APPENDIX A

United States Court of Appeals
for the Federal Circuit

KEVIN R. GEORGE,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2019-1916

Appeal from the United States Court of Appeals for Veterans Claims in No. 16-2174, Chief Judge Margaret C. Bartley, Judge Amanda L. Meredith, Senior Judge Robert N. Davis.

MICHAEL B. MARTIN,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2020-1134

Appeal from the United States Court of Appeals for Veterans Claims in No. 18-124, Chief Judge Margaret C. Bartley.

Decided: March 16, 2021

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

AMY F. ODOM, Chisholm Chisholm & Kilpatrick, Providence, RI, argued for claimant-appellant Michael B. Martin. Also represented by APRIL DONAHOWER, ZACHARY STOLZ.

TANYA KOENIG, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by ERIC P. BRUSKIN, JEFFREY B. CLARK, MARTIN F. HOCKEY, JR., ROBERT EDWARD KIRSCHMAN, JR.; BRIAN D. GRIFFIN, ANDREW J. STEINBERG, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before LOURIE, CHEN, and STOLL, *Circuit Judges*.

CHEN, *Circuit Judge*.

Kevin R. George and Michael B. Martin (collectively, Appellants) are military veterans whose respective claims for disability benefits were denied several decades ago in final decisions by the Department of Veterans Affairs (VA). More recently, Appellants each filed a motion for revision of those denial decisions, alleging that the VA in those decisions had committed clear and unmistakable error (CUE). The VA's denials had been based in part on a straightforward application of a then-existing regulation, 38 C.F.R. § 3.304(b) ("Presumption of soundness"), that was years later overturned. In Appellants' view, the VA's reliance on a now-invalidated regulation in its denials of Appellants' original claims establishes CUE.

The United States Court of Appeals for Veterans Claims (Veterans Court) affirmed the Board of Veterans' Appeals' (Board) denials of Appellants' CUE motions, reasoning that the VA did not commit a clear and unmistakable legal error when it faithfully applied the version of the presumption of soundness regulation that existed at the time of the denials. Because *Jordan v. Nicholson* and *Disabled American Veterans v. Gober* establish that a legal-based CUE requires a misapplication of the law as it was understood at that time, and cannot arise from a subsequent change in interpretation of law by the agency or judiciary, we *affirm*. *See Jordan v. Nicholson*, 401 F.3d 1296 (Fed. Cir. 2005); *Disabled Am. Veterans v. Gober*, 234 F.3d 682 (Fed. Cir. 2000) *(DAV)*, *overruled in part on other grounds by Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 981 F.3d 1360, 1373 (Fed. Cir. 2020) (en banc).

BACKGROUND

These companion appeals involve similar facts and legal issues. Before discussing the details of each case, we first address the statutory presumption of soundness at issue in both appeals.

A. Statutory Presumption of Soundness

The statutory presumption of soundness recites:

> [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.*

38 U.S.C. § 311 (1970) (now codified as 38 U.S.C. § 1111)[1] (emphasis added). Under this standard, a veteran is presumed to have been in sound condition at entry to service as to disorders that are not identified on the veteran's entrance medical examination. The presumption, however, can be rebutted by "clear and unmistakable evidence" that the disorder "existed before acceptance and enrollment and was not aggravated by service." *Id.*

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[1] For ease of reference, we hereafter refer to the statutory presumption of soundness as 38 U.S.C. § 1111.

In 1970, the VA's implementing regulation for § 1111 did not require clear and unmistakable evidence of lack of aggravation by service for rebuttal. *See* 38 C.F.R. § 3.304(b) (1970).[2] In other words, for the VA to rebut the presumption of soundness, the 1970 version of § 3.304(b) required only clear and unmistakable evidence that the disorder "existed prior [to service]." *Id*. This version of the regulation prevailed until 2003, when the VA invalidated the regulation for conflicting with the language of § 1111, *see* VA Gen. Counsel Prec. 3-2003 (July 16, 2003) (2003 OGC opinion), and subsequently amended the regulation to require evidence of *both* preexisting condition and no aggravation, *see* 70 Fed. Reg. 23,027, 23,028 (May 4, 2005).

We confirmed the correctness of the VA's changed understanding of the statute in *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004). There, we began our statutory analysis by acknowledging that § 1111's "rebuttal standard is somewhat difficult to parse" and "on its face … appears to be somewhat self-contradictory." *Id*. at 1093. After a careful

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[2] Specifically, 38 C.F.R. § 3.304(b) (1970) 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*. Only such conditions as are recorded in examination reports are considered as noted.

Id. (emphasis added). This language remained unchanged from the time of Mr. Martin's 1970 regional office decision to Mr. George's 1977 Board decision.

examination of the statutory history, we determined that Congress intended for the presumption of soundness to apply "even when there was evidence of a preexisting condition, [so long as] the government failed to show clear and unmistakable evidence that the preexisting condition was not aggravated" by service. *Id.* at 1096. *Wagner* thus held that the VA must show "clear and unmistakable evidence of both a preexisting condition and a lack of in-service aggravation to overcome the presumption of soundness." *Id.*

B. Mr. George's Appeal

Mr. George served in the U.S. Marine Corps from June to September 1975. His medical entrance examination made no mention of any psychiatric disorders. Yet, a week after enlistment, Mr. George suffered a psychotic episode requiring extended hospitalization and was diagnosed with paranoid schizophrenia. Two months into his service, a military medical board confirmed the schizophrenia diagnosis and found Mr. George unfit for duty. The medical board determined that his condition had preexisted service because he had experienced "auditory hallucinations, paranoid ideas of reference, and delusions" prior to enlistment. J.A. 53-54. The medical board also determined that his condition was aggravated by service, observing that he "now appeared quite disturbed" and was "withdrawn [and] tearful." *Id.* At his time of discharge, however, a physical evaluation board concluded that his condition was *not* aggravated by service, finding that Mr. George "essentially appear[ed] in his

pre-enlistment state" and that his schizophrenia was "in remission." J.A. 55.

In December 1975, Mr. George filed a disability benefits claim, contending that his schizophrenia was aggravated by service. The VA regional office (RO) denied his claim for lack of service connection, which the Board affirmed in September 1977. While the Board did not specifically cite the statutory presumption of soundness or the implementing regulation, it concluded that his schizophrenia "existed prior to military service" and "was not aggravated by his military service." J.A. 60. Mr. George did not appeal the Board's decision, which became final.

Years later, in December 2014, Mr. George requested revision of the 1977 Board decision based on CUE, asserting that the Board had failed to correctly apply 38 U.S.C. § 1111. Mr. George argued that he had been improperly denied the presumption of soundness because his "entrance examination to service was negative for any preservice mental disorder" and the record "[did] not clearly and unmistakably indicate that [his] schizophrenia was not aggravated by service." J.A. 66-67. If not for the 1977 Board's purported failure to "rebut *both* prongs of the presumption," Mr. George alleged that he would have been granted service-connected benefits for schizophrenia. J.A. 67 (emphasis added).

The Board, in 2016, denied Mr. George's request, finding no CUE in the 1977 Board decision. Relevant to this appeal, the Board observed that, as of 1977, 38 C.F.R. § 3.304(b) did "not require[] clear and

unmistakable evidence that the disability was not aggravated by service" to rebut the presumption of soundness. J.A. 73. While acknowledging that the 2003 OGC opinion and *Wagner* later invalidated § 3.304(b) for conflicting with the statute, the Board concluded that "judicial decisions that formulate new interpretations of the law subsequent to a VA decision cannot be the basis of a valid CUE claim." J.A. 74. Thus, any purported failure by the 1977 Board to find that Mr. George's schizophrenia was not clearly and unmistakably aggravated by service "cannot be considered to be CUE." *Id*. Mr. George appealed to the Veterans Court.

A divided panel of the Veterans Court affirmed, concluding that *Wagner's* interpretation of § 1111 could not retroactively apply to establish CUE in the 1977 Board decision. *See George v. Wilkie*, 30 Vet. App. 364, 373 (2019) ("*Wagner* does not change how [§ 1111] was interpreted or understood before it issued."). Instead, citing this court's decisions in *DAV* and *Jordan*, the Veterans Court determined that the 1977 Board was required to apply the law *existing at the time*, namely, the 1977 version of 38 C.F.R. § 3.304(b). Because that version of § 3.304(b) required only clear and unmistakable evidence that an injury preexisted service to rebut the presumption of soundness, the Veterans Court concluded that the 1977 Board's alleged failure to also demonstrate clear and unmistakable evidence of no aggravation did not constitute CUE. *Id*. at 374-75.

The Veterans Court next considered a trio of cases involving a CUE claim filed by a widow, Mrs. Patrick, seeking death and indemnity compensation benefits.

See Patrick v. Principi, 103 F. App'x 383 (Fed. Cir. 2004) (*Patrick I*); *Patrick v. Nicholson*, 242 F. App'x 695 (Fed. Cir. 2007) (*Patrick II*); *Patrick v. Shinseki*, 668 F.3d 1325 (Fed. Cir. 2011) (*Patrick III*). As relevant here, *Patrick II* concluded that *Wagner* could form the basis for a CUE claim attacking a final VA decision that had relied on the now-invalidated version of § 3.304(b), because "[*Wagner*'s] interpretation of § 1111 … did not change the law but explained what § 1111 had always meant." *Patrick II*, 242 F. App'x at 698.

The Veterans Court determined that it was not bound by the *Patrick* cases, which contradicted the reasoning of *DAV* and *Jordan*. *George*, 30 Vet. App. at 374-75. *Patrick II*, the main case supporting Mr. George's position, was nonprecedential and issued after *DAV* and *Jordan*, and *Patrick III*, the only precedential opinion in this line of cases, pertained to attorneys' fees under the Equal Access to Justice Act (EAJA) and did not directly address whether *Wagner* supports a basis for CUE.

The Veterans Court also determined that permitting retroactive application of *Wagner*'s statutory interpretation would contravene the law on finality of judgments. While recognizing that "CUE is a statutorily permitted collateral attack on final VA decisions," the court observed that "Mr. George's appeal of the denial of benefits for schizophrenia was not open for *direct* review when *Wagner* was decided," and to hold that a judicial pronouncement of the law retroactively applies to final decisions closed to direct review would undermine long-standing principles of finality and *res judicata*. *George*, 30 Vet. App. at

372-73, 376 (citing *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993) and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991)). CUE instead requires "the application of the law as it was understood at the time of the [underlying] decision," and such an application of law "does not become CUE by virtue of a subsequent interpretation of the statute or regulation." *George*, 30 Vet. App. at 373.[3]

A dissenting judge opined that *Wagner* merely provided an "authoritative statement" of what § 1111 has always meant and thus should not be understood as implementing a "new understanding or interpretation" of that statute. *Id*. at 379. The dissent further concluded that the 1977 Board's failure to abide by § 1111's true meaning "constituted an undebatable and outcome-determinative misapplication of the law," which is "precisely" the type of error CUE was designed to remedy. *Id*. at 383.

C. Mr. Martin's Appeal

Mr. Martin served in the U.S. Army from August 1965 to February 1966, and from June 1968 to August 1969. At entry to service, Mr. Martin reported never having had "asthma," "shortness of breath," or "hay

[3] The Veterans Court majority also concluded that even assuming *Wagner* retroactively applies to support allegations of CUE in final VA decisions, Mr. George failed to demonstrate that this alleged error, based on the evidence extant in 1977, would have manifestly changed the outcome of the 1977 Board's decision to deny him benefits for schizophrenia. *George*, 30 Vet. App. at 377-78. Because we conclude that the error alleged is outside the scope of CUE, as discussed *infra*, we need not reach this alternative holding.

fever," J.A. 13, and his medical examination reported his lungs and chest as "normal," J.A. 15. During his second period of service, in November 1968, he sought treatment at an allergy clinic for a stuffy nose, sneezing, itchy eyes, and nocturnal wheezing. Contrary to his entrance examination, Mr. Martin reported a childhood history of asthma with similar symptoms. A note from his personal physician, dated January 1969, confirmed that Mr. Martin had started treatment for asthma as a child and had been "treated for this problem intermittently since that time." J.A. 10. A medical examiner diagnosed and treated Mr. Martin for "rhinitis and asthma, mixed infectious-allergic, with dust-mold and ragweed sensitivity." J.A. 11. By discharge, however, his separation examination did not report any asthma or related symptoms.

Shortly thereafter, in October 1969, Mr. Martin filed a claim for service-connected disability benefits for asthma. In support of his claim, Mr. Martin underwent a VA medical examination in December 1969, which noted that he had "made a good adjustment" following in-service treatment, but upon returning home after discharge, had experienced wheezing and shortness of breath during the ragweed season. J.A. 21. Mr. Martin was diagnosed with "[a]sthma due to sensitivity of ragweed class." J.A. 24.

The RO denied Mr. Martin's claim in February 1970 for lack of service connection. The RO found that following Mr. Martin's November 1968 treatment at the allergy clinic, there was "no further showing of complaints relative to asthma in service and [the] separation examination was negative." J.A. 26. While

acknowledging that Mr. Martin had reported asthma symptoms in his December 1969 medical examination four months after service, the RO concluded that: "In view of the pre-service history of asthma[,] it is held that the solitary exacerbation in service with a subsequent asymptomatic period of better than a year does not establish aggravation." J.A. 25-26. Mr. Martin did not appeal the RO decision.

In July 2013, Mr. Martin requested revision of the 1970 RO decision based on CUE, contending that the RO had failed to correctly apply "both" prongs of 38 U.S.C. § 1111. J.A. 27-28. As with Mr. George's case, the Board denied the request, finding no CUE in the 1970 RO decision because the regulation in force at that time did not require clear and unmistakable evidence of no aggravation. J.A. 39-40. Citing *George*, the Veterans Court affirmed the Board's decision:

> The denial of service connection in *George*, like the RO's denial here, predated the Federal Circuit's decision in *Wagner v. Principi* …. *George* held that *Wagner* does not apply retroactively to final decisions and affirmed the Board's finding that the VA decision did not contain CUE. The Court must reach the same conclusion here and affirm the Board's … finding that the February 1970 rating decision does not contain CUE.

Martin v. Wilkie, No. 18-0124, 2019 WL 3449689, at *3 (Vet. App. July 31, 2019) (citations omitted).

Both Mr. George and Mr. Martin timely appealed to this court. We have jurisdiction under 38 U.S.C. § 7292.

DISCUSSION

Our jurisdiction to review decisions of the Veterans Court is prescribed by statute. *Scott v. Wilkie*, 920 F.3d 1375, 1377-78 (Fed. Cir. 2019). We may "review and decide any challenge to the validity of any statute or regulation or any interpretation thereof" and "interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." 38 U.S.C. § 7292(c). We review claims of legal error in a decision of the Veterans Court without deference. *See Szemraj v. Principi*, 357 F.3d 1370, 1374-75 (Fed. Cir. 2004).

