APPENDIX A

NOTE: This disposition is nonprecedential.

United States Court of Appeals
for the Federal Circuit

DARYL R. BLANTON,
Claimant-Appellant

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2019-2009

Appeal from the United States Court of Appeals for Veterans Claims in No. 17-3138, Judge Michael P. Allen.

Decided: August 3, 2020

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

ERIC LAUFGRABEN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by ETHAN P. DAVIS, ROBERT EDWARD KIRSCHMAN, JR., LOREN MISHA PREHEIM; BRIAN D. GRIFFIN, JONATHAN KRISCH, Office of General Counsel,

United States Department of Veterans Affairs, Washington, DC.

Before REYNA, SCHALL, and STOLL, *Circuit Judges.*

SCHALL, *Circuit Judge.*

DECISION

Daryl R. Blanton appeals the March 14, 2019 decision of the United States Court of Appeals for Veterans Claims ("Veterans Court") in *Blanton v. Wilkie*, No. 17-3138, 2019 WL 1177988 (Vet. App. Mar. 14, 2019). In that decision, the Veterans Court affirmed the May 24, 2017 decision of the Board of Veterans' Appeals ("Board") that denied Mr. Blanton an effective date earlier than April 14, 1998, for a grant of service connection for a nervous condition. J.A. 115. The Board did so because it found no clear and unmistakable error ("CUE") in the February 6, 1997 rating decision that denied Mr. Blanton service connection for the condition. *Id.* For the reasons stated below, we *affirm.*

DISCUSSION

I.

In its decision, the Veterans Court held that Mr. Blanton had failed to demonstrate error in the Board's finding that Mr. Blanton had not shown CUE in the 1997 rating decision under the standard set forth in *Russell v. Principi*, 3 Vet. App. 310, 313–14 (1992) (en

banc). The Veterans Court recited the standard as follows:

> CUE is established when (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," rather than a mere "disagreement as to how the facts were weighed or evaluated"; and (3) the error "manifestly changed the outcome" of the decision.

Blanton, 2019 WL 1177988, at *2 (footnote omitted) (quoting *Russell*, 3 Vet. App. at 313–14, 319).

II.

On appeal, Mr. Blanton makes two arguments. His main argument is that "the decision of the Veterans Court to affirm the Board's adverse CUE decision is erroneous because it relied upon a misinterpretation of the plain language of the predicate [CUE] statute, 38 U.S.C. § 5109A." Appellant's Br. 4. The basis for this argument is Mr. Blanton's claim that the CUE standard set forth in *Russell* no longer should be followed because it was dicta and lacks support in the statute. *Id.* at 4–5, 7–25.

We need not decide, however, whether *Russell*'s articulation of the requirements for establishing CUE was dicta. The reason is that this court has adopted the

Russell test as controlling law. In *Cook v. Principi*, 318 F.3d 1334, 1345 (Fed. Cir. 2002) (en banc), we stated:

> We conclude that decisions of this court and the Veterans Court concluding that a clear and unmistakable error at the [Regional Office ("RO")] level must be outcome determinative and must be apparent from the evidence of record at the time of the original decision are supported by the language of 38 U.S.C. § 5109A and its legislative history. We therefore reject Mr. Cook's request that we overturn existing law to that effect.

Id. (footnote omitted); *see also Morris v. Shinseki*, 678 F.3d 1346, 1351 (Fed. Cir. 2012); *Willsey v. Peake*, 535 F.3d 1368, 1371 (Fed. Cir. 2008); *Natali v. Principi*, 375 F.3d 1375, 1382 (Fed. Cir. 2004).

At oral argument, counsel for Mr. Blanton acknowledged that, as a panel, we are bound by the en banc precedent of *Cook*. Oral Arg. at 10:05–11:09, http://oralarguments.cafc.uscourts.goy/default.aspx?f1=19-2009.mp3. He also acknowledged that, for that reason, in order for Mr. Blanton to succeed in his appeal, the full court would have to reconsider *Cook* en banc and overrule it. *Id.* As a panel, we could recommend that course of action. *See* Federal Circuit Rule 35(a)(1); *Henderson v. Shinseki*, 589 F.3d 1201, 1203 (Fed. Cir. 2009), *rev'd*, 562 U.S. 428 (2011). We decline to do so, however. In *Cook*, we expressly stated that we did not think a change with respect to the requirements for establishing CUE was "warranted." 318 F.3d at 1344.

III.

Mr. Blanton's second argument on appeal is that, even if the *Russell* test remains controlling law, we still should reverse the decision of the Veterans Court. In making this argument, Mr. Blanton states that the Veterans Court "erroneously affirmed the Board's adverse decision based on its misinterpretation of the specificity required to allege CUE" as set out in *Fugo v. Brown*, 6 Vet. App. 40 (1993). Appellant's Br. 25. What we understand Mr. Blanton to be referring to is the Veterans Court's ruling that it would not consider a new argument in support of his theory that in 1997 the RO misapplied the presumption of soundness. The purported new argument was that a laceration on Mr. Blanton's arm was an in-service manifestation of a mental disorder. In rejecting the argument, the court stated, "Appellant has not shown with the requisite degree of specificity that this argument was asserted before the Board as a reason that there was CUE in the 1997 RO decision based on a misapplication of the presumption of soundness." 2019 WL 1177988, at *3.

