
IN THE SUPREME COURT OF THE UNITED STATES

FRED PRIDE,
PETITIONER

v.

DENIS McDONOUGH, SECRETARY OF VA,

RESPONDANT

*ON PETITION FOR A WRIT OF CERTIORA TO
UNITED STATES COURT OF APEALS FOR THE FEDERAL CIRCUIT*

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OF CERTIORARI

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**United States Court of Appeals
for the Federal Circuit**

FRED PRIDE,
Claimant-Appellant

v.

**DENIS MCDONOUGH, SECRETARY OF
VETERANS AFFAIRS,**
Respondent-Appellee

2021-1212

Appeal from the United States Court of Appeals for
Veterans Claims in No. 19-5729, Judge Joseph L. Toth.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

DISMISSED IN PART AND AFFIRMED IN PART

ENTERED BY ORDER OF THE COURT

September 20, 2021

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

App. A. 18

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

FRED PRIDE,
Claimant-Appellant

v.

**DENIS MCDONOUGH, SECRETARY OF
VETERANS AFFAIRS,**
Respondent-Appellee

2021-1212

Appeal from the United States Court of Appeals for
Veterans Claims in No. 19-5729, Judge Joseph L. Toth.

Decided: September 20, 2021

FRED PRIDE, Huntsville, AL, pro se.

CHRISTOPHER L. HARLOW, Commercial Litigation
Branch, Civil Division, United States Department of Jus-
tice, Washington, DC, for respondent-appellee. Also repre-
sented by BRIAN M. BOYNTON, MARTIN F. HOCKEY, JR.,
ELIZABETH MARIE HOSFORD; CHRISTINA LYNN GREGG,
BRIAN D. GRIFFIN, Office of General Counsel, United States
Department of Veterans Affairs, Washington, DC.

Before DYK, O'MALLEY, and HUGHES, *Circuit Judges*.

PER CURIAM.

Fred Pride appeals a judgment of the United States Court of Appeals for Veterans Claims ("Veterans Court") denying his request to reopen a 1987 service connection claim for schizophrenia. *See Pride v. Wilkie*, No. 19-5729 (Vet. App. Sept. 29, 2020). Because we do not have jurisdiction to assess whether Mr. Pride's evidence of service connection was "new and material" and the Veterans Court properly found it lacked jurisdiction to consider a clear and unmistakable error ("CUE") claim that had never been filed, we *dismiss in part* and *affirm in part*.

I. BACKGROUND

Mr. Pride served in the United States Marine Corps from 1966 to 1969, including a period of combat duty in Vietnam. In 1984, he was hospitalized and diagnosed with schizophrenia. Mr. Pride then filed a claim for service connection for schizophrenia, which the VA Regional Office ("RO") denied in 1987 on grounds that there was no evidence of a service connection to his schizophrenia. Mr. Pride did not immediately appeal.

Two decades later, Mr. Pride was diagnosed with post-traumatic stress disorder (PTSD). Mr. Pride filed a claim for service connection for PTSD, which the VA RO in Montgomery, Alabama granted in October 2009, awarding a 30% disability rating. Upon receiving this 30% rating, Mr. Pride filed a claim with the Nashville, Tennessee VA RO requesting a PTSD disability rating of 100% and a total disability due to individual unemployability ("TDIU") award. The Nashville, Tennessee VA RO denied both claims in January 2010. Mr. Pride appealed the Nashville, Tennessee VA RO's decision to the Board of Veterans' Appeals ("Board").

The Board consolidated the Montgomery and Nashville VA RO decisions. The Board denied Mr. Pride's request to increase his PTSD disability rating to 100 percent, as well as his TDIU claim. Mr. Pride appealed the Board's decisions to the Veterans Court. In February 2017, the Veterans Court vacated and remanded these determinations, finding the reasons and bases for their decisions "inadequate"; both currently remain in remand status.

In 2017, Mr. Pride initiated another Board proceeding to challenge the Nashville VA RO's decision. This time, Mr. Pride sought to reopen his schizophrenia service connection claim that the VA denied in 1987. In 2019, the Board denied this request, finding that the VA's 1987 decision was final and that Mr. Pride had not identified any new and material evidence relating to an alleged service connection to his schizophrenia diagnosis.

