# APPENDIX

BVA Order and opinion dated May 8, 2015 in the Appel of Patrick Brunette, VA docket number 13-12 715 with a two-page form attachment advising a BVA claimant of his or her Right to Appeal.

Order and Memorandum decision of Judge Mary J. Schoeelen of the U.S. Court of Appeals for Veterans Claims dated May 25, 2017.denying the appeal of Patrick Brunette, in Docket Number 15-3377.

Order and Memorandum Decision of the decision of the Chief Judge in Docket Number 2017-2534. Denying requested relief and upholding the decision of the BVA and the decision of the U.S. Court of Appeals for Veterans Claims. [A subsequent petition for rehearing was denied on September 18, 2018 and a timely Petition for Writ of Certiorari was filed by Petitioner and letters sent to Petitioner's Counsel by Supreme Court Clerk Jacob Travers on December 31, 2018 and March 7, 2019 noted many mistakes that required correction.]

952- 941-6020

# BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF
PATRICK A. BRUNETTE

[redacted]

DOCKET NO. 13-12 715 ) DATE May 8, 2015
) JK
)

On appeal from the
Department of Veterans Affairs Regional Office in St. Paul, Minnesota

## THE ISSUES

1. Entitlement to an increased rating for depression, not otherwise specified, rated 50 percent prior to March 26, 2014 and 70 percent from March 26, 2014.

2. Entitlement to a higher initial rating for L5-S1 spondylolisthesis with bilateral spondylosis, rated 10 percent prior to August 13, 2004 and 20 percent from August 13, 2004, exclusive of the temporary total ratings for convalescence.

3. Entitlement to an effective date earlier than March 25, 1982 for the award of service connection for L5-S1 spondylolisthesis with bilateral spondylosis.

4. Entitlement to an effective date earlier than March 4, 2008, for the award of service connection for depression, not otherwise specified, to include on the basis of CUE in a May 1982 rating decision.

5. Whether new and material evidence has been received to reopen a claim of entitlement to service connection for cervical disc disease.

6. Entitlement to a total disability rating for compensation purposes based upon individual unemployability (TDIU).

7. Entitlement to special monthly compensation (SMC) by reason of being housebound.

## REPRESENTATION

Appellant represented by: Edward A. Zimmerman, Attorney

## WITNESS AT HEARING ON APPEAL

The Veteran

## ATTORNEY FOR THE BOARD

J. Seay, Counsel

## INTRODUCTION

The Veteran served on active duty from March 1979 to March 1982.

These matters come before the Board of Veterans' Appeals (Board) on appeal of a November 2012 rating decision by the Department of Veterans Affairs (VA) Regional Office (RO) in St. Paul, Minnesota.

For historical background, with respect to the service-connected L5-S1 spondylolisthesis with bilateral spondylosis, the Veteran filed a claim for service connection for lumbar spine spondylolisthesis and spondylolysis which was received on April 5, 1982, less than one month following discharge from service. A

May 1982 rating decision denied service connection for a low back disability. The Veteran did not appeal the decision, no new and material evidence was received within the time period in which to appeal, and the decision became final. 38 U.S.C.A. § 7105(c) (West 2002); 38 C.F.R. § 20.1103 (2014). Thereafter, a May 2006 rating decision granted entitlement to service connection for L5-S1 spondylolisthesis with bilateral spondylosis and assigned an initial rating of 0 percent effective August 13, 2004. A July 2006 rating decision assigned a 20 percent initial rating for L5-S1 spondylolisthesis with bilateral spondylosis effective August 13, 2004.

Subsequently, a May 2012 Board decision found that the May 1982 rating decision, wherein service connection for low back disability was denied, must be reversed on the basis of CUE. A finding of CUE has the same effect as if the corrected decision had been made on the date of the reversed decision. 38 C.F.R. § 3.105(a) (2014). In light of the Board's May 2012 decision, a May 2012 rating decision granted entitlement to service connection for L5-S1 spondylolisthesis with bilateral spondylosis and assigned a 10 percent initial rating effective April 5, 1982. Thereafter, a November 2012 rating decision determined that a 10 percent rating was warranted effective March 25, 1982, the day following separation from service, and a rating of 20 percent was warranted from August 13, 2004, with the exception of periods of temporary total convalescence ratings. Staged ratings have been created and the issue on appeal is characterized as shown on the title page of this decision. *See Fenderson v. West*, 12 Vet. App. 119, 126-27 (1999).

In addition, the November 2012 rating decision continued the assigned 50 percent rating for depression, not otherwise specified, and determined that an effective date earlier than March 4, 2008 was not warranted. Subsequently, an April 2014 rating decision assigned a 70 percent rating for depression, not otherwise specified, effective March 26, 2014. Staged ratings have been created and the issue on appeal has been characterized as it appears on the title page of this decision. *See AB v. Brown*, 6 Vet. App. 35 (1993) (in an appeal in which the veteran expresses general disagreement with the assignment of a particular rating and requests an increase, the AOJ and the Board are required to construe the appeal as an appeal for the maximum benefit allowable by law or regulation).

In August 2014, the Veteran testified during a Travel Board hearing before the undersigned Veterans Law Judge. A transcript of the hearing is associated with the claims folder.

In *Rice v. Shinseki*, 22 Vet. App. 447 (2009), the United States Court of Appeals for Veterans Claims (Court) held that a claim for a TDIU, either expressly raised by the Veteran or reasonably raised by the record, involves an attempt to obtain an appropriate rating for a disability and is part of the claim for an increased rating. The Veteran reported that he cannot work due to his service-connected disabilities. Therefore, the issue of entitlement to a TDIU is on appeal and listed as an issue on the title page of this decision.

The issue of entitlement to a TDIU also raises the issue of entitlement to SMC by reason of being housebound, as asserted by the Veteran and his attorney. *See Akles v. Derwinski*, 1 Vet. App. 118, 121 (1991) (observing that entitlement to SMC is an "inferred issue" in the context of an increased rating claim that must be considered when the record indicates that it may be available, even if the claimant does not place eligibility for this ancillary benefit at issue). Moreover, VA regulations direct the Board to review a claim for SMC in the first instance if reasonably raised by the record. Recent case law directs the Board to consider awarding SMC at the housebound rate if the Veteran meets the requisite schedular or extra-schedular criteria. *See Buie v. Shinseki*, 24 Vet. App. 242, 250-51 (2011) (holding that whenever a Veteran has a total disability rating, schedular or extra-schedular, and is subsequently awarded service connection for any additional disability or disabilities, VA has a duty to assess all of the claimant's disabilities without regard to the order in which they were service connected to determine whether any combination of the disabilities establishes entitlement to SMC under subsection 1114(s)); *see also Bradley v. Peake*, 22 Vet. App. 280 (2008) (finding that SMC "benefits are to be accorded when a Veteran becomes eligible without need for a separate claim"). Accordingly, the Board has the authority to consider the issue of entitlement to SMC and the issue has been added for appellate consideration.