A motion for revision based on "clear and unmistakable error" is a statutorily authorized collateral attack on a final decision of the Board or RO that, if successful, results in a "reversed or revised" decision having "the same effect as if [it] had been made on the date of the [original] decision." *See* 38 U.S.C. §§ 7111, 5109A.[4] In other words, a meritorious CUE claimant may be entitled to benefits retroactive to the date of the original claim. CUE, however, is a "very specific and rare type of error," *Cook v. Principi*, 318 F.3d 1334, 1345 (Fed. Cir. 2002) (*en banc*), and must be based on "the record and the *law that existed at the time of the prior adjudication* in question," such

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[4] 38 U.S.C. § 7111 governs CUE arising from a Board decision whereas § 5109A governs CUE arising from an RO decision.

that "[e]ither the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions *extant at the time* were incorrectly applied," *see Willsey v. Peake*, 535 F.3d 1368, 1371 (Fed. Cir. 2008) (emphases added) (citing *Russell v. Principi*, 3 Vet. App. 310, 313-14 (1992) (en banc)). CUE must also be an "undebatable" error that would have "manifestly changed the outcome at the time it was made." *Willsey*, 535 F.3d at 1371.

A

Appellants first contend that their CUE claims do not seek to retroactively apply a changed interpretation of the law and, instead, are simply premised on the VA's purported failure to correctly apply the statute as written. Appellants assert that § 1111's meaning is plain and unambiguous, regardless of the VA's contrary interpretation set forth at the time in § 3.304(b). Rather than establish a "new" interpretation of § 1111, Appellants argue that *Wagner* "merely provided an authoritative statement of what [§ 1111] had *always* meant," including at the time of Appellants' respective VA decisions. *See* Martin Appellant's Br. 8 (internal quotation marks omitted) (citing *Rivers v. Roadway Exp., Inc.*, 551 U.S. 298, 313 n.12 (1994)). This reasoning, Appellants contend, comports with our nonprecedential decision in *Patrick II*, where we permitted a CUE claim to proceed based on the argument that the VA had "misapplied § 1111." *See Patrick II*, 242 F. App'x at 698.

We disagree with Appellants' argument because it overlooks the significance of the VA's regulation that existed at the time of the original decisions and fails to account for our caselaw. *Jordan*, in view of *DAV*, squarely forecloses Appellants' argument that *Wagner*'s later-in-time interpretation of § 1111 can serve as the basis for CUE. *DAV* upheld, over rulemaking challenge, the validity of CUE regulation 38 C.F.R. § 20.1403(e), which expressly states that CUE "does not include the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a *change in the interpretation* of the statute or regulation." *See DAV*, 234 F.3d at 695-98 (emphasis added).[5] In analyzing the regulation's specific carve-out of subsequent, changed interpretations as a basis for CUE, we clarified that "[t]he new interpretation of a statute can only retroactively

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[5] 38 C.F.R § 20.1403 governs CUE in Board decisions, whereas 38 C.F.R. § 3.105 governs CUE in RO decisions. We note that in 2019, § 3.105 was amended to include subsection (a)(1)(iv), which mirrors the language of § 20.1403(e). *See VA Claims and Appeals Modernization*, 84 Fed. Reg. 138 (Jan. 18, 2019) (final rule). In promulgating § 3.105(a)(1)(iv), the VA explained that "no substantive changes [were] intended to the existing law governing revision of final [RO] decision based on CUE," *see VA Claims and Appeals Modernization*, 83 Fed. Reg. 39,818, 39,820 (Aug. 10, 2018) (notice of proposed rulemaking), and the purpose of the amendment was to "conform[]" the regulation governing CUE in final RO decisions with the existing regulation governing final Board decisions, 84 Fed. Reg. at 142. Mr. Martin acknowledges that the substance of § 3.105(a)(1)(iv) applies to his appeal, *see* Martin Appellant's Reply Br. 6 n.2, and makes no attempt to distinguish *DAV* and *Jordan* based on the governing CUE regulation (§ 20.1403 vs. § 3.105) or statute (§ 7111 vs. § 5109A).

[a]ffect decisions still open on direct review, not those decisions that are final." *Id.* at 698. This limit on CUE, we explained, is consistent with Congress' intent that "changes in the law subsequent to the original adjudication … do not provide a basis for revising a finally decided case." *Id.* at 697-98. *DAV* thus established that CUE must be analyzed based on the law as it was *understood at the time* of the original decision and cannot arise from a subsequent change in the law or interpretation thereof to attack a final VA decision.

Jordan subsequently applied *DAV*'s understanding of CUE to the statutory presumption of soundness. There, in 1983, the Board denied Mr. Jordan's benefits claim for lack of service connection under then-governing 38 C.F.R. § 3.304(b)—the same version of the regulation that was applied to Appellants' original claims. *See Jordan*, 401 F.3d at 1297. Mr. Jordan never appealed the Board's decision, which became final. Several years later, in 1999, Mr. Jordan filed a CUE claim asserting that the 1983 Board had "misinterpreted provisions in 38 U.S.C. § 1111." *Id.* Like Appellants, Mr. Jordan claimed that § 1111's presumption of soundness had not been rebutted because the 1983 Board had failed to establish that his preexisting condition was not aggravated by service. The Board denied his CUE claim, and Mr. Jordan then appealed to the Veterans Court. While his Veterans Court appeal was pending, the VA issued its 2003 OGC opinion invalidating 38 C.F.R. § 3.304(b) for conflicting with § 1111. Nevertheless, the Veterans Court found no CUE because, as *DAV* held, CUE "does not include the otherwise correct application of

a statute or regulation" where there has been a subsequent "change in the interpretation of [that] statute or regulation." *Id.* On appeal before us, Mr. Jordan argued that there was no subsequent change in interpretation because 38 C.F.R. § 3.304(b) was "void *ab initio*" for being contrary to § 1111's "facially apparent meaning." *Id.* We rejected that argument because "the accuracy of the regulation as an interpretation of the governing legal standard does not negate the fact that [§ 3.304(b)] did provide the first commentary on section 1111, and was therefore the initial interpretation of that statute," which subsequently changed with the issuance of the 2003 OGC opinion. *Id.*

Here, as in *Jordan*, Appellants' argument that their CUE claims are not premised on a "change in the law" fails to appreciate that 38 C.F.R. § 3.304(b) provided the initial interpretation of § 1111, regardless of any inaccuracies subsequently reflected in *Wagner*. Section 3.304(b) established the VA's controlling interpretation of § 1111's rebuttal standard at the time of Appellants' VA decisions, and it would make little sense for the Board's and RO's "otherwise correct application" of this then-binding regulation to constitute adjudicative error, let alone CUE. *See* 38 C.F.R. §§ 20.1403(e), 3.105(a)(1)(iv). Indeed, Appellants do not dispute that VA adjudicators, at the time of their original Board and RO decisions, were bound by § 3.304(b). *See also* 38 U.S.C. § 7104(c) ("The Board shall be bound in its decisions by the regulations of the Department …."). And contrary to Appellants' assertion that § 1111's language is plain and unambiguous, *Wagner* found the language of § 1111's rebuttal standard "somewhat

difficult to parse" and "self-contradictory" "on its face." *See* 370 F.3d at 1093.

That *Wagner* was the first judicial interpretation of § 1111 by this court does not lead to a contrary result. *Jordan* does not differentiate between new agency interpretations and new judicial interpretations, and instead, refers to *both* the 2003 OGC opinion and *Wagner* as evidence of a change in interpretation of § 1111. *See Jordan*, 401 F.3d at 1298. *Jordan*, moreover, determined that granting CUE claims premised on a changed interpretation of law—whether based on *Wagner* or the 2003 OGC opinion—would fail to "give adequate weight to the finality of judgments," given that "[t]he Supreme Court has repeatedly denied attempts to reopen final decisions in the face of new judicial pronouncements." *Id*. at 1299; *see also DAV*, 234 F.3d at 698 (concluding that new statutory interpretations cannot, through a CUE motion, retroactively affect decisions that are final). We thus cabined the reach of CUE motions to exclude retroactive application of a new judicial or agency pronouncement to a final VA decision on a benefits claim.

Even though *Jordan* precludes CUE claims based on retroactively applying either our interpretation in *Wagner* or the VA's interpretation in the 2003 OGC opinion, Appellants nonetheless urge us to follow the contrary reasoning of the *Patrick* cases and hold that *Wagner* can serve as the basis for their CUE claims. Specifically, *Patrick II*, in a nonprecedential decision, distinguished *Jordan* as purportedly addressing only "whether a change in the regulatory interpretation of a statute had retroactive effect on CUE claims, not

whether our interpretation of the statute in *Wagner* had retroactive effect on CUE claims." *See Patrick II*, 242 F. App'x at 698. Because Mrs. Patrick's CUE claim was premised on our interpretation of § 1111 in *Wagner*, and not on the VA's changed regulatory interpretation of § 1111, *Patrick II* determined that *Jordan*'s "limited holding" did not apply to bar Mrs. Patrick's claim. *Id*. Subsequently, *Patrick III* summarized *Patrick II*'s reasoning in dicta and reversed the denial of Mrs. Patrick's application for EAJA fees, explaining that the lower court had failed to consider "the fact that the government had adopted an interpretation of [§ 1111] that was wholly unsupported by either the plain language of the statute or its legislative history" in assessing whether the government's position was substantially justified. *See Patrick III*, 668 F.3d at 1334.

We conclude, as the Veterans Court did, that we are not bound by the *Patrick* cases to reach a holding contrary to *DAV* and *Jordan*. *Patrick II* is a nonprecedential decision that issued after *DAV* and *Jordan*. Indeed, we expressly denied a motion to reissue *Patrick II*'s nonprecedential decision as precedential. *See Patrick v. Shinseki*, No. 06-7254 (Fed. Cir. Aug. 21, 2007), ECF No. 26. And *Patrick III*, though precedential, does not directly address whether *Wagner* can serve as a basis for CUE. While *Patrick III* summarizes *Patrick II*'s reasoning in the background section and in a footnote, its description of *Patrick II* in dicta does not elevate it to binding precedent. *See* Fed. Cir. R. 32.1(d) ("The court … will not give one of its own nonprecedential dispositions the effect of binding precedent.").

B

Appellants next argue that the Veterans Court misconstrued principles of finality and retroactivity in Supreme Court decisions, such as *Harper* and *Beam*. When properly read, Appellants contend, these cases "support the retroactive application of judicial pronouncements in cases that are open to collateral attack," Martin Appellant's Br. 19, or, if not, are otherwise "irrelevant" to their CUE claims given *Rivers*'s pronouncement that a judicial construction of a statute is an authoritative statement of what that statute has always meant, George Appellant's Br. 22. We disagree.

Nothing in these cases supports Appellants' contention that a new judicial pronouncement retroactively applies to *final* decisions, even those subject to a collateral attack, such as a request to revise a final Board or RO decision for CUE. *See Routen v. West*, 142 F.3d 1434, 1437 (Fed. Cir. 1998) (explaining that "basic principles of finality and res judicata apply to … agency decisions" that have not been appealed and have become final). Instead, *Harper* adopted a rule consistent with *Beam* that new judicial pronouncements are to be given "full retroactive effect in all cases *still open on direct review*" but not in final cases already closed. *See Harper*, 509 U.S. at 96 (emphasis added); *see also, e.g.*, *Beam*, 501 U.S. at 529 ("Retroactivity in civil cases must be limited by the need for finality; once suit is barred by *res judicata* …, a new rule cannot reopen the door already closed." (citation omitted)); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995) ("New legal principles, even when applied

retroactively, do not apply to cases already closed."); *DAV*, 234 F.3d at 698 ("[t]he new interpretation of a statute can only retroactively [a]ffect decisions still open on direct review, not those decisions that are final," and is therefore not a basis for CUE); *Jordan*, 401 F.3d at 1299 (recognizing that "new judicial interpretations" of a statute generally apply only to "pending cases").

While *Rivers* states that "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction," 511 U.S. at 312-13, it never holds that judicial constructions of statutes should be retroactively applied to *final* decisions, such as the VA decisions at issue here. Instead, *Rivers* cites to *Harper*, which expressly limits retroactivity of judicial decisions to pending "cases still open to direct review." *See id.* At 312 (citing *Harper*, 509 U.S. at 97). And *DAV* likewise cites *Harper* for support in upholding the validity of 38 C.F.R. § 20.1403(e), which states that CUE does not arise from "the correct application of the statute or regulation as it was interpreted at the time of the decision." *DAV*, 234 F.3d at 697.

C

Our determination that *Wagner* cannot serve as the basis for Appellants' CUE claims accords with the legislative intent behind the CUE statutes, 38 U.S.C. §§ 7111 and 5109A. Neither statute addresses subsequent changes in law, interpretations of law, or otherwise defines CUE. Instead, these statutes merely provide that a prior decision shall be revised

for CUE "[i]f evidence establishes the error." *See id.* §§ 7111(a), 5109A(a). Upon revision, the statutes then authorize retroactive benefits from the effective date of the original decision. *See id.* §§ 7111(b), 5109A(b).

The statutory history, however, is more instructive. Prior to their statutory enactment, CUE had been solely an administrative practice governed by VA regulation for several decades, dating back to 1928. *DAV*, 234 F.3d at 686. Congress enacted §§ 7111 and 5109A in 1997 to "codify [the] existing regulation[]" governing CUE in RO decisions and extend those principles to Board decisions as well. *See* H.R. Rep. No. 105-52, at 1 (1997). These statutes "made no change in the substantive standards" governing CUE and "merely codified the prior regulation" provided in 38 C.F.R. § 3.105, *see Donovan v. West*, 158 F.3d 1377, 1382 (Fed. Cir. 1998), and the Veterans Court's "long standing interpretation of CUE," *see Bustos v. West*, 179 F.3d 1378, 1381 (Fed. Cir. 1999). We therefore look to the pre-codified version of § 3.105 and established CUE standards to understand Congress' intent in enacting the CUE statutes.

As an initial matter, we observe that the VA's CUE regulation predates the enactment of the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat 4105 (1988), which, for the first time, permitted judicial review of VA decisions. Because § 3.105 predates judicial review, this regulation and the VA's administrative practice, before 1988, could not have contemplated CUE would arise from a new judicial interpretation of a statute.

More importantly, as of the CUE doctrine's statutory codification in 1997, § 3.105's preamble provided that revision of a final RO decision based on CUE was available "*except* where" the alleged error was based on "a change in law or Department of Veterans Affairs issue, or a *change in interpretation of law* or a Department of Veterans Affairs issue (§ 3.114)."[6] 38 C.F.R. § 3.105 (1997) (emphases added); *see also Russell*, 3 Vet. App. at 313 ("[C]hanges in the law subsequent to the original adjudication … do not provide a basis for revising a finally decided case."). Given that § 3.105 plainly excluded a "change in law" or "change in interpretation of law" from CUE, we conclude that by codifying this regulation, Congress did not intend for CUE to go so far as to attack a final VA decision's correct application of a then-existing regulation that is subsequently changed or invalidated, whether by

[6] We do not construe § 3.105's reference to § 3.114 to be limiting. We nonetheless observe that the substance of § 3.114 comports with our above understanding of CUE. As of 1997, § 3.114 pertained, in relevant part, to the effective date of awards pursuant to liberalizing laws. It explained that where an award is made pursuant to a "liberalizing law" or "liberalizing VA issue," the effective date of that award "shall not be earlier than the effective date of the act or administrative issue" itself. *See* 38 C.F.R. § 3.114(a) (1997). Thus, even where a subsequent law liberalizes benefits that were unavailable under a prior understanding of the law, the effective date of those benefits cannot be earlier than the effective date of the liberalizing law itself. Likewise, here, our understanding of CUE precludes *Wagner*'s interpretation of § 1111 from providing retroactive benefits predating *Wagner* itself.

the agency or the judiciary.[7] In other words, the VA does not commit clear and unmistakable error in a benefits claim decision when it faithfully applies a regulation as it existed at the time of decision, even if that regulation is later revised or invalidated.

