No. _____

In The

Supreme Court of the United States

PAULINE GARCIA,

Petitioner,

v.

ROBERT WILKIE, Secretary of Veterans Affairs,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

William A. L'Esperance
Counsel of Record
COUNSELLOR AT LAW
P.O. Box 90668
Albuquerque, N.M. 87199
(505) 266-8482
walesperance@wwdb.org

Dated: January 31, 2019 ***Counsel for Petitioner***

*Gibson*Moore Appellate Services, LLC
206 East Cary Street ♦ P.O. Box 1460 (23218) ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

TABLE OF CONTENTS
Appendix

Page:

United States Court of Appeals for the Federal Circuit

PAULINE GARCIA,
Claimant-Appellant

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2018-1038

Appeal from the United States Court of Appeals for Veterans Claims in No. 15-3669, Chief Judge Robert N. Davis, Judge Coral Wong Pietsch, Judge William S. Greenberg.

Decided: November 5, 2018

WILLIAM L'ESPERANCE, Albuquerque, NM, argued for claimant-appellant.

MARTIN F. HOCKEY, JR., Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by ROBERT EDWARD KIRSCHMAN, JR., JOSEPH H. HUNT; BRIAN D. GRIFFIN, JONATHAN KRISCH, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

APPENDIX A

Before O'MALLEY, REYNA, and TARANTO, *Circuit Judges.*

TARANTO, *Circuit Judge.*

Teofila Garcia, the late husband of appellant Pauline Garcia, was a veteran of the United States Army. In 2002, he filed a claim with the Department of Veterans Affairs for disability benefits based on a mental disorder characterized by paranoia, which he asserted was connected to his military service. The Board of Veterans' Appeals denied his claim in 2006. After initially appealing to the Court of Appeals for Veterans Claims (Veterans Court), Mr. Garcia successfully moved to dismiss the appeal, and the Board's decision became final.

Mr. Garcia then collaterally challenged the 2006 Board decision through a motion contending that the Board had committed clear and unmistakable error (CUE) in that decision. The Board denied Mr. Garcia's CUE motion in 2010. In filings with the Board and the Veterans Court after the 2010 Board decision, Mr. Garcia—succeeded by Mrs. Garcia when her husband died—raised new allegations of CUE. The Veterans Court ultimately determined that those new CUE allegations made in the subsequent filings were barred by regulation. *Garcia v. Shulkin*, 29 Vet. App. 47 (2017). Mrs. Garcia appeals to this court. We reject Mrs. Garcia's two challenges to that determination and therefore affirm.

I

A

Mr. Garcia served in the United States Army from 1952 to 1954. The military's records of his medical treatment during service were among those destroyed in a fire in 1973 at the National Personnel Records Center in St. Louis, Missouri. The record of his medical examination upon leaving the service was not destroyed. That record

reveals a normal psychiatric state and, more generally, no severe illnesses or injuries.

Mr. Garcia first saw Dr. John Smoker, a private physician, in 1965 for a burn from a welding accident. In 1969, Dr. Smoker diagnosed Mr. Garcia with, and prescribed medication for, paranoid schizophrenia.

In 2002, Mr. Garcia submitted a claim for disability benefits to the Albuquerque regional office of the Veterans Benefits Administration of the U.S. Department of Veterans Affairs (VA), alleging service connection of disability-causing paranoid schizophrenia. The regional office denied the claim. Mr. Garcia appealed to the Board of Veterans' Appeals, which held a hearing in September 2004 at which both Mr. Garcia and Mrs. Garcia gave testimony. In December 2004, the Board remanded the case to the regional office for a VA psychiatric examination, directing the examiner to "provide a current diagnosis and indicate whether any mental disorder currently shown is characterized by paranoia" and to state "the medical probabilities that it is attributable to the veteran's period of military service." J.A. 130.

The Appeals Management Center, processing the remand, requested a psychiatric examination on January 4, 2005. A VA examiner, Dr. Greene, conducted the examination on February 3, 2005. Dr. Greene's report leaves unclear if she looked at Mr. Garcia's claim file and medical records, but it shows that she took a medical history from Mr. Garcia, who stated that he saw a psychiatrist twice for paranoia while in the service. Dr. Greene found that Mr. Garcia met the "diagnostic criteria for the diagnosis of schizophrenia, paranoid type, for which he has been treated for many years and *claims he was first seen for paranoia in the service* and that as likely as not this disorder started in the service *per the history given*." J.A. 57 (emphases added).

In October 2005, the Appeals Management Center, upon receiving and reading the examination report, returned Mr. Garcia's file to Dr. Greene with a request that she "please state in [her] report that [she has] reviewed the claims folder[;] if not we run the risk of asking for a repeat examination and/or addendum." J.A. 58 (capitalization omitted). The Center also asked Dr. Greene to "provide a rationale for [her] finding" that "as likely as not this disorder started in the service per the history given." J.A. 59, 57. The Center noted that such a finding was not usually associated with service records like those of Mr. Garcia, which revealed that he had been promoted, had not lost time for being absent without leave or confinement, had been awarded the Good Conduct Medal, and had not been barred from further service or enlistment after successfully completing his full, two-year term of service. *Id*. at 59. According to the Center, people with paranoid schizophrenia, "in service, are often identified, wrongly, as discipline problems" and their records often show grade or rank reductions, frequent absence without leave, confinement, early discharge, and a bar on re-enlistment. *Id.* The Center advised that Dr. Greene consider the supporting rationale for her finding that Mr. Garcia's paranoid schizophrenia manifested itself during service in 1952–54 and stated that her rationale "must include studies, facts, treatment and other evidence or information that shows the progression of this disability over time." *Id.*

A week later, Dr. Greene responded by adding a one-sentence addendum to her initial report: "After review of the [claim] file, [I] now feel it is impossible to say, without resorting to mere speculation, as to whether this veteran's schizophrenia, paranoid type actually started in Service, without more documentation and records." J.A. 60. The Center then issued a Supplemental Statement of the Case, in which it "confirmed" the previous denial of service connection for Mr. Garcia's condition. J.A. 127.

APPENDIX A

On appeal to the Board once again, Mr. Garcia, through the American Legion as his non-attorney representative, submitted a brief arguing that Dr. Greene's medical report and addendum did not take account of other record evidence that supported his claim for benefits. The brief refers to and quotes from the Appeals Management Center's October 2005 request to Dr. Greene, *see* J.A. 130–31; *id.* at 131 (quoting J.A. 59), but it contains no challenge to that request as improperly having led Dr. Greene to change her conclusion. The Board denied Mr. Garcia's claim in October 2006. Mr. Garcia—who was represented by counsel at that time and has been ever since—appealed that decision to the Veterans Court. But he soon moved to dismiss the appeal, and the Veterans Court granted his motion.

B

In August 2007, Mr. Garcia initiated a collateral challenge to the Board's denial of his claim for disability benefits. He sent the regional office a form alleging "[c]lear and unmistakable error" in that the "[c]orrect facts were not before the Board in 2004 and 2006." J.A. 71 (citing 38 C.F.R. §§ 3.105(a), 20.1403, 20.1404). He "request[ed] [a] specific ruling on C.U.E.," J.A. 70, but the regional office determined that it did not have jurisdiction to decide his CUE claim because "[r]egional offices do not have the authority to overturn a Board . . . decision in the absence of new and material evidence," J.A. 67. Mr. Garcia then asked for the matter to be sent to the Board.

On July 29, 2008, Mr. Garcia submitted to the Board a more detailed CUE motion challenging the Board's 2006 decision denying his claim of service connection of his

paranoid schizophrenia.[1] He argued, among other things, that the record supported "several independent medical conclusions" of service connection, that he was entitled to more assistance from the VA in light of the loss of his medical records in the 1973 fire, and that he was entitled to the benefit of the doubt on the issue of service connection "[g]iven the evidence available at the time, including the testimony of [Mr. Garcia] and the reports of various medical providers." J.A. 63–65. He did not argue that the Appeals Management Center had improperly pressured Dr. Greene to change her service-connection conclusion or that his right to constitutional due process had been violated. Nor did he point to or rely on the testimony that Mrs. Garcia gave at the 2004 Board hearing.

The Board denied the CUE motion in April 2010. It found, among other things, that "there was no competent evidence, to include lay testimony, establishing a continuity of symptomatology since service." J.A. 76. In July 2010, Mr. Garcia filed a motion to reconsider under 38 U.S.C. § 7103 and 38 C.F.R. §§ 20.1000, 20.1001, challenging that finding. He stated that "counsel [in earlier filings] may have not adequately notified the Board of portions of the record which bear directly upon the C.U.E. issue at bar," J.A. 18—specifically, Mrs. Garcia's 2004 Board testimony, which he claimed indicated the existence of a paranoia disorder when the two began dating soon after he returned from service. Acting under 38 C.F.R. §§ 20.102(a) and 20.1001(c), the Board's Deputy Vice Chairman denied the motion to reconsider, concluding that, although Mrs. Garcia's testimony may have

---

[1] Neither party here suggests that the legal issues presented to us call for distinguishing Mr. Garcia's 2008 filing with the Board from his 2007 filing originally made with the regional office. For simplicity, we refer to the 2008 filing as encompassing both.

affected the weighing of evidence, including contrary evidence, any failure to consider her testimony did not constitute clear and unmistakable error.