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).

The issues of entitlement to an increased rating for depression, not otherwise specified, rated 50 percent prior to March 26, 2014 and 70 percent from March 26, 2014, entitlement to a higher initial rating for L5-S1 spondylolisthesis with bilateral spondylosis, rated 10 percent prior to August 13, 2004 and 20 percent from August 13, 2004, exclusive of temporary total ratings for convalescence, whether new and material evidence has been received to reopen a claim of entitlement to service connection for cervical disc disease, entitlement to a TDIU, and entitlement to SMC by reason of being housebound, are addressed in the REMAND portion of the decision below and are REMANDED to the Agency of Original Jurisdiction (AOJ).

## FINDINGS OF FACT

1. On the record at the time of the August 2014 hearing, the Veteran withdrew the appeal of the issue of entitlement to an effective date earlier than March 25, 1982 for the award of service connection for L5-S1 spondylolisthesis with bilateral spondylosis.

2. An unappealed May 1982 rating decision which did not adjudicate entitlement to service connection for a psychiatric disability, to include depression, did not contain error of law or fact in that regard which, had it not been made, would have manifestly changed the outcome.

## CONCLUSIONS OF LAW

1. The criteria for the withdrawal of the appeal for entitlement to an effective date earlier than March 25, 1982 for the award of service connection for L5-S1 spondylolisthesis with bilateral spondylosis are met. 38 U.S.C.A. § 7105 (West 2002); 38 C.F.R. §§ 20.202, 20.204 (2014).

2. The criteria for an effective date earlier than March 4, 2008, for the award of service connection for depression, not otherwise specified, to include on the basis of CUE in a May 1982 rating decision, are not met. 38 U.S.C.A. § 7111; 38 C.F.R. § 3.105 (2014).

## REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

*VA's Duty to Notify and Assist*

Pursuant to the Veterans Claims Assistance Act of 2000 (VCAA), VA has a duty to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2002 & Supp. 2014); 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326(a) (2014). Given the parameters of the law surrounding CUE claims, the duty to notify and assist is not applicable when CUE is claimed in decisions by the Board or in decisions by the RO. *See Livesay v. Principi*, 15 Vet. App. 165, 178-179 (2001); *Parker v. Principi*, 15 Vet. App. 407 (2002). As a result, discussion of VA's duty to notify and assist is not required with respect to whether CUE exists in a May 1982 rating decision. Absent a finding of CUE, the Veteran's earlier effective date claim is a free standing claim and further notification or assistance in this case would serve no useful purpose. *Sabonis v. Brown*, 6 Vet. App. 426, 430 (1994) (holding that remands which would only result in unnecessarily imposing additional burdens on VA with no benefit flowing to the claimant are to be avoided). With respect to the duty to assist, adjudicating the issue in this case is based upon review of the evidence that existed in the claims folder at the time of the prior final rating decision. As a result, there are no identified records or evidence to obtain with respect to the issue on appeal. The Board will proceed with a decision.

*Withdrawal*

The Veteran perfected an appeal as to the issue of entitlement to an effective date earlier than March 25, 1982 for the award of service connection for L5-S1 spondylolisthesis with bilateral spondylosis. During his August 2014 hearing, prior to promulgation of a decision in this case, the Veteran expressly requested withdrawal of the appeal for entitlement to an effective date earlier than March 25, 1982 for the award of service connection for L5-S1 spondylolisthesis with bilateral spondylosis.

The Board may dismiss any appeal that fails to allege specific error of fact or law in the determination being appealed. 38 U.S.C.A. § 7105. A substantive appeal may be withdrawn in writing at any time before the Board promulgates a decision. 38 C.F.R. §§ 20.202, 20.204(b). Withdrawal may be made by the claimant or the claimant's authorized representative. 38 C.F.R. § 20.204(a). Except for appeals withdrawn on the record at a hearing, appeal withdrawals must be in writing. 38 C.F.R. § 20.204(b)(1).

The request for withdrawal of the appeal was made on the record during the August 2014 hearing, thus satisfying the pertinent criteria. There remain no allegations of errors of fact or law for appellate consideration with respect to this issue. As the Board consequently does not have jurisdiction to review the issue, it is dismissed.

*Earlier Effective Date – Depression, not otherwise specified*

The assignment of effective dates of awards is governed by 38 U.S.C.A. § 5110 and 38 C.F.R. § 3.400. Generally, the effective date of an evaluation and award of pension, compensation, or dependency and indemnity compensation based on an original claim, a claim reopened after final disallowance, or a claim for increase will be the date of receipt of the claim or the date entitlement arose, whichever is later. 38 U.S.C.A. § 5110(a) (West 2002); 38 C.F.R. § 3.400 (2014).

In this case, a November 2012 rating decision continued the Veteran's 50 percent rating for depression, not otherwise specified. The Veteran appealed the decision

and argued that he was entitled to a rating prior to March 4, 2008, i.e., essentially requesting an effective date earlier than March 4, 2008 for the award of service connection for depression, not otherwise specified.

As a brief procedural history, a June 2008 rating decision granted entitlement to service connection for depression, not otherwise specified. The rating decision assigned an initial rating of 30 percent, effective March 4, 2008, the date of the Veteran's claim for service connection. The Veteran filed a notice of disagreement with respect to the initial rating assignment. Specifically, in the correspondence received by VA in August 2008, the Veteran stated that he disagreed with the June 2008 rating decision "to assign a 30% evaluation to the service-connected depressive disorder." No reference was made as to the effective date assigned for the award of service connection.

A written communication from a claimant or his representative expressing dissatisfaction or disagreement with an adjudicative determination by the AOJ and a desire to contest the result will constitute a notice of disagreement. While special wording is not required, the notice of disagreement must be in terms which can be reasonably construed as disagreement with that determination and a desire for appellate review. 38 C.F.R. § 20.201; *see Jarvis v. West*, 12 Vet. App. 559, 561 (1999) (holding that in determining whether a written communication constitutes a notice of disagreement, the actual wording of the communication and the context in which it was written must be considered); *Garlejo v. Brown*, 10 Vet. App. 229, 233-34 (1997) (Court held that "[e]ven a liberal reading of the appellant's letter does not yield his disagreement with the denial regarding the degenerative joint disease"); *Allin v. Brown*, 10 Vet. App. 55, 58 (1997) (the mere submission of net worth and employment statement form, in the absence of a statement on the form identifying some disagreement with the rating decision, is not a notice of disagreement; writing expressed no dissatisfaction with the rating decision or a desire for appellate review).

