APPENDIX A

United States Court of Appeals for the Federal Circuit

RICHARD D. SIMMONS,
Claimant-Appellant

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2019-1519

Appeal from the United States Court of Appeals for Veterans Claims in No. 16-3039, Chief Judge Margaret C. Bartley, Judge Michael P. Allen, Senior Judge Robert N. Davis.

Decided: July 17, 2020

KENNETH M. CARPENTER, Law Offices of Carpenter Chartered, Topeka, KS, argued for claimant-appellant.

ASHLEY AKERS, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by ETHAN P. DAVIS, TARA K. HOGAN, ROBERT EDWARD KIRSCHMAN, JR., BARBARA E. THOMAS; JONATHAN KRISCH, Y. KEN LEE, Office of General Counsel, United

States Department of Veterans Affairs, Washington, DC.

Before MOORE, CLEVENGER, and CHEN, *Circuit Judges*.

CHEN, *Circuit Judge*.

Richard D. Simmons appeals a decision from the U.S. Court of Appeals for Veterans Claims (Veterans Court), affirming the decision of the Board of Veterans' Appeals (Board) denying Mr. Simmons's claim for compensation for a service-connected psychiatric disorder. The Veterans Court held that, even though the Board incorrectly stated that the presumptions of soundness and service connection did not apply to Mr. Simmons's claim, that error was harmless because it did not affect the basis of the Board's denial of the claim. On appeal, Mr. Simmons argues that a failure to apply an evidentiary presumption is per se prejudicial. Because we agree with the Veterans Court that the failure to apply the presumptions of soundness and service connection is not per se prejudicial, we affirm.

BACKGROUND

We begin by discussing the pertinent background law.

I. Presumptions of Soundness and Service Connection

Veterans are entitled to compensation from the Department of Veterans Affairs (VA) if they develop a

disability "resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty." 38 U.S.C. §§ 1110 (wartime service), 1131 (peacetime service). To establish a right to disability benefits, a veteran must show: "(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service." *Shedden v. Principi*, 381 F.3d 1163, 1166–67 (Fed. Cir. 2004).

As to the second requirement, whether a disability was incurred or aggravated during service, Congress provided for a special evidentiary rule known as the presumption of soundness, set forth in 38 U.S.C. § 1111 (wartime service):

> For the purposes of section 1110 of this title, every veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service.

See also 38 U.S.C. § 1132 (peacetime service). When no preexisting disorder is noted in the veteran's paperwork upon entry into service, any medical problem arising during service is presumed to have occurred

during service. *Holton v. Shinseki*, 557 F.3d 1362, 1367 (Fed. Cir. 2009).

Another statutory presumption relevant to the second requirement is set forth in 38 U.S.C. § 105(a), which creates a presumption that an injury or disease incurred by a veteran during active service was incurred in the line of duty and not caused by any veteran misconduct. 38 U.S.C. § 105(a) states:

> [a]n injury or disease incurred during active military, naval, or air service will be deemed to have been incurred in line of duty and not the result of the veterans own misconduct when the person on whose account benefits are claimed was, at the time the injury was suffered or disease contracted, in active military, naval, or air service, whether on active duty or on authorized leave, unless such injury or disease was a result of the persons own willful misconduct or abuse of alcohol or drugs.

Neither the presumption of soundness nor the presumption of service connection, however, is relevant to the third requirement, in which the veteran must show that the in-service injury or disease is causally related to the veteran's current disability. *Holton*, 557 F.3d at 1367.

II. Mr. Simmons

Mr. Simmons served in the U.S. Navy from 1968 to January 1970. Throughout his time in service, Mr.

Simmons experienced feelings of depression and homesickness. In April 1969, a VA physician diagnosed Mr. Simmons with a laceration of the left wrist and situational depression but no permanent disability. In December 1969, another VA physician diagnosed him with immature personality disorder and recommended he be discharged. Mr. Simmons was discharged the next month.

On September 13, 1972, Mr. Simmons submitted a claim for a non-service-connected pension for polyarthritis. In December 1972, the VA awarded Mr. Simmons the requested non-service-connected pension and rated the polyarthritis claim as similar to rheumatoid arthritis. In June 1974, Mr. Simmons submitted a claim for additional compensation, asserting that his arthritis was service connected and that he also had a nervous condition that justified compensation. J.A. 49. The VA conducted a medical examination, at which Mr. Simmons complained of severe joint pain and nervousness. The VA diagnosed Mr. Simmons with arthritis and a nervous condition with depressive features as a result of said arthritis. J.A. 50. In September 1974, the VA regional office (RO) denied Mr. Simmons's claim for service connection for arthritis and a nervous condition with depressive features; the VA found no evidence that the arthritis stemmed from Mr. Simmons's service and that his nervous condition was a by-product of his non-service-connected arthritis and not causally related to any of his diagnoses in service. J.A. 49. Because Mr. Simmons never perfected an appeal to the Board, the RO's decision became final.

Over the subsequent years, Mr. Simmons at various points sought to re-open his claims for arthritis and a nervous condition, which the VA denied each time. On December 21, 2005, after having received a total disability rating for an unrelated asbestosis-based claim, Mr. Simmons filed a claim that there was clear and unmistakable error (CUE) in the RO's 1974 rating decision, but only with respect to the denial of service connection for his nervous condition. There, he argued that if the VA had considered the presumptions of soundness and service connection set forth in 38 U.S.C. §§ 105(a) and 1111, respectively, he would have been awarded disability compensation for his nervous condition.

In 2016, the Board denied Mr. Simmons's request for revision of the RO's 1974 decision because it was not a product of CUE, finding instead that Mr. Simmons's current psychiatric disorder was due to his non-service-connected arthritis and not related to any mental health condition suffered in service. Moreover, the Board found that the presumptions of service and soundness in 38 U.S.C. §§ 105(a) and 1111 did not apply.

Mr. Simmons appealed the Board's failure to apply the two presumptions to the Veterans Court. In September 2018, the Veterans Court affirmed the Board's decision and found that although the Board erred in analyzing the two statutory presumptions when it found no CUE in the RO's 1974 decision, that error was harmless because Mr. Simmons's current disability was not causally related to his inservice condition.

Simmons v. Wilkie, 30 Vet. App. 267 (2018). The Veterans Court explained that, under 38 U.S.C. § 7261(b)(2), it is "statutorily required to consider whether those errors prejudiced him." *Id.* at 2770. It then ruled that the error in this case "is not an inherently prejudicial error, although it may nevertheless be prejudicial in a particular case." *Id.* at 283.

Mr. Simmons timely appealed to our court in January 2019. We have jurisdiction pursuant to 38 U.S.C. § 7292(c).

DISCUSSION

We review legal determinations of the Veterans Court de novo. *Prenzler v. Derwinski*, 928 F.2d 392, 393 (Fed. Cir. 1991).

As previously mentioned, the Veterans Court determined that the Board's failure to apply the two presumptions, although incorrect, was harmless because Mr. Simmons failed to prove the third requirement necessary for the receipt of benefits—the so-called "nexus" requirement. *See Holton*, 557 F.3d at 1366. Mr. Simmons asks us to overturn the Veterans Court's decision and apply a per se rule of prejudice when either the RO or the Board fails to apply the two presumptions. For the reasons that follow, we decline to adopt such a rigid, categorical rule.

The Supreme Court's analysis in *Shinseki v. Sanders* guides our ruling in this instance. 556 U.S. 396 (2009). In *Sanders*, the Supreme Court rejected as

not "consistent with the statutory demand" this court's prior rule of a presumption of prejudice whenever the VA failed to provide a claimant the notice required by 38 U.S.C. § 5103(a). *Id.* at 406. Instead, under 38 U.S.C. § 7261(b)(2), the Veterans Court must "take due account of the rule of prejudicial error," which "requires the Veterans Court to apply the same kind of harmless-error rule that courts ordinarily apply in civil cases." *Id.* (internal quotations omitted).

In rejecting a per se presumption of prejudice, the Supreme Court explained that this court's per se rule "differ[ed] significantly from the approach courts normally take in ordinary civil cases" in three ways. *Id.* at 407. First, such a rule would require the reviewing court to find prejudice even if that court conscientiously determined that the error had not affected the outcome. *Id.* Second, the rule placed "an unreasonable evidentiary burden upon the VA." *Id.* at 408–09. Third, a rigid rule requiring the VA to explain why the error is harmless would conflict with Supreme Court precedent placing the burden of establishing prejudice on the party that seeks to have a judgment set aside. *Id.* at 409–10. Thus, when determining whether an error affected the outcome of the case or was harmless, the Court has "warned against courts' determining whether an error is harmless through the use of mandatory presumptions and rigid rules rather than case-specific applications of judgment, based upon examination of the record." *Id.* at 407.

Mr. Simmons's proposed rigid, per se rule is clearly foreclosed by § 7261(b)(2) and the reasoning in

Sanders. Contrary to Mr. Simmons's view, nothing in *Sanders's* disapproval of per se rules for harmless error analysis suggests that it is constrained to the context of "notice errors." Likewise, § 7261(b)(2)'s mandate for the Veterans Court to "take due account of the rule of prejudicial error" applies to all cases under the jurisdiction of the Veterans Court and is not limited to notice errors. Mr. Simmons's proposed rule also presents the same three problems the Supreme Court identified in *Sanders*. We therefore hold that a per se rule of prejudice is not appropriate here, for the same reasons that it was not appropriate in *Sanders*.

Such a per se rule of prejudice when the RO or Board fails to apply the two presumptions also would be inconsistent with our case law. We have held that the presumptions of soundness and service connection are not relevant to the third requirement for establishing entitlement to disability benefits—the nexus requirement. *Dye v. Mansfield*, 504 F.3d 1289, 1292 (Fed. Cir. 2007) (stating that the presumption of soundness cannot fill the gap where the veteran failed to show a causal relationship between his in-service and post-service medical problems); *Holton*, 557 F.3d at 1367 (holding that neither the presumption of soundness nor service connection are relevant to the question of whether the in-service injury or disease is causally related to the veteran's current disability). A per se rule of prejudice for failure to apply the two presumptions—which are relevant to the second requirement and not the third, nexus requirement—would also undo any proper VA finding that the claimant had

failed to establish a causal nexus. Such an expansion of the effect of these two statutory presumptions would be inconsistent with *Dye* and *Holton*.

Accordingly, we decline to alter the Veterans Court's harmless error framework by adding a per se rule of prejudice with respect to the presumptions of soundness and service connection. Instead, as the Supreme Court has instructed, the Veterans Court should apply the "same kind of harmless-error rule that courts ordinarily apply in civil cases." *Sanders*, 556 U.S. at 406 (internal quotations omitted). Because that is the rule that the Veterans Court applied here when it evaluated whether Mr. Simmons had been prejudiced by the Board's failure to apply the two presumptions in light of the facts and circumstances of the particular case, the Veterans Court correctly followed § 7261(b)(2).

CONCLUSION

We have considered Mr. Simmons's remaining arguments and find them unpersuasive. Accordingly, the appeal from the final judgment of the Veterans Court is

AFFIRMED

COSTS

No costs.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-3039

RICHARD D. SIMMONS, APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE

On Appeal from the Board of Veterans' Appeals

(Argued April 25, 2018 Decided September 20, 2018)

Kenneth M Carpenter, of Topeka, Kansas, for the appellant.

Mark D. Gore, with whom *Meghan Flanz*, Interim General Counsel; *Mary Ann Flynn*, Chief Counsel; and *Kenneth A. Walsh*, Deputy Chief Counsel; and *Joshua L. Wolinsky*, Appellate Attorney, all of Washington, D.C., were on the brief for the appellee.

Before DAVIS, *Chief Judge*, and BARTLEY and ALLEN, *Judges*.