Mr. Garcia appealed the Board's denial of his CUE motion to the Veterans Court. At that point, Mr. Garcia argued, for the first time, that the Appeals Management Center had denied him due process by "secretly litigat[ing] against" him in "attack[ing]" Dr. Greene's initial finding regarding service connection and "suggest[ing] what findings a medical examiner should make." J.A. 93–94. But the Veterans Court determined that the allegation of a due process violation had not been presented to the Board, so it dismissed Mr. Garcia's appeal, for want of jurisdiction, insofar as it made this allegation.

Mr. Garcia also argued to the Veterans Court that the Board committed clear and unmistakable error by not adequately considering Mrs. Garcia's 2004 testimony. The Secretary argued that Mr. Garcia had not properly presented to the Board this allegation of clear and unmistakable error. But the Veterans Court, citing Mr. Garcia's motion to reconsider, "set aside" the 2010 Board decision and remanded the case to the Board for full consideration of the allegation in the first instance. J.A. 34.

On remand, the Board in October 2012 ruled against the allegation—now made by Mrs. Garcia (substituted for Mr. Garcia, who had passed away)—of clear and unmistakable error based on the asserted failure to consider Mrs. Garcia's 2004 testimony. In early 2013, Mrs. Garcia submitted a motion to reconsider the 2012 Board decision. She contended that the 2006 Board decision as to service connection would have been manifestly different if the Board had considered her 2004 testimony. In mid-2013, the Deputy Vice Chairman denied the motion for reconsideration.

The early-2013 filing that includes the motion to reconsider also includes a motion to vacate the 2012 Board

decision. In that motion, Mrs. Garcia contended that the 2012 decision failed to address what she asserted was the "obvious denial" of due process when, in 2005, the Appeals Management Center returned Dr. Greene's examination report for further consideration, leading to a different opinion by Dr. Greene. J.A. 37. In mid-2013, the Board denied the motion to vacate, treating it as governed by 38 C.F.R. § 20.904 ("Vacating a decision").

Mrs. Garcia appealed the Board's October 2012 decision to the Veterans Court. She again argued that the Appeals Management Center's actions regarding Dr. Greene violated her late husband's right to due process and that the Board's failure to consider her testimony was clear and unmistakable error. The Veterans Court again found that the allegation of a due process violation had not been properly presented to the Board. And it again remanded the matter of Mrs. Garcia's testimony for further consideration.

In that remand, the Board again ruled against the allegation of clear and unmistakable error based on Mrs. Garcia's 2004 testimony. Mrs. Garcia appealed that decision to the Veterans Court. She again pressed both the due process and 2004 testimony allegations of clear and unmistakable error.

The Veterans Court found that neither allegation had been presented to the Board in Mr. Garcia's CUE motion or before the Board issued its decision on that CUE motion in 2010. *Garcia*, 29 Vet. App. at 54. On that basis, the Veterans Court ruled that a governing regulation, 38 C.F.R. § 20.1409(c), as construed in governing precedent, "requires that all possible errors in a final Board decision be raised at the time a motion for revision of that Board decision based on CUE is filed," barring "later CUE challenges to [that] Board decision." *Garcia*, 29 Vet. App. at 54. For that reason, the Veterans Court concluded that the Board lacked jurisdiction to entertain either allega-

tion and that the Veterans Court itself therefore lacked jurisdiction, and it dismissed the appeal with prejudice. *Id.* at 53, 56.

Mrs. Garcia timely appealed to this court. We have jurisdiction pursuant to 38 U.S.C. § 7292.

II

This court has jurisdiction to review the Veterans Court's legal determinations, 38 U.S.C. § 7292(d)(1), and to review and decide any challenge to the validity or interpretation of a statute or regulation "to the extent presented and necessary to a decision," *id.* § 7292(c). But this court does not have jurisdiction to review the Veterans Court's factual determinations, or its application of law to the facts of a particular case, "[e]xcept to the extent that an appeal under this chapter presents a constitutional issue." *Id.* § 7292(d)(2).

A

As this court explained in an en banc decision years ago, Congress has provided for two mechanisms for a claimant like Mr. Garcia to seek to revise a Board denial of a claim for disability benefits after the denial has become final. *See Cook v. Principi*, 318 F.3d 1334, 1337 (Fed. Cir. 2003) (en banc). One is through showing new and material evidence. 38 U.S.C. § 5108; *see* 38 C.F.R. § 3.156(a). The second is through showing clear and unmistakable error. 38 U.S.C. § 7111; *see* 38 C.F.R. § 20.1400. This case involves the latter form of collateral attack—a request for revision of a Board decision based on clear and unmistakable error under § 7111, which provides, in pertinent part:

> (a) A decision by the Board is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised. . . .

> (e) Such a request shall be submitted directly to the Board and shall be decided by the Board on the merits . . . .

The regulations pertaining to CUE motions to the Board, contained in 38 C.F.R. subpart O, §§ 20.1400–1411, set forth several requirements that are relevant here. *First*: The substantive standard for relief is high. "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." 38 C.F.R. § 20.1403(a); *see also id.* § 20.1403(c) ("To warrant revision of a Board decision on the grounds of clear and unmistakable error, 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 cannot be clear and unmistakable." (emphasis added)).

Second: The pleading requirements for a CUE motion are demanding:

> Specific allegations required. The 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 why the result would have been manifestly different but for the alleged error. Non-specific allegations of failure to follow regulations or failure to give due process, 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 the requirements set forth in this paragraph shall

> be dismissed without prejudice to refiling under this subpart.

Id. § 20.1404(b). Pursuant to that regulation, this court has ruled that "each 'specific' assertion of CUE constitutes a claim that must be the subject of a decision by the [Board] before the Veterans Court can exercise jurisdiction over it." *Andre v. Principi*, 301 F.3d 1354, 1361 (Fed. Cir. 2002); *see* 38 U.S.C. §§ 7252, 7261. CUE motions, unlike filings in direct appeals, are not liberally construed; instead, the regulations governing CUE motions "place the onus of specifically raising each issue on the claimant." *Robinson v. Shinseki*, 557 F.3d 1355, 1360 (Fed. Cir. 2009) (citing § 20.1404(b)); *see also Andrews v. Nicholson*, 421 F.3d 1278, 1283 (Fed. Cir. 2005) (requirement to liberally construe pleadings does not apply to CUE motions filed by counsel).

Third: Under 38 C.F.R. § 20.1409, a regulation adopted pursuant to 38 U.S.C. § 501(a) and generally upheld in *Disabled American Veterans v. Gober*, 234 F.3d 682, 702 (Fed. Cir. 2000), a claimant may not freely file multiple CUE challenges to the same Board decision regarding a particular claim for benefits. Section 20.1409(a) first identifies what a "final" decision on a CUE motion is: "A [Board] decision on a motion filed by a party or initiated by the Board pursuant to [subpart O, 38 C.F.R. §§ 20.1400–1411, governing CUE challenges to Board decisions] will be stamped with the date of mailing on the face of the decision, and is final on such date." 38 C.F.R. § 20.1409(a); *see also id.* § 20.1409(b) (certain dismissals without prejudice and referrals of CUE motions to a regional office are not "final decision[s] of the Board" under § 20.1409). Section 20.1409(c) then states an anti-multiplicity rule:

> Once there is a final decision on a motion under this subpart relating to a prior Board decision on an issue, that prior Board decision on that issue is

> no longer subject to revision on the grounds of clear and unmistakable error. Subsequent motions relating to that prior Board decision on that issue shall be dismissed with prejudice.

This court has approved the Secretary's reading of § 20.1409(c), a rule adopted in 1998, to "permit[] only one CUE challenge to a Board decision on any given disability claim." *Hillyard v. Shinseki*, 695 F.3d 1257, 1260 (Fed. Cir. 2012) (deferring to agency explanation of § 20.1409(c) in *Proposed Rules*, 63 Fed. Reg. 27,534, 27,538 (Dep't of Veterans Affairs May 19, 1998), as a reasonable interpretation, and holding that the regulation barred the claimant from filing a second CUE motion after the Board's decision on the claimant's first CUE motion became final, even though the allegations of error differed).

B

On appeal, Mrs. Garcia argues that the Veterans Court erred in holding that the Board was barred by regulation from considering the allegations of clear and unmistakable error now at issue (concerning constitutional due process and Mrs. Garcia's 2004 testimony) because she (more precisely, her late husband) did not present those CUE allegations to the Board in the 2008 CUE motion itself or at any time before the Board's 2010 decision on that motion. We address only the two focused challenges to the Veterans Court's ruling that Mrs. Garcia presents here. We reject those challenges.