Even construed liberally, there is no statement during the period in which to appeal, i.e., the one-year period from the June 14, 2008 date of the notice letter of the June 2008 rating decision, which could reasonably be construed as a notice of

disagreement with the assigned effective date of March 4, 2008. 38 C.F.R. § 20.201. There was also no new and material evidence received within the period in which to appeal that would have warranted readjudication of the effective date assigned. As a result, the June 2008 rating decision is final with respect to the assigned effective date of March 4, 2008 for the award of service connection for depression, not otherwise specified. 38 U.S.C.A. § 7105; 38 C.F.R. § 20.1103.

The Court has determined that when an effective date is assigned in a final unappealed rating decision, a claimant cannot attempt to overcome the finality of that prior rating decision by raising "a freestanding claim" for an earlier effective date. *See Rudd v. Nicholson*, 20 Vet. App. 296, 300 (2006). Rather, the only way to overcome the finality of a final decision in an attempt to gain an earlier effective date is by a request for revision of that final decision based on CUE. *Id.*; *see also DiCarlo v. Nicholson*, 20 Vet. App. 52, 56-57 (2006) (discussing the types of collateral attack authorized to challenge a final decision by the Secretary).

Here, the Veteran has claimed CUE in an unappealed May 1982 rating decision for not adjudicating service connection for a psychiatric disability, to include depression, and an April 2014 rating decision which is part and parcel of the current appeal for an increased rating for service-connected low back disability.

Previous determinations which are final and binding will be accepted as correct in the absence of CUE. Where evidence establishes such error, the prior decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of CUE has the same effect as if the corrected decision had been made on the date of the reversed decision. 38 C.F.R. § 3.105(a) (2014).

CUE is a very specific and rare kind of error, of fact or 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. *Fugo v. Derwinski*, 6 Vet. App. 40, 43 (1993). In order to find CUE it must be determined (1) that either the correct 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. *Bouton v. Peake*, 23 Vet. App. 70 (2008); *Russell v. Principi*, 3 Vet. App. 310, 313-14 (1992) (en banc)).

In a CUE claim, "[t]he claimant, in short, must assert more than a disagreement as to how the facts were weighed or evaluated." *Crippen v. Brown*, 9 Vet. App. 412, 418 (1996). Also, for a claim of CUE to be reasonably raised, the claimant must provide some degree of specificity as to what the error is, and, unless it is the kind of error that, if true, would be CUE on its face, persuasive reasons must be given as to why the error would have manifestly changed the outcome at the time it was made. *Bustos v. West*, 179 F.3d 1378, 1380 (1999) (citing *Russell*, 3 Vet. App. at 313 (1992)); *see also Fugo*, 6 Vet. App. at 44 (1993). Additionally, "even where the premise of error is accepted, if it is not absolutely clear that a different result would have ensued, the error complained of cannot be, *ipso facto*, clear and unmistakable." *Fugo*, 6 Vet. App. at 43-44.

The Board will first address the Veteran's allegation of CUE in an April 2014 rating decision. During the pendency of the current appeal of a November 2012 rating decision which continued a 50 percent evaluation for service-connected depression, an April 2014 rating decision assigned a 70 percent rating for service-connected depression, effective March 26, 2014. The Veteran claimed that his depression warrants a 70 percent rating and/or higher rating prior to March 26, 2014. As the April 2014 rating decision is part and parcel of the current appeal for an increased rating for service-connected depression, prior to and from March 26, 2014, the April 2014 rating decision is not final. As such, it is not subject to a claim of CUE. Thus, the allegations of CUE in the April 2014 rating decision will not be further discussed herein.

With respect to the issue of entitlement to an effective date prior to March 4, 2008 for the award of service connection for depression, not otherwise specified, the Veteran also asserted that an unappealed May 1982 rating decision was the product of CUE in not adjudicating entitlement to service connection for a psychiatric disability, to include depression. The May 1982 rating decision denied the issue of

entitlement to service connection for a low back disability. A June 1982 VA notice letter advised the Veteran of the May 1982 rating decision. The letter noted enclosure of VA Form 1-4107, Notice of Procedural and Appellate Rights. No appeal was taken from that determination. New and material evidence was not received prior to expiration of the period to appeal. The May 1982 rating decision is final. 38 U.S.C.A. § 7105(c) (West 2002), 38 C.F.R. §§ 3.104, 20.302, 20.1103 (2014); *see also* 38 C.F.R. § 3.156(b) (2014).

The Veteran has argued that the May 1982 rating decision is the product of CUE because it did not infer a claim of entitlement to service connection for depression or psychiatric disability.

For VA compensation purposes, at the time of the May 1982 rating decision, a "claim" was defined as "a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement, to a benefit." 38 C.F.R. § 3.1(p) (1981). An informal claim was defined as "[a]ny communication or action indicating an intent to apply for one or more benefits." It must "identify the benefit sought." 38 C.F.R. § 3.155(a) (1981).

In reviewing the record before the AOJ at the time of the May 1982 rating decision, there is no communication from the Veteran that could have been construed as a claim for benefits for a psychiatric disability or depression. The Veteran's Application for Compensation or Pension at Separation from Service, received by VA in April 1982, shows that he requested service connection for a back disability. There was no mention of a psychiatric disability or depression and no other communication from the Veteran that could be construed, even liberally, as requesting service connection for a psychiatric disability or depression. Moreover, even if medical evidence existed at the time of the May 1982 rating decision, the mere presence of medical evidence does not establish intent on the part of the Veteran to seek service connection for a condition. *See Brannon v. West*, 12 Vet. App. 32, 35 (1998); *Lalonde v. West*, 12 Vet. App. 377, 382 (1999) (where appellant had not been granted service connection, mere receipt of medical records could not be construed as informal claim). Merely seeking treatment, does not establish a claim, to include an informal claim, for service connection. Further, the

mere presence of a disability does not establish intent on the part of the Veteran to seek service connection for that condition. *See KL v. Brown*, 5 Vet. App. 205, 208 (1993); *Crawford v. Brown*, 5 Vet. App. 33, 35 (1995). As a result, the Veteran's argument fails.

Finally, any allegation with respect to the failure in the duty to assist, such as not providing a VA medical examination that would have revealed a psychiatric disability, is not grounds for finding CUE. A breach of VA's duty to assist cannot constitute CUE. *Cook v. Principi*, 318 F.3d 1334, 1345-47 (Fed. Cir. 2002); *see also* 38 C.F.R. § 20.1403(c) and (d) (citing as example that VA's failure to fulfill the duty to assist does not constitute CUE.)