BARTLEY, *Judge:* Veteran Richard D. Simmons appeals through counsel a May 13, 2016, Board of Veterans' Appeals (Board) decision that found that a September 1974 regional office (RO) rating decision denying service connection for an acquired psychiatric disorder did not contain clear and unmistakable error (CUE). Record (R.) at 2-19. This matter was referred to a panel of the Court principally to address the Court's harmless error analysis framework post-*Sanders*,

particularly in the context of reviewing Board decisions on CUE motions. *Shinseki v. Sanders*, 556 U.S. 396 (2010). We hold that, although the Board erred in analyzing two statutory presumptions when it found no CUE in the 1974 decision, that error is harmless because it did not affect the essential fairness of the adjudication or the Board's ultimate determination that the 1974 RO decision did not contain CUE; therefore, the Court will affirm the May 13, 2016, Board decision.

I. BACKGROUND

Mr. Simmons served on active duty in the U.S. Navy from November 1968 to January 1970. R. at 43. Upon entry into service, he denied "frequent trouble sleeping," "frequent or terrifying nightmares," "depression or excessive worry," and "nervous trouble of any sort." R. at 119. In a contemporaneous examination, a service physician documented a normal clinical examination with no noted psychiatric symptoms. R. at 121-22.

In April 1969, Mr. Simmons was hospitalized for two days for psychiatric observation following a suicide attempt. R. at 127-29. Upon admission, he requested medication for "nerves," and the service clinician provided diagnostic impressions of "depressive reaction" and "attempted suicide." R. at 127-28. The hospital discharge summary reflects that Mr. Simmons had "a long history of 'nerve' problems . . . [with] several episodes of 'home sickness' and depression since coming aboard

[the ship] in November [1968]." R. at 129. The service clinician diagnosed "situational depression." *Id.* Mr. Simmons remained depressed and under observation for 48 hours until "he received a letter from home [at which point h]is spirits lifted measurably and he was discharged to duty." *Id.*

In December 1969, following unsuccessful attempts at obtaining a hardship discharge, Mr. Simmons was referred for neuropsychiatric evaluation due to frequent feelings of depression and "inability to adjust to Naval life." R. at 130. The service clinician documented a moderately depressed mood, appropriate affect, clear sensorium, intact memory, and logical and coherent thought processes. *Id.* The clinician asserted that Mr. Simmons had "no evidence of psychosis"; he diagnosed Mr. Simmons with immature personality disorder and recommended administrative discharge due to unsuitability. R. at 130-31. The January 1970 service separation examination report reflects a normal clinical examination with no noted psychiatric symptoms. R. at 106-07.

In September 1972, Mr. Simmons sought non-service-connected pension benefits. In December 1972, a VA RO granted pension benefits due to polyarthritis of multiple joints. R. at 69-70.

In June 1974, Mr. Simmons requested disability compensation for rheumatoid arthritis, stating "there is a reasonable presumption that my rheumatoid arthritis condition was manifested as a direct result of my mental depression in service and culminated in my

administrative discharge." R. at 52. In an attached statement, Mr. Simmons's private hematologist opined that "it is a reasonable presumption that the illness manifested as mental depression during [service] is the same illness now manifested as arthritis involving multiple joints." R. at 49. He added that "it [is] likely that the chronic disorder [Mr. Simmons] now has was present at the time of his military service." *Id.*

Upon VA examination in August 1974, Mr. Simmons reported current symptoms of severe pain, weakness, weight loss, loss of appetite, nervousness, sleep disturbances, and stiffness. R. at 1453. Following medical examination, the examiner diagnosed rheumatoid arthritis. R. at 1456. Upon psychological examination, Mr. Simmons stated that while he was overseas, he felt tense, nervous, and homesick, causing him to drink excessively. R. at 1457. He denied in-service hospitalization except for acute intoxication. *Id.* He stated that he "got along alright after service[,] although he felt a little nervous at times," he worked regularly for almost 2 years at a Dupont plant until he developed rheumatoid arthritis, and that rheumatoid arthritis has been progressive since then, involving more joints and constant medication. *Id.* He further stated that he "feels tense and nervous most of the time and this is worse when [there is] more pain in his joints" and attributed some insomnia, depressed mood, and decreased concentration to increased physical symptoms. *Id.* Following examination, the examiner diagnosed "anxiety reaction with depressive features, moderate only, secondary to arthritic condition." *Id.*

In September 1974, the RO denied service connection for rheumatoid arthritis and a nervous condition. R. at 1448-49. The RO found no evidence that Mr. Simmons experienced chronic neurosis during service and noted that he was administratively discharged due to immature personality disorder. R. at 1449. Likewise, the RO found no evidence that Mr. Simmons experienced arthritis during service or within one year following service. *Id.* The RO concluded that neither the arthritic condition nor the anxiety reaction was incurred during service, and that the currently diagnosed anxiety reaction was not related to the immature personality disorder that resulted in his separation from service. R. at 1448. Mr. Simmons filed a Notice of Disagreement (NOD) with the September 1974 RO decision, but did not perfect an appeal to the Board following issuance of a Statement of the Case (SOC).

In 1977, Mr. Simmons successfully filed to reopen his claims for service connection, but they were again denied in an unappealed April 1977 RO decision.[1] In

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[1] The Court notes that in August 1995, Mr. Simmons alleged CUE in the April 1977 RO decision, which was denied by the RO in February 1996 and by the Board in January 1998. *See* R. at 472. Mr. Simmons appealed the adverse Board decision to this Court. In May 2000, the Court issued a precedential decision affirming the Board decision. *Simmons v. West*, 13 Vet.App. 51 (2000). In August 2000, the Court withdrew its May 2000 decision, denied Mr. Simmons's motion for reconsideration, and again affirmed the Board decision. *Simmons v. West*, 14 Vet.App. 84 (2000). However, following a motion to vacate and additional procedural development, the Court set aside the January 1998 Board decision and remanded the matter to the Board for readjudication. *Simmons v. Principi*, 17 Vet.App. 104 (2003). Upon

January 1990, Mr. Simmons again filed to reopen a claim for service connection for emotional trauma and a nervous breakdown. In an unappealed February 1991 decision, the Board reopened the claim for service connection, but denied the underlying claim.

In December 2005, Mr. Simmons, through counsel, filed a CUE motion as to the September 1974 RO decision that denied service connection for rheumatoid arthritis and a nervous condition with depressive features. R. at 326-33. In September 2009, the RO found no CUE in the September 1974 RO decision with respect to both claims. R. at 315-17. In September 2010, Mr. Simmons filed an NOD only as to the RO's finding of no CUE in the September 1974 denial of service connection for an acquired psychiatric disability. R. at 293-300. Following a March 2012 SOC, R. at 234-47, Mr. Simmons perfected an appeal to the Board in April 2012, R. at 194-202.

In March 2015, the Board found no CUE in the September 1974 RO decision that denied service connection for an anxiety disorder with depressive features. R. at 184-92. In its decision, the Board found that the September 1974 RO decision was subsumed by the February 1991 adverse Board decision and, therefore,

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readjudication, the Board, in August 2004, found that Mr. Simmons's 1995 motion alleging CUE regarding the denial of service connection for a nervous disorder was without legal merit as it was subsumed by the Board's February 1991 decision. R. at 471-94. The Board also dismissed the motion alleging CUE regarding the denial of service connection for arthritis as legally insufficient. *Id.* Mr. Simmons did not appeal the August 2004 Board decision.

was not subject to a CUE challenge. R. at 190. Mr. Simmons appealed that Board decision to this Court. In a January 2016 joint motion for remand, the parties agreed that readjudication was needed because the Board erred in finding that the February 1991 Board decision subsumed the September 1974 RO decision because the February 1991 Board decision did not involve a de novo review of the same issue before the RO in 1974. R. at 137-42 (citing *Brown v. West*, 203 F.3d 1378, 1381-82 (Fed. Cir. 2000) and noting that the Board, in February 1991, determined that the evidence submitted subsequent to April 1977 did not demonstrate that a psychiatric disorder was present during active service and, therefore, did not conduct a de novo review of the entire record to determine if the September 1974 RO decision was erroneous).

In the May 2016 decision on appeal, the Board found no CUE in the September 1974 RO decision that denied service connection for an acquired psychiatric disorder. R. at 4-5. The Board found that Mr. Simmons failed to demonstrate that the September 1974 RO decision misapplied, or failed to apply, any applicable law or VA regulation, or that the decision otherwise contained CUE. R. at 18. In consideration of Mr. Simmons's arguments regarding statutory presumptions, the Board specifically found that neither the presumption of soundness nor the presumption of service incurrence applied. R. at 16-17. The Board further found that most of Mr. Simmons's arguments "boil down to allegations that the RO in 1974 improperly weighed the evidence of record in denying the claim; such

allegations can never rise to the level of CUE." *Id.* The Board added that "[Mr. Simmons] has not offered an explanation as to how the outcome would be manifestly different but for the errors claimed." *Id.* This appeal followed.

II. THE BOARD'S CUE ANALYSIS

When a prior final RO or Board decision contains CUE, that decision may be reversed or revised, resulting in correction of the error effective the date of its commission. 38 U.S.C. §§ 5109A, 7111; *see DiCarlo v. Nicholson*, 20 Vet.App. 52, 54-58 (2006); 38 C.F.R. §§ 3.105 (2018), 20.1400-1411 (2018). CUE is established when the following components are met: (1) Either the correct facts as they were known at the time were not before the adjudicator, the adjudicator made an erroneous factual finding, 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, 319 (1992); *see King v. Shinseki*, 26 Vet.App. 433, 439 (2014); *Bouton v. Peake*, 23 Vet.App. 70, 71-72 (2008); *Damrel v. Brown*, 6 Vet.App. 242, 245 (1994); *see also Bustos v. West*, 179 F.3d 1378, 1380-81 (Fed. Cir. 1999). In other words, "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. Brown*, 6 Vet.App. 40, 43 (1993).

In reviewing Board decisions evaluating allegations of CUE in prior final decisions, the Court "cannot conduct a plenary review of the merits of the original decision." *Andrews v. Principi*, 18 Vet.App. 177, 181 (2004) *aff'd sub nom. Andrews v. Nicholson*, 421 F.3d 1278 (Fed. Cir. 2005); *see Archer v. Principi*, 3 Vet.App. 433, 437 (1992). Rather, the Court's overall review of a Board decision finding no CUE in a prior, final RO decision is limited to determining whether the Board's CUE 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 adequate reasons or bases on all material issues of fact and law, 38 U.S.C. § 7104(d)(1). *See Cacciola v. Gibson*, 27 Vet.App. 45, 59 (2014); *King*, 26 Vet.App. at 439. The components that lead to a valid CUE finding, however, are subject to review under the standards applicable to each component. *Hopkins v. Nicholson*, 19 Vet.App. 165, 167-68 (2005). Whether applicable law or regulation was applied or was correctly applied is a question of law, which the Court reviews de novo. *Id.* at 168; *see also George v. Shulkin*, 29 Vet.App. 199, 206 (2018); *Stallworth v. Nicholson*, 20 Vet.App. 482, 487 (2006); *Joyce v. Nicholson*, 19 Vet.App. 36, 43-44 (2005); *Andrews*, 18 Vet.App. at 182.

Mr. Simmons argues that the Board made clear errors of law as to 38 U.S.C. §§ 105(a) and 1111 (formerly 38 U.S.C. § 311 (1970)) when it determined there was no CUE in the RO's failure to apply the

presumptions of service incurrence and soundness. Appellant's Brief (Br.) at 4-14; Reply Br. at 1-13. He argues that, consistent with evidence extant in 1974, the Board made favorable findings of fact that in service he was diagnosed with an acquired psychiatric disability not noted upon service entry, and therefore the Board should have found that the RO erred in 1974 (1) in not affording him the presumptions under sections 105(a) and 1111 and (2) in not concluding that such disability was incurred during service, meeting the second element of service connection. Appellant's Br. at 4-5; *see Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004) (noting that to establish service connection, "the veteran must show (1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service").