Mr. Blanton's second argument rests on a challenge to the Veterans Court's application of the law of issue exhaustion to the facts of his case. It thus amounts to an argument that is beyond the scope of our jurisdiction. *See Scott v. Wilkie*, 920 F.3d 1375, 1377–78 (Fed. Cir. 2019) (reciting jurisdictional limitations on Federal Circuit review of Veterans Court decisions). We therefore cannot consider it.

Conclusion

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

AFFIRMED

APPENDIX B

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-3138

DARYL R. BLANTON, APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE

Before ALLEN, *Judge.*

MEMORANDUM DECISION

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

ALLEN, *Judge*: Appellant Daryl R. Blanton served the Nation honorably on active duty in the United States Army from May 1990 to May 1994.[1] He appeals a May 24, 2017, Board of Veterans' Appeals decision denying an effective date earlier than April 14, 1998, for a grant of service connection for a nervous condition because it found no clear and unmistakable error (CUE) in a February 1997 rating decision that denied service connection for that condition. The question in this appeal, which is timely and over which the Court has jurisdiction,[2] is whether in finding no CUE in the February 1997 decision, the Board misapplied the law pertaining to the presumption of soundness and the

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[1] Record (R.) at 1147.

[2] *See* 38 U.S.C. §§ 7266(a), 7252(a).

line-of-duty presumption. Because the Board's decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, the Court affirms.

I. PROCEDURAL BACKGROUND AND FACTS

In April 1994, while on active duty, appellant was treated for a self-induced laceration to his right arm.[3] At that time, appellant stated he was trying to commit suicide.[4] In October 1996, he filed a claim for service connection for a psychiatric disorder.[5] VA treatment records at that time noted his in-service suicide attempt and also that he had suicidal ideation and hallucinations when he was in high school.[6] In a February 1997 rating decision, the regional office (RO) denied service connection for a nervous condition, finding that his condition "existed prior to service" and that there was "no evidence that the condition permanently worsened as a result of service."[7] Appellant did not appeal this decision and it became final.

In April 1998, he sought to reopen his claim for service connection for a psychiatric condition.[8] The RO again denied the claim, but this time appellant filed an appeal. In a July 2004 rating decision, the RO granted

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[3] R. at 226.

[4] *Id.*

[5] R. at 1297-1300.

[6] R. at 1177.

[7] R. at 1150.

[8] R. at 1141.

service connection for a schizoaffective disorder, based on a VA examiner's opinion that appellant's time in the military exacerbated his prior symptoms. He was awarded a 100% disability rating as of April 14, 1998, the date of his claim to reopen.[9]

In March 2006, appellant filed a motion to reverse or revise the February 1997 rating decision on the grounds that it contained CUE, warranting an earlier effective date for his psychiatric disability.[10] He argued that the 1997 decision did not consider or apply 38 U.S.C. §§ 105(a) and 1111. The motion was denied, and ultimately appellant perfected an appeal to the Board. The Board remanded the matter in October 2014 for further development. The CUE motion returned to the Board, which denied it in the decision on appeal. The Board concluded that the RO correctly considered the facts and law at the time of its 1997 decision. The Board found that the presumption of soundness applied and that "it is not clear that the RO incorrectly applied" it in the 1997 decision.[11] The Board determined that the RO's reliance on appellant's postservice reports of suicidal thoughts in high school supported its finding that his condition preexisted service. Furthermore, the Board found that "the RO's conclusions that there was no evidence that the condition permanently worsened as a result of service could support

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[9] R. at 689-701.

[10] R. at 599-606.

[11] R. at 9.

the RO's finding of no aggravation."[12] The Board concluded that the RO's evaluation of evidence "was not necessarily at odds with the clear-and-unmistakable standard."[13] Additionally, the Board held that any error in the RO's application of the presumption of soundness was not outcome determinative and thus did not constitute CUE as an independent matter, because there was no evidence of nexus before the RO in February 1997. Finally, the Board noted that the RO had not misapplied section 105(a), which creates a presumption that an injury or disease occurred in the line of duty but not a presumption of service connection, as appellant alleges. This appeal followed.

II. ANALYSIS

Appellant asserts four bases on which he claims the Board erred. First, he argues that the Board erred by misapplying the presumption of soundness in its analysis of the 1997 rating decision because it "did not address the actual physical injury suffered when he lacerated his right arm."[14] Second, he claims that the Board erred in finding clear and unmistakable evidence before the RO in February 1997 to establish that his psychiatric condition preexisted service. Third, appellant submits that the Board's finding that his condition was not worsened by his military service should be reversed because the Board required evidence that

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[12] R. at 10.

[13] *Id.*

[14] Appellant's Brief (Br.) at 5.

his condition permanently worsened, which is a higher standard than required by law. Finally, he argues that the RO in 1997 and the Board in the decision on appeal failed to properly apply 38 U.S.C. § 105(a) and give him a presumption of service connection.

