 Reopened Claim for Seizure Disorder

Mr. Williams asserts that the 2-page hospital report, which predates any claim for Seizure Disorder, lacks the necessary requirements to be considered a valid Veterans Administration examination, even for the September 1982 denial. However, the same is certainly inadequate to use in consideration for a reopened claim more than two (2) years later.

In his January 1985 Statement in Support of Claim, Mr. Williams said, "I request that I be furnished an examination to evaluate my claimed service-connected disabilities." E2, P5. However, the following month a Confirmed Rating Decision was issued, which indicated that "no examination" would be requested and that the examination being considered was the same inadequate hospital records from August 10, 1982, more than 2 years prior to the reopened claim. E2, P6. Moreover, the following month, on his VA Form 9, Substantial Appeal, Mr. Williams reiterated his desire to have a "complete diagnostic study" of his seizures and related in-service head injury. E2, P8. Again, no examination was authorized.

Informal Claim for Heat Intolerance and Mental Disorder

Mr. Williams contends that the Board committed legal error by considering the hospital records to be a valid Veterans Administration evaluation. However, if the

records are sufficient for rating purposes, the same should also have been utilized for purposes of informal claim(s) under 38 C.F.R. § 3.157(a) which states:

> A report of examination or hospitalization which meets the requirements of this section will be accepted as an informal claim for benefits…if the report relates to a disability which may establish entitlement. 41 FR 53797, Dec 9, 1976.

The same inadequate records used as the Veterans Administration evaluation contain as much, or more, information about heat intolerance; even offering evidence to show the condition predated any seizure activity. Supposing the questioned records are adequate for rating purposes, the same would necessarily be adequate to establish an informal claim for heat intolerance, which was never adjudicated and remains pending. 38 C.F.R. § 3.156(a).

Lastly, Mr. Williams contests any rebuttal that suggests the October 17, 1984 medical opinion by Dr. George West[2] was used in place of an actual Veterans Administration examination. First, all applicable rating decisions (deferred and confirmed) only indicate examination dates of August 6-10, 1982. E2. However, if concluded that the statement was sufficient for rating purposes, the same would be a valid informal claim for a mental disorder. Dr. West, not only opines that Mr. William's injuries result in emotional instability, he clearly attributes his "disabilities" not to "intemperance or willful misconduct but rather to be the product of his mental disability."

[2] Dr. West is the same physician that signed the August 6-10, 1982 hospital records.

Material Increase In Condition

Pursuant to § 3.327(a), Mr. Williams was entitled to, and should have received, an official Veterans Administration examination due to a "material increase in disability" since the first examination. Subsequent to the August 6-10, 1982 hospitalization, Mr. Williams was treated several times in the emergency room and was prescribed medications in 1983 and 1984. E1, P2. One such prescription, Dilantin, is a powerful Group 1 Antiarrhythmic/Hydantoin Anticonvulsant. The FDA has linked Dilantin to: severe allergic reactions, Multiorgan hypersensitivity, and Purple Glove Syndrome[3]. Moreover, Dilantin is often considered to be more powerful than morphine[4].

Pursuant to § 4.124a, Epilepsies Note (1), "when continuous medication is shown necessary for the control of epilepsy, the minimum evaluation will be 10 percent." 38 C.F.R. § 4.124a (1984). Mr. Williams does not raise this point to insist he should have received a 10 percent rating, however it does evidence VA's recognition and obligation to consider the need for medication as a material increase in disability. A Veterans Administration examination should have been authorized, but was not, and failure to do so necessarily amounts to a clear and unmistakable error of law.

2. Error in Law – Inadequate Review, Wrong Diagnostic Code

> For the application of this schedule, accurate and fully descriptive medical examinations are required, with emphasis upon the limitation of activity imposed by the disabling condition…it is thus essential, both in the examination and in the evaluation of disability, that each disability be viewed in relation to its history.
>
> 38 C.F.R. § 4.1 (1984).