We note that Mrs. Garcia does not present any challenge within this court's jurisdiction under 38 U.S.C. § 7292(c) or (d)(1) to the Veterans Court's interpretation of § 20.1409(c) as reaching beyond the situation of a separate, new CUE motion filed after a Board decision on a first CUE motion attacking the same claim determination. That was the situation in *Hillyard*—where, in fact, the second CUE motion was filed after the Board's decision on the first CUE motion became final in the strong

sense that available appellate direct review of the decision was complete. 695 F.3d at 1258 (explaining that, after the Board denied the first CUE motion and the Veterans Court affirmed, the Board could not later entertain a second CUE motion attacking the same disability determination by the Board).[2] *Hillyard* thus had no occasion to interpret the regulation's application to other situations. Indeed, the court in *Hillyard* was addressing a different question, stating that the appeal presented "a solitary legal question: what the term 'issue' means in 38 C.F.R. § 20.1409(c)." *Id.*

Mrs. Garcia does not challenge the interpretation of § 20.1409(c) as reaching various situations where just one formal CUE motion is filed. One such situation involves CUE allegations that are presented in the continuing proceedings on the initial motion itself, but only after the motion was filed. *Garcia*, 29 Vet. App. at 54. As an example of that situation, the new allegations might be presented in the proceedings on the initial CUE motion after the Board issues a "final" decision on the initial motion under § 20.1409(a) and after that decision is later set aside on appeal and the matter remanded. Any questions about, for example, the availability of amendments to a CUE motion during the Board's consideration, or on

---

[2] *See* Claimant-Appellant's Br., *Hillyard v. Shinseki*, No. 2011-7157, 2011 WL 5561120, at *2–3 (Fed. Cir. Oct. 20, 2011) (stating that Mr. Hillyard filed a first CUE motion in 2001, the Board denied that motion, the Veterans Court affirmed the Board's denial in 2003, Mr. Hillyard filed an appeal to the Federal Circuit that he then withdrew, and Mr. Hillyard filed his second CUE motion several years later, in 2006).

remand after the Board's decision is set aside, are not before us.[3]

1

Regarding the alleged due process violation, we limit our ruling to the situation presented here: undisputed facts demonstrate that the allegation could have been, but was not, presented in the 2008 CUE motion. The parties agree, and the record clearly shows, that Dr. Greene's initial examination report, the Appeals Management Center's follow-up request, and Dr. Greene's addendum were provided or were available to Mr. Garcia in 2006, at the time he submitted his brief to the Board in support of his claim for benefits. Oral Arg. at 5:40–6:00; *id.* at 11:42–12:00; *see* J.A. 130–32 (2006 brief on behalf of Mr. Garcia stating that Dr. Greene's report and addendum are part of the claim file and quoting from the Center's follow-up request). The parties also do not dispute that Mr. Garcia first alleged the constitutional due process violation in 2011 in his appeal to the Veterans Court of the Board's 2010 decision denying his CUE motion. *See* Garcia Br. 2; VA Br. 8; J.A. 9–10 (Veterans Court noting that the parties did not dispute this point); *see also* J.A. 93 (Mr. Garcia's 2011 brief to Veterans Court). In these circumstances, the Veterans Court properly found that Mr. Garcia did not raise a due process challenge in his initial CUE motion or, indeed, until after the Board ruled on that motion.

---

[3] Mrs. Garcia also does not challenge the Veterans Court's ruling that it lacked jurisdiction to review the denials of the motions to reconsider and the motion to vacate. *Garcia*, 29 Vet. App. at 56 (relying on *Mayer v. Brown*, 37 F.3d 618, 619 (Fed. Cir. 1994) (discussing motions to reconsider), and *Harms v. Nicholson*, 20 Vet. App. 238, 243 (2006) (discussing motions to vacate)).

The Veterans Court drew the conclusion that the allegation of a due process violation was no longer permitted at the time Mr. Garcia presented it. According to the Veterans Court, that conclusion follows from 38 C.F.R. § 20.1409(c)'s bar on presenting a CUE challenge regarding a claim for benefits where that challenge was omitted from an earlier-filed CUE motion regarding the same claim for benefits. *Garcia*, 29 Vet. App. at 54.

Mrs. Garcia makes only one argument against the Veterans Court's conclusion as to the due process allegation. She contends that a constitutional challenge is special and simply is not subject to the rule against successive allegations of CUE in the same underlying Board decision. We see no sound basis for adopting the suggested exception.

In *Cook*, the en banc court held that the principles of finality and res judicata generally apply to a claim determination by the VA. 318 F.3d at 1336–37; *see Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991) ("We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality."). Congress may create exceptions to the finality of a claim determination, as it did for Board determinations upon a showing of (1) new and material evidence, 38 U.S.C. § 5108, or (2) CUE, *id.* §§ 5109A, 7111. But the court explained in *Cook* that there is no "third exception" even for "grave procedural error." 318 F.3d at 1337, 1340–41, 1341 n.9.[4]

---

[4] The final VA claim determination at issue in *Cook* was that of a regional office, because the claimant in that case did not appeal the regional office's determination. 318 F.3d at 1335–36. But the reasoning in *Cook* applies equally to a final determination of the Board. *See id.* at

APPENDIX A

Adopting Mrs. Garcia's proposal to exempt procedural constitutional challenges from all CUE constraints, even those concerning timing, would run counter to *Cook*'s rulings. Mrs. Garcia has not established any inherent limitation on "finality" applicable here or the availability of a procedural vehicle other than a CUE motion as a basis for her assertion. (She does not argue new and material evidence.) And we need not explore the broad question whether, after *Cook*, there could be a constitutional basis for allowing presentation of some due process allegations to revise otherwise-final VA decisions without proceeding by way of a CUE motion or a motion based on new and material evidence. Even if there could be, which we need not say, there is no such basis in this case for overriding the CUE regulation on timely presentation of challenges. The particular due process challenge at issue here was readily available to Mr. Garcia at the time of the 2008 CUE challenge. We see no constitutional difficulty in the regulation's channeling of an available CUE challenge on this basis to the initial CUE motion, with CUE relief on this basis not thereafter available. *See United States v. Mezzanatto*, 513 U.S. 196, 200–01 (1995) (constitutional arguments may be waived); *Singleton v. Shinseki*, 659 F.3d 1332, 1334 n.2 (Fed. Cir. 2011) (same).

Mrs. Garcia contends that this court's decision in *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009), issued several years after *Cook*, suggests that *Cook* is no longer good law. The court in *Cushman* reviewed a collateral challenge to a VA claim determination and concluded

---

1337 (noting the same two statutory exceptions apply to the finality of decisions by the Secretary and by the Board); *id.* at 1339 (explaining the purpose of the rule of finality and Congress's understanding of that rule in enacting the statutes codifying CUE challenges to both Secretary and Board determinations).

that the presentation of an improperly altered medical record in the original agency proceeding violated the veteran's constitutional right to due process. *Id.* at 1291. In assessing that claim, the court stated that it "ha[d] jurisdiction and authority to consider a free-standing constitutional issue independently from the CUE framework typically applicable to appellate review of veterans' claims." *Id.* at 1296 (citing *In re Bailey*, 182 F.3d 860, 869–70 (Fed. Cir. 1999)).

We do not read that statement to mean what Mrs. Garcia urges—that a constitutional challenge is generally free of the regulatory timely-presentation limits that channel CUE challenges as an exception to finality principles. Most specifically, the statement does not address timely-presentation limits. That is not surprising: there was no timeliness issue in *Cushman*. The court observed that "[i]t [was] not disputed that [Mr. Cushman's] free-standing due process claim was timely raised." *Id.* at 1298 n.2; *see also id.* at 1294 (noting statement by government counsel in earlier proceeding that "Mr. Cushman would be free to raise those claims [including the due process claim] before the Board").

Beyond that, nothing in *Cushman* addresses or seeks to distinguish (much less purports to modify) *Cook*'s en banc ruling as to the limited avenues for collateral attacks on otherwise-final VA claim determinations. There was no issue about Mr. Cushman having proceeded outside the authorized avenues: Mr. Cushman raised his due process contention within a CUE challenge that the government accepted as proper. *Id.* at 1294. The court's citation to *In re Bailey* for the reference to a "free-standing constitutional issue" merely pointed to *Bailey*'s characterization of such an issue as "one not also involving a challenge to the interpretation or validity of a statute or regulation" but that "otherwise meets the limitations of the jurisdictional statute [38 U.S.C. § 7292]." *Bailey*, 182 F.3d at 869–70. The court later

noted Mr. Cushman's argument "that the burdens of proof applicable to CUE claims do not apply to his free-standing due process claim" and "agree[d] that the burdens of proof typically applicable to due process claims also apply to such claims raised in the context of veteran's benefits." *Cushman*, 576 F.3d at 1299 n.3. But that statement requires no more than applying the normal constitutional "burdens of proof" for disturbing the results of an adjudication based on due process defects, even when the issue is raised within a CUE challenge. It does not question the rules that channel such collateral challenges within defined limits where, as here, there is no separate due process problem with adhering to those limits.

For those reasons, we reject Mrs. Garcia's challenge to the Veterans Court's application of 38 C.F.R. § 20.1409(c) to bar her due process allegation of CUE.[5]

2

As for the CUE allegation based on Mrs. Garcia's 2004 testimony, Mrs. Garcia makes just one argument: that this allegation was actually presented in the initial CUE motion. She relies on that motion's statement that the "[c]orrect facts were not before the Board in 2004 and 2006." J.A. 71.

---

[5] The government argues that *Andre*, 301 F.3d 1354, separately deprived the Veterans Court of jurisdiction over Mrs. Garcia's due process claim. We do not reach that argument. The Veterans Court decision before us does not rely on *Andre*, and we affirm based on the § 20.1409(c) ground on which the Veterans Court relied. We note that, as this court explained in *Hillyard*, the *Andre* case did not involve § 20.1409(c) or a CUE challenge to a Board decision, but instead involved a CUE challenge to a regional office decision, to which § 20.1409(c) does not apply. *Hillyard*, 695 F.3d at 1260.