CUE is established when (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," rather than a mere "disagreement as to how the facts were weighed or evaluated"; and (3) the error "manifestly changed the outcome" of the decision.[15]

It is not easy to establish CUE in a final decision. This Court has held that an error is "undebatable" when " 'reasonable minds could only conclude that the original decision was fatally flawed' " at the time it was made.[16] In sum, "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

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[15] *Russell v. Principi*, 3 Vet.App. 310, 313-14, 319 (1992); *see Simmons v. Wilkie*, 30 Vet.App. 267, 274 (2018); *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).

[16] *Andrews v. Principi*, 18 Vet.App. 177, 181 (2004) (quoting *Russell*, 3 Vet.App. at 313-14), *aff'd sub nom. Andrews v. Nicholson*, 421 F.3d 1278 (Fed. Cir. 2005).

results would have been manifestly different but for the error."[17]

When assessing the Board's CUE determination, the Court "cannot conduct a plenary review of the merits of the original decision."[18] Rather, the Court's overall review of a Board decision finding no CUE in a prior, final decision, is limited to determining whether the Board's finding was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"[19] and whether it was supported by an adequate statement of reasons or bases on all material issues of fact and law.[20] But the components of a valid CUE finding are subject to review under the standards applicable to each.[21] Whether an applicable regulation was correctly applied or interpreted is a question of law, something the Court reviews de novo.[22]

The presumption-of-soundness statute, in 1997, as today, stated:

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[17] *Fugo v. Brown*, 6 Vet.App. 40, 43 (1993).

[18] *Andrews*, 18 Vet.App. at 181; *see Archer v. Principi*, 3 Vet.App. 433, 437 (1992).

[19] 38 U.S.C. § 7261(a)(3)(A).

[20] 38 U.S.C. § 7104(d)(1); *see Cacciola v. Gibson*, 27 Vet.App. 45, 59 (2014); *King*, 26 Vet.App. at 439.

[21] *Simmons*, 30 Vet.App. at 274-75; *Hopkins v. Nicholson*, 19 Vet.App. 165, 167-68 (2005).

[22] *Simmons*, 30 Vet.App. at 275; *Hopkins*, 19 Vet.App. 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.

> [E]very 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.[23]

The implementing regulation provided that "[o]nly such conditions as are recorded in examination reports are to be considered as noted."[24] Thus, one must first determine whether the presumption of soundness applies in a given situation. If it does, then one moves on to whether that presumption has been rebutted. The rebuttal portion of the analysis has two parts: (1) Did the condition exist before service and (2) was that condition not aggravated by such service?

The presumption of service incurrence, also called the "presumption of service connection" or the "line-of-duty presumption," under 38 U.S.C. § 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.[25] The presumption of service incurrence serves as a shield against any assertion by the Secretary that a veteran's in-service injury or

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[23] 38 U.S.C. § 1111 (1997).

[24] 38 C.F.R. § 3.304(b) (1997).

[25] 38 U.S.C. § 105(a) (1997); *see Holton v. Shinseki*, 557 F.3d 1362, 1366-67 (Fed. Cir. 2009); *Dye v. Mansfield*, 504 F.3d 1289, 1292 (Fed. Cir. 2007).

disease was not in the line of duty or was caused by the veteran's willful misconduct or abuse of alcohol or drugs.[26] Also, the presumption of service incurrence is triggered by evidence of an in-service injury or disease.[27] Most importantly, once the presumption applies and the Secretary is unable to 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.[28] In some ways, the presumption of service incurrence operates similarly to the way the presumption of soundness operates, where we turn first.

A. Physical Manifestation

Appellant's argument regarding the right arm laceration that resulted from his in-service suicidal attempt is unclear at best. Although he asserts that he is raising an issue of first impression before the Court, he does not clearly identify what that issue is. Thus, the Court holds that, to the extent it can decipher appellant's argument, it is appropriately addressed by a single judge and does not require a precedential decision.[29]

First, the Secretary argues that the Court lacks jurisdiction to consider appellant's argument based on the physical manifestation of his suicide attempt

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[26] *See Holton*, 557 F.3d at 1367.

[27] *See id.*

[28] *See id.*; *Dye*, 504 F.3d at 1292.

[29] *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

because it is a distinct theory of CUE appellant did not raise below.[30] If that were so, the Secretary would be correct that the Court would lack jurisdiction to address the theory.[31] However, the Court agrees with appellant that this is not a new theory of CUE but rather an argument supporting the theory he unquestionably raised concerning the presumption of soundness. Thus, there is no jurisdictional bar to proceeding.

But there is a separate problem even if we treat the "physical manifestation" point as an argument instead of a distinct theory of CUE. Appellant has not shown with the requisite degree of specificity that this argument was asserted before the Board as a reason that there was CUE in the 1997 RO decision based on a misapplication of the presumption of soundness.[32] As far as we can tell, in fact, appellant never mentioned this aspect of his argument until his opening brief on appeal to this Court. In such situations, the Court has discretion to hear a newly raised argument but it is not required to do so.[33] In exercising its discretion, the Court considers "whether the interests of the individual weigh heavily against . . . institutional interests" such as "to protect agency administrative authority and to promote judicial efficiency."[34]

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[30] Secretary's Br. at 13-14.