[3] http://www.fda.gov/Safety/MedWatch/SafetyInformation/ucm243476.htm
[4] http://www.drugtalk.com/dilantin/

> It is the responsibility of the rating specialist to interpret reports in the light of the whole recorded history, reconciling the various reports into a consistent picture so that the current rating may accurately reflect the elements of the disability present…if the report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for evaluation purposes.
>
> 38 C.F.R. § 4.2 (1984).

> Every element in any way affecting the probative value to be assigned the evidence in each individual claim must be thoroughly and conscientiously studied by each member of the rating board in the light of established policies of the Veterans Administration to the end that decisions will be equitable and just as contemplated by the requirements of law.
>
> 38 C.F.R. § 4.6 (1984).

> …[E]valuations are based upon lack of usefulness…This imposes upon the medical examiner the responsibility of furnishing, in addition to the etiology, anatomical, pathological, laboratory and prognostic data required for ordinary medical classification, full description of the disability upon the person's ordinary activity.
>
> 38 C.F.R. § 4.10 (1984).

Mr. Williams contends that when applying applicable regulations found in Part 3 of Chapter 38 of the Codified Federal Regulations, he has demonstrated that the Board committed legal error, due to the lack of medical evaluation. Mr. Williams further contends that the same error continued and caused additional legal error under Part 4. Specifically, he was evaluated under Diagnostic Code 8910, General Epilepsy, when all evidence showed he should have been evaluated under 8914, Psychomotor Epilepsy or Non-Neurological Epilepsy.

38 C.F.R. § 4.124a states that, "a thorough study of all materials in §§ 4.121 and 4.122 of the preface and under the ratings for epilepsy is necessary prior to any rating action." In pertinent part, § 4.121 states, "when there is doubt as to the true nature of epilepiform attacks, neurological observation in a hospital adequate to make such a study

is necessary…frequency of seizures should be ascertained while under the ordinary conditions of life **(while not hospitalized)**" [Emphasis added]. However, no such observation was conducted for Mr. Williams and, in fact, the only report used for rating purposes was the report issued by the hospital. E3.

38 C.F.R. § 4.122 states that, "psychomotor epilepsy refers to a condition that is characterized by seizures and not uncommonly by a chronic psychiatric disturbance as well…abnormalities of mood or affect…sweating…rising feeling of warmth in the abdomen." Mr. Williams had medical records evidencing symptoms of mildly depressed mood, heat intolerance, and stomach disorders to name a few. E3-E4.

Moreover, § 4.122(b) states that, "a chronic mental disorder is not uncommon as an interseizure manifestation of psychomotor epilepsy" while § 4.125 serves as a constant reminder that, "the field of mental disorders represents the greatest possible variety of etiology, chronicity, and disabling effects."

When evaluating the claim in relation to the facts and history of both the claims and the claimant, as required under §§ 4.1 and 4.2, it is unclear how Mr. Williams would be evaluated under DC 8910 and not 8914. Against policy, there was not any comprehensive effort to determine the etiology of the seizures despite two (2) different requests by Mr. Williams. And over the course of 10 years, 4 different neurological evaluations were performed on Mr. Williams, which rejected any neurological etiology. At the same time, service records were positive for several examples of mental instability including: drug overdose, marital problems, apathy, and numerous hospitalizations. E4.

In fact, service records indicate that a psychiatrist was treating Mr. Williams once or twice a week while in service, E4, P4, because he was having difficulties caring for his

newborn daughter who was born with Down's syndrome. E4, P2-5. His Commanding Officer commented that he, "believe[s] [Williams] has a personel [sic] problem and emotional problems which require concentrated professional assistance…he may be suicidal…has responsibilities which are in excess of his ability to cope." E4, P8. However, that opinion came only one (1) year after Mr. Williams received a Letter of Commendation stating, "the military bearing, professionalism, and attention to detail you displayed is an example to be emulated by all." E4, P9.

CONCLUSION

WHEREFORE, for the foregoing reasons, veteran Leroy Williams claims Clear and Unmistakable Error in his 1985 Board decision denying entitlement to service connection for Seizure Disorder. Claimant prays that his motion be granted and his case be remanded for further development under 38 C.F.R. § 19.182.

Year of The Lord,

Jonathan B. Kelly
Attorney for Leroy Williams