Accordingly, we reject Appellants' theory as to the scope of CUE and hold that our interpretation of § 1111 in *Wagner* cannot be the basis for Appellants' CUE claim.

CONCLUSION

We have considered Appellants' remaining arguments but find them unpersuasive. For the reasons set forth above, we affirm the Veterans Court's decisions.

AFFIRMED

COSTS

No costs.

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[7] We note that the VA reached this conclusion in its 1994 OGC opinion, VA Gen. Counsel Prec. 9-94 (Mar. 25, 1994), which addressed whether Veterans Court decisions invalidating VA regulations or statutory interpretations have retroactive effect through CUE. As with our decision today, the VA also interpreted § 3.105's preamble to exclude changes in interpretation of law by judicial precedent as a basis for CUE. *See id.* at 2 ("[I]t is our view that section 3.105(a) provides no authority … for retroactive payment of benefits when the [Veterans Court] invalidates a VA interpretation or regulation.").

APPENDIX B

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-2174

KEVIN R. GEORGE, APPELLANT,

V.

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

On Appeal from the Board of Veterans' Appeals

(Decided January 4, 2019)

Kenneth M. Carpenter, of Topeka, Kansas, was on the brief for the appellant.

Meghan Flanz, Interim General Counsel; *Mary Ann Flynn*, Chief Counsel; *Richard A. Daley*, Deputy Chief Counsel; and *Mark D. Gore*, all of Washington, D.C., were on the brief for the appellee.

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

Davis, *Chief Judge*, filed the opinion of the Court. BARTLEY, *Judge*, filed a dissenting opinion.

DAVIS, *Chief Judge*: U.S. Marine Corps veteran Kevin R. George appeals through counsel a March 1, 2016, Board of Veterans' Appeals (Board) decision

that found no clear and unmistakable error (CUE) in a September 1977 Board decision that denied entitlement to VA disability compensation benefits for schizophrenia. Record (R.) at 2-14. On September 6, 2017, the Court issued a memorandum decision affirming the Board's decision. On September 19, 2017, Mr. George filed a motion for reconsideration. On October 27, 2017, the matter was referred to a panel of the Court. On November 15, 2017, the panel granted Mr. George's motion for reconsideration, withdrew the September 2017 memorandum decision, ordered the Secretary to respond to Mr. George's motion for reconsideration, and permitted Mr. George to reply to the Secretary's response. After considering the briefs, the motion for reconsideration, the Secretary's response to the motion, and Mr. George's reply, the Court will affirm the Board's March 2016 decision.

I. BACKGROUND

In June 1975, Mr. George enlisted in the U.S. Marine Corps. A week after enlistment, he was hospitalized and diagnosed with an acute situational reaction. R. at 6; *see* R. at 1172, 1289. In July 1975, Mr. George was discharged from the hospital and ultimately placed in a training platoon. The following month, a psychiatrist diagnosed Mr. George with paranoid schizophrenia. An August 1975 Medical Board Report confirmed the schizophrenia diagnosis, found that his condition preexisted service and *was aggravated* by service, and recommended referral to the Central Physical Evaluation Board for discharge. In contrast, the Physical Evaluation Board found that his condition preexisted service but *was not*

aggravated by service. Mr. George was discharged from service in September 1975.

In December 1975, Mr. George filed a claim for benefits contending that his schizophrenia was aggravated by his military service. A May 1976 regional office (RO) decision denied his claim because his condition existed prior to service and there was an acute exacerbation but no permanent aggravation during service. In September 1977, the Board denied Mr. George's claim because his condition existed prior to service and was not aggravated during service.

In December 2014, through current counsel, Mr. George filed a motion to revise the September 1977 Board decision on the basis of CUE. Mr. George alleged that the Board failed to correctly apply 38 U.S.C. § 311,[1] as VA did not rebut the presumption of sound condition with clear and unmistakable evidence that his condition was not aggravated by service. R. at 593.

In the March 2016 decision on appeal, the Board found no CUE in the September 1977 Board decision. The 2016 Board noted that the September 1977 Board "in conducting its presumption of soundness analysis under 3.304(b) (1977) … was not required to find clear and unmistakable evidence that the disability was not aggravated by service." R. at 5. The Board further acknowledged that the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) held that section

[1] The presumption of soundness is now codified as 38 U.S.C. § 1111, but the statutory language is identical to the precursor statute, section 311.

1111, the presumption of soundness statute, requires clear and unmistakable evidence that a condition *both* existed prior to service *and* was not aggravated during service, *see Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004), but stated that "judicial decisions that formulate new interpretations of the law subsequent to a VA decision cannot be the basis of a valid CUE claim." R. at 6. Relying on *Jordan v. Nicholson*, 401 F.3d 1296 (Fed. Cir. 2005), the Board explained that the interpretation of the presumption of sound condition that the Federal Circuit "articulated in *Wagner*[] does not have retroactive application in a CUE case. Thus, the failure of the Board [in September 1977] to find that the [claimant's] condition was not clearly and unmistakably aggravated by service as part of its presumption of soundness analysis cannot be considered to be CUE." *Id.*

In its 2016 decision, the Board discussed the evidence before the Board in September 1977 and concluded that there was evidence that Mr. George's schizophrenia existed prior to service, and conflicting evidence as to whether his condition was aggravated by service. The Board noted that the Medical Board had concluded that Mr. George's condition had its onset prior to service and that his disability was aggravated by service. R. at 8. In contrast, the Board pointed to the August 1975 "Physical Evaluation Board Proceedings and Findings" form stating that Mr. George's condition preexisted service and was not aggravated by service.

The 2016 Board conceded that the September 1977 Board did not discuss the presumption of

soundness statute, 38 U.S.C. § 311 (1977), discuss its implementing regulation, 38 C.F.R. § 3.304(b) (1977), or explain how there was clear and unmistakable evidence that Mr. George's condition existed prior to service and was not aggravated by service. R. at 10. The 2016 Board stated, however, that even though the September 1977 Board erred, the error was not outcome determinative "because the Board nonetheless considered all relevant evidence of record at the time of its September 1977 decision." R. at 11. The 2016 Board concluded that Mr. George's allegation of CUE in the September 1977 decision is simply a disagreement with how the Board in 1977 weighed the evidence, which does not constitute CUE.

II. PARTIES' ARGUMENTS

On appeal, Mr. George argues that the Board in March 2016 erred in finding that, under 38 C.F.R. § 3.304(b) (1977), the Board in September 1977 "was not required to find clear and unmistakable evidence that the disability was not aggravated by service." R. at 5. He contends that his CUE motion specifically challenged the application of section 311, a *statute*, and not the VA *regulation* in effect in 1977. Mr. George further points out that when a court interprets a statute, its interpretation is a statement of what the law has always been, which he argues renders the Board's dismissal of *Wagner* improper. *See* Appellant's Brief (Br.) at 5. He asserts that the 2016 Board's reliance on *Jordan* is misplaced because that case does not address "whether the court's interpretation of the statutory presumption of soundness had a retroactive effect on requests for revisions based on an allegation of [CUE] due to the

Board's failure to correct[ly] apply the statute, notwithstanding what the VA's regulatory interpretation of the statute may have been." *Id.* at 6. In support of this argument, Mr. George relies on the Federal Circuit's decision in *Patrick v. Shinseki*, 668 F.3d 1325 (Fed. Cir. 2011).

The Secretary agrees that the 2016 Board erred in stating that the 1977 Board, "in conducting its presumption of soundness analysis under 3.304(b) (1977)[,] … was not required to find clear and unmistakable evidence that the disability was not aggravated by service." R. at 5. Further, the Secretary recognizes that the 2016 Board also erred in relying on *Jordan*, 401 F.3d at 1288-89. The Secretary explains that *Jordan* speaks only to an allegation of CUE based on a retroactive effect of a regulation's invalidity and the issue here is an allegation of CUE based on the Board's failure to properly apply the statute.

Despite the Board's error, the Secretary contends that it is evident from the decision that the 2016 Board conducted the proper analysis, because it recognized that the Board in 1977 was "bound by the requirement that there be clear and unmistakable evidence on the aggravation prong of the analysis." Secretary's Br. at 8. The Secretary argues for the affirmance of the March 2016 Board decision because Mr. George did not demonstrate that the Board's error in articulating an incorrect evidentiary standard in 1977 would have resulted in a manifestly changed outcome. The Secretary asserts that the 2016 Board explained that there was evidence before the Board in 1977 rebutting both prongs of the

presumption of soundness, that is, evidence that Mr. George had a preexisting condition and that his condition was not aggravated by service. *See* Secretary's Br. at 10 (citing R. at 1282-84, 1289, 1294). Accordingly, the Secretary contends that the 2016 Board properly found no CUE in the 1977 Board decision.

III. ANALYSIS

Mr. George argues that there was CUE in the September 1977 Board decision because the Board misapplied the statutory presumption of soundness. He asserts that, had the presumption of soundness been correctly applied, VA would have been required to show by clear and unmistakable evidence that his condition existed prior to service and was not aggravated by service. Before addressing Mr. George's arguments, the Court will briefly discuss the statutory presumption of soundness, the statute and regulation providing for revision of Board decisions on the basis of CUE, and the Federal Circuit's decisions in *Wagner*, *Jordan*, and *Patrick*, which provide the context to Mr. George's arguments.

A. Presumption of Soundness

The presumption of soundness statute, in 1977, as today, stated:

> [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.

38 U.S.C. § 311 (1977) (now 38 U.S.C. § 1111). Because of *Wagner*, we now know that the presumption may be rebutted only with clear and unmistakable evidence of *both* preexistence and no aggravation. 370 F.3d at 1096. In 1977, however, the implementing regulation for this statute required the Secretary to rebut the presumption of soundness only with "clear and unmistakable (obvious or manifest) evidence [that] demonstrates that an injury or disease existed prior [to service]." 38 C.F.R. § 3.304(b) (1977). In 2003, VA invalidated this version of the regulation. *See* VA Gen. Coun. Prec. 3-2003 (July 16, 2003). The regulation was amended, effective May 4, 2005, to incorporate the new interpretation requiring evidence of both preexistence and no aggravation. *See* 70 Fed. Reg. 23,027-01, 23,028 (May 4, 2005).

B. CUE: An Exception to Finality

Congress has enacted a statute allowing Board decisions to be challenged on the basis of CUE. *See* 38 U.S.C. § 7111. "CUE proceedings are fundamentally different from direct appeals," in that they are a limited statutory exception to the rule of finality. *Robinson v. Shinseki*, 557 F.3d 1355, 1360 (Fed. Cir. 2009); *see Disabled Am. Veterans v. Gober* (*DAV*), 234 F.3d 682, 686-87 (Fed. Cir. 2000). CUE is a rare kind of error and allows final RO and Board decisions to be reversed or revised. 38 U.S.C. §§ 5109A, 7111; *see*

DiCarlo v. Nicholson, 20 Vet.App. 52, 54-58 (2006); 38 C.F.R. §§ 3.105, 20.1400-11 (2018).

To establish CUE, a claimant must show that either the facts known at the time were not before the adjudicator or the law then in effect was incorrectly applied, and an error occurred based on the record and the law that existed at the time the decision was made. *Russell v. Principi*, 3 Vet.App. 310, 313-14 (1992) (en banc). The error must also have "manifestly changed the outcome" of the decision. *Id.*; *see Bustos v. West*, 179 F.3d 1378, 1380 (Fed. Cir. 1999). The Court's review of a Board decision finding no CUE in a prior final Board decision is limited to determining whether the Board's finding was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 38 U.S.C. § 7261(a)(3)(A); *Russell*, 3 Vet.App. at 315.

VA's implementing regulation for section 7111, 38 C.F.R. § 20.1403(e), states that CUE "does not include the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a change in the interpretation of the statute or regulation." The Federal Circuit affirmed VA's rulemaking authority and upheld § 20.1403(e) in *DAV*, 234 F.3d at 698 ("The new interpretation of a statute can only retroactively [a]ffect decisions still open on direct review, not those decisions that are final.").

C. *Wagner*, *Jordan*, and the Presumption of Soundness

After *DAV*, the Federal Circuit addressed § 3.304(b), section 1111's implementing regulation, in *Wagner*. In that case, the appellant appealed this Court's affirmance of a Board decision that determined that the presumption of soundness had been rebutted because the Secretary established with clear and unmistakable evidence that the appellant's injury preexisted service. This Court's decision was based on § 3.304(b), which allowed the presumption of soundness to be "rebutted solely by 'clear and unmistakable evidence that an injury or disease existed prior to service.'" *Wagner*, 370 F.3d at 1091 (quoting 38 C.F.R. § 3.304(b) (1999)). After the appellant filed his appeal to the Federal Circuit, VA's general counsel issued a precedential opinion stating that, to rebut the presumption of soundness, the Secretary must show with clear and unmistakable evidence that a claimant's disability preexisted service *and* was not aggravated by service. *See* VA Gen. Coun. Prec. 3-2003 (July 16, 2003). After examining the legislative history and the language of section 1111, the Federal Circuit agreed, holding that the Government must show both preexistence and no aggravation to rebut the presumption of soundness, consistent with the VA General Counsel's opinion. *Wagner*, 370 F.3d at 1096.

Following its decision in *Wagner*, the Federal Circuit turned to whether its invalidation of § 3.304(b) had retroactive effect. In *Jordan*, the appellant had appealed a 1999 Board decision finding no CUE in a 1983 decision that, in turn, found the

presumption of soundness had been rebutted pursuant to § 3.304(b). The appellant contended that the invalidation of § 3.304(b) in *Wagner* should apply retroactively such that the regulation was, in effect, not in existence at the time of the 1999 Board decision, thereby requiring the Board to consider whether *both* prongs of the presumption had been rebutted in 1983. The Federal Circuit rejected Mr. Jordan's argument that "invalidation of [the] regulation can retroactively affect final decisions." *Jordan*, 401 F.3d at 1297. Instead, the Federal Circuit applied the rule announced in *DAV*, holding that "CUE does not arise from a new regulatory interpretation of a statute" and that, "because the 1983 Board decision was final, Mr. Jordan has no recourse for appeal through a CUE [motion]." *Id.* at 1299.