In light of the above, the Board concludes that the Veteran has not established that the correct facts were not considered, or that the AOJ ignored or incorrectly applied the statutory and regulatory provisions applicable at the time of the May 1982 rating decision. Accordingly, the Veteran's claim of CUE must be denied. Absent a finding of CUE, the assignment of an earlier effective date in this case is not warranted. The Veteran's claim must be denied on the absence of legal merit or the lack of entitlement under the law. *See Sabonis v. Brown*, 6 Vet. App. 426, 430 (1994).

ORDER

The issue of entitlement to an effective date earlier than March 25, 1982 for the award of service connection for L5-S1 spondylolisthesis with bilateral spondylosis is dismissed.

Entitlement to an effective date earlier than March 4, 2008, for the award of service connection for depression, not otherwise specified, to include on the basis of CUE in a May 1982 rating decision, is denied.

REMAND

The Board finds that the issues of entitlement to an increased rating for depression, not otherwise specified, rated 50 percent prior to March 26, 2014 and 70 percent from March 26, 2014, and entitlement to a higher initial rating for L5-S1 spondylolisthesis with bilateral spondylosis, rated 10 percent prior to August 13, 2004 and 20 percent from August 13, 2004, exclusive of assigned temporary total ratings for convalescence, must be remanded for additional development.

First, the Board notes that the oldest VA medical treatment records are dated in October 1997. In an October 1998 statement with respect to his claim to reopen a claim of service connection for a low back disability, the Veteran requested that VA obtain all of his VA medical treatment records from the Minneapolis VA Medical Center. The request for VA medical treatment records dated in January 1999 only reflects that a request was made for records beginning in October 1997. As a result, the Board finds that additional relevant records may exist. VA treatment records, even if not in the claims folder, are considered part of the record on appeal because they are within VA's constructive possession. *See* 38 U.S.C.A. § 5103A (b) (West 2002); *Bell v. Derwinski*, 2 Vet. App. 611 (1992). A request must be made for all VA medical treatment records prior to October 1997. In addition, the most recent VA medical treatment records were printed in December 2008. The electronic file contains some VA medical treatment records dated from 2011 to 2012. However, a request for all VA medical treatment records since December 2008 has not been accomplished. Review of the evidence shows that the Veteran reported that he receives psychiatric care by Dr. Y., a VA physician, since 2007. *See* March 2014 VA mental disorders examination report. In addition, the March 2014 VA spine examination report noted that the Veteran received back care at the VA Medical Center and was seen in October 2013, a VA treatment record that is not available to the Board for review. A remand for updated VA treatment records is required. *See Bell, id.*

In an April 2013 rating decision, the Veteran's claim to reopen the issue of entitlement to service connection for cervical disc disease remained denied because the evidence presented was not new and material. In a statement received in April

2013, subsequent to the rating decision, the Veteran's representative stated that the presented evidence was new and material and discussed the Veteran's neck/cervical spine disability. The April 2013 statement is considered a notice of disagreement with the April 2013 rating decision wherein the issue of whether new and material evidence has been received to reopen a claim of entitlement to service connection for cervical disc disease was denied. 38 C.F.R. § 20.201 (2014); *see Gallegos v. Principi*, 283 F.3d 1309 (Fed. Cir. 2002). A Statement of the Case has not been issued. *See Manlincon v. West*, 12 Vet. App. 238 (1999). Thus, a Statement of the Case must be issued and the Veteran must be advised that to vest the Board with jurisdiction over the issue, a timely substantive appeal must be filed. 38 C.F.R. § 20.202 (2014).

Finally, with respect to the claims for entitlement to a TDIU and SMC, the Veteran should be provided a proper notice letter. In addition, a VA examination and opinion must be obtained to determine the functional impact of his service-connected disabilities on his ability to secure or follow a substantially gainful occupation. 38 C.F.R. § 4.16. In requesting such an examination, the Board recognizes that a "combined-effects medical examination report or opinion" is not required to adjudicate a TDIU claim. *See Geib v. Shinseki*, 733 F.3d 1350 (Fed. Cir. 2013); *Floore v. Shinseki*, 26 Vet. App. 376 (2013). The ultimate responsibility for a TDIU determination is a factual rather than a medical question and is an adjudicative determination made by the Board or the AOJ. *Geib*, 733 F.3d at 1354 (citing 38 C.F.R. § 4.16(a)). However, the Board finds that an opinion as to the functional impact of his disabilities on employment would be useful to the Board in adjudicating the issue. Concerning the issue of entitlement to SMC by reason of being housebound, the Board must defer adjudication because it is considered to be inextricably intertwined with the issue of entitlement to a TDIU. *See Harris v. Derwinski*, 1 Vet. App. 180 (1991).

Accordingly, the issues are REMANDED for the following action:

**(Please note, this appeal has been advanced on the Board's docket pursuant to 38 C.F.R. § 20.900(c). Expedited handling is requested.)**

1. Issue a Statement of the Case with respect to an April 2013 rating decision, and notice of disagreement therewith received later that same month, as to the issue of whether new and material evidence has been received to reopen a claim of entitlement to service connection for cervical disc disease. Notify the Veteran that to vest the Board with jurisdiction over the issue, a timely substantive appeal must be filed. 38 C.F.R. § 20.202 (2014). If the Veteran perfects an appeal, return the case to the Board for appellate review.

2. Send the Veteran a notice letter with respect to the issues of entitlement to a TDIU and entitlement to SMC based on the need for aid and attendance or by reason of being housebound. Provide the Veteran a VA Form 21-8940, Veterans Application for Increased Compensation Based on Unemployability, for completion.

3. Ask the Veteran to identify all relevant VA and/or private medical treatment. Provide the Veteran a VA Form 21-4142, Authorization and Consent to Release Information to VA, to complete with respect to any private treatment. Request any records identified by the Veteran.

4. Request *all* VA medical treatment records from the Minneapolis VAMC since service prior to October 28, 1997 and updated VA medical treatment records from December 2008 to the present.

5. Following the above requested development and any other development deemed necessary, schedule the Veteran for a VA medical examination to determine the impact and effect of the Veteran's service-connected

disabilities on his ability to maintain substantially gainful employment. The Veteran's claims folder must be made available for review and the examiner must indicate that a review was completed. Any indicated tests and studies must be completed.

Following an examination of the Veteran and review of the claims folder, the examiner is asked to comment on the functional impact of all of the Veteran's service-connected disabilities, in combination, on his ability to work, consistent with his educational and occupational experience.