This argument, however, is a challenge to the Veterans Court's factual determination that the particular allegation of CUE—this one not a constitutional challenge—was omitted from the initial CUE motion, having been presented only in July 2010 on a motion to reconsider the Board's April 2010 denial of the motion. *Garcia*, 29 Vet. App. at 54. We do not have jurisdiction to review that factual determination regarding a non-constitutional issue. *See* 38 U.S.C. § 7292(d)(2)(A); *Comer v. Peake*, 552 F.3d 1362, 1372 (Fed. Cir. 2009) ("Whether a veteran has raised a particular [CUE challenge] is a factual determination, outside the purview of our appellate authority."); *see also Kernea v. Shinseki*, 724 F.3d 1374, 1382 (Fed. Cir. 2013) (no jurisdiction to consider whether claimant raised a valid CUE challenge because that "would require us to review and interpret the contents of her [CUE motion]"). We have before us no challenge to the application of § 20.1409(c) to bar the allegation regarding Mrs. Garcia's 2004 testimony if we accept, as we must, the Board's factual findings about when that allegation was first presented.

III

We therefore affirm the Veterans Court's decision.

AFFIRMED

Costs

No costs.

APPENDIX A

United States Court of Appeals for the Federal Circuit

PAULINE GARCIA,
Claimant - Appellant

v.

ROBERT WILKIE, Secretary of Veterans Affairs,
Respondent - Appellee

18-1038

Appeal from the United States Court of Appeals for Veterans Claims in case No. 15-3669 Judge William S. Greenberg, Judge Coral Wong Pietsch, Chief Judge Robert N. Davis

---

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

APPENDIX B

November 5, 2018

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

APPENDIX B

Not Published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO: 15-3669

PAULINE GARCIA, APPELLANT,

V.

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

JUDGMENT

The Court has issued a decision in this case. The time allowed for motions under Rule 35 of the Court's Rules of Practice and Procedure has expired.

Under Rule 36, judgment is entered and effective this date.

Dated: August 31, 2017

FOR THE COURT:

GREGORY O. BLOCK
Clerk of the Court

By: /s/ Michael V. Leonard
Deputy Clerk

Copies to:

William A. L'Esperance, Esq.

VA General Counsel (027)

APPENDIX C

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-3669

PAULINE GARCIA, APPELLANT,

V.

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

On Appeal from the Board of Veterans' Appeals

(Argued June 26, 2017 Decided August 9, 2017)

William A. L'Esperance, of Albuquerque, New Mexico, for the appellant.

Omar Yousaf, with whom *Leigh A. Bradley*, General Counsel; *Mary Ann Flynn*, Chief Counsel; and *Kenneth A. Walsh*, Deputy Chief Counsel, all of Washington, D.C., were on the brief for the appellee.

Before DAVIS, *Chief Judge*, and PIETSCH and GREENBERG, *Judges*.

DAVIS, *Chief Judge*: The appellant, Pauline Garcia, appeals through counsel a May 19, 2015, Board of Veterans' Appeals (Board) decision that found no clear and unmistakable error (CUE) in an October 2006 Board decision that denied her late husband's claim for benefits for a mental disorder characterized by paranoia. Record (R.) at 2-23. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. § 7252(a). The matter was referred to a panel of the Court on May 11, 2017, to resolve a constitutional question. For the reasons that follow, the Court will dismiss this appeal with prejudice.

I. BACKGROUND

Mrs. Garcia's husband, Teofilo O. Garcia, served on active duty in the U.S. Army from August 1952 to August 1954. His August 1954 separation examination revealed that his psychiatric state was normal.

The record contains a November 1981 summary of Mr. Garcia's medical history from his private physician, John Smoker, M.D. Dr. Smoker's summary reveals that he first treated Mr. Garcia in November 1965 for a burn to the eyes from a welding mishap. The summary states that

Dr. Smoker first treated Mr. Garcia for paranoia in August 1969, at which time he prescribed medication.

In July 2002, Mr. Garcia filed a claim for benefits for a "history of paranoia." R. at 909. In July 2003, a VA regional office (RO) denied the claim. Mr. Garcia filed a Notice of Disagreement (NOD) with that decision and ultimately appealed to the Board.

In July 2003, VA received a letter from Dr. Smoker stating that he had treated Mr. Garcia from 1965 to 1998, and that his treatment included medication for paranoid schizophrenia. Also in July 2003, VA received a copy of a letter from private physician Byrch Williams, M.D., to Mr. Garcia, indicating that he had been treating Mr. Garcia "almost exclusively" since 1998. R. at 962. Dr. Williams stated:

> Dr. Smoker first mentions your paranoia on 8/5/1969 and rapidly increased a dose of Mellaril to 100 milligrams 4 times a day. Paranoia that requires this much medicine often begins in teenage years and rarely when someone is in their late 30's[,] as you were in 1969. I think this is consistent with your history of developing paranoia while you were in the service.

Id.

In September 2004, Mr. and Mrs. Garcia testified at a Board hearing. Mrs. Garcia stated that she had known Mr. Garcia since she was 14 years old and began dating him shortly after he left service. R. at 500. She reported that Mr. Garcia would tell her that people were following him, even when there was no one around, and that he would accuse her of things that he believed were true but were not. *Id.* She stated that she spoke to her own doctor who then asked to see Mr. Garcia, and "that's when I learned about paranoia." *Id.*

In December 2004, the Board remanded Mr. Garcia's claim for further development, including a VA psychiatric examination.

In February 2005, Mr. Garcia underwent the requested examination, conducted by Cheryl Greene, who is identified as the "examining physician." R. at 470. Dr. Greene stated that Mr. Garcia's claims file and medical records "were available to review prior to this examination," but did not state that she had, in fact, reviewed them. *Id.* She opined that Mr. Garcia met the diagnostic criteria for paranoid schizophrenia, "for which he has been treated for many years and claims he was first seen for paranoia in the service and that as likely as not this disorder started in service per the history given." R. at 471.

APPENDIX D

In October 2005, the Appeals Management Center (AMC) found Dr. Greene's report inadequate and issued the following examination inquiry:

> Return this case to Dr. Green[e] . . . for the reasons indicated below. Ensure that the case folder is provided and reviewed with a comment to the same included in the opinion report.
>
> Opinion Request
>
> The February 3, 2005[,] mental examination of this veteran found that it is as likely as not that his schizophrenia, paranoid[,] started in service per the history given. Please provide a rationale for this finding. The veteran's service history is limited due to the los[s] of records in the 1973 fire at the National Personnel Records Center, but available documentation does not manifest the type of service record common to personnel with his condition.
>
> He successfully completed two years of service, the full term of service for a draftee. His DD Form 214 (Separation Form) shows: he was promoted; he had no lost time for being absen[t] without leave (AWOL) or confinement; and he was awarded the Good Conduct Medal. Collectively[,] those facts indicate good discipline in service. Also, no bar to further service or reenlistment is annotated on the DD 214.
>
> Personnel with his condition[] in service[] are often identified, wrongly, as discipline problems until a mental condition is di[a]gnosed. This fact is usually manifest by having frequent discipline problems resulting in grade or rank reductions; frequent AWOL; confinement; early administrative[] discharged; and bars to reentry into the military annotated on the DD Form 214. His records reflect none of those things.
>
> The supporting rationale for concluding schizophrenia, paranoid[,] pre-existed and/or manifested in service must include studies, facts, treatment[,] and other evidence or information that shows the progression of this disability over time.

R. at 451.

Later that month, Dr. Greene provided an addendum in which she wrote only: "After review of [claims] file, [I] now feel it is impossible to say, without resorting to mere speculation, as to whether this veteran's schizophrenia, paranoid type[,] actually started in [s]ervice, without more documentation and records." R. at 449.

In September 2006, Mr. Garcia filed, through a veterans service organization, a brief outlining his arguments to the Board. Of note, Mr. Garcia's nonattorney representative wrote:

> From the record, we note the processing of the remand by the [AMC], Washington, D.C.[,] and the AMC Resource Center (RC), Cleveland, Ohio.

APPENDIX D

. . .

> The February 2005 VA examiner professed an opinion of service relationship of the diagnosed paranoid schizophrenia, "per the history given." The VAE report was returned to obtain "a rationale for this finding[]" and to obtain a specific declaration of claims file review.

R. at 426, 427.

In October 2006, the Board denied Mr. Garcia's claim for benefits. Mr. Garcia, through his current counsel, appealed to the Court, but subsequently moved to dismiss his appeal. The Court granted that motion in May 2007.

In July 2008, Mr. Garcia, through current counsel, filed a motion for revision of the October 2006 Board decision on the basis of CUE. Specifically, he argued that revision of the decision was required because (1) the Board had not afforded sufficient probative weight to several favorable independent medical conclusions; (2) he was entitled to "a greater duty to assist" because his records were destroyed in the 1973 National Personnel Records Center fire; and (3) given the evidence available at the time of the October 2006 Board decision, the Board should have given him the benefit of the doubt. R. at 371-73.

In April 2010, the Board specifically addressed these three allegations and denied Mr. Garcia's motion for revision of the October 2006 Board decision. In July 2010, Mr. Garcia filed a motion for reconsideration of the April 2010 Board decision, arguing that the Board's failure in October 2006 to consider Mrs. Garcia's September 2004 testimony was also CUE. The Board denied that motion in August 2010, finding that the Board in October 2006 specifically considered Mrs. Garcia's testimony. Mr. Garcia appealed to the Court.

In December 2011, the Court issued a memorandum decision affirming the Board's finding of no CUE in the October 2006 Board decision based on Mr. Garcia's three initial allegations of CUE, but found that Mr. Garcia's fourth allegation—that the Board in October 2006 failed to consider his wife's September 2004 Board hearing testimony—was a distinct allegation of CUE that the Board was required to address. More specifically, the Court stated that "[t]his is a rare instance where an appellant may demonstrate that the correct facts were not before the Board based on the evidence of record." R. at 214 (citing *Caffrey v. Brown*, 6 Vet.App. 377, 384 (1994) (Kramer, J., concurring)). The Court continued: "Because the 2006 [Board member] misstated the obvious content of the record, the facts known at the time were not really before him." R. at 215.