D. The *Patrick* Line of Cases[2]

One month after issuing *Wagner*, the Federal Circuit issued *Patrick I*, a nonprecedential decision,

[2] The *Patrick* line of cases, including precedential and nonprecedential decisions from both this Court and the Federal Circuit, is as follows: *Patrick v. Principi* (*Patrick I*), 103 F. App'x 383 (2004) (nonprecedential Federal Circuit decision remanding the case for this Court to consider *Wagner*); *Patrick v. Nicholson* (*Patrick II*), No. 99-916, 2006 WL 318822 (Vet. App. Feb. 1, 2006) (single-judge decision of this Court affirming the 1999 Board decision finding no CUE in the March 1986 Board decision); *Patrick v. Nicholson* (*Patrick III*), 242 F. App'x 695 (Fed. Cir. 2007) (nonprecedential Federal Circuit decision vacating this Court's affirmance of the 1999 Board decision); *Patrick v. Peake* (*Patrick IV*), No. 99-916, 2008 WL 331094 (Vet. App. Jan. 31, 2008) (single-judge decision of this Court remanding the case for the Board to provide an adequate statement of reasons or bases

which began the *Patrick* line of cases. The Court will discuss this line of cases for context, because Mr. George relies heavily on the Federal Circuit's decision in *Patrick VI*, a decision on attorney fees, as well as the Federal Circuit's nonprecedential decisions on the merits that preceded it. *See* Motion for Reconsideration at 5-10. In the *Patrick* cases, a veteran's widow argued that the Board erred in finding no CUE in a March 1986 Board decision because section 1111 requires clear and unmistakable evidence both that an injury or disease preexisted service and that any such injury or disease was not aggravated by service. *See Patrick I*, 103 F. App'x at 384. This Court affirmed the Board decision and the appellant appealed to the Federal Circuit.

In *Patrick I*, a nonprecedential decision, the Federal Circuit noted its then-recent decision in *Wagner* and remanded the matter for "further consideration" by this Court in light of that precedent. *Id.* at 385. The Federal Circuit also noted that Mrs. Patrick did not challenge the Board's finding

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for its conclusion that Mr. Patrick's preexisting heart disorder did not permanently increase during service); *Patrick v. Shinseki* (*Patrick V*), 23 Vet.App. 512 (2010) (panel decision of this Court denying Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), fees to Mrs. Patrick because it found that the Government's position was substantially justified); *Patrick v. Shinseki* (*Patrick VI*), 668 F.3d 1325 (Fed. Cir. 2011) (Federal Circuit's precedential reversal of the denial of EAJA fees to Mrs. Patrick for failure to adequately address the totality of the circumstances); *Patrick v. Shinseki* (*Patrick VII*), No. 08-10899(E), 2012 WL 1860869 (Vet. App. May 23, 2012) (single-judge decision following the Federal Circuit's guidance and finding the Secretary's position was not substantially justified).

that the Secretary had rebutted the preexistence prong but rather argued that the Secretary had not shown by clear and unmistakable evidence that there was no aggravation during service. *Id.* On remand, this Court again affirmed the Board decision, finding that the Federal Circuit, in its intervening decision in *Jordan*, had held "that the presumption-of-soundness interpretation articulated in *Wagner* … does not have retroactive application in a CUE case." *Patrick II*, 2006 WL 318822, at *9 (citing *Jordan*, 401 F.3d at 1298-99). The appellant again appealed to the Federal Circuit.

In *Patrick III*, another nonprecedential decision, the Federal Circuit stated that this Court had "misread[]" *Jordan*, which had "addressed whether a change in the regulatory interpretation of a statute had retroactive effect on CUE [motions], not whether [its] interpretation of the statute in *Wagner* had retroactive effect on CUE [motions]." 242 F. App'x at 697. The Federal Circuit further stated that its holding in *Jordan* was "limited" and explained that, "[u]nlike changes in regulations and statutes, which are prospective, [its] interpretation of a statute is retrospective in that it explains what the statute has meant since the date of enactment." *Id.* at 698 (citing *Rivers v. Roadway Express*, 511 U.S. 298, 312-13 (1994)). More specifically, the Federal Circuit stated that its "interpretation of [section] 1111 in *Wagner* did not change the law but explained what [section] 1111 has always meant." *Id.* (emphasis omitted). The Federal Circuit expressly directed this Court on remand to consider Mrs. Patrick's CUE motion and if necessary "remand to the Board for a determination of whether the government has rebutted the

presumption of soundness under [section] 1111 by providing clear and unmistakable evidence of no in-service aggravation of Mr. Patrick's heart disease." *Patrick III*, 242 F. App'x at 698. On remand, in *Patrick IV*, this Court vacated the Board decision and remanded the appellant's appeal, and she filed an application for attorney fees under EAJA. In *Patrick V*, this Court denied the application, finding that the Secretary's position was substantially justified; Mrs. Patrick again appealed to the Federal Circuit.

In the "Background" section of *Patrick VI*, the first and only precedential decision in this line of cases, the Federal Circuit summarized what it said in *Patrick III* about the limitations of *Jordan* and the effect of its pronouncement regarding section 1111 in *Wagner*. 668 F.3d at 1328-29. In the "Discussion" section of *Patrick VI*, the Federal Circuit addressed whether EAJA fees were warranted, reversed this Court's finding that the Secretary's position was substantially justified, and remanded the matter for this Court to consider substantial justification using the totality of circumstances test.[3] *Id.* at 1334. The Federal Circuit included the following footnote:

> Nor did the Veterans Court [in *Patrick V*] fully assess the question of whether the government was substantially justified in arguing, following our decisions in *Wagner*, 370 F.3d at 1094-96, and *Patrick I*, 103 F[.] App[']x[] at 384-85, that this court's

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[3] This Court ultimately granted Mrs. Patrick's EAJA application in *Patrick VII*.

> interpretation of section 1111 did not apply retroactively in the context of a CUE claim. We soundly rejected this argument in *Patrick III*, where we explained that[,] "[u]nlike changes in regulations and statutes, which are prospective, our interpretation of a statute is retrospective in that it explains what the statute has meant since the date of enactment." 242 F[.] App[']x[] at 698. We emphasized, moreover, that "our interpretation of § 1111 … did not *change* the law but explained what [section] 1111 has always meant," and should therefore be applied to Mrs. Patrick's claim alleging CUE in the [B]oard's previous decision denying her application for dependency and indemnity benefits. *Id.*

Patrick VI, 668 F.3d at 1333 n.6.

E. Retroactivity and CUE

This appeal involves the competing doctrines of finality and retroactivity. In civil cases, the need for finality limits the application of retroactivity. *James B. Beam Distilling Co. v. Ga.* (*Beam*), 501 U.S. 529, 541 (1991) (citing *Chicot Cty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940)). The Federal Circuit has held that "[p]rinciples of finality and *res judicata* apply to agency decisions that have not been appealed and become final." *Cook v. Principi*, 318 F.3d 1334, 1336 (Fed. Cir. 2002); *see id.* at 1339 ("The purpose of the rule of finality is to preclude repetitive and belated readjudication of veterans' benefit claims."). In *Jordan*, the Federal Circuit noted the importance

of finality, commenting that the appellant's argument that § 3.304(b) was void ab initio did not "give adequate weight to finality of judgments" and citing Supreme Court cases that "denied attempts to reopen final decisions in the face of new judicial pronouncements or decisions finding statutes unconstitutional." 401 F.3d at 1299 (citing *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995), for the proposition that new judicial interpretations of a statute apply to "all pending cases").

Generally, courts apply settled principles of law to the disputes before them but, "when the law changes in some respect," an argument for retroactivity arises. *Beam*, 501 U.S. at 534. A new rule of law is announced, in the civil context, when the court overrules past precedent or decides a case of first impression. *Reynoldsville Casket Co.*, 514 U.S. at 763. *Beam* makes clear that the retroactive application of a judicial pronouncement of the law is not absolute. Rather, as the Supreme Court has expressly determined, the application of judicial retroactivity in civil cases is bound by principles of res judicata and limited to those cases open on direct review.[4] In *Harper v. Virginia Department of*

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[4] In the criminal context, the Supreme Court even distinguishes between applying new rules to cases open on direct review and those cases subject to collateral attack. New rules in criminal law are applied to cases open on direct review but not to those subject to collateral attacks. *Compare Griffith v. Kentucky*, 479 U.S. 314 (1987) (applying new rules retroactively to criminal cases on direct review), *with Teague v. Lane*, 489 U.S. 288 (1989)

Taxation, the Supreme Court, relying on *Beam*, held that, when a court applies a "federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect *in all cases still open on direct review*." 509 U.S. 86, 97 (1993) (emphasis added); *see Beam*, 501 U.S. at 535.

Generally, there is little opportunity to collaterally attack final judgments in civil cases; however, in the veterans law universe, limited collateral attacks on final decisions are authorized by statute. *See Beam*, 501 U.S. at 540 (determining whether to apply new rules to cases on direct appeal or cases arising collaterally is not a problem in the civil arena as "there is little opportunity for collateral attack of final judgments"); *see also* 38 U.S.C. § 7111; *Cook*, 318 F.3d at 1339 (noting that CUE is a statutory exception to the rule of finality). An allegation of CUE is a statutorily permitted collateral attack on final VA decisions, with allegations of CUE evaluated based on the law that existed at the time of the final decision. *Russell*, 3 Vet.App. at 314 ("A determination that there was a '[CUE]' must be based on the record and the law that existed at the time of the prior … decision."); *see Willsey v. Peake*, 535 F.3d 1368, 1373 (Fed. Cir. 2008) ("[T]he record and the law as they existed at the time of the determination do not compel a finding of CUE in the 1983 determination.").

The Federal Circuit's interpretation of the presumption of soundness statute announced in

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(holding that new rules will not relate back to criminal convictions challenged on habeas corpus grounds).

Wagner is "an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers*, 511 U.S. at 312-13. We do not, as our dissenting colleague contends, find that *Wagner* contained a new interpretation of section 1111. *Post* at 17. Instead, as further explained below, we find that the Federal Circuit's announcement in *Wagner* in 2004 of what section 1111 means cannot defeat the finality of a 1977 Board decision, *see Harper*, 509 U.S. at 97. This is so because consideration of CUE requires the application of the law as it was understood at the time of the 1977 decision, *see Willsey*, 535 F.3d at 1373; *Russell*, 3 Vet.App. at 314, and *Wagner* does not change how section 311 (now section 1111) was interpreted or understood before it issued. Applying a statute or regulation as it was interpreted and understood at the time a prior final decision is rendered does not become CUE by virtue of a subsequent interpretation of the statute or regulation by this Court or the Federal Circuit. When VA proposed the CUE regulation, VA anticipated that "[a]n interpretation of a statute or regulation could, in light of future interpretations—whether by the General Counsel or a court—be viewed as erroneous. That would not, however, be the kind of error required for CUE, i.e., an error about which reasonable persons could not differ." 63 Fed. Reg. 27,534, 27,537 (May 19, 1998).

F. Application of Law to the Facts

Mr. George argues that the 2016 Board erred in stating that the 1977 Board *was not* required to find clear and unmistakable evidence that his

schizophrenia was not aggravated by service in light of the 1977 version of § 3.304(b). Appellant's Br. at 3. Although the Secretary concedes error in this regard, the Court does not agree. *See Copeland v. Shinseki*, 26 Vet.App. 86, 90 n.4 (2012) (noting that the parties' agreement is not binding on the Court). In 1977, the Board was required to apply the law as it existed at that time, including § 3.304(b), requiring the Secretary to rebut the presumption of soundness with only clear and unmistakable evidence that an injury or disease existed before service. *See* 38 C.F.R. § 19.1 (1977) ("In its decisions, the Board is bound by the regulations of the Veterans Administration, instructions of the Administrator and precedent opinions of the chief law officer."). Consequently, it is not clear how the Board could have ignored this regulation or why the Board would have been required to find clear and unmistakable evidence of aggravation in 1977. This regulatory interpretation of the statutory presumption of soundness, requiring the Secretary to rebut the presumption only with clear and unmistakable evidence that a disability preexisted service, prevailed until 2003. *See Doran v. Brown*, 6 Vet.App. 283, 286 (1994) (holding that the presumption of soundness "can be overcome only by clear and unmistakable evidence that a disability existed prior to service"); *Bagby v. Derwinski*, 1 Vet.App. 225, 227 (1991) (holding that the presumption of soundness had been rebutted when there was clear and unmistakable evidence that the appellant entered service with a preexisting ulcer); *see also* VA Gen. Coun. Prec. 3-2003 (July 16, 2003).

While the Federal Circuit's interpretation of the presumption of soundness statute in *Wagner* sets

forth what the statute has always meant, it was not the interpretation or understanding of the statute before its issuance. *See Rivers*, 511 U.S. at 312-13; *Harper*, 509 U.S. at 97; *Russell*, 3 Vet.App. at 315. VA issued a precedential general counsel opinion in 2003 that invalidated the statute's initial implementing regulation, § 3.304(b). In 2004, the Federal Circuit issued its first judicial interpretation of the presumption of soundness statute — a new interpretation and different from VA's initial interpretation as expressed in § 3.304(b). *Jordan*, 401 F.3d at 1298 ("[T]here was a change in interpretation of section 1111 with the issuance of the opinion by the VA's General Counsel stating that 38 C.F.R. § 3.304 conflicted with the language of section 1111."). Because we find that *Wagner* does not apply retroactively to final decisions, we conclude that the 2016 Board correctly stated the law as it existed in 1977.

With regard to judicial retroactivity, the parties agree that *Wagner* applies retroactively and its holding supports an allegation of CUE based on the misapplication of the presumption of soundness as discussed in *Patrick III*. *See* Appellant's Motion for Reconsideration at 9; Secretary's Response to the Appellant's Motion for Reconsideration at 6. The Court, however, disagrees. *See Copeland*, 26 Vet.App. at 90 n.4. Mr. George's argument is that if the Federal Circuit's interpretation of section 1111 in *Wagner*—that clear and unmistakable evidence is required to rebut both prongs of the presumption of sound condition—is what the law "'has meant since the date of enactment,'" *Patrick VI*, 668 F.3d at 1329 (quoting *Patrick III*, 242 F. App'x at 698), then the Board in

September 1977 was required to apply that interpretation of the law and its failure to do so could constitute CUE.

As noted above, in *Patrick VI*, the Federal Circuit commented in a footnote that it had "soundly rejected [the argument that *Wagner* did not apply retroactively in the context of a CUE motion] in *Patrick III*." 668 F.3d at 1333 n.6. Mr. George essentially contends that, by explaining in the precedential *Patrick VI* opinion what the Federal Circuit held in the nonprecedential *Patrick III* opinion, the nonprecedential holding became precedential. *Patrick VI*, however, addresses whether EAJA fees are warranted; it does not directly address whether *Wagner* supports a basis for a CUE motion. Accordingly, we conclude that the Federal Circuit's pronouncement in *Patrick VI*—regarding the effect of *Wagner* on CUE motions—is dicta. *See Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 352 n.12 (2005) ("Dictum settles nothing, even in the court that utters it."); *McDaniel v. Sanchez*, 452 U.S. 130, 141 (1981) ("[D]ictum unnecessary to the decision in [a] case … [is] not controlling in this case.").

Moreover, *Patrick III* is not binding precedent. *See* Fed. Cir. R. 32.1(d) ("The court may refer to a nonprecedential disposition in an opinion or order and may look to a nonprecedential disposition for guidance or persuasive reasoning, but will not give one of its own nonprecedential dispositions the effect of binding precedent."). In *Patrick III*, the Federal Circuit clearly stated that the interpretation of a statute is retrospective and implied that *Wagner* could form the basis of an allegation of CUE. *Patrick*

III also explained that this Court misread the limited holding of *Jordan*, and that *Jordan* did not support the proposition that this Court announced, i.e., that *Wagner could not* support an allegation of CUE. Interestingly, to support the legal proposition that a court's interpretation of a statute is retrospective and explains what a statute has always meant, the Federal Circuit in *Patrick III* cited *Rivers*, 511 U.S. at 312, which noted that judicial decisions generally apply retroactively only to cases open on direct review.