A. The Board's Presumption of Soundness Analysis

The presumption of soundness under section 1111 dictates that a veteran shall be presumed to have been in sound condition when entering service, except as to disorders noted upon a service entrance examination. 38 U.S.C. § 1111; 38 U.S.C. § 311 (1970)[2]; *see Holton v. Shinseki*, 557 F.3d 1362, 1367 (Fed. Cir. 2009); *Dye v. Mansfield*, 504 F.3d 1289, 1293 (Fed. Cir. 2007). "[T]he

[2] In 1974, the presumption of soundness was codified at section 311, but the current statute is substantially similar to the version in effect in 1974.

presumption of soundness serves as a shield against any assertion by the Secretary that a veteran's in-service disability that was not noted upon entry to service preexisted service." *Gilbert v. Shinseki*, 26 Vet.App. 48, 52 (2012). It "is not a sword for the veteran to fulfill the second element of service connection without any evidence of the manifestation of an in-service disability." *Id.* For the presumption of soundness to apply, there must be evidence of an injury or disease manifesting during service that was not noted upon entry. *Id.*; *see Holton*, 557 F.3d at 1367; *Horn v. Shinseki*, 25 Vet.App. 231, 236 (2013). Once the presumption applies, and if the Secretary is unable to rebut it, the injury or disease that manifested during service is presumed to have been incurred during service, thus satisfying the second element of service connection. *See Gilbert*, 26 Vet.App. at 52; *Horn*, 25 Vet.App. at 236; *see also Shedden*, 381 F.3d at 1166-67.

The Board noted that Mr. Simmons was seeking "the benefit of [the] presumption of soundness . . . as no pre-existing mental health disorder was noted on the service entrance examination [report]" and "evidence of record extant at the time was legally insufficient to rebut the presumption of soundness and did not contain clear and unmistakable evidence that [he] had a pre-existing mental health disorder that was not aggravated by such service." R. at 14. However, the Board characterized this argument as an attempt to convert the case from one for direct service connection to one for preexistence and aggravation and concluded that, because no question of preexistence was raised at

the time of the September 1974 RO decision, the presumption of soundness was not applicable and the RO did not err in not addressing it. R. at 17.

Although the Board correctly noted that Mr. Simmons is seeking to benefit from the presumption of soundness, it misunderstood his argument. Mr. Simmons's argument below was that, because there was no notation of an acquired psychiatric disability on his service entrance examination report, he should have been presumed sound at entry as to his psychiatric condition and any psychiatric condition that occurred during service would be presumed to have manifested during service. Mr. Simmons was not alleging that the RO failed to rebut the presumption in an attempt to have the high burden on VA of rebuttal to prove with clear and unmistakable evidence both that a psychiatric disorder did not pre-exist service and was not aggravated by service. R. at 17. Instead, Mr. Simmons is simply seeking the benefit of the presumption—namely, that the in-service notations of mental health complaints following a clear entrance examination establish that a mental health condition arose during service and did not pre-exist service.

Regardless of the Board's characterization, the Court's role in reviewing the Board decision is to determine if the Board's CUE determination was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The presumption of soundness is triggered by evidence of manifestation during service of an injury or disease not noted upon entry to service. *Holton*, 557 F.3d at 1367; *Gilbert*, 26 Vet.App. at 52;

Horn, 25 Vet.App. at 236. Although the Board acknowledged several in-service psychiatric symptoms and that they were not noted upon entry, it found that the presumption of soundness did not apply. R. at 16-17. This Board finding is a clear misapplication of law. *See Holton*, 557 F.3d at 1367; *Gilbert*, 26 Vet.App. at 52; *Horn*, 25 Vet.App. at 236.

B. The Board's Presumption of Service Incurrence Analysis

The presumption of service incurrence[3] under section 105(a) establishes that an injury or disease incurred during active service was incurred in the line of duty and was not the result of misconduct. 38 U.S.C. § 105(a)[4]; *see Holton*, 557 F.3d at 1366-67; *Dye*, 504 F.3d at 1292. In certain ways, the presumption of service incurrence operates similarly to the presumption of soundness. The presumption of service incurrence serves as a shield against any assertion by the Secretary that a veteran's in-service injury or disease was not in the line of duty or was caused by the veteran's willful misconduct or abuse of alcohol or drugs. *See Holton*, 557 F.3d at 1367. Also, the presumption of service incurrence is triggered by evidence of an in-service injury or disease. *See id.* Most importantly, once the presumption applies and the Secretary is unable to

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[3] The presumption of service incurrence is alternatively called the presumption of service connection or the line-of-duty presumption.

[4] The current statute is substantially similar to the version in effect in 1974. U.S.C. § 105(a) (1970).

rebut it, the injury or disease that manifested during service is presumed to have been incurred during service, satisfying the second element of service connection. *See id.*; *Dye*, 504 F.3d at 1292.

In its decision, the Board found that the presumption of service incurrence did not apply because "the evidence must first demonstrate that there is a mental health disability incurred in service" for Mr. Simmons to receive the benefit of the presumption. R. at 16. The Board then referenced the 1974 examiner's opinion, seemingly to conclude that the presumption was not triggered because the in-service mental health symptoms were not *related* to the post-service diagnosed anxiety reaction with depressive features, which the examiner attributed to the nonservice-connected rheumatoid arthritis. *See* R. at 1457. But whether the in-service symptoms were attributable to the post-service psychiatric disability concerns nexus, the third prong of service connection. *See Shedden*, 381 F.3d at 1167. The presumption of service incurrence relates exclusively to the second prong of service connection, incurrence in service; therefore, the question of linkage to service is irrelevant to whether the presumption applies. *See Holton*, 557 F.3d at 1367; *Dye*, 504 F.3d at 1292; *Shedden*, 381 F.3d at 1367.

The Secretary argues that Mr. Simmons was in fact "not diagnosed with a disability [in service, but] rather was assigned with symptoms of depression," noting that "service treatment records fail to show a confirmed diagnosed disability." Secretary's Br. at 12; *see* Oral Argument at 39:00-42:06, *Simmons v.*

O'Rourke, U.S. Vet. App. No. 16-3039. His arguments, however, are unsupported by the evidence as there is no indication from the service treatment records that the diagnoses of "depressive reaction," R. at 128, and "situational depression," R. at 129, were provisional diagnoses or were not confirmed. *See* R. at 130 (noting that Mr. Simmons was referred for psychiatric consultation because, between April and December 1969, he was "continuing and progressively becoming depressed"). Moreover, even if the Secretary's characterization is correct—that the in-service mental health symptoms were not manifestation of an in-service disease or injury that is subject to service connection but were instead manifestations of a non-service-connectable personality disorder—it is the Board's responsibility to provide such an analysis and the Court cannot accept the Secretary's post-hoc rationalizations. *See In re Lee*, 277 F.3d 1338, 1345-46 (Fed. Cir. 2002) ("'[C]ourts may not accept appellate counsel's post hoc rationalization for agency action.'") (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *Smith v. Nicholson*, 19 Vet.App. 63, 73 (2005) ("[I]t is not the task of the Secretary to rewrite the Board's decision through his pleadings filed in this Court.").

The presumption of service incurrence is triggered by evidence of manifestations during service of an injury or disease. *Holton*, 557 F.3d at 1367. Although the Board acknowledged several in-service notations of psychiatric symptoms, it found that the presumption of service incurrence did not apply. R. at 16. This Board

finding is a clear misapplication of law. *See Holton*, 557 F.3d at 1367; *Dye*, 504 F.3d at 1292.

C. The Board's Conclusion Concerning No Manifestly Changed Outcome

As we have explained, the Board erred as a matter of law when it concluded that the RO in 1974 need not have considered sections 105(a) and 1111. Merely finding an error, however, is not enough for Mr. Simmons to prevail. We are statutorily required to consider whether those errors prejudiced him. 38 U.S.C. § 7261(b)(2); *see Hilkert a West*, 12 Vet.App. 145, 151 (1999) (en banc) (appellant has the burden to show prejudicial error). The matter is somewhat more complicated in the context of CUE because part of the analysis that the Board undertakes incorporates a form of prejudicial error analysis—an error cannot be CUE unless it would have "manifestly changed the outcome" of the underlying agency decision. *Fugo*, 6 Vet.App. at 43; *Russell*, 3 Vet.App. at 113-14.

Whether the Board addressed the "manifestly changed outcome" prong of the CUE analysis, and did so adequately, is important because the answer to that question dictates our scope of review. Whether an error would have manifestly changed the outcome of a VA benefits decision is a mixed question of law and fact because that question "involves the application of law . . . to a specific set of facts." *Butts v. Brown*, 5 Vet.App. 532, 538 (1993); *see Joyce*, 19 Vet.App. at 42-44; *Andrews*, 18 Vet.App. at 182. Thus, if the Board reaches

the manifestly changed outcome question, as it must in a CUE context if it finds error in the underlying decision, and determines that there would have been no manifestly changed outcome, this Court may only set aside that Board finding if it is arbitrary or capricious, 38 U.S.C. § 7261(a)(3)(A),[5] or if it was unsupported by adequate reasons or bases, *see Allday v. Brown*, 7 Vet.App. 517, 527 (1995). Thus, in the context of our review of a Board decision on CUE, if we determine that the Board's manifestly changed outcome conclusion as to the underlying decision was not arbitrary or capricious and that it was supported by adequate reasons or bases, there would be no need for the Court to employ a prejudicial error analysis because there would be no Board error, the predicate for a Court harmless error analysis.[6]

An example will help illustrate this point. Assume that, as in this appeal, the Board concluded that the RO in 1974 did not need to apply sections 105 and 1111, but then went further and concluded, based on

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[5] As the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has recognized, because the "arbitrary or capricious" and "clearly erroneous" standards are so similar, the differences between them are "in actual practice a matter for academic debate." *Munn v. Dept. of Health & Hum. Servs.*, 970 F.2d 863, 872 (Fed. Cir. 1992); *Butts*, 5 Vet.App. at 544 (arguing that there is no material difference between the "arbitrary or capricious" standard and the "clearly erroneous" test) (Steinberg, J., concurring).

[6] The Court cautions that, if the Board commits a procedural error when making its CUE determination, we would need to assess whether this procedural error prejudiced the claimant under the standards we articulate in the next section of this opinion.

fully adequate reasons or bases, that, even assuming the RO should have applied these statutory provisions, there was no CUE in the underlying RO decision because the outcome would not have been manifestly different. In this situation, if the Court concluded that the Board's manifestly changed outcome conclusion was not arbitrary or capricious, there would be no need to assess prejudice with respect to any Board error on sections 105 and 1111 because the Board in essence would have corrected its own error and adequately explained that there would be no manifestly changed outcome even if the RO applied sections 105 and 1111. In this hypothetical belt-and-suspenders approach, although the Board's belt approach contained error, its suspenders approach did not, and it fully supported its determination that there was no CUE in the RO's 1974 decision.

Things are quite different if the Board found no error and never took the additional step of adequately analyzing whether the alleged error, had it occurred, would have manifestly changed the outcome of the underlying decision. In that case, to comply with our statutory mandate to account for prejudicial error, the Court would have to assess whether any Board error in concluding that there was no error in the underlying RO decision was prejudicial to the claimant.

Here, after discussing why the statutes at issue were not relevant, the Board also stated that "the Veteran has not offered an explanation as to how the outcome would have been manifestly different but for the errors claimed," R. at 18, and then continued by stating

that "to demonstrate CUE in a Board decision, it must be clear that a different result would have ensued but for the claimed error." *Id.* However, aside from noting Mr. Simmons's burden to show prejudice, the Board did not sufficiently explain why the RO's failure to apply the presumptions would not have manifestly changed the outcome in 1974. It gave no rationale for the Court to review under section 7104(a)(3)(A) and, thus, violated section 7104(d)(1) by not providing adequate reasons and bases. The Board did not adequately discuss whether the presumptions, if correctly applied, would have manifestly changed the outcome of the claim. Given this, the Court now must assess the harmfulness of the Board's failure to apply sections 105 and 1111, something we turn to next.