[31] *See Jarrell v. Nicholson*, 20 Vet.App. 326, 330-32 (2006) (en banc).

[32] *See Fugo*, 6 Vet.App. at 44.

[33] *See Maggitt v. West*, 202 F.3d 1370, 1377 (Fed. Cir. 2000).

[34] *Id.*

In this case, the balance cuts against exercising discretion to consider this newly minted argument. To begin with, the Board is given wide latitude when making CUE determinations. Allowing arguments in the context of such deferential review to be presented first to the Court undercuts the discretion vested in the Board. Moreover, appellant's argument is extremely confusing and undeveloped. This makes it difficult for the Secretary to respond in a meaningful way as well as for the Court to efficiently exercise judicial review. We have held that such underdevelopment independently allows the Court to decline to address an argument.[35] These concerns lead the Court to decline to exercise its discretion to address the newly raised physical-manifestation argument in this appeal.

B. Preexistence Prong

Appellant's next arguments turn to rebutting the presumption of soundness, which all agree attached at the time of appellant entered into service. Appellant first argues that the February 1997 decision "offered no reasons or bases" for its "implicit determination that the presumption of soundness had been rebutted."[36] However, any reasons-or-bases error by the RO cannot constitute CUE.[37] Next, he argues that the

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[35] *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006), *rev'd on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order); *see Locklear v. Nicholson*, 20 Vet.App. 410, 416-17 (2006).

[36] Appellant's Br. at 8.

[37] *Fugo*, 6 Vet.App. at 43-44.

Board erred because "the record did not include clear and unmistakable evidence that [he] suffered from a preexisting psychiatric disease."[38] This argument also fails because as the Board correctly noted, an error in the weight afforded the evidence by the RO does not rise to the level of CUE.[39]

The Board found that "it was within the province of the RO, and consistent with [the clear-and-unmistakable evidentiary] standard, to conclude that [appellant's] post-service reports of having suicidal ideation . . . in high school supported a finding of a pre-existing condition."[40] Although appellant spends several paragraphs trying to convince the Court that we review the Board's finding de novo and that the Board was required to consider the RO decision de novo, he presents no evidence to support his contention that the Board erred. In other words, appellant points to no evidence that runs counter to the Board's determination that the RO appropriately relied on postservice treatment records noting that his condition preexisted service.[41] The Court therefore cannot hold that the Board's finding of no CUE as to this matter was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

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[38] Appellant's Br. at 9.

[39] *See Russell*, 3 Vet.App. at 313-14.

[40] R. at 10.

[41] *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc).

C. Aggravation Prong

With respect to appellant's argument that the aggravation prong of the presumption of soundness was not met, on January 4, 2019, the Court ordered the parties to address the effect of a precedential decision issued in *George v. Wilkie.*[42] In that case, the Court held that the interpretation of the presumption of soundness extending the clear-and-unmistakable-evidence standard to the aggravation prong does not apply retroactively for CUE purposes.

Here, the Board erroneously required, to rebut the presumption of soundness, clear and unmistakable evidence that appellant's condition did not worsen.[43] The Board found "the RO's conclusion that there was no evidence that the condition permanently worsened as a result of service could support the RO's finding of no aggravation under the clear-and-unmistakable evidence standard."[44] The Board's use of the wrong standard is harmless in this regard because it placed a higher burden on VA—clear and unmistakable evidence of no worsening—and still found that burden was met because there was *no* evidence of worsening. Thus, it follows that, under *George*, a finding of no evidence of worsening would meet a standard less strenuous than clear and unmistakable evidence.

Appellant argues that both the Board in the decision on appeal and the RO in the February 1997 rating

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[42] 30 Vet.App. 364 (2019).

[43] R. at 9.

[44] R. at 10.

decision required evidence of "permanent worsening" to rebut the presumption of soundness at the aggravation prong, which imposed a higher burden on him. Although it is true that the aggravation prong does not require permanent worsening, once again appellant has failed to meet his burden of demonstrating prejudicial error.[45] The RO relied on a complete lack of evidence that his condition had worsened, and appellant does not point to anything that was left out of that analysis.[46]

D. 38 U.S.C. § 105(a)

Appellant argues that the Board misapplied 38 U.S.C. § 105(a) in finding no CUE in the February 1997 RO decision. He asserts that he was entitled to a "presumption of service connection," namely that "such a suicide attempt was the product of [his] mental unsoundness."[47] In its decision, the Board specifically addressed section 105(a) and found it "did not provide for a presumption of service connection but instead defined the circumstances in which an injury or disease

[45] *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009).

[46] The Court notes that the Board also concluded that even if there was error in the 1997 decision concerning rebuttal of the presumption, the error would not have been outcome determinative. *See* R. at 10-11. This is an independent basis on which to conclude that the 1997 decision did not contain CUE. *See Simmons*, 30 Vet.App. at 277-78. The Court reviews such a determination under the arbitrary and capricious standard. *Id.* at 278. The Board's assessment passes muster under this standard.