APPENDIX D

The Court concluded that the Board's conclusion in April 2010 that the Board in October 2006 plainly considered and rejected Mrs. Garcia's testimony lacked adequate reasons or bases. Accordingly, that matter alone was remanded.

The Court in December 2011 also acknowledged that Mr. Garcia "devote[d] considerable briefing effort decrying what he consider[ed] inappropriate influence exerted on [Dr. Greene] by the rating specialist and the [AMC]." R. at 212. The Court further stated: "The appellant discovered the involvement of the rating specialist and [AMC] only when reviewing the record on appeal." R. at 213. The Court found, however, that Mr. Garcia had "not argue[d] that this sequence of events constituted a violation of constitutional due process," but a failure of VA's enhanced duty to assist in cases where a claimant's service records were destroyed in the National Personnel Records Center fire. *Id.* The Court determined that, as an allegation of CUE, the constitutional theory could not succeed because it had not presented to the Board. The Court therefore dismissed Mr. Garcia's appeal "insofar as it advance[d] a theory of CUE based on the behavior of the rating specialist and [AMC] with regard to the VA examination report of February 2005." *Id.*

In January 2012, Mr. Garcia died. Later that year, Mrs. Garcia was substituted for her husband in this matter.

In October 2012, the Board explained that, in light of the Court's December 2011 determination that the correct facts were not before the Board in October 2006, the only remaining question regarding the fourth allegation of CUE[1] was whether the Board's consideration of Mrs. Garcia's September 2004 testimony in October 2006 would have changed the outcome of the decision. The Board found that there was both positive and negative evidence of continuity of symptoms since service, and, therefore, the matter was one related to the weight of the evidence. The Board correctly noted that an error in the weight afforded the evidence by the Board does not rise to the level of CUE. R. at 158; *see Russell v. Principi*, 3 Vet.App. 310, 313-14 (1992) (en banc) (stating that the alleged error must be "undebatable," not merely "a disagreement as to how the facts were weighed or evaluated"). The Board also considered Mrs. Garcia's testimony along with the other evidence of record and concluded that it was not "absolutely clear" that, but for the

[1] The Board readjudicated the three original allegations of CUE, despite the fact that the Court in December 2011 affirmed the April 2010 Board decision as to those matters. R. at 156-57. The Court's December 2011 memorandum decision is the law of the case on those matters, and the Court need not revisit them here.

APPENDIX D

Board's failure to consider the testimony, the outcome of the October 2006 Board decision would have been favorable to Mr. Garcia. R. at 158-59.

In January 2013, Mrs. Garcia filed a motion to vacate and reconsider the October 2012 Board decision. Her motion included, for the first time, an allegation that the October 2005 AMC examination inquiry constituted a violation of due process. R. at 36-38. In July 2013, the Board denied Mrs. Garcia's motion. Mrs. Garcia appealed to the Court, arguing that the Board erred in finding no CUE in the October 2006 decision because the Board did not address her argument regarding due process and failed to readjudicate the matter of her September 2004 testimony in accordance with the Court's December 2011 remand.

In October 2014, the Court issued a memorandum decision again remanding the matter of CUE based on the Board's consideration of Mrs. Garcia's September 2004 testimony, finding that the Board considered only whether the testimony established that Mr. Garcia's paranoia began *in* service, while the testimony, in fact, related to whether his paranoia began *within one year of discharge*. R. at 1119 (citing 38 C.F.R. §§ 3.307, 3.309 (2014)). The Court again dismissed the allegation of CUE based on a due process violation, concluding that, because the allegation was never presented to the Board, the Court lacked jurisdiction to consider it. The Court reiterated that "Mr. Garcia has not raised any theories of CUE based on constitutional error," and that, to the extent that Mrs. Garcia relied an August 2012 letter to the Board, "th[at] letter d[id] not refer to or raise a valid theory of CUE as it contain[ed] only the single, incorrect statement that the Court's 2011 decision noted a constitutional defect in the Board's 2006 decision." R. at 1120; *see* R. at 194.

In May 2015, the Board issued the decision on appeal, finding that the Board's failure in October 2006 to consider Mrs. Garcia's September 2004 Board hearing testimony did not constitute CUE because the error did not manifestly change the outcome of the decision. This appeal followed.

II. ANALYSIS

To begin, the Court must satisfy itself that it has jurisdiction over the constitutional matter, which arrived at the Court by way of the Board's adverse decision on the fourth allegation of CUE. *See Barnett v. Brown*, 83 F.3d 1380, 1383 (Fed. Cir. 1996) ("[A] statutory tribunal must ensure that it has jurisdiction over each case before adjudicating the merits . . . . [A] potential jurisdictional

defect may be raised by the court or tribunal, sua sponte . . . and, once apparent, must be adjudicated."); *Marsh v. West*, 11 Vet.App. 468, 469 (1998) ("[T]he Court has jurisdiction to assess its own jurisdiction."). If the Board lacked jurisdiction to entertain that allegation, the Court likewise lacks jurisdiction to review it, and this appeal must be dismissed. *See* 38 U.S.C. § 7252(a); *Ledford v. West*, 136 F.3d 776, 779 (Fed. Cir. 1998) (stating that his Court's jurisdiction is "premised on and defined by the Board's decision concerning the matter being appealed").

A. Timeliness of the Fourth CUE Allegation

A prior final Board decision must be reversed or revised where evidence establishes clear and unmistakable error. *See* 38 U.S.C. § 7111(a). CUE is established when the following conditions are met: First, either (1) the correct facts in the record were not before the adjudicator or (2) the statutory or regulatory provisions in existence at the time were incorrectly applied. *See Damrel v. Brown*, 6 Vet.App. 242, 245 (1994). Secondly, the alleged error must be "undebatable," not merely "a disagreement as to how the facts were weighed or evaluated." *Russell*, 3 Vet.App. at 313-14. Finally, the commission of the alleged CUE must have "manifestly changed the outcome" of the decision being attacked at the time that decision was rendered. *Id.*; *see Bustos v. West*, 179 F.3d 1378, 1380 (Fed. Cir. 1999) (expressly adopting the "manifestly changed the outcome" language in *Russell*).

In March 2011, approximately eight months before the Court issued its first memorandum decision in this matter, the Court issued a decision in *Hillyard v. Shinseki*, 24 Vet.App. 343 (2011). In that case, the Court held that an appellant has only one opportunity to raise allegations of CUE for each claim decided in a Board decision, and any subsequent attempt to raise a CUE challenge to the same claim contained in a Board decision must be dismissed with prejudice. 24 Vet.App. at 352-53. Although the facts of that case were much simpler—Mr. Hillyard attempted to raise a new CUE challenge several years after his earlier CUE challenge was denied and had become final—we find that case unequivocal and controlling under the circumstances presented here.

Here, although the Court in December 2011 remanded Mr. Garcia's CUE motion, raising the question of whether a new CUE challenge may be raised where the Court remands the initial CUE challenge, it is only in hindsight that this issue arises. It would be illogical to hold that new allegations of CUE in a Board decision may be raised on remand because, at the time the initial CUE motion is filed, it is impossible to know whether, at some point in the future, the Court will remand the initial CUE challenge. The rule established in *Hillyard* rightly requires that all possible

APPENDIX D

errors in a final Board decision be raised at the time a motion for revision of that Board decision based on CUE is filed. No later CUE challenges to a Board decision may be entertained.

In light of the rule in *Hillyard*, the Court concludes that, in both December 2011 and October 2014, it improperly entertained the fourth allegation of CUE regarding Mrs. Garcia's hearing testimony. There is no dispute that Mr. Garcia's initial motion for revision of the October 2006 Board decision based on CUE was filed in July 2008 and raised only three arguments. R. at 371-73. He did not raise the fourth allegation regarding his wife's testimony until his July 2010 motion for reconsideration of the April 2010 Board decision that adjudicated his three initial CUE allegations. R. at 276-85. There is also no dispute that *Hillyard* was controlling law at the time of the December 2011 memorandum decision. Accordingly, in December 2011, the proper course of action was for the Court to dismiss Mr. Garcia's appeal of the Board's decision on the fourth allegation of CUE. *See Hillyard*, 24 Vet.App. at 354. That remains the proper course of action, and the Court will therefore dismiss Mrs. Garcia's appeal of the May 2015 Board decision to the extent that it pertains to the Board's denial of CUE in the October 2006 Board decision based on her September 2004 hearing testimony. The Court regrets its error and the subsequent effort and expense its error imposed on the parties. Nevertheless, the Court may not create jurisdiction where none exists.

B. Due Process Allegation

Having found that the Court lacked, and lacks, jurisdiction to entertain Mrs. Garcia's fourth CUE allegation, we must next consider whether we have jurisdiction to entertain her constitutional due process argument. It is well settled that entitlement to VA benefits is a property interest protected by the Due Process Clause of the Fifth Amendment of the U.S. Constitution. *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009). Accordingly, claimants are entitled to a "fundamentally fair adjudication of [their] claim[s]." *Id.* at 1296. Mrs. Garcia contends that the AMC's October 2005 examination inquiry so plainly sought a negative nexus opinion that it violated her husband's right to the impartial development of evidence. *See Austin v. Brown*, 6 Vet.App. 547, 552 (1994) ("[B]asic fair play requires that evidence be procured by the agency in an impartial, unbiased, and neutral manner."). The Court holds that it need not determine whether a constitutional violation occurred because this matter is not properly before us.