III. HARMLESS ERROR

Although the Board erred in its analysis of whether the presumptions of soundness under section 1111 and service incurrence under section 105(a) should have been applied in the September 1974 RO decision, as we explained, the Court has a duty to consider whether the Board's errors prejudiced Mr. Simmons because the Board did not adequately address the "manifestly changed outcome" portion of the CUE analysis. In reviewing a Board decision, this Court must "take due account of the rule of prejudicial error." 38 U.S.C. § 7261(c)(2); *Sanders*, 556 U.S. at 406-07; *Vogan v. Shinseki*, 24 Vet.App. 159, 161-62 (2010). Congress's use of the words "take due account" and "prejudicial error," the words used in the Administrative

Procedure Act (APA), inform us that we are to apply "the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases." *Sanders*, 556 U.S. at 406-07. *Compare* 38 U.S.C. § 7261(c)(2) *with* 5 U.S.C. § 706 (APA: "The reviewing court . . . shall review the whole record . . . and due account shall be taken of the rule of prejudicial error."). A review of legislative history confirms that Congress expressly included a reference to the APA's rule of prejudicial error to guide this Court in its application of that rule. *See* S. Rep. No. 100-418, p. 61 (1988).

In *Sanders*, the Supreme Court found no "relevant distinction between the manner in which reviewing courts treat civil and administrative cases" and provided further guidance on how this Court must conduct a harmless error analysis. 556 U.S. at 407-14. Specifically, the Supreme Court, in invalidating a harmless-error framework established by the Federal Circuit, highlighted several considerations that shape this Court's harmless error analysis. *Id.* Together, these considerations inform us that prejudice is established by demonstrating a disruption of the essential fairness of the adjudication, which can be shown by demonstrating that the error (1) prevented the claimant from effectively participating in the adjudicative process, or (2) affected or could have affected the outcome of the determination. As explained below, we conclude that the Board's errors did not disrupt essential fairness; first, though, we review the basics of this Court's harmless error framework.

First, a reviewing court's role in conducting a harmless error analysis is to assess whether the error affected the claimant's substantial rights. *See id.* at 407. Generally, such consideration equates to whether the result would be different had the error not occurred. *See id.* at 411; *see also Vogan*, 24 Vet.App. at 163; S. Rep. No. 100-418, p.61 ("[A] court should pass over errors in the record of the administrative proceedings that the court finds not to be significant to the outcome of the matter."). However, courts must also consider the effect of the error on the "perceived fairness, integrity, and public reputation of judicial proceedings." *Sanders*, 556 U.S. at 411-12; *see Vogan*, 24 Vet.App. at 163.

Second, a harmless error analysis generally should be conducted through a case-specific application of judgment based upon examination of the individual record, rather than based on mandatory presumptions of prejudicial error and rigid rules. *Sanders*, 556 U.S. at 407-08 (noting that the statutory language of the federal harmless-error rule "seeks to prevent appellate courts from becoming impregnable citadels of technicality" (citing *Kotteakos v. United States*, 328 U.S. 750, 759 (1946))).

Third, irrespective of the prohibition against mandatory presumptions of prejudice, courts may make generalizations about the types of errors that typically prove harmful to claimants. *Id.* at 411 (noting that reviewing courts may learn over time that certain errors naturally affect a litigant's substantial rights (citing *Kotteakos*, 328 U.S. at 760-61)). Although these

generalizations must not control, courts may consider these "natural effects" in conducting a harmless error analysis. *Id.* The Supreme Court cautioned, however, that courts must not generalize too broadly, but instead may consider these "natural effects," along with other factors, within "the specific factual circumstances in which the error arises." *Id.* at 411-12. Of note, the Supreme Court specifically acknowledged that it is this Court "that sees sufficient case-specific raw material in veterans' cases to enable it to make empirically based, nonbinding generalizations about 'natural effects,'" and is better able to make informed judgments regarding "natural effects." *Id.* at 412.

Fourth, the appellant generally bears the burden of demonstrating the prejudicial effect of an error. *Id.* at 409-11. In circumstances where the prejudicial effect of an error is not obvious, the aggrieved party "normally must explain why the erroneous ruling caused harm." *Id.* at 410. The goal is not to "impose a complex system of 'burden shifting' rules or a particularly onerous requirement," but is an acknowledgement that in administrative cases, like in civil cases, the appellant is generally in a better position to explain how they have been harmed by an error. *Id.*

Finally, specific to the veterans benefits context, and underpinning all of the considerations above, the Supreme Court acknowledged some leeway in conducting a harmless error analysis due to the non-adversarial nature of the veterans benefits system. *Id.* at 412. As VA is statutorily obliged to assist veterans in the development of their claims and as veterans are often

unrepresented throughout the administrative process, a reviewing court might consider an error harmful in a veteran's case where it might be considered harmless in other circumstances. *Id.*

Although *Sanders* provides a general framework for this Court's harmless error analysis, this case presents an opportunity for us to expand upon that framework, particularly in the context of our review of Board decisions on CUE motions.

A. Inherent Prejudice in Failing to Afford the Benefit of Two Presumptions?

Mr. Simmons argues that the Board's failure to recognize that the RO in 1974 should have afforded the benefit of the presumptions of soundness and service incurrence was sufficiently harmful that our harmless error analysis should end there. *See* Appellant's Supplemental (Supp.) Br. at 11-13; Oral Argument at 1:10:34-1:13:16; 1:16:28-1:16:55. He argues that the essential fairness of the adjudicative process is disrupted if the Board fails to correctly apply mandatory statutory and regulatory presumptive provisions. *See* Appellant's Supp. Br. at 11-13; Oral Argument 1:13:00-1:13:16 ("[C]learly, when a presumption is afforded by Congress or when VA itself creates a regulatory presumption, then those presumptions have to be afforded for there to be the essential fairness of an adjudication."). Further, he argues that if the Court's harmless error analysis focuses solely on whether correction of the Board's error manifestly would result in a different

outcome, it would undermine the importance and value of statutory and regulatory presumptions, *see* Oral Argument at 1:06:50-1:08:36, and "the totality of the adjudication process would be insulated from review and revision," Appellant's Supp. Br. at 13.

As noted, usually a harmless error determination is conducted through case-specific application of judgment without relying on mandatory presumptions of prejudicial error. *See Sanders*, 556 U.S. at 407-08. Contrary to the Supreme Court's instruction in *Sanders* to avoid mandatory presumptions of prejudice, Mr. Simmons implores this Court to find that failure by the Board to properly apply a statutory or regulatory provision is inherently prejudicial. He argues that, because the benefit of a presumption is to relieve a claimant from the burden of providing evidence of the relevant issue, failure to afford a claimant the benefit of the presumption is unfair, naturally harmful to the claimant, and undermines the essential fairness of the adjudicative process. *See* Appellant's Supp. Br. at 10-11; Oral Argument at 1:13:00-1:13:16; *see also* Oral Argument at 7:00-8:02, 25:07-26:56, 33:15-34:13, 1:06:50-1:08:37. He argues that such "natural effect" should lead this Court to an obvious conclusion of prejudicial error. Although no doubt such failure could prejudice a veteran, were this Court to adopt a presumption of prejudice in such circumstances, we would risk negating our statutory obligation to take due account of the rule of prejudicial error. Nevertheless, *Sanders* left the door open for this Court to make non-binding generalizations about inherently prejudicial errors, that is, errors

where the "natural effect" is prejudicial. 556 U.S. at 411-12.

We have held on several occasions that VA claimants are entitled to a fair adjudicative process that includes certain rights and procedural safeguards. *See*, *e.g.*, *Thurber v. Brown*, 5 Vet.App. 119, 123 (1993) ("The entire thrust of [] VA's nonadversarial claims system is predicated upon a structure which provides for notice and an opportunity to be heard at virtually every step in the process."); *Bernard v. Brown*, 4 Vet.App. 384, 392-94 (1993) (holding that VA claimants must be afforded "full benefits of . . . procedural safeguards" afforded by statutory and regulatory provisions establishing "extensive procedural requirements to ensure a claimant's right to full and fair assistance and adjudication in the VA adjudication process"). When an error abrogates the essential fairness of the adjudication or deprives a claimant of a meaningful opportunity to participate in the processing of their claim, the error has the "natural effect" of being prejudicial. *See Sanders*, 556 U.S. at 411; *see also Overton v. Nicholson*, 20 Vet.App. 427, 43435 (2006) ("A procedural or substantive error is prejudicial when the error affects a substantial right that a statutory or regulatory provision was designed to protect." (citing *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 553 (1984))).

We have not identified a finite set of errors that affect essential fairness or deprive a claimant of a meaningful opportunity to participate in the VA adjudicatory process. In *Overton*, pre-dating *Sanders*, we noted that proper notice regarding the evidence

necessary to substantiate a claim and the person responsible for obtaining such evidence was significant in ensuring that a claimant was provided a meaningful opportunity to participate effectively in the processing of the claim. 20 Vet.App. at 435. In *Vazquez-Flores v. Shinseki*, post-dating *Sanders*, we noted that VA's lack of notice or defective notice to a veteran of evidence necessary to substantiate a claim would have a naturally prejudicial effect, but that incomplete notice would not necessarily have a naturally prejudicial effect because it would not prevent veterans from participating in the adjudication of their claims. 24 Vet.App. 94, 105-07 (2010). In *Arneson v. Shinseki*, we found that failure to afford an opportunity for a hearing before all Board decisionmakers deprived the claimant of an opportunity to meaningfully participate in the adjudicatory process. 24 Vet.App. 379, 388-89 (2011); *but see Bowen v. Shinseki*, 25 Vet.App. 250, 253-54 (2012) (finding no prejudicial error where the veteran was not provided a hearing at the RO level because the veteran was provided an opportunity for a hearing before the Board).

Other courts have considered similar factors when determining whether an error affected the essential fairness of the decision-making process. *See*, *e.g.*, *United States v. Young*, 470 U.S. 1, 17 n4 (1985) (noting that federal courts have consistently required that for an error to be prejudicial, it must have an effect on jury deliberations—"[o]nly then would the court be able to conclude that the error undermined the fairness of the trial and contributed to a miscarriage of justice");

Smith v. Phillips, 455 U.S. 209, 217-21 (1982) (noting that due process does not require a new trial every time a juror is placed in a potentially compromising situation, particularly where the facts found demonstrated that the juror's conduct did not affect their impartiality); *United States v. Reynolds*, 710 F.3d. 498, 516-19 (3d Cir. 2013) (noting a distinction between technical errors in an agency's notice and comment procedures and an agency's "utter failure" to comply with notice and comment requirements); *California Wilderness Coalition v. U.S. Department of Energy*, 631 F.3d 1072, 1092 (9th Cir. 2011) (noting that harmless error is error that "has no bearing on the procedure used or the substance of the decision reached." (internal citation omitted)); *United States v. Rivera*, 273 F.3d 751, 757 (7th Cir. 2001) (finding an errant jury instruction prejudicial where it "had serious potential to affect the outcome" and thus "undermined the essential fairness and integrity of the trial"); *Ficek v. Southern Pacific Company*, 338 F.2d 655, 657 (9th Cir. 1964) (distinguishing between "substantive fairness" and "essential fairness" of an arbitration, the latter meaning that the arbitration proceeding met the minimal requirements of fairness—notice, a full and fair hearing, and a decision based on the honest judgment of the adjudicators); *see also McDonough Power Equipment Inc.*, 464 U.S. at 553 (noting that "a litigant is entitled to a fair trial but not a perfect one" (internal citation and alteration omitted)).