[47] Appellant's Br. at 14-15.

would be defined as occurring in the line of duty."[48] Thus, the Board found that the RO had not incorrectly applied the statute.

Appellant misunderstands the law under section 105(a). Although he cites *Holton v. Shinseki* as holding that section 105(a) creates a presumption of service connection, that case makes clear that the presumption goes to the second element of service connection: an in-service event. Here, neither the RO nor the Board disputes the fact that appellant attempted suicide while in service and neither the 1997 rating decision nor the Board decision on appeal contends that the suicide attempt did not occur in the line of duty. Thus, the Court cannot discern what appellant argues as to how the Board misapplied the law, as his argument is underdeveloped.[49]

III. CONCLUSION

After consideration of the parties' briefs and a review of the record, the Court AFFIRMS the May 24, 2017, Board decision.

DATED: March 14, 2019

Copies to:

Kenneth M. Carpenter, Esq.

VA General Counsel (027)

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[48] R. at 11.

[49] *Locklear*, 20 Vet.App. at 416-17; *Coker*, 19 Vet.App. at 442.

APPENDIX C

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

IN THE APPEAL OF
DARYL R. BLANTON

DOCKET NO. 10-47 002A) DATE May 24, 2017
) [/s/ TDG]
)

On appeal from
the Department of Veterans Affairs Regional Office
in Houston, Texas

THE ISSUE

Whether clear and unmistakable error (CUE) was committed in a February 1997 rating that denied service connection for a nervous condition, such that an earlier effective date of service connection for schizoaffective disorder is warranted.

REPRESENTATION

Appellant represented by: Kenneth Carpenter, Attorney

ATTORNEY FOR THE BOARD

Devon Rembert-Carroll, Associate Counsel

INTRODUCTION

The Veteran had active service from May 1990 to May 1994.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from an April 2008 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Houston, Texas.

In an October 2014 decision, the Board remanded the appeal for further development.

FINDINGS OF FACT

1. In a final decision issued in February 1997, the RO denied the Veteran's claim of entitlement to service connection for a nervous condition.

2. The February 1997 rating decision was consistent with, and reasonably supported by, the evidence then of record and the existing legal authority, and it did not contain undebatable error that would have manifestly changed the outcome.

CONCLUSION OF LAW

Clear and unmistakable error has not been shown in the February 1997 rating decision. 38 U.S.C.A. § 5109A (West 2014); 38 C.F.R. § 3.105(a) (2016).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Duties to Notify and Assist

VA has a duty to provide the Veteran notification of the information and evidence necessary to substantiate the claim submitted, the division of responsibilities in obtaining evidence, and assistance in developing evidence, pursuant to the Veterans Claims Assistance Act of 2000 (VCAA). However, in *Livesay v. Principi*, 15 Vet. App. 165 (2001), the Court held that "there is nothing in the text or the legislative history of VCAA to indicate that VA's duties to assist and notify are now, for the first time, applicable to CUE motions." The Court in *Livesay* held that CUE claims are not conventional claims, but rather are requests for revisions of previous decisions. Thus, a "claimant," as defined by 38 U.S.C.A. § 5100, cannot encompass a person seeking a revision of a final decision based upon CUE. As a consequence, VA's duties to notify and assist contained in the VCAA are not applicable to the Veteran's CUE claim.

Additionally, the Board finds that the RO has substantially complied with the October 2014 remand directives which included providing information regarding what is needed to prove CUE and giving the Veteran the opportunity to clarify which rating decision he was claiming contained CUE. *See Stegall v. West*, 11 Vet. App. 268 (1998); *see also Dyment v. West*, 13 Vet. App. 141 (1999) (holding that another remand is not required under *Stegall* where the Board's

remand instructions were substantially complied with), *aff'd, Dyment v. Principi*, 287 F.3d 1377 (2002).

The Board thus finds that all necessary development has been accomplished and appellate review may proceed. *See Bernard v. Brown*, 4 Vet. App. 384 (1993).

Analysis

The Board notes that on remand, the Veteran's representative clarified that the Veteran was only alleging CUE in the February 1997 rating decision. *See* August 2015 representative statement. In this regards, the Veteran essentially contends that the absence of any notation of a defect or disorder on the Veteran's enlistment examination entitled the Veteran to the benefit of the presumption of soundness under 38 U.S.C. § 1111. The Veteran also contends that the VA failed to consider and properly apply 38 U.S.C. § 105(a) and 1111. *See* March 2006 CUE claim and August 2015 representative statement.

On October 15, 1996, the Veteran filed a claim for a nervous condition. In a February 1997 rating decision, the RO denied entitlement to service connection for a nervous condition. The Veteran was notified of this decision by way of a letter dated February 10, 1997. The Veteran did not appeal that rating decision and no additional evidence pertinent to the issue was physically or constructively associated with the claims folder within one year of the rating decision. *See* 38 C.F.R. § 3.156(b) (2016); *Bond v. Shinseki*, 659 F.3d 1362 (Fed. Cir. 2011); *see also Buie v. Shinseki*, 24 Vet. App. 242,

251-52 (2010). Thus the February 1997 rating decision became final based on the evidence then of record. 38 U.S.C.A. § 7105 (West 2014); 38 C.F.R. § 20.1103 (2016).