A rationale must be provided for any opinion offered.

6. After completing the above action, readjudicate the remaining issues on appeal, to include the increased rating issues, and issues of entitlement to a TDIU, and SMC. If any benefit sought remains denied, issue a supplemental statement of the case to the Veteran and his attorney. After an appropriate amount of time for response, return the appeal to the Board for review.

The appellant has the right to submit additional evidence and argument on the matters the Board has remanded. *Kutscherousky v. West*, 12 Vet. App. 369 (1999).

This claim must be afforded expeditious treatment. The law requires that all claims that are remanded by the Board of Veterans' Appeals or by the United States Court

of Appeals for Veterans Claims for additional development or other appropriate action must be handled in an expeditious manner. *See* 38 U.S.C.A. §§ 5109B, 7112 (West 2014).

U. R. POWELL
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

# YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. We will return your file to your local VA office to implement the BVA's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court *before* you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

**How long do I have to start my appeal to the court?** You have 120 days from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you,* you will have another 120 days from the date the BVA decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time.* Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

**How do I appeal to the United States Court of Appeals for Veterans Claims?** Send your Notice of Appeal to the Court at:

**Clerk, U.S. Court of Appeals for Veterans Claims**
**625 Indiana Avenue, NW, Suite 900**
**Washington, DC 20004-2950**

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: http://www.uscourts.cavc.gov, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

**How do I file a motion for reconsideration?** You can file a motion asking the BVA to reconsider any part of this decision by writing a letter to the BVA clearly explaining why you believe that the BVA committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that such letter be as specific as possible. A general statement of dissatisfaction with the BVA decision or some other aspect of the VA claims adjudication process will not suffice. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

**Director, Management, Planning and Analysis (014)**
**Board of Veterans' Appeals**
**810 Vermont Avenue, NW**
**Washington, DC 20420**

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

**How do I file a motion to vacate?** You can file a motion asking the BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

**How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error?** You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400 – 20.1411, and *seek help from a qualified representative before filing such a motion.* See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

**How do I reopen my claim?** You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

**Can someone represent me in my appeal?** Yes. You can always represent yourself in any claim before VA, including the BVA, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: http://www.va.gov/vso/. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: http://www.uscourts.cavc.gov. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: http://www.vetsprobono.org, mail@vetsprobono.org, or (855) 446-9678.

**Do I have to pay an attorney or agent to represent me?** An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

**Fee for VA home and small business loan cases:** An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

**Filing of Fee Agreements:** In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to the Secretary at the following address:

**Office of the General Counsel (022D)**
**810 Vermont Avenue, NW**
**Washington, DC 20420**

The Office of General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).

*Designated for electronic publication only*

# UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-3377

PATRICK K. BRUNETTE, APPELLANT,

V.

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

Before SCHOELEN, *Judge*.

## MEMORANDUM DECISION

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

SCHOELEN, *Judge*: The appellant, Patrick K. Brunette, through counsel appeals a May 8, 2015, Board of Veterans' Appeals (Board) decision that denied an effective date earlier than March 4, 2008, for the award of service connection for depression, not otherwise specified, to include on the basis of clear and unmistakable error (CUE) in a May 1982 rating decision and dismissed the appellant's claim of entitlement to an effective date prior to March 25, 1982, for the award of service connection for L5-S1 spondylolisthesis with bilateral spondylosis. Record of Proceedings (R.) at 1-20. The Board remanded the appellant's claims for (1) an increased disability rating for depression, not otherwise specified, rated 50% prior to March 26, 2014, and 70% from March 26, 2014; (2) a higher initial rating for L5-S1 spondylolisthesis with bilateral spondylosis, rated 10% prior to August 13, 2004, and 20% from August 13, 2004, exclusive of temporary total ratings for convalescence; (3) a total disability rating based upon individual unemployability (TDIU); and (4) special monthly compensation (SMC) by reason of being housebound. R. at 14-18. The Board also remanded the issue whether new and material evidence had been submitted to reopen a claim of entitlement to service connection for cervical disc disease. *See id.* The remanded matters are not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 483 (1997) (claims remanded by the Board may not be reviewed by the Court).

The appellant does not raise any argument concerning the Board's dismissal of his claim for an effective date prior to March 25, 1982, for the award of service connection for L5-S1 spondylolisthesis with bilateral spondylosis. Appellant's Brief (Br.). Therefore, the Court finds that he has abandoned his appeal of this issue and the Court will dismiss the appeal as to the abandoned issue. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc). This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm the Board's decision denying an effective date earlier than March 4, 2008, for the award of service connection for depression, not otherwise specified, to include on the basis of CUE in a May 1982 rating decision.

## I. BACKGROUND

The appellant served on active duty in the U.S. Army from March 1979 to March 1982. R. at 3. The appellant was medically discharged from service after a medical board determined that he was unfit for duty as a result of a lumbar spine condition. R. at 2117, 2121-23, 2128-33. The medical board examination noted that his psychiatric condition was "normal" upon clinical evaluation. R. at 2117, 2123.

In April 1982, the appellant filed an application for disability compensation for grade 1, L5-S1 spondylolisthesis. R. 2507-09. In a May 1982 rating decision, a VA regional office (RO) denied the claim, finding that the condition was "a constitutional or developmental abnormality, not a disability under the law." R. at 2497. The appellant did not appeal the decision and it became final.

In August 2004, the appellant requested to reopen his claim for a low back disability. R. at 2431. In November 2004, the appellant asserted that the May 1982 decision denying service connection for a lumbar spine disability was the product of CUE because the RO did not consider whether service aggravated his low back condition. R. at 2410-11. The appellant also asked VA to obtain his service medical records, which he alleged would show an in-service back injury. R. at 2411. In May 2006, the RO awarded service connection for L5-S1 spondylolisthesis with bilateral spondylosis and assigned a noncompensable rating effective August 2004. R. at 4. In July 2006, his disability rating was increased to 20% from August 2004. *Id.*

On March 4, 2008, the appellant, through his accredited representative, submitted "a new claim for service connection for depression secondary to . . . [his] service[-]connected back condition." R. at 1427. In May 2008, the appellant underwent a VA mental disorders examination, which diagnosed a depressive disorder, not otherwise specified. R. at 1377-88. The examiner opined that the appellant's depression was at least as likely as not aggravated (15 to 20%) by his back condition. R. at 1387-88.

In June 2008, the RO granted service connection for depression and assigned 30% disability rating, effective March 4, 2008, the date of his claim. R. at 1363-73. In August 2008, the appellant disagreed with the assigned disability rating, R. at 1324, and in December 2008, a decision review officer awarded a 50% disability rating effective March 4, 2008, R. at 1178-81, 1205-09.