Mr. Simmons asks us to equate the Board's failure to ensure that the RO in 1974 afforded him the benefit

of two statutory presumptions, which, if afforded, would result in fulfillment of one of three elements of service connection, with failure to afford various due process and other safeguard factors related to ensuring that justice is served and that lie at the core of any decision-making process. *See* Oral Argument at 1:12:31-1:13:00. But we do not agree that the two are equivalent. Aside from stating that the natural effect of failure to abide by these presumptions is harmful, Mr. Simmons has not persuasively demonstrated how the Board's error affected the essential fairness of the adjudication as to CUE here, or deprived him of a meaningful opportunity to participate in the fair processing of his claim. There is no indication that the Board's errors undermined the essential fairness and integrity of VA's decision-making process in relation to his CUE motion and he points to no factor on a scale with lack of notice, defective notice, lack of opportunity for a hearing, partiality or dishonesty of a decision-maker, or any other factor that would violate even minimum standards of fairness. Particularly here, where the presumptions at issue relieve a claimant of affirmatively providing evidence on a single element out of several required for success, the failure to properly apply a presumption does not have the natural effect of preventing meaningful participation in the VA decision-making process. Therefore, even considering the pro-claimant nature of the veterans benefits system, we hold that the failure to afford the benefit of the type of statutory or regulatory presumption at issue in this case is not an inherently prejudicial error, although it may nevertheless be prejudicial in a particular case.

B. When No Inherent Prejudice, Look at Individual Circumstances

As we have found that the Board's error in Mr. Simmons's case—the failure to properly afford him the benefit of the aforesaid statutory presumptions—is not inherently prejudicial, we must now look at the individual circumstances surrounding the Board's error to determine if it prejudiced Mr. Simmons. In cases not involving allegations of CUE, this usually involves looking at the effect of Board error on the Board's ultimate decision to determine if the error prejudiced the claimant.

But Mr. Simmons argues that this Court's *Archer* decision prohibits the Court in this case from assessing prejudice as we normally do. *See* Oral Argument at 3:42-6:19, 8:02-8:46, 24:3325:07; 34:59-35:58, referring to *Archer*, 3 Vet.App. at 437 (In reviewing a Board decision on a CUE motion, "[w]e cannot conduct a plenary review of the merits of the original decision; rather, we are limited to determining whether the [Board's] subsequent decision . . . was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (internal citation omitted)); *see also Andrews*, 18 Vet.App. at 181-82 (reiterating our standard of review of a Board decision on a CUE motion, as enunciated in *Archer).* He argues that this Court's usual harmless error review, which generally involves determining whether Board error would have made a difference in a benefits determination outcome, would compel us to engage in plenary review of the underlying facts of the RO decision, an endeavor that the

Court in *Archer* prohibited. For several reasons, the Court disagrees.

First, in *Archer* the Court did not engage in a harmless error analysis, because it did not find any error in Mr. Archer's Board decision. Its pronouncement prohibiting plenary review therefore only applied to the kind of review that it conducted in Mr. Archer's case—the Court's review of Mr. Archer's Board decision for arbitrariness or capriciousness. Therefore, the Court concludes that the *Archer* prohibition against plenary review of the underlying facts does not apply at the stage where we shoulder our statutory obligation to examine for prejudicial error, consequent to finding that the Board erred in its CUE determination.

Essentially, although Mr. Simmons argues that our harmless error analysis cannot involve a plenary review of the underlying facts, his argument overlooks that the Court in reviewing a Board decision on a CUE motion undertakes two separate inquiries. The prohibition on plenary review applies when the Court is determining whether the Board decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. In contrast, when conducting a harmless error analysis, the Court has already determined that the Board has erred and that the Board did not address, or did not address adequately, whether, if the underlying decision were incorrect, the outcome would manifestly have been different. In that context, the Court is determining whether the Board error was prejudicial or affected the essential fairness of the adjudication. *See Sanders*, 556 U.S. at 411-12; *Arneson*,

24 Vet.App. at 388-89; *Vogan*, 24 Vet.App. at 163. That inquiry must go beyond the Board's analysis because "[t]he Board cannot predict every instance in which it might be found to have committed error," and, therefore, "cannot be expected to make specific factual findings that might facilitate a prejudicial error analysis." *Vogan*, 24 Vet.App. at 163; *see id.* at 163-64 ("If the Court's review were restricted to findings made by the Board, the usefulness of Congress's direction that we examine an error for prejudice would be marginalized as a tool for avoidance of remands that entail no realistic prospect of an outcome more favorable to a veteran."). Undertaking harmless error review after finding Board error in a Board decision on a CUE motion does not violate *Archer* but instead begins a separate, statutorily required step in our review of a Board decision on CUE.[7]

Second, precedent indicates that the Court's harmless error analysis is exceedingly broad. In *Newhouse v. Nicholson*, the Federal Circuit noted that

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[7] This discussion is similar to the one set forth above concerning the different inquiries that the Court may make in reviewing Board decisions regarding CUE. When the Court reviews whether a Board's determination regarding the existence of CUE is arbitrary or capricious, *Archer* has force. The Court does not look through the Board decision to assess the underlying decision that is the subject of the CUE motion. In contrast, when the Court is determining whether any Board error is prejudicial to the appellant, the Court is considering prejudicial error as an original matter. Because the Board's CUE determination involves a "manifestly different outcome" component, the only way to assess any prejudice in a Board error is to consider the decision that is the subject of the CUE motion.

section 7261(b)(2) does not limit our prejudicial error analysis to the facts as found by the Board, but rather requires a full review of the record to determine if the error is prejudicial. 497 F.3d. 1298, 1302 (2007). Similarly, in *Vogan*, we held that the statute "places no limitations on the scope" of a harmless error analysis. 24 Vet.App. at 163; *see Mayfield v. Nicholson*, 19 Vet.App. 103, 114 (2005) (noting that the Court's ability to take due account of the rule of prejudicial error "leaves us with considerable latitude as to how to 'take due account' "), *rev'd on other grounds, Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006).

Having determined that the Board erred, that those errors did not have the natural effect of prejudicing Mr. Simmons, and that conducting a prejudicial error analysis here will not violate *Archer*, we turn now to determining whether the Board's errors prejudiced Mr. Simmons. *See Sanders*, 556 U.S. at 411-12; *Vazquez-Flores*, 24 Vet.App. at 107 ("[P]rejudice is not assessed in a vacuum; rather it is based on the facts and circumstances presented in the entire record."). That inquiry must be guided by whether essential fairness was disrupted by the error, usually demonstrated by determining whether the error affected the Board's ultimate decision or prevented the claimant from effectively participating in the process. *See Sanders*, 556 U.S. at 411-12; *Arneson*, 24 Vet.App. at 388-89; *Vogan*, 24 Vet.App. at 163.

The Court concludes that the Board errors did not prevent Mr. Simmons from participating in the processing of his CUE motion or affect the overall fairness

of the adjudicative process. Mr. Simmons, through counsel that currently represents him before this Court, initiated his CUE motion in December 2005. R. at 326-33. In his original motion, and in subsequent statements, Mr. Simmons, through counsel, advanced arguments similar to those he now raises—that the RO did not apply the presumptions of soundness and service incurrence. *See* R. at 194-202, 293-300, 326-33. The Board specifically addressed these contentions in the May 2016 decision here on appeal. R. at 14-18. Although the Court concludes that the Board itself misapplied the statutory presumptions, there is no indication that Mr. Simmons has not been provided a meaningful opportunity to participate in the processing of his CUE motion or that the overall adjudicative process was unfair.

The Board's errors also did not affect its ultimate determination—that there was no CUE in the September 1974 RO decision denying service connection for an acquired psychiatric disorder—because, even if it had not made those errors, the Court concludes that the Board would not have found CUE in the September 1974 RO decision. The presumptions of soundness and service incurrence relieve a claimant of providing evidence that satisfies the second—or inservice—prong of service connection; the presumptions do not relieve a claimant of providing evidence of the third—or linkage—prong of service connection.[8] *See Holton*, 557 F.3d

[8] The parties agree that, in 1974, Mr. Simmons had evidence sufficient to satisfy the first prong of service connection—a current disability.

at 1367; *Dye*, 504 F.3d at 1292; *Shedden*, 381 F.3d at 1367; *Horn*, 25 Vet.App. at 236. Mr. Simmons argues that the June 1974 private medical opinion provides that linkage. Appellant's Br. at 10; *see* Appellant's Supp. Br. at 12. The June 1974 private medical opinion indicated that Mr. Simmons's then-current (non-service-connected) inflammatory or rheumatoid arthritis began during service, manifesting itself in service as depression. Despite Mr. Simmons's assertions to the contrary, the private physician did not provide an opinion linking his then-current acquired psychiatric disorder to his in-service diagnoses of depressive reaction and situational depression or to any symptoms of mental depression.

And, even assuming that the opinion was favorable linkage evidence, the record before the RO in September 1974 also included the August 1974 VA examiner's opinion that Mr. Simmons's acquired psychiatric disability was secondary to a non-service-connected arthritic condition. R. at 1457. Therefore, despite his arguments, the Court cannot agree with Mr Simmons that "[h]ad the presumption[s] been afforded[,] based on the evidence of nexus in the record, an award of service compensation would have been required." Appellant's Supp. Br. at 12.

Finally, the Court notes that, during oral argument, Mr. Simmons argued that, had VA properly applied the statutory presumptions, it would have triggered additional duties to develop the record for additional evidence. *See* Oral Argument at 15:48-19:57. To the extent that he is suggesting correction of the

Board's error would trigger the *Board* to develop additional evidence, the Board's adjudication of CUE motions must be made on the evidence that existed at the time of the original decision. *See Pierce v. Principi*, 240 F.3d 1348, 1354 (Fed. Cir. 2001); *Caffrey v. Brown*, 6 Vet.App. 377, 383 (1994). Therefore, it is unclear what additional evidence the Board would have been required to develop. To the extent that Mr. Simmons is suggesting that the correction of any *RO* error in failing to apply the same statutory presumptions would have triggered additional development by the RO in 1974, duty-to-assist errors can never rise to the level of CUE. *Cook v. Principi*, 318 F.3d 1334, 1346-47 (2002); *Caffrey*, 6 Vet.App. at 383-84.

In summary, although the Board erred in its analysis of whether the presumptions of soundness and service incurrence applied in September 1974, its error neither affected a substantial right that disrupted the fundamental fairness of the adjudication nor affected its ultimate determination. Because, even with correction of its error with regard to sections 1111 and 105(a), the Board could not have found CUE in the September 1974 RO decision, the Board's error is harmless. *See*, *e.g.*, *Sanders*, 556 U.S. at 411-12; *Vogan*, 24 Vet.App. at 163. Therefore, this matter will be affirmed.

IV. CONCLUSION

Upon consideration of the foregoing, the May 13, 2016, Board decision is AFFIRMED.

APPENDIX C

[SEAL] **BOARD OF VETERANS' APPEALS**
DEPARTMENT OF
VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF [redacted]
RICHARD D. SIMMONS

DOCKET NO. 12-10 110) DATE May 13, 2016
) PAJ
)

On appeal from the
Department of Veterans Affairs (VA)
Regional Office (RO) in
Winston-Salem, North Carolina

THE ISSUE

Whether there was clear and unmistakable error (CUE) in a September 18, 1974, rating decision that denied service connection for an acquired psychiatric disorder.

REPRESENTATION

Appellant represented by: Kenneth M. Carpenter, Attorney

ATTORNEY FOR THE BOARD

E. Blowers, Associate Counsel

INTRODUCTION

The Veteran, who is the appellant, had active service from November 1968 to January 1970.

This matter came before the Board of Veterans' Appeals (Board) on appeal from a September 2009 rating decision of the RO in Winston-Salem, North Carolina. Initially, the Board must address the exact issue on appeal. In its September 2009 rating decision, the RO found no revision warranted to the September 18, 1974 rating decision as to the issues of 1) service connection for rheumatoid arthritis and 2) service connection for anxiety disorder with depressive features. These two issues were listed in the March 2012 statement of the case (SOC) and the September 2013 VA Form 8.