To begin, there is no dispute that this matter was, when viewed in the light most favorable to Mrs. Garcia, first raised to the Court in 2011 in Mr. Garcia's briefs, and to the Board in the

APPENDIX D

January 2013 motion for revision of the October 2012 Board decision. Therefore, to the extent that Mrs. Garcia intended to allege a due process violation as an allegation of CUE in the October 2006 Board decision, that argument must fail in light of *Hillyard*, as discussed above. Further, to the extent that the due process argument is before the Court only as a result of the improper December 2011 and October 2014 remands by the Court, the Court lacks jurisdiction to entertain it. *See* 38 U.S.C. § 7252(a); *Ledford*, 136 F.3d at 779.

At oral argument, counsel for Mrs. Garcia argued that due process violations are special and may be raised at any time, regardless of the finality of the underlying decision. The U.S. Court of Appeals for the Federal Circuit (Federal Circuit), however, appears to disagree. In *Cook v. Principi*, the Federal Circuit made clear that there are only two exceptions to finality in the veterans benefits system: The submission of new and material evidence in a previously and finally decided claim and CUE in a final RO or Board decision. 318 F.3d 1334, 1339 (Fed. Cir. 2002) (en banc) ("The statutory scheme provides only two exceptions to the rule of finality."); *see* 38 U.S.C. § 5109A(a) ("A decision by the Secretary . . . is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised."); 38 U.S.C. § 5108 ("If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of that claim.").

In dissent, one judge of the Federal Circuit asserted that a due process violation could vitiate the finality of a decision. *Cook*, 318 F.3d at 1350-58 (Gajarsa, J., dissenting). In a footnote, the majority addressed this contention:

> The Due Process Clause question was not briefed by the parties or argued to us. Nevertheless, assuming arguendo that a breach of the duty to assist may implicate the Due Process Clause, we note that the claim adjudication process before the RO and the Board has long provided a structure that affords a veteran a hearing. *See* 38 C.F.R. §§ 3.3-3.14; 19.0-19.7 (1949). During the adjudication of his claim, a veteran may always assert that there has been a breach of the duty to assist. Moreover, as noted, under the regime that has existed since 1988, if the Veterans Court determines that the VA failed to comply with the duty to assist, the court may vacate the decision being appealed and remand the case for further consideration in compliance with the duty to assist. *Pond* [*v. West*], 12 Vet.App. [341,] 346 [(1999)].
>
> If, however, a breach of the duty to assist is not known to the veteran during the adjudication of his claim, and becomes known to the veteran only after the decision to deny his claim for benefits has become final, the veteran may only apply to have

APPENDIX D

> the final judgment reopened through the two avenues provided by Congress, CUE and new and material evidence. These two avenues constitute significant departures from the normal rule that final judgments cannot be reopened. For the reasons stated infra in this opinion, a breach of the duty to assist may not form the predicate for a CUE claim. Whether it is possible for a veteran to ameliorate the potential harm of a breach of the duty to assist with a claim of new and material evidence is not a matter before us. In any event, the possibility that an error may occur during the claim adjudication process is not a reason to hold the process in violation of the Due Process Clause and therefore vitiate the rule of finality.

Id. at 1341 n.9. Although this language is plainly dicta, as this issue was not briefed or argued to the Federal Circuit in that case, it is nevertheless instructive, and we adopt this reasoning in holding that even an allegation of a due process violation may not vitiate the finality of a decision.

The Court notes that, in his briefs in 2011 and again at oral argument before the Court in this case, counsel for Mrs. Garcia represented that he was not aware of the October 2005 AMC inquiry when he filed the July 2008 motion for revision of the October 2006 Board decision based on CUE. Although the Court has no reason to doubt counsel's representation, it nevertheless appears that the October 2005 AMC inquiry was in Mr. Garcia's claims file at least as early as September 2006. As noted in Part I above, Mr. Garcia's nonattorney representative plainly quoted that inquiry in his September 2006 brief to the Board. *Compare* R. at 427 (September 2006 brief), *with* R. at 451 (October 2005 AMC inquiry). Because the potential duty to assist violation was known before the October 2006 Board decision, it should have been raised at that time, on direct appeal, as the Federal Circuit stated in *Cook*.

Finally, in her briefs, Mrs. Garcia cites 38 C.F.R. § 20.904(a) for the proposition that "[a]n appellate decision may be vacated at any time on the Board's (or Court's) own motion when there has been a denial of due process." Appellant's Br. at 11. To the extent that Mrs. Garcia challenges the Board's July 2013 denial of her January 2013 motion to vacate and reconsider, which first raised the constitutional issue, the Court lacks jurisdiction over that matter. The Court "[has] no jurisdiction to consider the Chairman's denial of [a motion for] reconsideration," *Mayer v. Brown*, 37 F.3d 618, 619 (Fed. Cir. 1994), and the Court's caselaw requires it to consider a motion to vacate no differently than a motion for reconsideration with respect to appealability. *See Harms v. Nicholson*, 20 Vet.App. 238, 243 (2006) (en banc). Moreover, as Mrs. Garcia acknowledged at oral argument, § 20.904(a) empowers *the Board* to vacate its own decision on the basis of a due process violation, not the Court. 38 C.F.R. § 20.904 (2017) ("An appellate decision may be

APPENDIX D

vacated by the [Board] at any time upon request of the appellant or his or her representative, or on the Board's own motion" where the Board determines there has been a violation of due process).

In light of this discussion, the Court concludes that we must dismiss Mrs. Garcia's allegation of a due process violation in the development of her husband's claim.

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs, the matters raised at oral argument, and a review of the record on appeal, this appeal is DISMISSED with prejudice.

APPENDIX D

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 13-2283

PAULINE GARCIA, APPELLANT,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before DAVIS, *Judge*.

MEMORANDUM DECISION

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

DAVIS, *Judge*: Mrs. Pauline Garcia, surviving spouse of U.S. Army veteran Teofilo O. Garcia, appeals through counsel from an October 16, 2012, Board of Veterans' Appeals (Board) decision that found no clear and unmistakable error (CUE) in an October 27, 2006, Board decision that denied disability compensation for a mental disorder characterized by paranoia. For the following reasons, the Court will set aside that part of the Board's October 2012 decision that addressed a theory of CUE based on consideration of Mrs. Garcia's lay testimony, and remand the matter for further proceedings.

I. BACKGROUND

Teofilo Garcia served on active duty from 1952 to 1954. In 2002, he filed a claim for disability compensation based on a long history of paranoia. In support of his claim for benefits, Mr. Garcia and his wife testified at a 2004 Board hearing. Mrs. Garcia testified that she remembered Mr. Garcia making paranoid comments after he left service, when they were dating. After the two were married in 1961, Mrs. Garcia began to notice more paranoia. At some point, Mrs. Garcia took her husband to a doctor, who diagnosed Mr. Garcia with paranoia and prescribed medication. Medical reports of record first note paranoia in August 1969.

APPENDIX E

In assisting in the development of this claim, the Secretary obtained a medical examination. The medical examiner first opined: "It is felt that this veteran meets diagnostic criteria for the diagnosis of schizophrenia, paranoid type, for which he has been treated for many years and claims he was first seen for paranoia in the service and that as likely as not this disorder started in the service per the history given." Record (R.) at 323. The VA Appeals Management Center (AMC) returned the case for clarification, asking the examiner to provide a rationale and noting that Mr. Garcia was not treated for a mental disorder during service. R. at 304-05. In response, the VA examiner opined that "[a]fter review of c-file, [I] now feel it is impossible to say, without resorting to mere speculation, as to whether this veteran's schizophrenia, paranoid type actually started in service." R. at 303. Based in part on the addendum, the Board denied Mr. Garcia's claim in 2006. Mr. Garcia appealed the Board's decision to the Court, but subsequently withdrew his appeal, and the Court dismissed the appeal in 2007. R. at 251.

In 2007, Mr. Garcia sought to revise the 2006 Board decision on the basis of CUE. In 2010, the Board determined no CUE existed in the prior Board decision; Mr. Garcia appealed this decision to the Court, which set aside the decision in 2011. In remanding the case, the Court noted that Mrs. Garcia's hearing testimony provided continuity-of-symptomatology evidence but that the 2006 Board decision had denied the existence of such evidence and the 2010 Board decision did not adequately address this aspect of Mr. Garcia's CUE argument. The Court remanded the case for the Board to address whether consideration of Mrs. Garcia's continuity-of-symptomatology testimony would have manifestly changed the outcome of the 2006 Board decision. The Court dismissed the appeal to the extent that it referred to a theory of CUE based on some sort of wrongdoing during 2005 between the AMC and the VA medical examiner in the AMC's effort to obtain the negative medical examination addendum. The Court also noted that Mr. Garcia had not raised any CUE theories based on constitutional errors. Mr. Garcia died in January 2012, and in June 2012 Mrs. Garcia was substituted for her husband in this appeal.