In the interim, in an August 18, 2008, decision, the Board determined that the May 1982 rating decision, which denied service connection for a low back disability, was not the product of CUE. R. at 1312-21. However, in July 2011, the Board ordered reconsideration of the August 2008 decision and, in May 2012, issued a decision by a three-judge panel finding that the May 1982 rating decision contained CUE. R. at 943-52. The Board explained that, in March 2011, the appellant's counsel submitted additional service treatment records not previously associated with the claims file, including a February 16, 1982, revised physical evaluation board (PEB) report finding that the veteran's condition preexisted service, was aggravated by service, and rendered him unfit for service. R. at 948. The Board further noted that the PEB report recommended that the appellant be separated from military service with severance pay and a rating of 10%. *Id.* Because the correct facts as known at the time were not before the adjudicators and consideration of the additional service records, under the law then in effect, compelled a manifestly different outcome, the Board concluded that the May 1982 decision was clearly and unmistakably erroneous. R. at 949.

The Board further found that the provisions of 38 C.F.R. § 3.156(c) applied because at the time of the denial VA had received relevant service department records that had not been associated with the claims file. *Id.* The Board noted the appellant's argument that he was entitled to an effective date for his service-connected low back disability and depression as of the date of his discharge from service, but stated that those issues were not before the Board and could not properly be addressed. R. at 949-50.

On November 19, 2012, the RO granted a 10% disability rating for the appellant's low back disability effective from March 25, 1982, the date following his discharge from service, and a 20% disability rating from August 13, 2004, along with additional temporary ratings for surgical treatment and convalescence. R. at 880; *see* R. at 865-84. The November 2012 rating decision also continued the appellant's 50% disability rating for depression and denied an earlier effective date. R. at 882-83.

The appellant, through his current counsel, filed a Notice of Disagreement (NOD) asserting that the appellant's depression should be rated 70% disabling effective March 24, 1982. R. at 826. He argued that because the appellant "filed a claim with the VA within 12 days of discharge, his claim relates back to his date of discharge." *Id.* The RO issued a Statement of the Case (SOC) that denied an earlier effective date for depression, noting that the appellant filed a claim for a psychiatric condition in March 2008 and that, during the claims process in 1982, he had not submitted a claim for a psychiatric condition and a psychiatric condition was not indicated. R. at 659-62.

On April 8, 2014, the RO awarded an increased disability rating, from 50% to 70%, for depression, effective March 26, 2014, the date of his most recent VA examination. R. at 497. The RO also issued a Supplemental SOC that denied disability ratings in excess of 50% prior to March 26, 2014, and in excess of 70% on or after March 26, 2014. R. 493-98. In August 2014, the appellant again asserted entitlement to a March 1982 effective date for his service-connected depression. R. at 501-10. In a confusing argument, he stated:

> Had the [r]ating [b]oard followed its statutory and regulatory duties[,] it would have detected [c]laimant's dysthymia . . . and determined the correct rating. . . . Yet it was not until 2008 that it determined the correct rating for dysthymia and ruled that it was secondary to the back injury, but did not assign an earlier effective date.

R. at 509.

In November 2014, the appellant's counsel expounded on his previous argument, stating that because the rating board failed to consider available service records, "38 C.F.R. § 3.156[ ] requires that the rating board decision be reopened – not just for the purpose of allowing the new evidence or even to reconsider the issue – but *completely reopened* for all purposes." R. at 449. Counsel argued that "[t]his means that the VARO must do everything it should have done in the first place and it also means that the final rating outcome can be as high as it is today if that is the highest possible rating." *Id.* Regarding the appellant's depression, he further argued that the April

2014 rating decision was clearly and unmistakably erroneous for assigning an April 2014 effective date for the 70% disability rating because the decision "ignor[ed] the law that his 1982 claim was reopened" and that "[t]he effective date of March 25, 1982[,] should be assigned immediately to the 70% rating." R. at 452 n.2.

On May 8, 2015, the Board denied an earlier effective date for the award of service connection for depression, to include on the basis of CUE in the May 1982 rating decision. R. at 1-20. The Board noted that a June 2008 rating decision granted service connection for depression and assigned a March 4, 2008, effective date, the date his claim was received. R. at 9. The Board found no communication disagreeing with the effective date within the 1-year appeal period. R. at 9-10. Accordingly, the Board concluded that the June 2008 decision became final with respect to the effective date and noted that the appellant may not overcome the finality of the decision by bringing a freestanding claim for an earlier effective date. R. at 10 (citing *Rudd v. Nicholson*, 20 Vet.App. 296, 300 (2006)).

The Board then addressed the appellant's allegation that the May 1982 rating decision contained CUE because it did not infer and adjudicate entitlement to service connection for a psychiatric disability. R. at 11-13. The Board found no communication in 1982 that might be construed as a claim for benefits for a psychiatric disability and stated, even assuming medical evidence existed at the time, the mere presence of such evidence does not establish an intent on the part of the veteran to seek service connection. R. at 12-13. Lastly, the Board concluded that any allegation with respect to the duty to assist, such as the failure to provide a medical examination, cannot constitute CUE. R. at 14. Absent a finding of CUE, the Board concluded that an earlier effective date was not warranted. *Id.* This appeal followed.

## II. ANALYSIS

### A. The Parties' Arguments

The appellant's brief is difficult to decipher and contains numerous arguments unrelated to the issue on appeal. For example, the appellant (1) "seeks awards of 60% each for . . . lower back and neck injuries and 100% for . . . major depression secondary to the low back and neck injuries," Appellant's Br. at 15; (2) asserts that Diagnostic Code 5243 required the 1982 rating board to rate his back and neck separately, *id.* at 17-19; and (3) asserts entitlement to TDIU and SMC, *id.* at 23-25.

Because the Court lacks jurisdiction over matters not finally decided in the May 2015 decision, the Court will not address the appellant's arguments that are unrelated to the effective date for his service-connected depression. *See* 38 U.S.C. § 7252(a) (providing that the Court's jurisdiction is generally limited to review of final Board decisions); *Ledford v. West*, 136 F.3d 776, 779 (Fed. Cir. 1998) (holding that "the [C]ourt's jurisdiction is premised on and defined by the Board's decision concerning the matter being appealed"); *see also Tyrues v. Shinseki*, 23 Vet.App. 166, 178 (2009) ("[T]his Court's jurisdiction is controlled by whether the Board issued a 'final decision' – i.e., denied relief by either denying a claim or a specific theory in support of a claim and provided the claimant with notice of appellate rights."), *aff'd*, 631 F.3d 1380, 1383 (Fed. Cir. 2011), *vacated and remanded for reconsideration*, 132 S. Ct. 75 (2011), *modified*, 26 Vet.App. 31 (2012).