If a veteran wishes to reasonably raise a claim of CUE, there must be some degree of specificity as to what the alleged 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 one would be compelled to reach the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the alleged error. *Bustos v. West*, 179 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 967 (1999); *Fugo v. Brown*, 6 Vet. App. 40, 43-44 (1993). Here, the Veteran has never pled with any specificity some error in the September 18, 1974 RO rating decision denying service connection for rheumatoid arthritis. The arguments from the date of the original CUE claim to the present have solely addressed the denial of service connection for an acquired psychiatric

disability. As such, the Board does not find that the issue of CUE in the September 18, 1974 RO rating decision as to denial of service connection for rheumatoid arthritis is currently before the Board, and, even if it were, dismissal would be required due to the failure to plead a specific error of fact or law. *See* 38 U.S.C.A. §§ 5109A (West 2014); 38 C.F.R. § 3.105 (2015).

This matter was first before the Board in March 2015, where the Board found that the issue of CUE in a September 18, 1974 RO rating decision that denied service connection for an acquired psychiatric disorder was subsumed by a prior February 4, 1991 Board decision. The Veteran appealed the March 2015 Board decision to the U.S. Court of Appeals for Veterans Claims (Court). In a January 2016 Order, the Court granted a Joint Motion for Vacatur and Remand (JMR) and remanded the CUE issue currently on appeal for action consistent with the terms of the JMR. Specifically, the parties agreed that the Board erred in finding that the February 4, 1991 Board decision had subsumed the 1974 rating decision. In the instant decision, the Board directly addresses the issue of whether there was CUE in the September 18, 1974 rating decision that denied service connection for an acquired psychiatric disorder. *See Forcier v. Nicholson*, 19 Vet. App. 414 (2006) (holding that the duty to ensure compliance with a Court Order extends to the terms of the agreement struck by the parties that forms the basis of the JMR).

In a March 2016 brief, the Veteran's representative requested that "the previous docket number, 96-30 550, be reassigned" to the appeal. The Board notes that the Veteran's representative made the same request in a December 2013 brief. In a January 2014 letter, the Board denied this request and explained its reasoning for doing so, citing to appropriate law and regulation. The March 2016 brief does not contain any new argument and/or evidence supporting the assigning of the earlier docket number; therefor, the request need not be addressed a second time Further, as this is a CUE claim, any grant of benefits would be retroactive to the original date of claim. There is also no reason for the instant matter to be remanded to the RO. As such, there would be no additional benefit to the Veteran in assigning the previous docket number.

The Board has reviewed the physical claims file and both the Veterans Benefits Management System (VBMS) and the "Virtual VA" files so as to insure a total review of the evidence.

FINDINGS OF FACT

1. A claim seeking service connection for an acquired psychiatric disability was received by VA in July 1974.

2. A September 18, 1974, RO rating decision denied service connection for the acquired psychiatric disabilities of anxiety reaction with depressive features and an immature personality disorder, which subsequently became final.

3. The evidence has not established, without debate, that the correct facts, as then known, were not before the RO at the time of the September 18, 1974 rating decision, or that the RO incorrectly applied the applicable laws and regulations existing at the time.

CONCLUSION OF LAW

The September 18, 1974 rating decision denying service connection for an acquired psychiatric disability was not clearly and unmistakably erroneous. 38 U.S.C.A. § 5109A (West 2014); 38 C.F.R. § 3.105 (2015)

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Duties to Notify and Assist

The Veterans Claims Assistance Act of 2000 (VCAA) enhanced VA's duty to notify and assist claimants in substantiating their claims for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2014); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) (2014). 9 $ '10 duties to notify and assist claimants under the VCAA do not apply to claims alleging CUE. *Parker v. Principi*, 15 Vet. App. 407 (2002); *Livesay v. Principi*, 15 Vet. App. 165, 179 (2001) (en banc). Therefore, no further discussion of VCAA duties to notify or assist will take place regarding the CUE issue.

Whether Clear and Unmistakable Error was Present in the September 18, 1974 Rating Decision

Previous determinations that are final and binding, including decisions of service connection and other matters, will be accepted as correct in the absence of CUE. Where evidence establishes such error, the prior rating decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicatory 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).

CUE 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. Simply to claim CUE on the basis that previous adjudications had improperly weighed and evaluated the evidence can never rise to the stringent definition of CUE. Similarly, neither can broad-brush allegations of "failure to follow the regulations" or "failure to give due process," or any other general, nonspecific claim of "error." *Fugo v. Brown*, 6 Vet. App. 40, 43-44 (1993). In addition, failure to address a specific regulatory provision involves harmless error unless the outcome would have been manifestly different. *Id.* at 44.

The Court has held that there is a three-pronged test to determine whether CUE is present in a prior determination: (1) "[e]ither the correct facts, as they were

known at the time, were not before the adjudicator (i.e., more than a simple disagreement as to how the facts were weighed or evaluated) or the statutory or regulatory provisions extant at the time were incorrectly applied," (2) the error must be "undebatable" and of the sort "which, had it not been made, would have manifestly changed the outcome at the time it was made," and (3) a determination that there was CUE must be based on the record and law that existed at the time of the prior adjudication in question. *Damrel v. Brown*, 6 Vet. App. 242, 245 (1994) (quoting *Russell v. Principi*, 3 Vet. App. 310, 313-14 (1992) (en banc)).

If a veteran wishes to reasonably raise a claim of CUE, there must be some degree of specificity as to what the alleged 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 one would be compelled to reach the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the alleged error. *Bustos v. West*, 179 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 967 (1999); *Fugo*, 6 Vet. App. at 43-44. If the error alleged is not the type of error that, if true, would be CUE on its face, if the veteran is only asserting disagreement with how the RO evaluated the facts before it, or if the veteran has not expressed with specificity how the application of cited laws and regulations would dictate a "manifestly different" result, the claim must be denied or the appeal to the Board terminated because of the absence of legal merit or the lack of entitlement under the law. *Luallen v. Brown*, 8 Vet. App. 92 (1995);

Caffrey v. Brown, 6 Vet. App. 377, 384 (1994).) Further, VA's failure in the duty to assist cannot constitute CUE. *See Cook v. Principi*, 318 F.3d 1334, 1346 (Fed. Cir. 2003).

In the present case, the Veteran alleges CUE in a prior September 18, 1974 RO rating decision that denied service connection for various acquired psychiatric disabilities. As an initial matter, the Board finds the allegations of CUE made by the Veteran and representative are adequate to meet the threshold pleading requirements. *See Simmons v. Principi*, 17 Vet. App. 104 (2003); *Phillips v. Brown*, 10 Vet. App. 25 (1997) (distinguishing denial of CUE due to pleading deficiency and denial of CUE on merits). Additionally, the Veteran was notified of the September 18, 1974 rating decision through a September 24, 1974 correspondence. The Veteran filed a notice of disagreement (NOD) to the denial and a SOC was issued in November 1974. The Veteran did not perfect the appeal and it became final. 38 U.S.C.A. § 7105 (West 1972).

Evidence of record at the time of the September 1974 RO rating decision included service treatment records, post-service treatment records, and an August 1974 VA mental health examination. The Veteran's August 1968 service entrance examination reflects no psychiatric disability at service entrance. An April 1969 service treatment record noted that the Veteran was treated after an attempted suicide. At that time, the Veteran was diagnosed with "depressive reaction." In a corresponding April 1969 service treatment record,

the Veteran was diagnosed with "situational depression."

Subsequently, the Veteran received an in-service mental health examination. The report reflects that at the time of the suicidal action the Veteran was in "acute emotional distress." It was also noted that the Veteran had advanced frequent feelings of depression. The Veteran further conveyed having increased nervousness, insomnia, and crying spells Upon examination the Veteran's mood was depressed. At the conclusion of the examination, the Veteran was diagnosed with "immature personality" and it was recommended that the Veteran be given an administrative discharge. The report from the January 1970 administrative discharge medical examination states that the Veteran was mentally normal at separation from service.

In a January 1970 employment application, completed soon after service separation, the Veteran denied symptoms of depression, excessive worry, and/or nervousness. The Veteran also denied receiving medical treatment for any condition other than minor aches and pains for the previous five years. While VA received multiple treatment records for the period from 1971 to 1974, none reflected treatment for a mental health disorder. A June 1974 letter from a private physician noted that "it is a reasonable presumption that the illness manifested as mental depression during [service] is the same illness now being manifested as arthritis involving multiple joints."

The Veteran received a VA psychiatric examination in August 1974. The examination report reflects that the Veteran advanced feeling tense and nervous when stationed overseas onboard a ship. After separation from service, the Veteran conveyed getting along alright, but also having a little nervousness at times Then, in 1971, the Veteran was diagnosed with rheumatoid arthritis. Subsequently, the Veteran began to regularly feel nervous and shaky. Upon examination it was noted that the Veteran appeared mildly depressed and moderately tense. At the conclusion of the examination, the VA examiner diagnosed the Veteran with anxiety reaction with depressive features, and opined that the psychiatric disability was secondary to the diagnosed arthritic condition.

Per the September 18, 1974 RO rating decision, the issue of service connection for "polyarthritis variously diagnosed rheumatoid arthritis" was denied. As the VA examiner at the August 1974 VA mental health examination had found that the currently diagnosed anxiety reaction with depressive features, the only mental health disability diagnosed at that time, was secondary to the arthritis disability, service connection for the mental health disability was also denied. Further, the RO found that service connection for an immature personality disorder could not be granted as it was a constitutional or developmental abnormality that was not a disability under the law.

As discussed above, to reasonably raise a claim of CUE there must be some degree of specificity as to what the alleged error is unless it is the kind of error that, if

true, would be CUE on its face. The Veteran argues, as will be addressed below, that the RO erred in failing to appropriately apply 38 C.F.R. § 3.303(b) (1974), 38 U.S.C.A. § 105(a) (West 1972), and 38 U.S.C.A. § 1111 (previously 38 U.S.C.A. § 311) (West 1972) in the denial of service connection for an acquired psychiatric disorder in the September 18, 1974 RO rating decision.

Per the September 18, 1974 RO rating decision, as to the issue of service connection for an acquired psychiatric disorder, the RO 1) denied service connection for anxiety reaction with depressive features on a direct and, as will be addressed below, presumptive basis, and 2) denied service connection for immature personality as "a constitutional or developmental abnormality and not a disability under the law."

With respect to personality disorders, such as an immature personally, congenital or developmental abnormalities are not "diseases or injuries within the meaning of applicable legislation" and, hence, do not constitute disability for VA compensation purposes. 38 C.F.R. §§ 3.303(c), 4.9 (1974). However, service connection may be granted, in limited circumstances, for disability due to aggravation of a constitutional or developmental abnormality by superimposed disease or injury. *See* VAOPGCPREC 82-90, 55 Fed. Reg. 45,711 (1990); *Carpenter v. Brown,* 8 Vet. App. 240, 245 (1995); *Monroe v. Brown*, 4 Vet. App. 513, 514-15 (1993).

Here, the Veteran has offered no argument that the RO made an error of fact or law in applying 38 C.F.R. § 3.303(c) and 38 C.F.R. § 3.303(c) and 38 C.F.R. § 4.9

to find that the Veteran's in-service diagnosis of immature personality was a personality disorder not subject to service connection under the law. Even assuming, *arguendo*, that the RO did err in its application of 38 C.F.R. § 3.303(b), 38 U.S.C.A. § 105(a), and/or 38 U.S.C.A. § 1111, service connection would still have been barred under 38 C.F.R. § 3.303(c) and 38 C.F.R. § 4.9; therefore, it cannot be said that any error under 38 C.F.R. § 3.303(b), 38 U.S.C.A. § 105(a), and/or 38 U.S.C.A. § 1111 would have manifestly changed the outcome as to the denial of service connection for an immature personality disorder. Absent any argument from the representative that the RO erred in its application of 38 C.F.R. § 3.303(c) and 38 C.F.R. § 4.9, CUE has not been showed in the September 18, 1974 RO rating decision as to the issue of service connection for the acquired psychiatric disorder of immature personality disorder. *Damrel*, 6 Vet. App. at 245; *Fugo*, 6 Vet. App. at 43-44.