The statements in *Patrick III* and the footnote in *Patrick VI* as to *Wagner's* retroactivity conflict with other precedential Federal Circuit caselaw. For example, in *DAV*, the Federal Circuit recognized that CUE is a collateral attack on a final regional office or Board decision and that "[t]he new interpretation of a *statute* can only retroactively [a]ffect decisions still open on direct review, not those decision[s] that are final." 234 F.3d at 698 (emphasis added) (citing *Harper*, 509 U.S. at 97). The Federal Circuit affirmed VA's regulation in *DAV*, including the language that CUE "does not include the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a change in the interpretation of the statute or regulation." 38 C.F.R. § 20.1403(e). Mr. George asserts that there was no "otherwise correct application" of the law in 1977 because *Wagner* stated what the law has always meant. At the time of the Board's 1977 decision, however, the law was interpreted and understood differently. *Russell*, 3 Vet.App. at 312-13. In another case dismissing an appeal from this Court, the Federal Circuit

commented that, "where the regulations in existence at the time of the original decision imposed a different rule, *Wagner* cannot be the basis for a CUE claim." *Joyce v. Nicholson*, 443 F.3d 845, 848 (Fed. Cir. 2006).

Further, it would defy reason to hold, on the one hand, that VA's 2003 change in interpretation of § 3.304(b) cannot form the basis of a CUE challenge to the 1977 Board decision because the Board in 1977 applied the then-prevailing regulatory interpretation, *see Jordan*, 401 F.3d at 1298, and on the other hand that a statement of statutory interpretation announced in 2004 can form the basis of a CUE challenge to the 1977 Board decision because the statute has "always meant" something different than the then-prevailing interpretation, *see Patrick III*, 242 F. App'x at 698. Because the statutory interpretation of section 311 in 1977 was embodied in § 3.304(b) as it then existed, there was no practical difference between the application of section 311 and § 3.304(b) in 1977. *Wagner* did not exist in 1977, and therefore the proper application of section 311 in 1977 did not require clear and unmistakable evidence that a preexisting condition was not aggravated by service. *See Berger v. Brown*, 10 Vet.App. 166, 170 (1997) ("A new rule of law from a case decided in 1993 could not possibly be the basis of an adjudicative error in 1969.").

It is noted that the implications from the Federal Circuit's nonprecedential *Patrick* opinions and the *Patrick VI* EAJA opinion raise significant issues from the perspective of this specialized Court with regard to the review of CUE motions. *See Shinseki v. Sanders*, 556 U.S. 396, 412 (2009) (noting this Court's

special expertise and quoting *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999), for the proposition that an "Article I court's special 'expertise … guides it in making complex determinations in a specialized area of the law'"). The impact of allowing judicial decisions interpreting statutory provisions issued after final VA decisions to support allegations of CUE would cause a tremendous hardship on an already overburdened VA system of administering veterans benefits. Each judicial interpretation of a statute which changes a previously accepted meaning of the statute could spawn hundreds of allegations of CUE in prior final decisions. As a result of a deluge of CUE motions, VA's limited resources would be diverted from processing claims and hearing appeals to evaluating allegations of CUE based on new statutory interpretations. *See Exxon Corp. v. U.S. Dep't of Energy*, 744 F.2d 98, 114 (Fed. Cir. 1984) (considering the "substantial and impossible burdens on the administration of justice" when deciding whether a rule should be retroactive); *Cook*, 318 F.3d at 1336 (noting that the "[p]rinciples of finality and res judicata apply to agency decisions that have not been appealed and have become final").

Here, Mr. George's appeal of the denial of benefits for schizophrenia was not open for direct review when *Wagner* was decided. In 1977, Mr. George had exhausted his administrative remedy by appealing to the Board and this decision was final. Until 1988, veterans who received adverse Board decisions had virtually no recourse to the courts. *See* Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105 (codified as amended at 38 U.S.C. §§ 7251-7198); *Prinkey v. Shinseki*, 735 F.3d 1375, 1382 (Fed.

Cir. 2013) ("[B]efore the enactment of [the VJRA] in 1988, there was virtually no judicial review of decisions by the VA."). Because Mr. George's case was not open for direct review, the judicial interpretation in *Wagner* does not apply retroactively. *See Harper*, 509 U.S. at 97; *Beam*, 501 U.S. at 535. Therefore, *Wagner's* interpretation of the presumption of soundness statute issued in 2004 did not change how the law was interpreted or understood when the Board issued its final decision in September 1977.

Thus, to the extent that Mr. George's CUE motion includes an argument that, in 1977, there was not clear and unmistakable evidence to show that his condition preexisted service, the 2016 Board noted that the evidence before the 1977 Board included evidence that Mr. George began to hear voices in April 1975 and that he experienced psychiatric symptoms en route to Utah to join the military in May 1975. R. at 10-11; *see* R. at 1244, 1282. The Medical Board and the Physical Evaluation Board both concluded that Mr. George's mental condition preexisted service. R. at 11. Although the 2016 Board noted that the record contained conflicting statements as to when Mr. George stated that his psychiatric symptoms began, it stressed that the September 1977 Board considered and weighed the evidence of record. R. at 11. As the 2016 Board concluded, "any disagreement with how the [1977] Board evaluated the evidence []and how it concluded from the evidence that the [v]eteran's claimed psychiatric disability pre[]existed service … is inadequate to rise to the level of CUE." R. at 11; *see Waltzer v. Nicholson*, 447 F.3d 1378, 1380 (Fed. Cir. 2006) (explaining that a challenge to the legal

sufficiency of the evidence requires an argument of *no evidence* to rebut the presumption of soundness or the *kind or character of the evidence* is insufficient as a matter of law, otherwise, the challenge is to the weight or sufficiency of fact required to rebut the presumption of soundness); *Kent v. Principi*, 389 F.3d 1380, 1383 (Fed. Cir. 2004) ("The clear and unmistakable evidentiary standard ... does not require the absence of conflicting evidence."); 38 C.F.R. § 20.1403(d)(3). Accordingly, Mr. George has not demonstrated that the 2016 Board's decision that the 1977 Board decision does not contain CUE is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Pierce v. Principi*, 240 F.3d 1348, 1356 (Fed. Cir. 2001) (holding that the party challenging a final decision bears the burden of proving CUE); *Berger*, 10 Vet.App. at 169 ("[T]he appellant, who always bears the burden of persuasion on appeals to this Court, bears an extra-heavy burden when the appeal is a collateral attack, in the form of a CUE [motion], concerning a final decision. A final decision is entitled to a strong presumption of validity."); *Russell*, 3 Vet.App. at 315.

IV. MANIFESTLY CHANGED OUTCOME

Alternatively, assuming that *Wagner* applies retroactively and can support allegations of CUE in final VA decisions, the 2016 Board did in fact assess Mr. George's CUE allegation as to *both* preexistence and aggravation and Mr. George fails to establish that the 2016 Board erred in concluding that the 1977 Board's errors as to each prong would not have manifestly changed the outcome of its 1977 decision.

The 2016 Board conceded that the 1977 Board did not discuss the relevant statute or regulation or explain how there was clear and unmistakable evidence of a preexisting condition or no aggravation of this condition.[5] R. at 10. Mr. George, however, must demonstrate that these errors, based on the evidence extant in 1977, would have manifestly changed the outcome of the 1977 Board's decision to deny benefits for schizophrenia.

Based on the 1977 record, Mr. George suggests that the Secretary could not have satisfied his evidentiary burden to rebut the presumption of soundness with clear and unmistakable evidence of preexistence and lack of aggravation of his schizophrenia. The 2016 Board noted, however, that there was conflicting evidence of *both* preexistence and aggravation, yet Mr. George does not allege that this evidence was, as a matter of law, insufficient to establish either preexistence or no aggravation of schizophrenia. *See Waltzer*, 447 F.3d at 1380; *Kent*, 389 F.3d at 1383. In that regard, Mr. George does not

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[5] As noted in *Gilbert v. Derwinski*, prior to enactment of the Veterans Judicial Review Act, the Board was not required to provide reasons or bases for its decisions. 1 Vet.App. 49, 56 (1990) ("Prior to the enactment of the VJRA, the decisions of the Board were required only to be in 'writing and … contain the findings of fact and conclusions of law separately stated.' 38 U.S.C. § 4004(d) (1982). Congress amended 38 U.S.C. § 4004(d), effective as of January 1, 1989, to mandate that a 'decision of the Board shall include … a written statement of the Board's findings and conclusions, *and the reasons or bases for those findings and conclusions*, on all material issues of fact and law presented on the record.' 38 U.S.C. § 4004(d)(1) (1988) (emphasis added).").

in any of his pleadings include analyses or arguments as to specific evidence in 1977. Our dissenting colleague makes these findings herself, even though Mr. George's pleadings are entirely silent in this regard. *See post* at 20-22. We decline to find facts to assist a represented appellant in addressing arguments he has, presumably strategically, chosen not to raise. *See Robinson v. Peake*, 21 Vet.App. 545, 554 (2008) (presuming that "an experienced attorney in veteran's law[ ] says what he means and means what he says"), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009).

Here, we conclude that Mr. George has failed to carry his burden of demonstrating that the 2016 Board erred in concluding that the 1977 Board's failure to cite the relevant statutory and regulatory provisions and to explain how the evidence of record rebutted both prongs of the presumption of soundness was not outcome determinative. Without evidence of a manifestly changed outcome, he has not demonstrated that the 2016 Board's finding of no CUE in the 1977 Board decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Pierce*, 240 F.3d at 1356; *Russell*, 3 Vet.App. at 315. Although the Court may have reached a different conclusion than the 1977 Board based on the evidence in the record, this fact does not establish CUE in the 1977 Board decision or error in the 2016 Board decision finding no CUE in the 1977 Board decision. *King v. Shinseki*, 26 Vet.App. 433, 442 (2014) ("[T]here will be times when the Court arrives at a different conclusion when reviewing a motion to revise a prior, final decision

than it would have had the matter been reviewed under the standards applicable on direct appeal.").

V. CONCLUSION

For the reasons stated above, the Court AFFIRMS the March 1, 2016, Board decision finding no CUE in the September 1977 Board decision.

BARTLEY, *Judge*, dissenting: I respectfully disagree with the majority in two critical respects. First, I believe that my colleagues fundamentally mischaracterize *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004), particularly in light of *Patrick v. Nicholson*, 242 F. App'x 695 (Fed. Cir. 2007) (*Patrick III*) and *Patrick v. Shinseki*, 668 F.3d 1325 (Fed. Cir. 2011) (*Patrick VI*), leading them to incorrectly conclude that *Wagner* contained a new understanding or interpretation of 38 U.S.C. § 1111 (née 311) not in effect in September 1977. Second, I believe that the Board's March 2016 conclusion that there was no CUE in the September 1977 decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law because, had the Board properly applied the statutory presumption of soundness in September 1977 and not analyzed Mr. George's claim as one for service connection based on aggravation of a preexisting mental disorder, it would have had no choice but to grant him service connection. Accordingly, I must dissent from the majority's decision to affirm the March 2016 Board decision currently on appeal.

Regarding the first matter, I disagree with the majority's characterization of *Wagner* and its effect on

the state of the law regarding the presumption of soundness. Although my colleagues insist that their decision relates only to the issue of the finality of the September 1977 decision, their finality analysis is grounded in an implicit assumption that *Wagner* contained a new understanding or interpretation of section 1111. But *Wagner* did not, as my colleagues suggest, contain a new understanding or interpretation of section 1111 that would need to be applied retroactively in order for Mr. George to prevail on his CUE motion. Rather, the Federal Circuit's judicial construction of section 1111 in *Wagner* provided "an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994); *see also Schwartz v. State*, 361 P.3d 1161, 1180 (Haw. 2015) (explaining that when a court "announces a legal principle grounded in its understanding of a particular statute, it merely expresses in definitive terms what that statute has always meant, both before and after that decision is handed down"). Although the Federal Circuit's statement of the law differed from VA's pre-2003 interpretation of section 1111 set forth in 38 C.F.R. § 3.304(b), *Wagner's* implicit rejection of that interpretation did not constitute a change in law. *See State v. Ruiz*, 164 A.3d 837, 844 (Conn. App. Ct. 2017) ("A decision that corrects a mistaken interpretation of the law does not constitute a change in the law."). Instead, *Wagner* recognized that VA had "misinterpreted the will of the enacting Congress" and reaffirmed "what the statute has meant continuously since the date when it

became law." *Rivers*, at 313 n.12; *see United States v. Peppers*, 899 F.3d 211, 230 (3d Cir. 2018).

Because "judicial decisions operate retrospectively" in this manner, *United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982), *Wagner*'s statement of what section 1111 has always meant cannot, as the majority concludes, only apply prospectively to cases decided after *Wagner* was issued in June 2004. Quite the contrary: the only way to give proper effect to *Rivers* and its progeny is to accept that *Wagner* merely explicated the law governing the presumption of soundness since the enactment of section 311, including the law extant in September 1977 when the challenged Board decision was issued. *See United States v. City of Tacoma, Wash.*, 332 F.3d 574, 580 (9th Cir. 2003) ("The theory of a judicial interpretation of a statute is that the interpretation gives the meaning of the statute from its inception, and does not merely give an interpretation to be used from the date of the decision.").

This view of the law is the most concordant with constitutional separation of powers. As the Federal Circuit declared in *Wagner*, the language of section 1111, though complicated, has always been "clear on its face" and thus "susceptible of interpretation without resort to *Chevron* deference." 370 F.3d at 1093. In holding that the plain language of section 1111 mandated that "the government must show clear and unmistakable evidence of both a preexisting condition and a lack of in-service aggravation to overcome the presumption of soundness for wartime service," the Federal Circuit decreed that "it [was]

clear that Congress intended … to effectively convert aggravation claims into ones for service connection when the government fails to overcome the presumption of soundness under section 1111." *Id.* at 1096. In effect, the Federal Circuit ruled that Congress left no room to debate the meaning and mechanics of section 1111, meaning that, to the extent that the principles set forth in *Wagner* conflicted with VA's interpretations of section 311 and pre-2003 1111, the will of Congress, not VA, should prevail. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

This is precisely the result that the Federal Circuit prescribed in *Patrick III* and *VI*. As my colleagues recognize, *ante* at 8, the Federal Circuit in *Patrick III* expressly held that an allegation that the Board misapplied section 1111 "can serve as the basis for grounding a CUE claim" because, "[u]nlike changes in regulations and statutes, which are prospective, our interpretation of a statute is retrospective in that it explains what the statute has meant since the date of enactment." 242 F. App'x at 697 (citing *Rivers*, 511 U.S. at 312-13). Contrary to the majority's holding in this case, the Federal Circuit concluded that "our interpretation of [section] 1111 in *Wagner* did not change the law but explained what [section] 1111 has always meant" and vacated the decision and remanded the matter for the Court to consider the CUE motion in light of *Wagner*. *Id.* Then, when the case returned to the Federal Circuit for an

EAJA dispute in *Patrick VI*, the Federal Circuit reiterated that it had "soundly rejected" the argument "that this court's interpretation of section 1111 did not apply retroactively in the context of a CUE claim." 668 F.3d 1325, 1333 n.6 (Fed. Cir. 2011). Unlike my colleagues, I am not willing to dismiss this unambiguous and germane guidance from our reviewing court, particularly not when that guidance is grounded in the unalterable principle that veteran-friendly congressional intent holds primacy over a VA interpretation that is less beneficial to veterans. *See Brown v. Gardner*, 513 U.S. 115, 118-22 (1994) (recognizing "the rule that interpretive doubt is to be resolved in the veteran's favor" and declining to defer to VA's regulatory interpretation of a statute that "flies against the plain language of the statutory text").