Regarding the matter on appeal, the appellant does not dispute the Board's determination that he did not file an NOD with the effective date assigned for the award of service connection for depression and that the June 2008 decision is final with respect to the assigned effective date of March 4, 2008. *See* R. at 10. Nor does he dispute the Board's factual determination that, in 1982, he did not file a claim for depression. *See* R. at 12. In fact, the appellant concedes that in 1982 he "did not file a claim for depression because he didn't know he had it." Appellant's Br. at 6.

Nevertheless, he claims entitlement to a 1982 effective date for his depression because he asserts that 38 C.F.R. § 3.156(c) requires the Board to "consider evidence of statements given now as if they were made at the time of the original claim and medical evidence and x-rays taken many years later as proof of [his] condition at the time of discharge." *Id.* at 10. The appellant contends that "[i]f [his] major depression was secondary to his chronic pain when diagnosed in 2004, then it was secondary in 1982 and was a part of his claim for back pain in 1982." *Id.* at 17. The appellant also argues that, in 1982, VA was required to provide him a compensation examination, which would have included a psychiatric evaluation, 38 C.F.R. § 4.42, and that his depression would have been diagnosed had VA provided a proper examination. *Id.* at 22. He baldly states that "[t]his Court knows what a proper C&P examination would have disclosed and may correct the failure to provide one by just ordering payment of the compensation [he] was entitled to receive." *Id.* at 23.

The Secretary argues for affirmance of the Board's decision, asserting that the appellant does not contest the finality of the June 2008 rating decision that assigned an effective date for his service-connected depression and that the decision may only be challenged by an allegation of

CUE in the June 2008 rating decision, which has not been raised. Secretary's Br. at 7-9. In response to the appellant's § 3.156(c) arguments, the Secretary argues that, to the extent this issue was raised below, any error by the Board in failing to address its application is harmless. *Id.* at 8 n.1. The Secretary contends that the essential facts are undisputed and urges the Court to consider the matter in the first instance. *Id.*

The Secretary avers that § 3.156(c) necessarily requires that a claim for a condition have previously been decided by the Secretary and that a subsequent grant for benefits be based all or in part on the newly discovered service record. *Id.* at 11. Here, he asserts, it is undisputed that the appellant did not file a claim for depression until 2008 and nothing in the rating decision awarding service connection for depression indicates that the award was based all or in part on any newly discovered service records. *Id.*

B. Discussion

Although the Board did not address whether the appellant is entitled to an earlier effective date under § 3.156(c), the Court finds that the appellant has not demonstrated prejudicial error. *See Shinseki v. Sanders*, 556 U.S. 396, 407-10 (2009) (under the harmless error rule, the appellant has the burden of showing that he suffered prejudice as a result of VA error). The undisputed facts are that the appellant did not file a claim for depression until March 2008 and, in June 2008, the RO finally decided the issue of the appropriate effective date for the appellant's depression. R. at 10-12. The only way the appellant may overcome the finality of the June 2008 decision is through a request for revision on the basis of CUE. *See Rudd*, 20 Vet.App. at 300; *see also* 38 U.S.C. § 5109A. However, the appellant does not allege CUE in that decision and in the decision on appeal such a challenge was not adjudicated by the Board. *See Andre v. Principi*, 301 F.3d 1354, 1361 (Fed. Cir. 2002) (holding that "each 'specific' assertion of CUE constitutes a claim that must be the subject of a decision by the B[oard] before the . . . Court can exercise jurisdiction over it").

To the extent that appellant argues that § 3.156(c) warrants an earlier effective date, he fails to establish how that regulation applies to the facts of this case. Section 3.156(c) provides an exception to the general rules governing the assignment of effective dates, 38 U.S.C. § 5110(a). Specifically, when the Secretary decides a claim, but later receives "relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim." 38 C.F.R. § 3.156(c)(1) (2016). If the Secretary awards benefits "based all or in part" on the newly submitted service department records, VA

allows the assignment of an effective date of benefits "on the date entitlement arose or the date VA received the previously decided claim, whichever is later." 38 C.F.R. § 3.156(c)(3); *see Mayhue v. Shinseki*, 24 Vet.App. 273, 279 (2011) (holding that "a claimant whose claim is reconsidered based on newly discovered service department records may be entitled to an effective date as early as the date of the original claim").

Here, VA did not decide a claim for depression in 1982 and the appellant does not dispute the Board's determination that, "at the time of the May 1982 rating decision, there is no communication from the [appellant] that could have been construed as a claim for benefits for a psychiatric disability." R. at 12. In 1982, the RO decided a claim for a low back condition and, upon receipt of newly discovered service department records, VA "reconsidered" the back claim. *See* R. at 880, 949. The appellant does not provide any support for his contention that reconsideration of his back claim must include a claim for a psychiatric disability that the appellant admittedly did not know that he had and was not diagnosed until 2004. Because the appellant makes no cogent argument supporting his theory of entitlement, it will be rejected. *See Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments."), *rev'd on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order).

To the extent the appellant argues that in 1982 the RO erred when it failed to provide him a VA medical examination, which would have revealed a psychiatric disability, the Board correctly found that any breach of VA's duty to assist is not grounds for finding CUE in the May 1982 rating decision. R. at 13; *see Cook v. Principi*, 318 F.3d 1334, 1346 (Fed. Cir. 2002) ("The requirements that a clear and unmistakable error be outcome determinative and be based on the record that existed at the time of the original decision make it impossible for a breach of the duty to assist to form the basis for a CUE claim."); *see also Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant bears the burden of demonstrating error on appeal), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

## III. CONCLUSION

The appeal of the Board's May 8, 2015, decision that dismissed the appellant's claim for an effective date prior to March 25, 1982, for the award of service connection for L5-S1 spondylolisthesis with bilateral spondylosis is DISMISSED. After consideration of the parties' pleadings, and a review of the record, the Board's decision denying an effective date earlier than March 4, 2008, for the award of service connection for depression, not otherwise specified, to include on the basis of CUE in a May 1982 rating decision, is AFFIRMED.

DATED: May 25, 2017

Copies to:

Edward A. Zimmerman, Esq.

VA General Counsel (027)

NOTE: This disposition is nonprecedential.

# United States Court of Appeals for the Federal Circuit

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PATRICK BRUNETTE,
*Claimant-Appellant*

v.