Further, as to the personality disorder issue, the fact pattern of the instant matter is strikingly similar to that found in *Morris v. Shinseki*, 678 F.3d 1346 (Fed Cir. 2012). There, the veteran, who was represented by the same representative as the Veteran in the instant matter, argued the following:

> Mr. Morris hinges his CUE claim on the argument that, in the 1988 Board Decision, the Board incorrectly applied 38 C.F.R. § 3.303(c) and that the 2008 Board Decision and the decision of the Veterans Court now on appeal continued the error. His argument essentially

is as follows: It is true that under § 3.303(c) a disability attributable to a personality disorder is not compensable. Reply Br. at 2. However, under 38 U.S.C. § 1111, a veteran claiming disability compensation under 38 U.S.C. § 1110 is entitled to a presumption that he was in sound condition when he entered service. Thus, even when the record contains an in-service diagnosis of a personality disorder, in order to have that diagnosis defeat a claim for compensation under § 1110, the VA must rebut the presumption of sound condition under § 1111. According to Mr. Morris, if, as here, "no pre-service disability was noted, . . . the VA must in accordance with the presumption of sound condition show by clear and unmistakable evidence that the condition noted during service was a pre-service disability." Claimant's Br. at 12. That this requirement exists, Mr. Morris contends, is supported by the language of § 3.303(c), *id.* at 1014, and the interpretation of § 3.303(c) set forth in two VA General Counsel opinions, *id.* at 14-19. Thus, Mr. Morris argues, the Board erred when it interpreted § 3.303(c) to mean that the in-service diagnosis of a personality disorder in and of itself was enough to defeat Mr. Morris's claim of a psychiatric disorder. Rather, the VA should have been required to demonstrate affirmatively that the personality disorder existed prior to service. In short, we understand Mr. Morris to be saying the following: I recognize that a personality disorder is not a compensable disability. I also recognize that, in my case, the record shows an

> in-service diagnosis of a personality disorder. However, before that diagnosis could serve to disqualify me from compensation, the VA should have been required to overcome § 1111's presumption of soundness by demonstrating that I had a personality disorder when I entered the service.

Id. at 1351-52.

After reviewing the relevant law and regulation, the United States Court of Appeals for the Federal Circuit (Federal Circuit) found that the Board had not erred in its previous 1988 decision denying service connection for a personality disorder, as it fell outside the scope of the applicable legislation and was not compensable under 38 C.F.R. § 3.303(c). *Id.* at 1353. In addressing the veteran's presumption of soundness argument, the Federal Circuit held that 38 U.S.C.A. § 1111 only grants veterans a statutory presumption of soundness for "injuries" and "diseases," and that when a valid VA regulation such as 38 C.F.R. § 3.303(c) designates something as not an injury or disease, the presumption of soundness does not come into play. *Id.* at 1354. As such, there, as in the instant matter, according to the express language of 38 C.F.R. § 3.303(c), personality disorders are not diseases or injuries within the meaning of 38 U.S.C.A. § 1110, are not compensable, and it was not CUE to find the presumption of soundness as inapplicable to the case at hand. *Id.* at 1356.

As the Board has found no CUE in the denial of service connection for an immature personality disorder, the remainder of this decision will address possible CUE

in the RO's denial of the acquired psychiatric disorder of anxiety reaction with depressive features. First, the Veteran has argued that at the time of the September 18, 1974 RO rating decision the RO failed to consider the applicability 38 C.F.R. § 3.303(b). At the time of the RO rating decision, 38 C.F.R. § 3.303(b) provided then, as now, that service connection will be presumed where there are either chronic symptoms shown in service or continuity of symptomatology since service for diseases identified as "chronic" in 38 C.F.R. § 3.309(a). With a chronic disease shown as such in service, subsequent manifestations of the same chronic disease at any later date, however remote, are service connected, unless clearly attributable to intercurrent causes. 38 C.F.R. § 3.303(b). Further, where a veteran served ninety days or more of active service, and a chronic disease becomes manifest to a degree of 10 percent or more within one year after the date of separation from such service, such disease shall be presumed to have been incurred in service, even though there is no evidence of such disease during the period of service. 38 C.F.R. §§ 3.307, 3.309(a) (1974).

In *Walker v. Shinseki*, the Federal Circuit held that the theory of continuity of symptomatology can be used only in cases involving those conditions explicitly recognized as chronic under 38 C.F.R. § 3.309(a). *Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. 2013). At the time of the September 18, 1974 RO rating decision, none of the previously diagnosed acquired psychiatric disorders of record constituted a chronic disease under 38 C.F.R. § 3.309(a). As such, there was no need for the RO

to consider presumptive service connection pursuant to 38 C.F.R. § 3.303(b).

Even if the RO were required to consider entitlement to service connection under 38 C.F.R. § 3.303(b), the September 18, 1974 RO rating decision reflects that the RO did consider whether presumptive service connection was warranted. Specifically, the RO noted that, per the August 1974 VA mental health examination, the Veteran was currently diagnosed with the mental health disability of anxiety reaction with depressive features, which was secondary to the Veteran's arthritic condition. As the mental health disability was caused by the arthritis, the RO then considered whether the arthritis, which is a chronic disability under 38 C.F.R. § 3.309(a), was presumptively related to service.

In determining whether presumptive service connection was warranted, the RO, in September 1974, discussed the extensive medical records received since the Veteran's separation from service in January 1970, and noted that the evidence reflected that the arthritis disability did not manifest until on or about December 1971, over a year after service separation. While the RO did not specifically discuss 38 C.F.R. § 3.303(b), the fact the RO considered whether the arthritis manifested within one year of service separation reflects that the RO considered whether service connection was warranted presumptively, and–even if 3.303(b) criteria applied–the evidence does not show "chronic" symptoms in service (see April 1969 service treatment records diagnosing transient depressive symptoms

and January 1970 service separation examination reflecting no mental health disability at service separation) or "continuous" post-service symptoms (see January 1970 employment application; negative treatment records from 1971 to 1974) to meet the 3.303(b) criteria. In light of the above, the Board finds that 38 C.F.R. § 3.303(b) was not incorrectly applied such that the outcome of the claim would have been manifestly different but for the error as to the issue of service connection for an acquired psychiatric disorder.

The Board notes that VA received a private opinion dated June 1974. In it, a private physician opined that it was likely that the Veteran's mental health manifestations in service were symptoms of a subsequently diagnosed arthritis disability. Even if this were to constitute evidence of possible "chronic" symptoms in service and/or "continuous" symptoms since service separation, the September 1974 RO rating decision reflects that the RO found the other evidence of record weighed in favor of a finding of post-service onset. A disagreement as to how the facts were weighed or evaluated is not the type of situation that rises to the level of clear and unmistakable error. *Russell*, 3 Vet. App. at 313 ("The claimant, in short, must assert more than a disagreement as to how the facts were weighed or evaluated.").

The Veteran has also argued that the RO failed to consider and apply the statutory presumptions under 38 U.S.C.A. §§ 105(a) and 1111. In multiple briefs throughout the course of this appeal, the Veteran and representative have alleged that symptoms,

manifestations, and diagnoses during service of a mental health disorder should have triggered VA's consideration of the presumption of service connection under 38 U.S.C.A. § 105(a). The Veteran further contended having entitlement to the benefit of presumption of soundness under 38 U.S.C.A. § 1111, as no pre-existing mental health disorder was noted on the service entrance examination. The Veteran also alleged that evidence of record extant at the time was legally insufficient to rebut the presumption of soundness and did not contain clear and unmistakable evidence that the moving party had a pre-existing mental health disorder that was not aggravated by such service. It is contended that had the Board correctly applied the extant statutory or regulatory provisions, the outcome would have been manifestly different and the moving party would have been granted service connection for the resulting post-service psychiatric disability, then diagnosed as anxiety reaction with depressive features, based on presumptive statutory provisions.

Concerning service connection on a direct basis, the pertinent laws and regulations at the time of the September 1974 rating decision, including 38 C.F.R. §§ 3.303(a) and 3.303(d), were essentially the same as now. Service connection may be granted for disability arising from disease or injury incurred in or aggravated by active service. 38 C.F.R. § 3.303(a) (1974). Service connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d)

(1974). As a general matter, service connection for a disability requires evidence of: (1) the existence of a current disability; (2) the existence of the disease or injury in service, and; (3) a relationship or nexus between the current disability and any injury or disease during service. *Shedden v. Princip*i, 381 F.3d 1163 (Fed. Cir. 2004); *see also Hickson v. West*, 12 Vet. App. 247, 253 (1999), *citing Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd*, 78 F.3d 604 (Fed. Cir. 1996).

A veteran will be considered to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at entrance into service, or where clear and unmistakable evidence demonstrates that an injury or disease existed prior thereto and was not aggravated by service. 38 U.S.C.A. § 1111 (formally 38 U.S.C.A. § 311). Only such conditions as are recorded in examination reports are to be considered as noted. 38 C.F.R. § 3.304(b) (1974) (citing to 38 U.S.C.A. § 311).

Where such defects, infirmities or disorders are not noted when examined, accepted, and enrolled for service, pursuant to 38 U.S.C.A. § 1111 and 38 C.F.R. § 3.304, in order to rebut the presumption of soundness on entry into service, VA must show by clear and unmistakable evidence both that the disease or injury existed prior to service and that the disease or injury was not aggravated by service. *See Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004).

The Board notes that at the time of the September 1974 RO rating decision, the law concerning pre-existing

conditions made distinctions based upon war and peacetime service. As the Veteran had wartime service, this former distinction has no impact on the instant matter. Further, the Board notes that Wagner was decided in 2004; however, the Board need not address issues of retroactivity, or any other issue concerning the presumption of soundness, for, as will be discussed below, in this matter the Veteran's representative is attempting to turn what has always been a direct service connection matter under 38 C.F.R. § 3.303(a), (d) into one for aggravation/preexistence in order to invoke the higher (clear and unmistakable evidence) burden on VA under 38 U.S.C.A. § 1111 and 38 C.F.R. § 3.304.

The Board finds that the September 18, 1974 RO rating decision is consistent with 38 C.F.R. § 105(a) and the applicable laws and regulations extant at that time. In evaluating the medical evidence, the RO gave significant weight to the August 1974 VA mental health examination in which a VA examiner opined that the currently diagnosed mental disability of anxiety reaction with depressive features was caused by a non-service-connected arthritis disability. As the Veteran was not service connected for an arthritis disability, and as there was no evidence of record indicating that the anxiety reaction with depressive features may have been related to the Veteran's in-service mental health symptoms, service connection was denied.

As stated above, the Veteran's argument is that service connection for the anxiety reaction with depressive features should have been granted because there were

symptoms and manifestations of a mental disorder during service, specifically, the diagnosed "depressive reaction" and "situational depression." In essence the Veteran is really disagreeing with the weight accorded the evidence of record by the RO. A disagreement as to how the facts were weighed or evaluated is not the type of situation that rises to the level of clear and unmistakable error. *Russell*, 3 Vet. App. at 313 ("The claimant, in short, must assert more than a disagreement as to how the facts were weighed or evaluated.").

In order to obtain the benefit of the 38 C.F.R. § 105 presumption of service connection, the evidence must first demonstrate that there is a mental health disability incurred in service. *Shedden*, 381 F.3d at 1167. The mere presence of symptoms in service, in and of itself, overlooks the fact that medical evidence of record included an opinion that the diagnosed mental disability of anxiety reaction with depressive features was secondary to a non-service-connected arthritis disability. The presumption of 38 U.S.C.A. § 105 did not apply, so there was no CUE on the part of the Board in denying the claim. *Id.*

As to the Veteran's final argument, as noted above, under 38 U.S.C.A. § 1111, now and at the time of the September 1974 RO rating decision, every veteran is presumed to have been in sound condition when enrolled in service except as to defects, infirmities, or disorders, noted at the time of enrollment, or where clear and unmistakable evidence demonstrates that the injury or disease existed before enrollment and was not aggravated by such service. 38 U.S.C.A. § 1111

(formerly 38 U.S.C.A. § 311). There appears to be no controversy, other than that now advanced by the Veteran's representative, between the Veteran's contention of entitlement to the presumption of soundness and the September 18, 1974 RO rating decision.