Moreover, I do not share the majority's concern that deciding this case in accordance with *Patrick III* and *VI* would "cause a tremendous hardship on an already burdened VA system of administering veterans benefits." *Ante* at 14. The circumstances of *Wagner* and this case are relatively narrow—both cases involve application of a plain language judicial interpretation of a statute to a claim that was denied on the basis of a VA regulation that clearly conflicted with that statute. But even if the *Rivers*'s theory of judicial construction would apply more broadly in the veterans' benefits CUE context, I have no reservations about requiring VA to remedy decades-old errors that prohibit otherwise deserving veterans and their dependents from receiving the benefits to which they are statutorily entitled. I simply cannot

endorse a CUE regimen that is so willing to exchange justice for administrative efficiency.[6]

Turning to the merits of the CUE motion, I am convinced, unlike my colleagues, that the Board's March 2016 finding that the September 1977 Board decision was not the product of CUE was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Each of the three CUE requirements is met in this case. First, consistent with *Rivers*, *Wagner*, and *Patrick III* and *VI*, the Board misapplied the law extant in 1977 because it did not afford Mr. George the presumption of soundness even though it failed to find a lack of in-service aggravation of schizophrenia by clear and unmistakable evidence. *See Wagner*, 370 F.3d at 1096 (explaining that the presumption of soundness applies, "even when there [i]s evidence of a preexisting condition, if the government fail[s] to show by clear and unmistakable evidence that a veteran's preexisting condition was not aggravated [in service]"). To the contrary, the Board appears to have applied the law regarding a claim for

[6] Even assuming that *Wagner* announced a new rule of law and raised a retroactivity issue, there is good reason to distinguish this case from the Supreme Court's other cases outlined by the majority, which recognize that new rules of law do not apply retroactively to civil cases that are final. The animating principle in those cases was giving due respect to the finality of judicial decisions. But, unlike the average civil case where there are only very limited exceptions for collateral attack, Congress has bestowed on veterans' benefits claimants a statutory right to attack a final decision based on CUE. It is against this unusual backdrop, not that underlying the average civil case, that we should review this question.

aggravation under 38 U.S.C. § 353, which places the burden to prove aggravation on the veteran, as opposed to section 311, which shifts the burden to the Secretary to show no aggravation by clear and unmistakable evidence. R. at 1176 (faulting the veteran for "fail[ing] to provide the Administration with the further information requested in order that further consideration may be given to the veteran's claim for aggravation" and concluding that his "preexisting schizophrenia was not aggravated by his military service" (citing 38 U.S.C. § 353)).

Second, that error is undebatable: The Board found that the veteran's "induction examination reveals no psychiatric abnormality," triggering section 311, but the Board erroneously analyzed the claim under section 353, with its attendant burdens, without rebutting the aggravation prong of the presumption of soundness by clear and unmistakable evidence. This is an unequivocal violation of the law:

> When no preexisting condition is noted upon entry into service, the veteran is presumed to have been sound upon entry. The burden then falls on the government to rebut the presumption of soundness by clear and unmistakable evidence that the veteran's disability was both preexisting and not aggravated by service .... [I]f the government fails to rebut the presumption of soundness under section 1111, the veteran's claim is one for service connection.

Wagner, 370 F.3d at 1096.

Finally, the Board's error was outcome-determinative because, *had the Board properly applied the presumption of soundness*, it would have granted service connection for schizophrenia.[7] The Board expressly found that the first element of service connection was satisfied. R. at 1176 (concluding that "examinations subsequent to the veteran's discharge reveal that he has schizophrenia").

The second element of service connection would have been met if the proper presumption of soundness analysis was conducted because the record in 1977 did not contain clear and unmistakable evidence that schizophrenia was not aggravated in service—thereby establishing that schizophrenia was incurred in service despite evidence that it preexisted service. *See Wagner*, 370 F.3d at 1094 (adopting the Government's position that, when VA fails to rebut the presumption of soundness, "whether and to what extent the veteran was entitled to compensation for the injury would be determined upon the assumption that the injury was incurred during service"); *Horn v. Shinseki*, 25 Vet.App. 231, 236 (2012) (holding that, "except for conditions noted at induction, the

[7] My colleagues accuse me of improperly finding facts on behalf of Mr. George. *Ante* at 16. However, I am finding facts only to the extent necessary to determine whether the error committed by the Board in finding no CUE in the September 1977 decision was prejudicial. *See Simmons v. Wilkie*, 30 Vet.App. 267, 283-84 (2018) (explaining that, once the Court finds error in the Board's determination that there was no CUE in a prior final rating or Board decision, the Court may examine the facts underlying the prior decision and find any facts necessary to determine whether the Board's error was harmless).

presumption of soundness ordinarily operates to satisfy the second [service-connection] requirement without further proof"). Evidence need not be uncontroverted to be clear and unmistakable, *see Kent v. Principi*, 389 F.3d 1380, 1383 (Fed. Cir. 2004), and I recognize that the record before the Board in September 1977 contained conflicting evidence as to whether schizophrenia was aggravated in service. *Compare* R. at 1280-84 (Aug. 1975 Medical Evaluation Board (MEB) finding of aggravation), *with* R. at 1294 (Aug. 1975 Physical Evaluation Board (PEB) finding of no aggravation). But because the record evidence of a lack of aggravation in this case is legally insufficient to constitute clear and unmistakable evidence to rebut the second prong of the presumption of soundness, schizophrenia must be presumed to have been incurred in service. *See Kinnaman v. Principi*, 4 Vet.App. 20, 27-28 (1993) (noting that the burden of proof to rebut the prongs of the presumption of soundness is "formidable" and concluding that evidence supporting the Board's finding of preexistence that was not "absolutely certain" did not rise to the level of clear and unmistakable evidence in light of a contrary PEB report). Thus, in the absence of clear and unmistakable evidence of a lack of aggravation, schizophrenia must be presumed to have been incurred in service.

Finally, the third element of service connection is satisfied via application of 38 C.F.R. § 3.303(b) (1977). In September 1977, that regulation provided that "[w]ith chronic disease shown as such in service (or within the presumptive period under [38 C.F.R.] § 3.307) so as to permit a finding of service connection,

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) (1977). As the Federal Circuit explained in *Walker v. Shinseki*, pursuant to § 3.303(b)

> [i]f a veteran can prove a chronic disease "shown in service," and there are no intercurrent causes, the manifestation of the chronic disease present at the time the veteran seeks benefits establishes service connection for the chronic disease. By treating all subsequent manifestations as service connected, the veteran is relieved of the requirement to show a causal relationship between the condition in service and the condition for which disability compensation is sought. In short, there is no "nexus" requirement for compensation for a chronic disease which was shown in service, so long as there is an absence of intercurrent causes to explain post-service manifestations of the chronic disease.

708 F.3d 1331, 1335-36 (Fed. Cir. 2013) (quoting 38 C.F.R. § 3.303(b)); *see Groves v. Peake*, 524 F.3d 1306, 1309 (Fed. Cir. 2008) ("The plain language of § 3.303(b) establishes a presumption of service connection (rebuttable only by 'clearly attributable intercurrent causes') for a chronic disease which manifests during service and then again 'at any later date, however remote.'" (quoting 38 C.F.R. § 3.303(b)).

In its September 1977 decision, the Board specifically found that Mr. George was diagnosed with schizophrenia in service, R. at 1172 (citing R. at 1280, 1282 (Aug. 1975 MEB diagnoses of paranoid schizophrenia); 1294 (Aug. 1975 PEB diagnosis of the same)), and was later diagnosed with chronic schizophrenia within the 1-year presumptive period following service, R. at 1173 (citing a March 1976 VA examiner's "diagnosis of chronic undifferentiated schizophrenic reaction"); *see* R. at 1244 (May 1976 RO decision denying service connection for "Schizophrenic Reaction, Chronic Undifferentiated Type"). Because these Board findings are favorable to the veteran and reflect that he was diagnosed with a mental disorder in service that was shown to be chronic within the relevant presumptive period, and the record in September 1977 did not contain evidence that attributed his then-current schizophrenia to an intercurrent cause, § 3.303(b) should have been applied and the linkage element of service connection should have been presumptively established, without the need to present any independent evidence of linkage. *See* 38 C.F.R. § 3.309(a) (1977) (classifying psychoses as chronic diseases).[8]

This is precisely the situation that the Federal Circuit addressed in *Groves*, where it reversed a Court decision affirming a Board decision that found no CUE in a prior RO decision that failed to apply

[8] Both this Court and the Federal Circuit have held that schizophrenia is a psychosis within the meaning of § 3.309(a). *See Groves*, 524 F.3d at 1309-10; *Ford v. Gober*, 10 Vet.App. 531, 535 (1997).

§ 3.303(b) to a claim for service connection for schizophrenia. Mr. Groves, like Mr. George, was diagnosed with paranoid schizophrenia during service, was medically discharged for that condition, and was again diagnosed with paranoid schizophrenia "shortly after discharge." *Groves*, 524 F.3d at 1310. The Federal Circuit in *Groves* held that this Court "committed legal error by disregarding the applicability of § 3.303(b) and requiring medical evidence to establish a nexus between the two diagnoses," and concluded that proper application of § 3.303(b) to the diagnoses in the record established CUE in the prior RO decision "as a matter of law" because Mr. Groves was entitled to presumptive service connection. *Id.* I see no principled basis upon which to distinguish *Groves* from the instant case, meaning that correction of the alleged error in this case would have unquestionably resulted in a manifestly different outcome for Mr. George.

Again, it is important to keep in mind the error that Mr. George is seeking to remedy. The language of section 311 in September 1977 was the same language in section 1111 in June 2004 that the Federal Circuit in *Wagner* described as "clear" and susceptible of only one interpretation. 370 F.3d at 1093. The only reason that Mr. George was deprived of the benefit of the presumption of soundness clearly envisioned and expressed by Congress was that a VA regulation, which was "inconsistent with the statute" and "impose[d] a requirement not authorized by [the statute]," dictated a different result. VA Gen. Coun. Prec. 3-2003 (July 16, 2003). Because, under *Rivers* and *Patrick III* and *VI*, the version of section 311 extant in September 1977 meant what the Federal

Circuit in *Wagner* said that Congress clearly intended it meant, VA's failure to abide by that statutory command constituted an undebatable and outcome-determinative misapplication of the law. Because CUE was designed to remedy precisely this type of error, *see Joyce v. Nicholson*, 19 Vet.App. 36, 48 (2005); *Russell v. Principi*, 3 Vet.App. 310, 313-14 (1992) (en banc), I cannot agree with my colleagues that, before the *Wagner* decision in 2004, VA's failure to rebut the statutory presumption of soundness by a showing of clear and unmistakable evidence that a condition both preexisted service and was not aggravated by service could not constitute CUE. Applying that analysis to this case, I would conclude that the Board in March 2016 committed reversible error in finding no CUE in the September 1977 Board decision that denied service connection for schizophrenia. Accordingly, I respectfully dissent.

APPENDIX C

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

IN THE MATTER OF THE MOTION OF KEVIN R. GEORGE — [Redacted]

MAR 01 2016

DOCKET NO. 15-24 629) DATE
)
)

THE ISSUE

Whether there was clear and unmistakable error (CUE) in the Board's September 2, 1977 decision that denied entitlement to service connection for schizophrenia.

REPRESENTATION

Moving party represented by: Kenneth M. Carpenter, Attorney at Law

ATTORNEY FOR THE BOARD

B. Elwood, Counsel

INTRODUCTION

The moving party served on active duty from June 1975 to September 1975.

This matter comes before the Board of Veterans' Appeals (Board) following the receipt of the moving party's December 2014 motion alleging CUE in a September 2, 1977 Board decision.

FINDINGS OF FACT

1. On September 2, 1977, the Board issued a decision denying entitlement to service connection for schizophrenia.

2. The Board did not discuss the presumption of soundness under 38 U.S.C. § 311 (1977) in its 1977 decision, but this error was not outcome determinative and the outcome of the claim of entitlement to service connection for schizophrenia would not have been manifestly different but for the Board's misapplication of the law.

CONCLUSION OF LAW

CUE in the Board's September 2, 1977 decision that denied entitlement to service connection for schizophrenia has not been demonstrated. 38 U.S.C.A. § 7111 (West 2014); 38 C.F.R. § 20.1404(a) (2015).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (Nov. 9, 2000) (codified at 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5106, 5107, 5126 (West 2014) redefined VA's duty to assist the Veteran in the development of a claim. VA regulations for the implementation of the VCAA were

codified as amended at 38 C.F.R. §§ 3.102, 3.156(a), 3.159, and 3.326(a) (2015).

The United States Court of Appeals for Veterans Claims (Court) has held that the VCAA is not applicable to motions for revision of a decision on the grounds of CUE. *Livesay v. Principi*, 15 Vet. App.165 (2001). Review for CUE in a prior Board decision is based on the record that existed when that decision was made. 38 C.F.R. § 20.1403(b).

Analysis

Under 38 U.S.C.A. § 7111, the Board has been granted the authority to revise a prior decision of the Board on the grounds of CUE.

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). ln 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 established a three-pronged test, each of which must be met before CUE is established: either (1) 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 in part *Russell v. Principi*, 3 Vet. App. 310 (1992)).

In order to constitute CUE, the error must be of a type that is outcome determinative. *Glover v. West*, 185 F.3d 1328 (Fed: Cir. 1999).

In his December 2014 motion, the moving party's representative argued that there was CUE in the Board's September 2, 1977 decision that denied entitlement to service connection for schizophrenia. Specifically, he argued that the Board misapplied the presumption of soundness under 38 U.S.C. § 311 (1977), that the evidence of record at the time of the Board's decision "did not include the required evidence necessary to rebut the presumption of soundness," and that service connection for schizophrenia would have been granted had it not been for the Board's error. The representative explained that there was relevant evidence that demonstrated that the moving party was entitled to the presumption of soundness, including an entrance

examination which was negative for any pre-service mental disorder, evidence of hospitalization for acute schizophrenic reaction in service, and a favorable line of duty determination dated in July 1975. These facts "triggered the provisions of 38 U.S.C. § 311 (1977)" and [a]bsent from the evidence extant was clear and unmistakable evidence to rebut the presumption of soundness." The representative concluded that "the evidence in this case does not clearly and unmistakably indicate that [the moving party's] schizophrenia was not aggravated by service."

At the time of the September 1977 Board decision, the law provided that 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. 38 U.S.C. § 311 (1977).