On August 8, 2012, Mrs. Garcia submitted a letter notifying the Board of the Court's decision. In the letter, Mrs. Garcia generally referred to CUE based on continuity of symptomatology and asserted that the Court's decision "notes a constitutional defect in the 2006 [Board] decision, relating to a 2005 error by the AMC." R. at 53. Mrs. Garcia also stated that her

APPENDIX E

basic CUE arguments could be found in "[t]he pleadings and briefs filed since 2006." *Id.*

The Board again found no CUE in the 2006 Board decision. The Board determined that consideration of Mrs. Garcia's continuity-of-symptomatology evidence would not have changed the outcome of the 2006 Board decision, and therefore did not rise to the level of CUE, because the record included both positive and negative evidence regarding the continuity of Mr. Garcia's paranoia symptoms. Specifically, the Board noted that the 2006 Board decision could have found a lack of continuity of symptomatology based on the VA medical examination addendum, which reviewed the claims file and found no evidence of a connection between schizophrenia and active service, as well evidence that Mr. Garcia had no psychiatric problems during service, had an evaluation of normal psychiatric condition at separation from service, and had no diagnosis of psychiatric illness until 15 years after service.

The Board's decision also addressed Mrs. Garcia's previously raised allegations of CUE. The Board found that Mrs. Garcia's allegation that the 2006 Board decision did not afford sufficient probative weight to several medical examinations did not demonstrate CUE because a disagreement as to how the facts were weighed does not rise to the level of demonstrating that an error was clear and unmistakable. *See Damrel v. Brown*, 6 Vet.App. 242, 245 (1994) (mere disagreement with how conflicting facts were weighed does not constitute CUE). Her argument that the 2006 Board decision wrongly declined to apply a heightened duty to assist was rejected because a breach of the duty to assist also does not constitute CUE. *See Cook v. Principi*, 318 F.3d 1334, 1344 (Fed. Cir. 2002) (en banc). Finally, Mrs. Garcia's contention that the 2006 Board committed CUE in finding that the benefit of the doubt rule was inapplicable did not rise to the level of CUE because this argument is merely a disagreement with how the facts were weighed. *Damrel*, *supra*; *see also Livesay v. Principi*, 15 Vet.App. 165, 179 (2001) (en banc) (" '[T]he benefit of the doubt rule' does not apply to the Board's decision on a CUE motion.").

II. ANALYSIS

A. CUE Based on Mrs. Garcia's Lay Testimony

Mrs. Garcia argues that the Board inadequately addressed her lay testimony. To prevail on a motion for revision on the basis of CUE, (1) either the correct facts were not before the adjudicator

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. *Russell v. Principi*, 3 Vet.App. 310, 313-14 (1992) (en banc); *see King (John T.) v. Shinseki*, 26 Vet.App. 433, 439 (2014); *see also Bustos v. West*, 179 F.3d 1378, 1380-81 (Fed. Cir. 1999) (expressly adopting the "manifestly changed outcome" standard). The Court's review of a Board decision finding no CUE in a prior, final regional office (RO) or Board decision is limited to determining whether the Board's finding was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 38 U.S.C. § 7261(a)(3)(A), and whether it was supported by an adequate statement of reasons or bases, 38 U.S.C. § 7104(d)(1). The Board's statement of reasons or bases is adequate when it is understandable to the claimant and facilitates judicial review. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

Here, the Board determined that consideration of Mrs. Garcia's lay testimony would not have manifestly changed the outcome of the 2006 Board decision, and that the failure to consider it was not CUE, because Mrs. Garcia's testimony was contradicted by evidence showing that her husband's paranoia did not have its onset in service. *See* R. at 17-18 (contradictory evidence included a VA medical examination addendum finding no connection between schizophrenia and active service, no evidence that Mr. Garcia had psychiatric problems during service, a psychiatric evaluation finding normal psychiatric condition at separation from service, and no diagnosis of psychiatric illness until 15 years after service). However, Mrs. Garcia did not testify that her husband's paranoia began during service. Rather, she testified that she first noticed paranoia symptoms when the two began dating just after Mr. Garcia left service. As Mr. Garcia ultimately was diagnosed with schizophrenia with paranoid delusions, and psychoses may be service connected when they become manifest within a year from leaving service, *see* 38 C.F.R. §§ 3.307, 3.309 (2014), the Board did not discuss this aspect of Mrs. Garcia's testimony or whether there was evidence to contradict it. The Board therefore did not adequately address whether the outcome of the 2006 Board decision would have been manifestly changed had Mrs. Garcia's testimony been considered. The Board's failure to do so renders its statement of reasons or bases inadequate and warrants remand. *Livesay* and *Allday*, both *supra*.

APPENDIX E

B. Other Allegations of CUE

Mrs. Garcia also argues that the Board erred in failing to address theories of CUE based on due process or other constitutional violations, including a theory of constitutional wrongdoing by the rating specialist or AMC in obtaining the medical examination addendum in 2005. A claimant arguing CUE bears the burden of presenting specific allegations of error, and "persuasive reasons must be given as to why the result would have been manifestly different but for the alleged error." *Fugo v. Brown*, 6 Vet.App. 40, 44 (1993); *see Livesay v. Principi*, 15 Vet.App. 165, 178 (en banc); *see also* 38 C.F.R. § 20.1404 (2014) ("Non-specific allegations of . . . failure to give due process, or any other general, non-specific allegation of error, are insufficient to satisfy the [CUE pleading] requirements."). The Court may not address CUE allegations that were not first presented to or decided by the Board. *Andre v. Principi*, 301 F.3d 1354, 1361 (Fed. Cir. 2002) ("[E]ach 'specific' assertion of CUE constitutes a claim that must be the subject of a decision by the [Board] before the Veterans Court can exercise jurisdiction over it.").

The Court lacks jurisdictional authority to address Mrs. Garcia's constitutional theories of CUE because they have never been presented to or decided by the Board. As the Court's 2011 memorandum decision notes, Mr. Garcia has not raised any theories of CUE based on constitutional error. *Garcia (Teofilo O.) v. Shinseki*, No. 10-3156, 2011 WL 6223654, at *3 (U.S. Vet.App. Dec. 15, 2011). Although Mrs. Garcia on appeal points to her August 2012 letter to the Board, this letter does not refer to or raise a valid theory of CUE as it contains only the single, incorrect statement that the Court's 2011 decision noted a constitutional defect in the Board's 2006 decision. *See* R. at 53; *Andre* and *Livesay*, both *supra*; *see also* 38 C.F.R. § 20.1404 ("Non-specific allegations of . . . failure to give due process, or any other general, non-specific allegation of error, are insufficient to satisfy the [CUE pleading] requirements.").

Mrs. Garcia also generally disagrees with the Board's determinations regarding her original allegations of CUE, which were based on the heightened duty to assist, the accordance of probative weight to favorable evidence, and the benefit of the doubt rule. However, the Court discerns no error in the Board's determinations that these arguments did not demonstrate CUE because they were either based on a violation of the duty to assist or were disagreements with how the evidence had been weighed. *See Cook*, *Damrel*, and *Livesay*, all *supra*.

Throughout her brief, Mrs. Garcia makes a variety of unconnected or tangentially related

APPENDIX E

assertions that can be viewed as allegations of CUE she believes should have been discussed by the Board. The Court will not address these poorly briefed and unsupported arguments. *See Evans v. West*, 12 Vet.App. 22, 31 (1998) ("Absent evidence and argument, the Court will give no further consideration to this unsupported contention.").

III. CONCLUSION

On consideration of the foregoing, the Court SETS ASIDE that part of the Board's October 16, 2012, decision that addressed a theory of CUE based on Mrs. Garcia's lay testimony, REMANDS the matter for further proceedings, and AFFIRMS the remainder of the Board's decision.

DATED: October 28, 2014

Copies to:

William A. L'Esperance, Esq.

VA General Counsel (027)

APPENDIX E

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 10-3156

TEOFILO O. GARCIA, APPELLANT,

V.

ERIC K. SHINSEKI
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before DAVIS, *Judge*.

MEMORANDUM DECISION

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

DAVIS, *Judge*: U.S. Army veteran Teofilo O. Garcia appeals through counsel from an April 12, 2010, Board of Veterans' Appeals (Board) decision that found no clear and unmistakable error (CUE) in an October 27, 2006, Board decision that denied entitlement to service connection for a mental disorder characterized by paranoia. For the following reasons, the Court will set aside the Board's April 2010 decision and remand for further proceedings.

The appellant served on active duty from August 16, 1952, to August 15, 1954. In a 2006 decision, the Board stated: "A December 1988 report from the National Personnel Records Center (NPRC) indicates that the veteran's service medical records (SMRs) were among those thought to have been destroyed in a 1973 fire at NPRC." Record (R.) at 113. In June 2003 the Albuquerque, New Mexico, regional office (RO) issued a formal finding of unavailability of the appellant's service records, indicating that the unavailability was fire related. *See* R. at 429.

On July 11, 2002, the appellant filed an application that included a claim for disability benefits for "history of paranoia." R. at 617. The RO denied that claim in July 2003, and after further development, the Board upheld the denial in an October 27, 2006, decision. Although the appellant filed an appeal with this Court shortly thereafter, "the appeal was voluntarily dismissed in order to have the Veteran pursue this CUE claim." Appellant's Brief at 2.

APPENDIX F

I. ANALYSIS

A request for revision of a Board decision on the basis of CUE is a collateral attack of a final Board decision. *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 696-98 (Fed. Cir. 2000). There is a three-fold requirement to support a finding of CUE. "[I]t must be determined (1) that either the facts known at the time were not before the adjudicator or the law then in effect was incorrectly applied, (2) that an error occurred based on the record and the law that existed at the time the decision was made, and (3) that, had the error not been made, the outcome would have been manifestly different." *Grover v. West*, 12 Vet.App. 109, 112 (1999); *see also Damrel v. Brown*, 6 Vet.App. 242, 245 (1994). A mere disagreement with how the facts were weighed or evaluated is not enough to substantiate a CUE claim. *Damrel*, 6 Vet.App. at 246.