A previous determination which is final and binding will be accepted as correct in the absence of CUE. Where evidence establishes such error, the prior decision will be reversed. For the purpose of authorizing benefits, a rating or other decision that constitutes a reversal of a prior decision on the grounds of CUE has the same effect as if the decision had been made on the date of the prior decision. 38 U.S.C.A. § 5109A; 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. Even where the premise of error is accepted, if it is not absolutely clear that a different result would have ensued, the error complained of cannot be CUE. *Fugo v. Brown*, 6 Vet. App. 40, 43-44 (1993).

There is a three-part test to determine whether a prior decision was based on CUE: (1) either the correct facts, as the facts were known at the time, were not before the adjudicator 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 the error not been made, the outcome would have changed; 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. *See Damrel v. Brown*, 6 Vet. App. 242, 245 (1994) (*quoting Russell v. Principi*, 3 Vet. App. 310, 313-14 (1992) (en banc)).

Simply to claim clear and unmistakable error on the basis that the previous adjudication improperly weighed and evaluated the evidence can never rise to the stringent definition of clear and unmistakable error, nor can broad-brush allegations of "failure to follow the regulations" or "failure to give due process," or any other general, non-specific claim of "error" meet the restrictive definition of clear and unmistakable error. *Fugo*, 6 Vet. App. 40, 44. Additionally, the failure to fulfill the duty to assist cannot be CUE. 38 C.F.R. § 20.1104 (2016); *Baldwin v. West*, 13 Vet. App. 1, 5 (1999).

The evidence of record at the time of the February 1997 rating decision included the Veteran's service treatment records and post-service VA treatment records dated September 1996 to December 1996.

The Veteran's August 1989 enlistment report of medical examination shows that the Veteran's psychiatric was noted as normal. There were no noted defects or diagnoses. The Veteran's August 1989 enlistment report of medical history shows that the Veteran denied frequent trouble sleeping, depression or excessive worry and nervous trouble of any sort.

The Veteran's March 1994 separation report of medical examination shows that the Veteran's psychiatric was noted as normal. On his March 1994 separation report of medical history the Veteran reported frequent

trouble sleeping and depression or excessive worry. It was noted that the Veteran had depression and denied suicidal or homicidal ideations. It was also noted that the Veteran had an upcoming appointment with community mental health on March 30, 1994.

An April 1994 service treatment record shows that the Veteran was treated for a self-induced cut to the right arm. The Veteran reported that he tried to commit suicide that morning The Veteran reported that he tried to commit suicide two weeks prior. It was noted that this was not discovered but the Veteran had a cut on the left forearm. The Veteran was diagnosed with a suicide attempt and a laceration to the right arm. An undated health assessment shows that the Veteran reported that in the prior year he sometimes experienced repeated or long periods of depression.

Post-service VA treatment records dated September 1996 to January 1997 reveal a September 1996 VA treatment record that shows that the Veteran reported that he had been feeling depressed on and off for about two years. An October 1996 VA treatment record that shows that the Veteran was diagnosed with major depression, recurrent, with psychotic features, a history of cocaine and alcohol abuse and rule out chronic psychotic disorder. A December 1996 VA treatment record shows that the Veteran was diagnosed with substance abuse disorder and mixed personality disorder. Another December 1996 VA treatment record shows that the Veteran reported he had suicidal ideation and experienced derogatory auditory hallucinations even when he was in high school. He reported that he was

hospitalized for two months, which he did not mention when he was inducted. The Veteran reported that he felt that he did well in the service until his last six months where he described paranoia and hallucinations aggravated by alcohol and drug abuse. Another December 1996 VA treatment record shows that the Veteran was admitted to the ICU following an overdose of psychiatric medication. The discharge diagnosis was possible schizoaffective disorder and a history of polysubstance abuse.

As noted above, in the February 1997 rating decision, the RO denied entitlement to service connection for a nervous condition. The RO noted the above evidence and concluded that the Veteran's condition neither occurred in nor was caused by service. The RO noted that the evidence showed that nervous condition existed prior to service. The RO also noted that there was no evidence that the condition permanently worsened as a result of service.

With regard to the first element of the CUE test, the Board finds that the correct facts as they were known at the time were considered in the February 1997 rating decision. In this regards the only evidence then of record included the Veteran's service treatment records and post-service VA treatment records dated September 1996 to December 1996. The Board acknowledges that in the March 2006 claim, the Veteran's representative discussed pre-service private treatment records dated June 1987 to May 1989. However, these records were not received by the RO until September 2000. Therefore, these records cannot be

considered in determining whether there was CUE in the February 1997 rating decision. Additionally, as far as any assertion that the RO should have obtained such records at the time of the February 1997 rating decision, the Board again notes that the failure to fulfill the duty to assist does not constitute CUE.

Having established that the correct facts were considered by the RO, the other issue that must be addressed with regard to the first element of the test is whether the law at the time was correctly applied. For the following reasons, the Board finds that it was.