The provisions of 38 U.S.C. § 311 (the precursor to current 38 U.S.C.A. § 1111) were implemented by 38 C.F.R. § 3.304(b) (1977), which provided that a veteran was 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 and manifest) evidence demonstrates that an injury or disease existed prior thereto. Thus, in conducting its presumption of soundness analysis under 3.304(b) (1977), the Board was not required to find clear and unmistakable

evidence that the disability was not aggravated by service.

The Board notes that in a precedent opinion that was issued many years after the Board decision in question, the VA General Counsel concluded that 38 C.F.R. § 3.304(b) conflicted with 38 U.S.C.A. § 1111, and that the regulation was therefore invalid. *See* VAOPGCPREC 3-2003 (2003). The United States Court of Appeals for the Federal Circuit (Federal Circuit) adopted the General Counsel's position. *See* *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004). However, judicial decisions that formulate new interpretations of the law subsequent to a VA decision cannot be the basis of a valid CUE claim. *Berger v. Brown*, 10 Vet. App. 166, 170 (1997). Moreover, VA General Counsel has held that the Board's application of a subsequently-invalidated regulation, *i.e.*, 38 C.F.R. 3.304(b) (l977), in a decision does not constitute "obvious error" or provide a basis for reconsideration of the decision. VAOPGCPREC 25-95, 61 Fed. Reg. 10065 (1996).

In any event, in *Jordan v. Nicholson*, 401 F.3d 1296, 1298-99 (Fed. Cir. 2005), the Federal Circuit specifically held that the presumption of soundness interpretation articulated in *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004) does not have retroactive application in a CUE case. Thus, the failure of the Board to find that the moving party's condition was not clearly and unmistakably aggravated by service as part of its presumption of soundness analysis cannot be considered to be CUE.

The evidence of record at the time of the Board's September 1977 decision included service treatment records, which reveal that the moving party's May 1975 entrance examination was normal other than for a vision defect. He did not report any psychiatric abnormalities on a May 1975 report of medical history form completed for purposes of entrance into service.

Shortly following his entrance into service, the moving party was admitted to the hospital with a diagnosis of acute situational reaction/non-specific psychotic episode after an assessment had revealed a thought disorder with marked looseness of associations and tangentiality, agitation, and a tense and inappropriate affect. It was noted that his performance in recruit training had been poor, and he had a belligerent attitude. He reported that he had been in a juvenile detention home for approximately 19 months because of purse snatching, and that he had begun to hear voices in approximately April 1975. He felt increasingly pressured and joined the military to get away from his hometown.

Examinations revealed that the moving party was somewhat hyperactive and inappropriate, that he was easily distracted, that he spoke spontaneously with a loose and rambling ideation, that his associations were loose, and that he had a flat affect. Concentration, abstractions, and insight were all decreased, there was marked paranoid and religious flavor to the moving party's thoughts, and he reportedly experienced auditory hallucinations. Also, his memory was confused and his mood was tense. He was treated with medications and group, individual, and milieu psychotherapy. He remained slightly

hyperactive and a bit inappropriate, but he lost most of his psychotic symptomatology and was eventually able to behave appropriately and give a reasonable history. He was diagnosed as having an acute schizophrenic reaction that occurred in line of duty and was not due to his own misconduct, and he was returned to the Recruit Evaluation Unit for separation from service.

An August 1975 Medical Board report indicates that the moving party had evidenced paranoid delusions, ideas of reference, and thought disorganization. He reported that he was in his usual state of health until May 1975, at which time he was en route to Utah to join the military. He first began to experience psychiatric symptoms during this trip. For example, he spoke with his cousins on the telephone and felt as if they were not really his cousins, he felt as if people in the airport lobby were giving him signs and that a bus driver was communicating with him through sequences, he thought that electronics were being "used on him," he feared that he was being watched by others, and he heard voices and was pre-occupied with religion. He subsequently enlisted in the military, did not report his problems at the time of his entrance into service, and was found fit for duty. He began to experience symptomatology during his early days of processing, was sent for a psychiatric evaluation, and was later admitted to the hospital for observation and treatment.

Following the period of hospitalization (as described above), the moving party was placed in a training platoon. In August 1975, he reported multiple vague complaints and was again sent to be evaluated by a

psychiatrist. He appeared to be quite disturbed and apprehensive, he was withdrawn and tearful, and he tightly clutched a towel to his face. Examination revealed that he had looseness of association, tangential thought, and a blunted and inappropriate affect. He reportedly continued to experience auditory hallucinations, paranoid ideas of reference, and delusions. There was no past history of any psychiatric care prior to service. He was treated supportively and continued to be supervised by a psychiatrist. He essentially appeared in his pre-enlistment state complicated by service aggravated stress, both prior to initial hospitalization and after training attempts. He was diagnosed as having paranoid schizophrenia.

The Medical Board concluded that the moving party was unfit for further military service as a result of physical disability, and that the physical disability had its onset prior to enlistment. As a result of conditions peculiar to service, his disability had progressed at a rate greater than was usual for the disorder and was considered to have been aggravated by service.

An August 1975 "Physical Evaluation Board-Proceedings and Findings" form (NAVSO 6100/16) includes a diagnosis of paranoid schizophrenia, "EPTE, not aggravated, not ratable." The moving party was found to be unfit for service because of physical disability.

The moving party submitted a claim of service connection for a psychiatric disability (identified as psychosis) in December 1975. A February 1976

"Initial Team Conference Summary" indicates that the moving party reportedly experienced visual and auditory hallucinations, a fear of harming himself and others (*i.e.* homicidal and suicidal thoughts), and an inability to keep a job. He also experienced impaired concentration, poor motivation, and poor impulse control. He was diagnosed as having schizophrenia, paranoid type.

A VA psychiatric examination was conducted in March 1976 and the moving party reported during the examination that he did not experience any psychiatric problems until after he entered service. He decompensated during service and was discharged. He again experienced strange ideas (*e.g.* homicidal ideation) in December 1975, was admitted for inpatient psychiatric treatment for 3 weeks, and continued to be treated on an outpatient basis. He had been prescribed medication, but he was unable to continue the medication because it made him drowsy.

Examination revealed that the moving party appeared tense and slightly depressed. He reportedly experienced auditory hallucinations and was unable to think clearly. His insight and judgment were fair. A diagnosis of chronic schizophrenic reaction, undifferentiated type, was provided.

A November 1976 statement from H.R. Wannen, LMSW includes an opinion that the moving party was not employable due to paranoid schizophrenia. He was not overtly psychotic, but he still retained an encapsulated delusional system, he remained suspicious of others, and would become anxious with pressure to preform or in any situation where he was

confined to one place or in the presence of others. His first known psychotic episode was in July 1975, and he had been psychotic the month prior to the November 1976 statement.

During a February 1977 VA Social and Industrial Survey, the moving party reported that he had been in juvenile court many times during his childhood, that he went to a youth camp for robbery and purse snatching, and that he was expelled from school in the 11th grade due to disciplinary problems. He was in good health prior to service and was diagnosed as having a schizophrenic reaction with underlying paranoid personality while in service. He denied having ever experienced auditory hallucinations prior to service. He was treated at various facilities for psychiatric problems following his separation from service and was not on any medication. At the time of the February 1977 evaluation, he was suspicious, agitated, rigid, and guarded.

In its September 1977 decision, the Board explained that the report of the moving party's entrance examination revealed that he was not experiencing any psychiatric abnormality. The Board described the psychiatric problems that the moving party had experienced in service and explained that an opinion was formed in service that he had schizophrenia which existed prior to service and had been aggravated by service (an opinion which was confirmed by the Medical Board). A subsequent physical evaluation board, after reviewing the proceedings and findings, made a diagnosis of paranoid schizophrenia which had existed prior to service, but which was not aggravated by service. The

Board also described the psychiatric problems that the moving party experienced after service and the treatment he had received.

The Board concluded that the moving party's schizophrenia existed prior to service. While he exhibited symptoms of schizophrenia shortly after his entrance into service, a careful evaluation by a physical evaluation board resulted in a conclusion that there was no aggravation of his pre-existing schizophrenia. While examinations subsequent to service revealed that the moving party had schizophrenia, they did not address the question of whether the pre-existing condition was aggravated by service. Hence, the Board concluded that the moving party's pre-existing schizophrenia is not aggravated by service and his claim of service connection for that disability was denied.

Initially, the Board finds that the provisions pertaining to the presumption of soundness (*i.e.* 38 U.S.C. § 311 (1977) and 38 C.F.R. § 3.304(b) (1977)) were not discussed in the September 1977 Board decision. Despite the fact that the moving party's May 1975 entrance examination was normal and that the presumption of soundness was for application, the Board did not cite the applicable presumption of soundness provisions, did not set forth the statutory or regulatory language pertaining to the presumption of soundness, and did not otherwise explain either how there was clear and unmistakable evidence that the moving party's claimed psychiatric disability existed prior to service or how there was clear and unmistakable evidence that any such pre-existing disability was not aggravated in service.

Nevertheless, despite the fact that the Board did not discuss the application of 38 U.S.C. § 311 (1977) and 38 C.F.R. § 3.304(b) (1977), this error was not outcome determinative and the inclusion of such a discussion would not have resulted in a manifestly different outcome to which reasonable minds could not differ. Although there were no psychiatric abnormalities present during the moving party's May 1975 entrance examination, he did provide reports of psychiatric symptoms prior to service (albeit conflicting reports). For example, he reported during his first hospitalization in service that he had begun to hear voices prior to service in approximately April 1975, that he felt increasingly pressured, and that he joined the military to get away from his hometown. Also, the August 1975 Medical Board report indicates that the moving party had reportedly been in his usual state of health until he was en route to Utah to join the military in May 1975 and that he first began to experience psychiatric symptoms during this trip.

Moreover, there was a medical evidence of record that the moving party's psychiatric disability pre-existed service and was either aggravated or not aggravated by service. The Medical Board concluded that the disability had its onset prior to enlistment and that it was considered to have been aggravated by service. The Physical Evaluation Board provided a different finding in August 1975 that the moving party's paranoid schizophrenia was not aggravated in service.

In light of the conflicting lay and medical evidence as to whether the moving party's claimed psychiatric disability pre-existed service and was aggravated by

service, the Board's September 1977 finding that his schizophrenia pre-existed service and was not aggravated by service was the result of how the evidence in the claims file at the time was weighed and evaluated. The moving party has not claimed that any specific evidence was missing from the claims file at the time of the September 1977 decision, the inclusion of which would have resulted in a manifestly different outcome to which reasonable minds could not differ. Thus, even though the Board erred by not discussing the application of 38 U.S.C. § 311 (1977) and 38 C.F.R. § 3.304(b) (1977) in its decision, this error was not outcome determinative because the Board nonetheless considered all relevant evidence of record at the time of its September 1977 decision.

The moving party's argument that there was no clear and unmistakable evidence to rebut the presumption of soundness and that "the evidence in this case does not clearly and unmistakably indicate that [the moving party's] schizophrenia was not aggravated by service" is essentially a contention that the Board improperly weighed and evaluated the evidence in the claims file at the time of its September 1977 decision. However, as noted above, any disagreement with how the Board evaluated the evidence (and how it concluded from the evidence that the Veteran's claimed psychiatric disability pre-existed service and was not aggravated by service) is inadequate to rise to the level of CUE. *Simmons v. West*, 14 Vet. App. 84, 89 (2000); *Luallen v. Brown*, 8 Vet. App. 92, 95 (1995).

In sum, the moving party has not presented evidence of CUE in the Board's September 2, 1977 decision that

denied entitlement to service connection for schizophrenia. Therefore, the motion to reverse or revise that decision must be denied.

ORDER

The motion to reverse or revise the Board's September 2, 1977 decision which denied entitlement to service connection for schizophrenia, on the grounds of CUE, is denied.

/s/ S. Bush

S. BUSH

Veterans Law Judge, Board of Veterans' Appeals

APPENDIX D

BOARD OF VETERANS' APPEALS

WASHINGTON, D.C. 20420

IN THE APPEAL OF	)	**FINDINGS AND**
	)	**DECISION**
KEVIN R. GEORGE	)	
[REDACTED]	)	DATE SEP 2 1977
	)	
	)	DOCKET NO.
	)	76-23 227

THE ISSUE

Service connection for schizophrenia.

REPRESENTATION

Appellant represented by: American National Red Cross

CONSULTATIONS BY THE BOARD

Marshall O. Potter, Jr., Staff Legal Adviser

ACTIONS LEADING TO PRESENT
APPELLATE STATUS

The veteran has appealed a decision by the regional office which denied his claim for service connection for schizophrenia on the ground that the disability existed prior to his entry onto active duty and it was not aggravated by military service. This case was remanded in order that a copy of the veteran's high

school grade transcript and behavior record be obtained; that medical record pertaining to a psychiatric evaluation made in connection with his confinement at the Atchison Correctional Facility be secured; that the medical records from the Job Corps relative to any psychiatric evaluation be obtained; that the records from the Kansas University Medical Center relative to treatment afforded the veteran in April and May 1975 be secured; and that a social survey as to the veteran's present behavior and habits be secured. This development has been completed as far as possible and the case recertified to us on the same issue.

CONTENTIONS

It is contended by and on behalf of the veteran that his schizophrenia was aggravated by his military service.

THE EVIDENCE

The veteran had honorable service from June 1975 to September 1975.

A report of his induction examination reveals no psychiatric abnormality.

The service medical records reveal that one week after his entry onto active duty the veteran was hospitalized for treatment and psychiatric evaluation at a service facility where he was observed to have loose associations, a flat affect, and conducted himself in a bizarre manner. He was considered to have undergone a nonspecific psychotic episode. In August

1975 the veteran sought further treatment and complained of mistreatment by noncommissioned officers. At that time he was considered to have an anxiety reaction. Subsequent psychiatric evaluation revealed the veteran to be disturbed, apprehensive, withdrawn and to have a blunted affect. An opinion was formed that the veteran had schizophrenia which existed prior to service and had been aggravated by his active duty. This opinion was confirmed by a medical board. A subsequent physical evaluation board, after reviewing the proceedings and findings, made a diagnosis of paranoid schizophrenia, which had existed prior to service, but opined that the condition had not been aggravated by his military service.

In February 1976 the veteran was hospitalized at a State facility after he had been involved in a fight. While hospitalized he reported auditory hallucinations and visual illusions. He demonstrated occasional homicidal and suicidal thought and his insight was considered to be poor. He had problems in concentrating and motivating himself and controlling his impulses. His thinking was observed to be confused. His prognosis was considered to be poor.

At an Administration examination in March 1976 the veteran denied ever having psychiatric problems prior to his entry onto active duty and stated that subsequent to his service he had worked for two weeks as an assembler but lost his job because he had left it without seeking permission. He gave a history of undergoing severe pressures while in service and of suffering a breakdown. He also reported that he had been hospitalized at a State facility and was

continuing treatment at that facility as an outpatient. On examination he was observed to be tense and depressed. His insight and judgment were fair. He reported that he heard voices and noises, and could not think clearly. A diagnosis of chronic undifferentiated schizophrenic reaction was made.

The file reflects that the veteran was asked to provide the name and address of his high school and to authorize release of information pertaining to his achievement and behavioral record; asked to provide a current medical authorization for the release of information from the Atchison Correctional Facility and the Kansas University Medical Center; and to furnish the name and address of the Job Corps employer so that a copy of a psychiatric evaluation report could be obtained. The file reflects that none of this information was provided by the veteran.