The September 18, 1974 RO rating decision did not raise the issue of presumption of soundness and/or discuss preexistence under 38 U.S.C.A. § 1111 as the decision was a direct service connection denial under 38 C.F.R. § 3.303(a), (d), and the RO did not need to make a finding that a non-personality psychiatric disorder preexisted service. As there was no finding of preexistence to service, 38 U.S.C.A. § 1111 and 38 C.F.R. § 3.304 are not applicable; therefore, as the RO never applied 38 U.S.C.A. § 1111/38 C.F.R. § 3.304 against the claim, this argument is meritless.

The case before the RO in 1974 did not raise application of the presumption of soundness. This is not an aggravation case and preexistence of a psychiatric disorder was not raised by the evidence and was not decided by the RO in September 1974. The representative's argument is an attempt to have the extremely high burden on VA (of clear and unmistakable evidence to prove non-aggravation) of 38 U.S.C.A. § 1111/ 38 C.F.R. § 3.304 applied to this direct service connection case where preexistence of a disability is not at issue. The fact that the diagnosis of a personality disorder shows that the disorder inherently preexisted service is controlled by the personality disorder regulations (VAOPGCPREC 82-90; 38 C.F.R. §§ 3.303(c), 4.9). The representative's arguments that a personality

disorder were not "noted" at service entrance are irrelevant to this direct service connection case, and arguing that noting is required when it is not does not convert the case from one for direct service connection (whether the disorder was directly incurred in service, applying 38 C.F.R. § 3.303(a) and (d)) to one for preexistence and aggravation under 38 U.S.C.A. § 1111 and 38 C.F.R. § 3.304.

Further, even assuming, *arguendo*, that 38 U.S.C.A. § 1111 and 38 C.F.R. § 3.304 did apply to the instant matter and VA could not meet the high burden to rebut the presumption of soundness, all that would happen is that the claim would become one for direct service connection under 38 C.F.R. § 3.303, and the analysis would be exactly the same as it was in the September 1974 RO rating decision. *See Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed. Cir. 2004) (explaining that, if VA fails to rebut the presumption of soundness under 38 U.S.C.A. § 1111, the veteran's claim is one for service connection). In other words, the RO in 1974 still would have relied on the medical evidence of record at that time and the August 1974 VA examination to find that the anxiety reaction with depressive features was secondary to the Veteran's arthritic condition, which was not incurred in service. As such, the Veteran's argument again boils down to a simple disagreement with the way the facts were weighed by the RO, which, as discussed above, is not CUE, whether the higher burden of 38 U.S.C.A. § 1111/38 C.F.R. § 3.304 is applied or not. *Russell*, 3 Vet. App. at 313 ("The claimant, in

short, must assert more than a disagreement as to how the facts were weighed or evaluated.").

In sum, the Veteran has failed to demonstrate that the September 18, 1974 RO rating decision misapplied, or failed to apply, any applicable law or VA regulation, or that the decision otherwise contained CUE. The arguments of the Veteran and representative concerning the purported failure of the Board to properly apply extant law and regulations are without merit. The other arguments of the Veteran and representative boil down to allegations that the RO in 1974 improperly weighed the evidence of record in denying the claim; such allegations can never rise to the level of CUE. *Id.* Moreover, the Veteran has not offered an explanation as to how the outcome would have been manifestly different but for the errors claimed, other than to state, rather unpersuasively, that the outcome would have been manifestly different if only the Board had favorably considered the evidence supporting the claim under 38 U.S.C.A. §§ 105(a) and 1111 (formerly 311), and/or 38 C.F.R. § 3.303(b). The Board emphasizes that to demonstrate CUE in a Board decision, it must be clear that a different result would have ensued but for the claimed error or errors. *Bustos*, 179 F.3d at 1381, *cert. denied*, 528 U.S. 967 (1999); *Fugo*, 6 Vet. App. at 43-44.

For the reasons discussed above, neither the Veteran, representative, nor the record reveals an error of fact or law on the part of the RO that, had it not occurred, would have supported a different outcome. For these

reasons, CUE is not shown. *Damrel*, 6 Vet. App. at 245; *Fugo*, 6 Vet. App. at 43-44.

ORDER

The September 18, 1974 RO rating decision denying service connection for an acquired psychiatric disorder was not clearly and unmistakably erroneous.

J. PARKER
Veterans Law Judge,
Board of Veterans' Appeals

APPENDIX D

NOTE: This order is nonprecedential.

United States Court of Appeals
for the Federal Circuit

RICHARD D. SIMMONS,
Claimant-Appellant

v.

ROBERT WILKIE,
SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2019-1519

Appeal from the United States Court of Appeals for Veterans Claims in No. 16-3039, Chief Judge Margaret C. Bartley, Judge Michael P. Allen, Senior Judge Robert N. Davis.

ON PETITION FOR PANEL REHEARING
AND REHEARING EN BANC

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

PER CURIAM.

ORDER

Appellant Richard D. Simmons filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issues on October 8, 2020.

FOR THE COURT

October 1, 2020
Date

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

* Circuit Judge Clevenger participated only in the decision on the petition for panel rehearing.

APPENDIX E

Not published
NON-PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-3039

RICHARD D. SIMMONS, APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before DAVIS, *Chief Judge*, and BARTLEY and ALLEN, *Judges*.

ORDER

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

On September 20, 2018, in a panel decision, the Court affirmed the May 13, 2016, Board of Veterans' Appeals decision that found that a September 1974 regional office rating decision denying service connection for an acquired psychiatric disorder did not contain clear and unmistakable error. On October 10, 2018, the appellant filed a timely motion for reconsideration. "[A] motion for . . . panel [reconsideration] . . . shall state the points of law or fact that the party believes the Court has overlooked or misunderstood." U.S. VET. APP. R. 35(e)(1). The Court did not overlook or misunderstand any points of law or fact that was properly before

it. The appellant has not presented any argument that warrants reconsideration by the panel.

Upon consideration of the foregoing, it is

ORDERED that the motion for reconsideration by the panel is denied.

DATED: November 2, 2018 PER CURIAM.

Copies to:

Kenneth M. Carpenter, Esq.

VA General Counsel (027)

APPENDIX F

RELEVANT STATUTES AND REGULATIONS

5 U.S.C. § 706 (2020). Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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38 U.S.C. § 105 (1970). Line of duty and misconduct

(a) An injury or disease incurred during active military, naval, or air service will be deemed to have been incurred in line of duty and not the result of the veteran's own misconduct when the person on whose account benefits are claimed was, at the time the injury was suffered or disease contracted, in active military, naval, or air service, whether on active duty or on authorized leave, unless such injury or disease was the result of his own willful misconduct. Venereal disease shall not be presumed to be due to willful misconduct if the person in service complies with the regulations of the appropriate service department requiring him to report and receive treatment for such disease.

(b) The requirement for line of duty will not be met if it appears that at the time the injury was suffered or disease contracted the person on whose account benefits are claimed (1) was avoiding duty by deserting the service, or by absenting himself without leave materially interfering with the performance of military duties; (2) was confined under sentence of court-martial involving an unremitted dishonorable discharge; or (3) was confined under sentence of a civil court for a felony (as determined under the laws of the

jurisdiction where the person was convicted by such court).

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38 U.S.C. § 311 (1970). Presumption of sound condition

For the purposes of section 310 of this title, every veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service.

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38 U.S.C. § 1110 (2020). Basic entitlement

For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if

the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

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38 U.S.C. § 5107 (2020). Claimant responsibility; benefit of the doubt

(a) CLAIMANT RESPONSIBILITY. – Except as otherwise provided by law, a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary.

(b) BENEFIT OF THE DOUBT. – The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.

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38 U.S.C. § 5109A (2020). Revision of decisions on grounds of clear and unmistakable error

(a) A decision by the Secretary under this chapter 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.

(b) For the purposes of authorizing benefits, a rating or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds

of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

(c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the Secretary on the Secretary's own motion or upon request of the claimant.

(d) A request for revision of a decision of the Secretary based on clear and unmistakable error may be made at any time after that decision is made.

(e) Such a request shall be submitted to the Secretary and shall be decided in the same manner as any other claim.

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38 U.S.C. § 7261 (2020). Scope of review

* * *

(b) In making the determinations under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals pursuant to section 7252(b) of this title and shall –

(1) take due account of the Secretary's application of section 5107(b) of this title; and

(2) take due account of the rule of prejudicial error.

* * *

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38 C.F.R. § 3.105 (2019). Revision of decisions

* * *

(a)(1) *Error in final decisions.* Decisions are final when the underlying claim is finally adjudicated as provided in § 3.160(d) Final decisions will be accepted by VA as correct with respect to the evidentiary record and the law that existed at the time of the decision, in the absence of clear and unmistakable error. At any time after a decision is final, the claimant may request, or VA may initiate, review of the decision to determine if there was a clear and unmistakable error in the decision. Where evidence establishes such error, the prior decision will be reversed or amended.

(i) *Definition of clear and unmistakable error.* A 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. If it is not absolutely clear that a different result would have ensued, the error complained of cannot be clear and unmistakable. Generally, either the correct facts, as they were known at the time, were not before VA, or the statutory and regulatory provisions extant at the time were incorrectly applied.

(ii) *Effective date of reversed or revised decisions.* For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal or revision of a prior decision on the grounds of

clear and unmistakable error has the same effect as if the corrected decision had been made on the date of the reversed decision. Except as provided in paragraphs (d) and (e) of this section, where an award is reduced or discontinued because of administrative error or error in judgment, the provisions of § 3.500(b)(2) will apply.

(iii) *Record to be reviewed.* Review for clear and unmistakable error in a prior final decision of an agency of original jurisdiction must be based on the evidentiary record and the law that existed when that decision was made. The duty to assist in §3.159 does not apply to requests for revision based on clear and unmistakable error.

(iv) *Change in interpretation.* Clear and unmistakable error does not include the otherwise correct application of a statute or regulation where, subsequent to the decision being challenged, there has been a change in the interpretation of the statute or regulation.

(v) *Limitation on Applicability.* Decisions of an agency of original jurisdiction on issues that have been decided on appeal by the Board or a court of competent jurisdiction are not subject to revision under this subsection.

(vi) Duty *to assist not applicable.* For examples of situations that are not clear and unmistakable error see 38 CFR 20.1403(d).

(vii) *Filing Requirements*—(A) *General.* A request for revision of a decision based on clear and unmistakable error must be in writing, and must be signed by the requesting party or that party's authorized representative. The request must include the name of the claimant; the name of the requesting party if other than the claimant; the applicable Department of Veterans Affairs file number; and the date of the decision to which the request relates. If the applicable decision involved more than one issue, the request must identify the specific issue, or issues, to which the request pertains.

(B) *Specific allegations required.* The request must set forth clearly and specifically the alleged clear and unmistakable error, or errors, of fact or law in the prior decision, the legal or factual basis for such allegations, and why the result would have been manifestly different but for the alleged error. Nonspecific 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.

(2) *Error in binding decisions prior to final adjudication.* Prior to the time that a claim is finally adjudicated, previous decisions which are binding will be accepted as correct by the agency of original jurisdiction, with respect to the evidentiary record and law existing at the time of the decision, unless the decision is clearly erroneous, after considering whether

any favorable findings may be reversed as provided in § 3.104(c).

* * *

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38 C.F.R. § 3.156 (2019). New evidence

* * *

(a) *New and material evidence.* For claims to reopen decided prior to the effective date provided in § 19.2(a), the following standards apply. A claimant may reopen a finally adjudicated legacy claim by submitting new and material evidence. New evidence is evidence not previously part of the actual record before agency adjudicators. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim.

* * *