At the time of the February 1997 rating decision, service connection was warranted for a particular injury or disease resulting in disability that was incurred coincident with service in the Armed Forces, or if preexisting such service, was aggravated therein. 38 U.S.C.A. § 1110; 38 C.F.R. § 3.303 (1997). Additionally, the law stated the 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 (obvious or manifest) evidence demonstrates that an injury or disease existed prior thereto and was not aggravated by such service. Only such conditions as are recorded in examination reports are to be considered as noted. 38 C.F.R. §1111; 38 U.S.C.A. § 3.304.

In this case, the presumption of soundness does apply, as the Veteran's psychiatric was noted as normal on

entrance and there were no notations of any defects or disorders on entrance examination.

The Federal Circuit clarified in *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004) that the presumption of soundness under 38 U.S.C.A. § 1111 is rebutted only if there is both (1) clear and unmistakable evidence that the claimed condition existed prior to service and (2) clear and unmistakable evidence that any pre-existing conditions were not aggravated by service.

The Board notes that at the time of the February 1997 rating decision, it was generally not VA's interpretation of the statute that the "clear and unmistakable" evidence standard applied to the issue of aggravation. It was only in *Wagner,* discussed above, which was issued in 2004, that the Federal Circuit held that based on the express terms of section 1111 the clear and unmistakable standard applied both to the issue of whether a disability pre-existed active service, and to the issue of whether it was aggravated by service. As noted above, CUE cannot be found in a decision that correctly applies the law that existed at the time. *See Damrel*, 6 Vet. App. at 245; cf. 38 C.F.R. § 20.1403(e) (2016) (providing that CUE in a Board decision does not include the otherwise correct application of a statute or regulation where, subsequent to that decision, there has been a change in the interpretation of that statute or regulation).

However, the Federal Circuit held that its interpretation of section 1111 in the *Wagner* opinion was retroactive in that the interpretation of a statute explains

"what the statute has meant since the date of enactment." *See Patrick v. Shinseki*, 668 F.3d 1325, 1329 (Fed. Cir. 2011) (*quoting Patrick v. Nicholson*, 242 Fed.Appx. 695, 698, 2007 WL 1725465 (Fed. Cir. 2007)). Thus, the Federal Circuit found that a 1986 Board decision (i.e. a pre-Wagner decision) which failed to apply the clearand-unmistakable-evidence standard to the issue of aggravation was not in accordance with the law. *See id.* Therefore, the case was remanded so that the Board could determine whether the outcome of that decision would have been different had it applied the correct standard. *See id.* Accordingly, the clear-and-unmistakable-evidence standard applied to the issue of aggravation at the time of the RO's February 1997 rating decision.

Here, it is not clear that the RO incorrectly applied the presumption of soundness in the February 1997 rating decision. The Board notes that the decision does not specifically use the words "clear and unmistakable evidence". As noted above, the RO instead stated that the evidence showed that the nervous condition existed prior to service and that there was no evidence that the condition permanently worsened as a result of service.

Nonetheless, the Board finds that even under the clear-and-unmistakable evidentiary standard, it was within the province of the RO, and consistent with such standard, to conclude that the Veteran's post-service reports of having suicidal ideation and experiencing derogatory auditory hallucinations in high school supported a finding of a pre-existing condition under the clear-and-unmistakable evidence standard. Likewise, with

respect to the aggravation prong, the Board finds that the RO's conclusions that there was no evidence that the condition permanently worsened as a result of service could support the RO's finding of no aggravation under the clear-and-unmistakable evidence standard, even in light of the Veteran's lay statements regarding his in-service symptoms towards the end of his military career. Thus, the RO's evaluation of the evidence was not necessarily at odds with the clear-and-unmistakable standard, and mere disagreement as to how the evidence was weighed does not amount to CUE. *See Fugo*, 6 Vet. App. at 44; *Russell*, 3 Vet. App. at 313-14.

Finally, and in the alternative, even assuming that the RO applied the wrong standard under the presumption of soundness, the error was not necessarily "outcome-determinative." *See Yates v. West*, 213 F.3d 1372, 1374 (Fed. Cir. 2000); *see also Bustos v. West*, 179 F.3d 1378 (Fed. Cir. 1999). The Court has made clear that in order for an error to manifestly change the outcome of a claim, the law and evidence must show "undebatably" that service connection would have been awarded but for the error. *See Joyce v. Nicholson*, 19 Vet. App. 36, 46 (2005) (holding that in order for a "CUE claim to succeed," it must be shown that the "outcome would have been manifestly different, that is, that service connection by aggravation would undebatably have been awarded . . . had the RO not erred regarding the presumption of aggravation").

Any failure to rebut the presumption of soundness at the time of the February 1997 rating decision does not compel the conclusion, as to which reasonable minds

could not differ, that the result would have been manifestly different but for the error. In this regard, if the presumption of soundness has not been rebutted, the disease or injury that manifested in service is deemed incurred in service, such that the second element of service connection is established. *See Gilbert v. Shinseki*, 26 Vet. App. 48, 55 (2012). Nevertheless, the claimant must still establish a current disability related to the in-service injury or disease. *Id.* As the Court stated in *Gilbert*: "The presumption of soundness . . . does not relieve the veteran of the obligation to show the presence of a current disability and to demonstrate a nexus between that disability and the in-service injury or disease or aggravation thereof." *Id.* (*citing Holton v. Shinseki*, 557 F.3d 1363, 1367 (Fed. Cir. 2009). In other words, even if the presumption of soundness is not rebutted, the current disability and nexus elements of service connection must still be satisfied in order to establish entitlement to service connection benefits. *See Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004).