In February 1977 an Administration social and industrial survey was performed. At that time he reported an unstable childhood, involvement with juvenile authorities and having been expelled from school as a disciplinary problem. He reported that he had worked for 10 days through a program for handicapped workers but because of difficulty in adjusting to the work he was terminated. This was confirmed by his employer. He reported having undergone treatment for schizophrenia at both State, Administration, and private facilities. The social worker opined that the veteran was preoccupied with receiving service-connected compensation.

A psychiatric examination conducted at the same time revealed the veteran to have an inappropriate

affect, anger, hostility, poor judgment and insight, to be depressed, to have auditory hallucinations, to be guarded, distrustful, agitated and tense. The diagnosis of chronic undifferentiated schizophrenic reaction with paranoid features was made.

The report from the State health facility in November 1976 reveals the veteran to be suffering from a paranoid schizophrenia in partial remission.

THE LAW AND REGULATIONS

Service connection may be granted for disability resulting from disease or injury incurred in or aggravated by wartime service. (38 U.S.C. 310)

A preexisting injury or disease will be considered to have been aggravated by active wartime service, where there is an increase in disability during such war service, unless there is clear and unmistakable evidence that the increase in disability is due to the natural progress of the condition. Aggravation may not be conceded where the disability underwent no increase in severity during service on the basis of all the evidence of record pertaining to the manifestations of the disability prior to, during and subsequent to service. (38 U.S.C. 353; 38 C.F.R. 3.306(b))

DISCUSSION AND EVALUATION

The medical evidence of record persuades us that the veteran's schizophrenia existed prior to his entry onto active duty. While the veteran exhibited symptoms of schizophrenia shortly after his entry onto active duty,

a careful evaluation by physical evaluation board resulted in a conclusion that there was no aggravation of his preexisting schizophrenia. While examinations subsequent to the veteran's discharge reveal that he has schizophrenia, they do not address themselves to the question of whether the preexisting condition was aggravated by his military service. We note as significant that the veteran has failed to provide the Administration with the further information requested in order that further consideration may be given to the veteran's claim for aggravation. Accordingly, on the basis of the medical evidence of record, we conclude that the veteran's preexisting schizophrenia was not aggravated by his military service. In the event that the veteran secures further information that he considers will support a claim for aggravation of the preexisting condition, he can always reopen his claim.

FINDINGS OF FACT

1. The veteran's schizophrenia existed prior to military service.

2. The veteran's preexisting schizophrenia was not aggravated by his military service.

CONCLUSION OF LAW

Entitlement to service connection for schizophrenia has not been established.

(38 U.S.C. 310, 353; 38 C.F.R. 3.306(b))

DECISION

The appeal is denied.

/s/ A. C. White
A. C. White

/s/ D. H. Leeper, Jr., M.D.
D. H. Leeper, Jr., M.D.

/s/ W. B. Morris
W. B. Morris

APPENDIX E

Not published
NON-PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-2174

KEVIN R. GEORGE, APPELLANT,

V.

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

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

ORDER

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

On January 4, 2019, in a panel decision, the Court affirmed the March 1, 2016, Board of Veterans' Appeals (Board) decision that found no clear and unmistakable error in a September 1977 Board decision that denied entitlement to VA disability compensation benefits for schizophrenia. On January 24, 2019, 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: March 18, 2019 PER CURIAM.

Copies to:
Kenneth M. Carpenter, Esq.
VA General Counsel (027)

APPENDIX F

Not Published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO: 16-2174

KEVIN R. GEORGE, APPELLANT,

V.

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

JUDGMENT

The Court has issued a decision in this case, and has acted on a motion under Rule 35 of the Court's Rules of Practice and Procedure.

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

Dated: March 18, 2019

FOR THE COURT:

GREGORY O. BLOCK
Clerk of the Court

By: /s/ Anthony R. Wilson
Deputy Clerk

Copies to:
Kenneth M. Carpenter, Esq.
VA General Counsel (027)

APPENDIX G

United States Code
Title 38. Veterans' Benefits

38 U.S.C. § 1111

§ 1111. 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.

APPENDIX H

United States Code
Title 38. Veterans' Benefits

38 U.S.C. § 5109A

§ 5109A. 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.

APPENDIX I

United States Code
Title 38. Veterans' Benefits

38 U.S.C. § 7111

§ 7111. Revision of decisions on grounds of clear and unmistakable error

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

(b) For the purposes of authorizing benefits, a rating or other adjudicative decision of the Board that constitutes a reversal or revision of a prior decision of the Board 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 Board on the Board's own motion or upon request of the claimant.

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

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

(f) A claim filed with the Secretary that requests reversal or revision of a previous Board decision due to clear and unmistakable error shall be considered to be a request to the Board under this section, and the Secretary shall promptly transmit any such request to the Board for its consideration under this section.

APPENDIX J

Code of Federal Regulations
Title 38. Pensions, Bonuses, and Veterans' Relief

38 C.F.R. § 3.105 (1997)

§ 3.105. Revision of decisions

The provisions of this section apply except where an award was based on an act of commission or omission by the payee, or with his or her knowledge (§ 3.500(b)); there is a change in law or a Department of Veterans Affairs issue, or a change in interpretation of law or a Department of Veterans Affairs issue (§ 3.114); or the evidence establishes that service connection was clearly illegal. The provisions with respect to the date of discontinuance of benefits are applicable to running awards. Where the award has been suspended, and it is determined that no additional payments are in order, the award will be discontinued effective date of last payment.

(a) Error. Previous determinations which are final and binding, including decisions of service connection, degree of disability, age, marriage, relationship, service, dependency, line of duty, and other issues, will be accepted as correct in the absence of clear and unmistakable error. Where evidence establishes such error, the prior decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of 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.

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APPENDIX K

Code of Federal Regulations
Title 38. Pensions, Bonuses, and Veterans' Relief

38 C.F.R. § 3.105

§ 3.105. Revision of decisions

The provisions of this section apply except where an award was based on an act of commission or omission by the payee, or with his or her knowledge (§ 3.500(b)); there is a change in law or a Department of Veterans Affairs issue, or a change in interpretation of law or a Department of Veterans Affairs issue (§ 3.114); or the evidence establishes that service connection was clearly illegal. The provisions with respect to the date of discontinuance of benefits are applicable to running awards. Where the award has been suspended, and it is determined that no additional payments are in order, the award will be discontinued effective date of last payment.

(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. Non-specific allegations of failure to follow regulations or failure to give due process, or any other general, non-specific allegations of error, are insufficient to satisfy the requirement of the previous sentence.

(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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APPENDIX L

Code of Federal Regulations
Title 38. Pensions, Bonuses, and Veterans' Relief

38 C.F.R. § 20.1403

§ 20.1403. What constitutes clear and unmistakable error; what does not

(a) General. Clear and unmistakable error is a very specific and rare kind of error. It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. Generally, either the correct facts, as they were known at the time, were not before the Board, or the statutory and regulatory provisions extant at the time were incorrectly applied.

(b) Record to be reviewed—

(1) General. Review for clear and unmistakable error in a prior Board decision must be based on the record and the law that existed when that decision was made.

(2) Special rule for Board decisions on legacy appeals issued on or after July 21, 1992. For a Board decision on a legacy appeal as defined in § 19.2 of this chapter issued on or after July 21, 1992, the record that existed when that decision was made includes relevant documents possessed by the Department of Veterans Affairs not later than 90 days before such record was transferred to the

Board for review in reaching that decision, provided that the documents could reasonably be expected to be part of the record.

(c) Errors that constitute clear and unmistakable error. To warrant revision of a Board decision on the grounds of clear and unmistakable error, there must have been an error in the Board's adjudication of the appeal which, had it not been made, would have manifestly changed the outcome when it was made. If it is not absolutely clear that a different result would have ensued, the error complained of cannot be clear and unmistakable.

(d) Examples of situations that are not clear and unmistakable error—

(1) Changed diagnosis. A new medical diagnosis that "corrects" an earlier diagnosis considered in a Board decision.

(2) Duty to assist. The Secretary's failure to fulfill the duty to assist.

(3) Evaluation of evidence. A disagreement as to how the facts were weighed or evaluated.

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

APPENDIX M

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BEFORE THE BOARD OF VETERANS' APPEALS

_Re_: CLAIM OF KEVIN R. GEORGE FOR DISABILITY COMPENSATION
CSS: [REDACTED[

REQUEST FOR REVISION OF THE DECISION OF THE BOARD DATED SEPTEMBER 2, 1977

Authority for Revision

Congress permits a disappointed veteran to challenge a final decision of the Board on the grounds of clear and unmistakable error ("CUE"). 38 U.S.C. § 7111. This motion asks you to review the Board's prior decision dated September 2, 1977, to determine whether the Board correctly denied Mr. George service connected compensation for his disability resulting from schizophrenia by failing to correctly apply 38 U.S.C. § 311 (1977).

Chronology

Mr. George had honorable service from June 10, 1975 to September 30, 1975. Mr. George's entrance examination to service was negative for any

psychiatric disability, During service Mr. George was hospitalized for acute schizophrenic reaction. He was given a medical board and was medically discharged from service for schizophrenia. The record contains a favorable line of duty determination dated July 11, 1975. An August 14, 1975 medical board report indicated that Mr. George's condition existed prior to service but was aggravated by service. A May 17, 1976 rating decision denied Mr. George service connected compensation for his disability from schizophrenia on the basis that although a diagnosis was not made prior to service, the symptoms existed prior to service with acute exacerbation during service. Mr. George appealed to the Board of Veterans Appeals which denied Mr. George service connected compensation for his disability from schizophrenia.

Specific Allegation of Error

Mr. George, through his attorney's representative, specifically alleges that the Board made a clear and unmistakable error in its decision by failing to correctly apply the provisions of 38 U.S.C. § 311 (1977). Specifically, Mr. George was entitled to the benefit of the presumption of soundness unless rebutted by clear and unmistakable evidence. The record before the Board **did not** include the required evidence necessary to rebut the presumption of soundness.

Evidence Extant at the Time of the September 2, 1977 Board Decision.

Of record at the time of the September 2, 1977, Board decision included multiple items of relevant

evidence which demonstrated that Mr. George was entitled to the benefit of the presumption of soundness. First, Mr. George's entrance examination to service was negative for any preservice mental disorder. Second, while on active duty Mr. George was hospitalized for acute schizophrenic reaction. Third, the record contains a favorable line of duty determination dated July 11, 1975. These facts triggered the provisions of 38 U.S.C. § 311 (1977).

Absent from the evidence extant was clear and unmistakable evidence to rebut the presumption of soundness.

Argument in support of revision.

In *Russell v. Principi*, 3 Vet. App. 310 (1992) (en banc), the Court established the following prerequisites for revision of a final VA decision:

(1) Either the correct facts, as they were known at the time, were not before the adjudicator or the statutory or <u>regulatory provisions extant at the time were incorrectly applied</u>,

(2) The error must be "undebatable" and 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 the law that existed at the time of the prior adjudication in question.

Russell, 3 Vet. App. at 313-314. In this case, the Board failed to correctly apply the provisions of 38 U.S.C. § 311 (1977) which required that the VA was to presume that Mr. George was of sound condition upon entrance to service if his entrance examination failed to note any preexisting disabilities or defects. Every veteran is presumed sound upon entry into service, except for defects, infirmities, or disorders noted at entry. 38 U.S.C. § 1111 formerly 38 U.S.C. § 311. VA can overcome this presumption by clear and unmistakable evidence that the injury or disease manifested in service was both preexisting and not aggravated by service. *Id.*; *see Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed. Cir. 2004). "Clear and unmistakable evidence" means that the evidence "'cannot be misinterpreted and misunderstood, i.e., it is undebatable.'" *Quirin v. Shinseki*, 22 Vet. App. 390, 396 (2009) (citing *Vanerson v. West*, 12 Vet. App. 254, 258-59 (1999)). The burden of proof is a formidable one: the Board must show by clear and unmistakable evidence that the veteran's condition existed prior to service. 38 U.S.C. § 1111; *see Akins v. Derwinski*, 1 Vet. App. 228, 231-32 (1991). Whether or not there is such evidence is a legal determination which the Court reviews *de nova*. *Bagby v. Derwinski*, 1 Vet. App. 225, 227 (1991). This Court undertakes an independent examination of whether the facts found by the Board relating to both whether the condition existed prior to service and was aggravated by service satisfactorily rebut the presumption. *Id. See Kinnaman v. Principi*, 4 Vet. App. 20, 27 (1993) (the question becomes whether a doctor's statement that there are signs which indicate or suggest that the condition was present prior to induction and his

opinion that it is probable, but not absolutely certain, that the condition began prior to service constitute clear and unmistakable evidence sufficient to rebut the presumption of sound).

Rebutting the presumption of soundness is a very serious matter. A rebuttal implies that the personnel responsible for examining the appellant and deciding whether to admit him into the military administered their responsibilities in an utterly incompetent manner, and it entitles the Board to ignore evidence clearly in the appellant's favor. As a consequence, when the Board attempts to rebut the presumption of soundness, it carries the burden of proof, it is held to an exacting standard, and the Court reviews its decision with great care to make sure that it is entirely correct. *Horn v. Shinseki*, 25 Vet. App. 231 (2012).

For its rebuttal of the presumption of soundness to stand, the Board must have supported its application of the standard found in section 1111 with clear and unmistakable evidence. *Horn*, 25 Vet. App. at 234. "The Court reviews *de novo* a Board decision concerning the adequacy of the evidence offered to rebut the presumption of soundness, while giving deferential treatment to the Board's underlying factual findings and determinations of credibility." *Id.* at 236 (quoting *Miller v. West*, 11 Vet. App. 345, 347 (1998)). The Court's review "extends beyond the findings of the Board to all the evidence of the record." *Id.* "'Clear and unmistakable evidence,' ... has been interpreted to mean evidence that 'cannot be misinterpreted and misunderstood, i.e., it is undebatable.'" *Quirin v. Shinseki*, 22 Vet. App.

390,396 (2009) (quoting *Vanerson v. West*, 12 Vet. App. 254, 258-59 (1999)). As the record material cited above plainly reveals, the evidence in this case does not clearly and unmistakably indicate that Mr. George's schizophrenia was not aggravated by service.

Conclusion

It is evident that had the Board in its September 2, 1977 decision failed to correctly apply the provisions of 38 U.S.C § 311 (1977) by failing to afford Mr. George the benefit of the presumption of soundness, and because there was not clear and unmistakable evidence of record in 1977 to rebut both prongs of the presumption, there would have been a manifestly different outcome because instead of denying Mr. George service connected compensation for his disability from schizophrenia, the Board would have been required to award him service connected compensation from October 1, 1975, the day following his discharge from service.

Mr. George requests that the Board revise the September 2, 1977 Board decision and direct the VA to assign a 100% rating for Mr. George's service connected schizophrenia from October 1, 1975, the day following his discharge from service to the present.

Respectfully submitted,

/s/ Kenneth M. Carpenter
Kenneth M. Carpenter (00B)
Counsel for Claimant
Kevin R. George
CSS: [REDACTED]

KMC:cm

cc: Kevin R. George

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