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

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2017-2534

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Appeal from the United States Court of Appeals for Veterans Claims in No. 15-3377, Judge Mary J. Schoelen.

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Decided: July 17, 2018

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EDWARD AUSTIN ZIMMERMAN, Military & Veterans National Law Center, Burnsville, MN, for claimant-appellant.

JOSEPH ASHMAN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent-appellee. Also represented by ROBERT EDWARD KIRSCHMAN, JR., LOREN MISHA PREHEIM, CHAD A. READLER.

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Before PROST, *Chief Judge*, MOORE and REYNA, *Circuit Judges*.

PER CURIAM.

Patrick Brunette appeals the U.S. Court of Appeals for Veterans Claims' determination that various claims remanded by the Board of Veterans' Appeals to the regional office ("RO") were not before it, and its affirmance of the Board's denial of an earlier effective date for the award of service connection for depression. Because the Veterans Court did not err in its determinations, we *affirm*.

## BACKGROUND

Mr. Brunette served in the United States Army from March 1979 to March 1982, when he was medically discharged from service due to a back condition. In April 1982, he applied for disability compensation for spondylolisthesis, a back condition. The RO denied the claim in May 1982, finding spondylolisthesis was not a disability under the law. Mr. Brunette did not appeal, but in August 2004 he requested the Department of Veterans Affairs reopen his claim, arguing the May 1982 rating decision was the product of clear and unmistakable error ("CUE"). In 2006, the RO awarded Mr. Brunette service connection for spondylolisthesis, and in May 2012, the Board determined that the May 1982 rating decision was the result of CUE, finding additional service records that were not before the adjudicators would have compelled a manifestly different outcome. The Board further determined that 38 C.F.R. § 3.156(c), which provides for the reconsideration of a claim, applied because at the time of the denial, the VA had received relevant service department records that had not been associated with the claims file. In November 2012, the RO granted a 10% disability rating for Mr. Brunette's back condition effective March

25, 1982, and a 20% disability rating effective August 13, 2004.

On March 4, 2008, Mr. Brunette submitted a new claim for depression secondary to his back condition. Following a VA examination, he was diagnosed with a depressive disorder. In June 2008, the RO granted service connection for depression and assigned a 30% disability rating effective March 4, 2008, which on review was increased to 50%.

In November 2012, the RO continued the 50% disability rating for depression and denied an earlier effective date. Mr. Brunette filed a notice of disagreement asserting his depression should be rated at 70% effective March 24, 1982. The RO awarded an increased disability rating of 70% effective March 26, 2014.

In May 2015, the Board denied Mr. Brunette an earlier effective date for depression. It determined the June 2008 decision of the RO setting the effective date had become final. It determined there was no CUE in the May 1982 rating decision because there was no communication in 1982 that might be construed as a claim for benefits for a psychiatric disability. The Board remanded on the issues of: (1) entitlement to an increased rating for depression; (2) entitlement to a higher initial rating for spondylolisthesis; (3) entitlement to a total disability rating based upon individual unemployability; and (4) special monthly compensation by reason of being housebound.

Mr. Brunette appealed to the Veterans Court. The Veterans Court determined that the issues on which the Board remanded were not before the Court and that Mr. Brunette was not entitled to a 1982 effective date for depression. Mr. Brunette timely appealed. We have jurisdiction under 38 U.S.C. § 7292.

## DISCUSSION

Our jurisdiction to review Veterans Court decisions is limited to "the validity of a decision of the Court on a rule of law or of any statute or regulation . . . or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision." 38 U.S.C. § 7292(a). We review such legal determinations de novo. *Andre v. Principi*, 301 F.3d 1354, 1358 (Fed. Cir. 2002). We may not review the Veterans Court's factual findings or its application of law to facts, absent a constitutional issue. *Singleton v. Shinseki*, 659 F.3d 1332, 1334 (Fed. Cir. 2011).

We hold that the Veterans Court did not err in dismissing the appeal as to the claims that the Board had remanded for further development. Although Mr. Brunette argues the Veterans Court may not remand under 38 U.S.C. § 7261, we see nothing in that section that prevents the Board from remanding a case to an RO for further development of the record. *See* 38 C.F.R. § 19.9 ("If further evidence, clarification of the evidence, correction of a procedural defect, or any other action is essential for a proper appellate decision, a Veterans Law Judge or panel of Veterans Law Judges shall remand the case to the agency of original jurisdiction, specifying the action to be undertaken.").

The Veterans Court also did not err in affirming the Board's decision denying Mr. Brunette an effective date earlier than March 4, 2008, for service connection for depression. Mr. Brunette argues the Veterans Court erroneously concluded that the Board's failure to apply 35 C.F.R. § 3.156(c) to his depression claim constituted harmless error. He argues § 3.156(c) applies because at the time of the May 1982 denial of the claim, the VA had received service department records related to his lower back claim but had not considered those records. According to Mr. Brunette, § 3.156(c) requires that the entire

1982 rating proceeding be reopened. He asserts that if this is done, the VA must accept his testimony and that of his friends and family regarding his symptoms of depression in 1982.

Section 3.156(c) provides for the reconsideration of a "claim." 35 C.F.R. § 3.156(c)(1). A secondary service connection is not necessarily part of the primary claim for service connection. *Manzanares v. Shulkin*, 863 F.3d 1374, 1377–78 (Fed. Cir. 2017). Mr. Brunette concedes that his 1982 claim was for spondylolisthesis and did not include a claim for depression. Pursuant to § 3.156(c), the Board's May 2012 determination directing the reconsideration of Mr. Brunette's spondylolisthesis claim does not, therefore, allow for introduction of evidence related to his secondary claim for depression.

We have considered Mr. Brunette's remaining arguments and find them unpersuasive. We note that Mr. Brunette expressly disavowed a claim based on CUE.

## CONCLUSION

For the foregoing reasons, the decision of the Veterans Court is *affirmed*.

## AFFIRMED

## COSTS

No costs.

NOTE: This order is nonprecedential.

# United States Court of Appeals for the Federal Circuit

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**PATRICK BRUNETTE,**
*Claimant-Appellant*

**v.**

**ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,**
*Respondent-Appellee*

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2017-2534

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Appeal from the United States Court of Appeals for Veterans Claims in No. 15-3377, Judge Mary J. Schoelen.

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**ON PETITION FOR PANEL REHEARING**

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Before PROST, *Chief Judge,* MOORE and REYNA, *Circuit Judges.*

PER CURIAM.

**ORDER**

Appellant Patrick Brunette filed a petition for panel rehearing.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The mandate of the court will issue on September 26, 2018.

FOR THE COURT

September 19, 2018
Date

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