The Court's review of Board decisions evaluating allegations of CUE in prior final decisions is circumscribed by the nature of the CUE requirements. The Court "cannot conduct a plenary review of the merits of the original decision." *Archer v. Principi*, 3 Vet. App. 433, 437 (1992). Rather, the Court is limited to determining whether the Board decision before it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," including whether the decision is supported by an adequate statement of reasons or bases. 38 U.S.C. §§ 7261(a)(3)(A), 7104(d)(1); *see Joyce v. Nicholson*, 19 Vet.App. 36, 43-44 (2005); *Lane v. Principi*, 16 Vet.App. 78, 83-84 (2002); *Russell v. Principi*, 3 Vet.App. 310, 315 (1992) (en banc).

A. The Board's Analysis[1]

In the decision here on appeal, the Board concluded that "the July [29], 2008[,] motion filed by the Veteran's attorney arguably satisfies the filing and pleading requirements for a motion for revision based on [CUE]." R. at 8. The Board perceived three allegations of CUE in that document.

First, the appellant alleged that the 2006 "Board's Finding of Fact is wrong in that the evidence of record supports [] several independent medical conclusions" that his mental disability had its onset in service. R. at 71. The Board responded that an allegation "that the Board did not

[1] All textual references to "the Board" herein designate the Board that issued the April 12, 2010, decision here on appeal unless otherwise indicated.

APPENDIX F

afford sufficient probative weight to several medical opinions in the claims file" does not constitute CUE. The Court discerns no error in the Board's reasoning in this regard. *See Damrel, supra.*

Second, the Board reiterated the appellant's assertion that he "was entitled to a greater duty to assist . . . due to the loss of his military records in the St. Louis fire." R. at 72. The Board responded that failure to fulfill the duty to assist cannot establish CUE because that failure only results in an incomplete rather than an incorrect record. The Board was correct in this assessment. *See Cook v. Principi*, 318 F.3d 1334, 1346 (Fed. Cir. 2002); *Caffrey v. Brown*, 6 Vet.App. 377, 384 (1994).

Finally, the Board noted the appellant's assertion that "it is CUE for the [2006] Board to find that the benefit of the doubt does not apply in this case." R. at 73. The Board correctly responded that this argument is merely another dispute as to how the evidence was weighed, which, as previously discussed, can not constitute CUE. *See Fugo v. Brown*, 6 Vet.App. 40, 44 (1993). (application of the benefit of the doubt rule is "an issue clearly within the 'weighing and evaluation' realm").

B. Additional Assertions of CUE

1. Inappropriate Request for Revision of VA Examination Report

The appellant devotes considerable briefing effort decrying what he considers inappropriate influence exerted on the VA examiner by the rating specialist and the VA Appeals Management Center. After receiving a report from a private treating physician linking the appellant's mental condition to service, a 2004 Board decision remanded the appellant's case to obtain a VA medical examination report. In a report dated February 3, 2005, the VA examiner stated as follows: "It is felt that this veteran meets the diagnostic criteria for the diagnosis of schizophrenia, paranoid type . . . and that as likely as not this disorder started in the service per the history given." R. at 169.

Upon receipt of this opinion, the rating specialist requested that the case be returned to the VA examiner. He requested that the examiner specifically indicate that the claims file had been reviewed and that she provide a rationale for the opinion provided. The rating specialist also included more than three paragraphs of what can only be characterized as argument that a different conclusion was in order. *See* R. at 151. After the Appeals Management Center transmitted this request verbatim to the examiner (R. at 149), she issued an addendum stating: "After review of c-file,

APPENDIX F

now feel it is impossible to say, without resorting to mere speculation, as to whether this veteran's schizophrenia, paranoid type actually started in [s]ervice, without more documentation and records." R. at 147. The 2006 Board then discounted the initial VA examination report and denied service connection based chiefly on the appellant's separation examination report, which was the only service record available. The appellant discovered the involvement of the rating specialist and Appeals Management Center only when reviewing the record on appeal.

He does not argue that this sequence of events constituted a violation of constitutional due process. *See Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009). Rather, he characterizes this behavior as a contradiction of the requirement that VA has an enhanced duty to assist in cases where records have been destroyed by fire. *See Cromer v. Nicholson*, 19 Vet.App. 215 (2005). He reasons that rather than fulfilling its heightened duty to assist, "[VA] litigated against the Veteran." Appellant's Brief at 9. The appellant presents this argument as support for his assertion of CUE.

As such, the argument cannot succeed. The Court does not have jurisdiction to consider the allegation as a theory of CUE because it was not presented to the Board below. *See Andre v. Principi*, 310 F.3d 1354, 1361 (Fed. Cir. 2001) ("[E]ach specific assertion of CUE constitutes a claim that must be the subject of a decision by the [Board] before [the] Court can exercise jurisdiction over it."). Therefore, the Court dismisses the appeal insofar as it advances a theory of CUE based on the behavior of the rating specialist and Appeals Management Center with regard to the VA examination report of February 2005.

2. Treatment of Lay Evidence

During a September 13, 2004, hearing both the appellant and his wife testified concerning the onset of his paranoid behavior. The appellant's wife testified that she had known the appellant since he was 14 years old and that she noticed various manifestations of his paranoid behavior from the time of his separation from service continuing until the present. *See* R. at 169.

In its 2006 decision the Board reiterated the appellant's hearing testimony that he had seen a psychiatrist in service but received no diagnosis or treatment. Thus, it was clear that the 2006 Board was aware of the hearing transcript and that the testimonial evidence from that hearing was formally before the Board.

APPENDIX F

The 2006 Board further stated, however, that "there is no evidence of record supporting continuity of symptomatology after service." R. at 116. In the decision here on appeal the Board characterized the record before the 2006 Board as containing "no competent evidence, to include lay testimony, establishing a continuity of symptomatology since service." R. at 7. The appellant argues that the 2006 Board's statement that there was no evidence supporting continuity of symptomatology and the 2010 Board's more specific statement that there was no competent lay evidence supporting continuity of symptomatology is demonstrably mistaken and that if the wife's testimony had been considered, it would have led to a different result.

The Secretary first argues that this theory of CUE was not raised before the Board. The Court's review of the record, however, reveals that the appellant filed a motion for reconsideration in which he reiterated his wife's testimony in great detail, arguing that if it had been properly considered it would have led to a manifestly different outcome. *See* R. at 798. The Court reviews whether a CUE issue has been presented under a de novo review standard. *See Phillips v. Brown*, 10 Vet.App. 25, 30 (1997). The Court holds that the reconsideration motion sufficed to present the theory of CUE involving the wife's lay testimony.

In the alternative, the Secretary argues that because the Board is presumed to have considered all evidence of record in its 2006 decision, the Board must have evaluated the wife's hearing testimony and rejected it, albeit sub silentio. On these facts, however, the Secretary's argument is not persuasive. The 2006 Board's statement was that there was *no evidence supporting* continuity of symptomatology. This statement refutes any presumption that the Board reviewed the testimony or otherwise dealt with it. The 2006 Board did not find the wife's testimony to lack competence or state that it was outweighed by other evidence. Instead, the Board effectively stated that the wife's testimonial evidence did not exist in the record. The testimony obviously tends to support continuity of symptomatology; it would necessarily have to be considered.

This is a rare instance where an appellant may demonstrate that the correct facts were not before the Board based on the evidence of record. *See Caffrey*, 6 Vet.App. at 384 (Kramer, J., concurring) (requirements that the correct facts were not before the adjudicator, based on the record before the Board at the time, "means facts so known at the time to be correct were in the VA record, but somehow were not actually in front of the adjudicator"; for example, an adjudicator stated there

APPENDIX F

were only two items of evidence on a given point when the record contained three). Because the 2006 examiner misstated the obvious content of the record, the facts known at the time were not really before him.

In the decision here on appeal, the Board did not discuss this error in the 2006 decision or whether it might have led to a manifestly different outcome. If the Board considered the wife's testimony at all, it implied that the Board in 2006 had found the wife's testimonial evidence incompetent. There is nothing in the 2006 Board decision so indicating, however, and, therefore, it is unclear how the 2010 reviewing Board might have decided that the testimony lacked competence. The lack of discussion of the wife's lay testimony requires a remand for a more complete statement of reasons or bases. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (Board must include in its decision a written statement of reasons or bases for its decision adequate to enable an appellant to understand the basis of the decision and facilitate review in this Court).

II. CONCLUSION

Based on consideration of the foregoing, the April 12, 2010, Board decision is SET ASIDE and the matter is REMANDED for further proceedings consistent with this decision.

On remand, the Board is required to adjudicate the appellant's case anew. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order). In addition, on remand, the appellant will be free to submit additional evidence and argument in support of his request to revise the 2006 Board decision on the basis of CUE, and the Board is required to consider any such evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). A final decision by the Board following the remand herein ordered will constitute a new decision that, if adverse, may be appealed to this Court upon the filing of a new Notice of Appeal with the Court not later than 120 days after the date on which notice of the Board's new final decision is mailed to the appellant. *Marsh v. West*, 11 Vet.App. 468, 472 (1998).

DATED: December 15, 2011

APPENDIX F