The medical evidence of record at the time of the February 1997 rating decision does not "compel the conclusion" that the Veteran had a current psychiatric disability related to his symptoms during service. The Board notes that the Veteran had an in-service notation of depression and a post-service notation of depression. In December 1996 the Veteran also reported problems with depression for the prior two years. However, there was no positive nexus opinion of record at the time of the February 1997 rating decision. The

Board also notes that it was within the RO's province to weigh the evidence of record at the time, and any disagreement with how that evidence was weighed and any assertion that the RO had a duty to obtain a VA examination are again not a basis for a valid CUE claim.

The Board also acknowledges the representatives assertions regarding the presumption of service connection under 38 U.S.C.A. § 105(a). At the time of the February 1997 rating decision, and now, 38 U.S.C.A. § 105(a) did not provide for a presumption of service connection but instead defined the circumstances in which an injury or disease would be defined as occurring in the line of duty. Therefore, the Board finds that this statute was not incorrectly applied. In regards to any argument concerning the presumption of aggravation under 38 U.S.C.A. § 1153: 38 C.F.R. § 3.306, the Board finds that the RO correctly applied the law extant at the time when it noted there was no evidence that the condition permanently worsened as a result of service. Additionally, any disagreement with this conclusion amounts to a disagreement with how the evidence was weighed, which again cannot form the basis of a valid CUE claim.

In light of the foregoing, the Board concludes that the correct facts, as known at the time, were before VA adjudicators at the time of the February 1997 rating decision and that the statutory and regulatory provisions extant at the time were correctly applied. The Board also finds that there was no error which was undebatable and of the sort which, had it not been made would

have manifestly changed the outcome at the time it was made. Consequently, the Board finds that the February 1997 rating decision did not contain clear and unmistakable error and, therefore, the Veteran's motion to reverse that decision on the basis of CUE is denied

ORDER

CUE was not committed in the February 1997 rating decision that denied service connection for nervous condition; entitlement to an earlier effective date of service connection for schizoaffective disorder on this basis is denied.

R. FEINBERG
Veterans Law Judge,
Board of Veterans' Appeals

APPENDIX D

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

DARYL R. BLANTON,
Claimant-Appellant

v.

ROBERT WILKIE,
SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2019-2009

Appeal from the United States Court of Appeals for Veterans Claims in No. 17-3138, Judge Michael P. Allen.

ON MOTION

Before PROST, *Chief Judge*, NEWMAN, LOURIE, SCHALL[1], DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges.*

PER CURIAM.

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[1] Circuit Judge Schall participated only in the decision on the petition for panel rehearing.

ORDER

Appellant Daryl R. Blanton filed a petition for rehearing en banc. The petition was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied. The petition for rehearing en banc is denied.

The mandate of the court will issue on October 20, 2020.

FOR THE COURT

October 13, 2020	/s/ Peter R. Marksteiner
Date	Peter R. Marksteiner

APPENDIX E

RELEVANT STATUTES AND REGULATIONS

38 U.S.C. § 105 (1997). 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 a result of the person's own willful misconduct or abuse of alcohol or drugs. 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 the person to report and receive treatment for such disease.

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38 U.S.C. § 1111 (1997). Presumption of sound condition

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.

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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 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. § 3.304 (1996). Direct service connection; wartime and peacetime.

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(b) *Presumption of soundness.* The 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 (obvious or manifest) evidence demonstrates that an injury or disease existed prior thereto. Only such conditions as are recorded in examination reports are to be considered as noted.

(Authority: 38 U.S.C. 1111)

(1) History of preservice existence of conditions recorded at the time of examination does not constitute a notation of such conditions but will be considered together with all other material evidence in determinations as to inception. Determinations should not be based on medical judgment alone as distinguished from accepted medical principles, or on history alone without regard to clinical factors pertinent to the basic character, origin and development of such injury or disease. They should be based on thorough analysis of the evidentiary showing and careful correlation of all

material facts, with due regard to accepted medical principles pertaining to the history, manifestations, clinical course, and character of the particular injury or disease or residuals thereof.

(2) History conforming to accepted medical principles should be given due consideration, in conjunction with basic clinical data, and be accorded probative value consistent with accepted medical and evidentiary principles in relation to value consistent with accepted medical evidence relating to incurrence, symptoms and course of the injury or disease, including official and other records made prior to, during or subsequent to service, together with all other lay and medical evidence concerning the inception, development and manifestations of the particular condition will be taken into full account.

(3) Signed statements of veterans relating to the origin, or incurrence of any disease or injury made in service if against his or her own interest is of no force and effect if other data do not establish the fact. Other evidence will be considered as though such statement were not of record.

* * *