Mr. Pride appealed to the Veterans Court. At this point, he argued not only that the VA's 1987 decision should be reopened, but that the 1984 diagnosis was incomplete or in error because it failed to recognize that he suffered, at least in part, from PTSD. The court affirmed the Board's decision not to reopen Mr. Pride's 1987 schizophrenia claim. The court first found no clear error in the Board's conclusion that Mr. Pride had presented no "new and material evidence" relevant to this claim. The court also noted that, to the extent Mr. Pride was suggesting that he was misdiagnosed in 1984, it lacked jurisdiction over that assertion because Mr. Pride had not properly raised it to the Board in the form of a CUE claim.

Mr. Pride timely appeals.

II. DISCUSSION

We may review the validity of a decision of the Veterans Court "on a rule of law or of any statute or regulation . . . or any interpretation thereof (other than a determination as to a factual matter) that was relied on by

the Court in making the decision.” 38 U.S.C. § 7292(a). We review the Veterans Court’s legal determinations de novo. *Prenzler v. Derwinski*, 928 F.2d 392, 393 (Fed. Cir. 1991). We may not review a challenge to a factual determination or to a law or regulation as applied to the facts of a particular case, except to the extent that an appeal presents a constitutional issue. 38 U.S.C. § 7292(d)(2); *Cayat v. Nicholson*, 429 F.3d 1331, 1333 (Fed. Cir. 2005).

If a veteran fails to appeal a VA RO decision concerning a claim for benefits, the decision becomes final. 38 U.S.C. § 7105(c). Relevant to this appeal, there are two statutory exceptions to this finality rule. First, before Congress passed statutory amendments in 2019, a veteran could reopen a claim by submitting “new and material evidence” under former 38 U.S.C. § 5108. See *Kisor v. McDonough*, 995 F.3d 1316, 1322 (Fed. Cir. 2021) (citations omitted). Second, a final decision may also be revised based on CUE. See *id.*; see also 38 U.S.C. §§ 5109A, 7111.

As discussed below, we do not reach the issue of whether to reopen Mr. Pride’s 1987 schizophrenia service connection claim for two reasons. First, as to his new and material evidence claim, we have no jurisdiction to disturb the Veterans Court’s order affirming the Board’s factual determination under § 5108. And, as to his apparent misdiagnosis claim, we find that the Veterans Court correctly dismissed any such claim because Mr. Pride failed to challenge his 1984 schizophrenia diagnosis on the basis of CUE before the Board.

A. Mr. Pride’s schizophrenia service connection claim

We have previously vacated Veterans Court decisions that improperly interpreted the statutory term “new and material evidence.” We would clearly have the jurisdiction to do the same in this case if the same type of error were asserted.

But that is not what Mr. Pride claims. Rather than interpret the statutory term “new and material evidence,” the Veterans Court reviewed the Board’s conclusion that Mr. Pride’s reiteration of his mental illness (including his current PTSD diagnosis) did not qualify as new and material evidence of a service connection for schizophrenia. *See Pride*, No. 19-5729 at *1–2. As this determination involves an application of the statutory term “new and material evidence” to the facts presented by Mr. Pride, we lack jurisdiction to review it. 38 U.S.C. § 7292(d)(2). While we routinely try to construe the law liberally for veterans pursuing service-connected claims, we cannot relieve Mr. Pride of his statutorily-imposed jurisdictional burden. *See Barnett v. Brown*, 83 F.3d 1380, 1383–84 (Fed. Cir. 1996) (holding that whether specific evidence presented by a veteran is “new and material” involves either a factual determination or an application of law to facts). Because we lack jurisdiction over this issue, we must dismiss it.¹

B. Mr. Pride’s CUE claim

We also must affirm the Veterans Court’s finding that it had no jurisdiction over Mr. Pride’s CUE claim. Mr. Pride’s appellate brief suggests that, if he had been misdiagnosed with schizophrenia in 1984, he would be entitled to an earlier effective date and a higher disability rating for PTSD. *See Appellant’s Br.* at 18–19. This is not a viable argument. Mr. Pride never actually filed a CUE claim before the Board, meaning we have no such claim available for our review. *In re Google Tech. Holdings LLC*, 980 F.3d 858, 863 (Fed. Cir. 2020) (“We have regularly stated and applied the important principle that a position not presented in the tribunal under review will not be considered

¹ To the extent Mr. Pride asserts that a finding of service connection for PTSD should suffice to justify a finding of service connection for his schizophrenia diagnosis, we find no support for such a logical leap in the record.

on appeal in the absence of exceptional circumstances.”). We therefore affirm the Veterans Court’s conclusion that it lacked jurisdiction over this claim. *Andre v. Principi*, 301 F.3d 1354, 1361 (Fed. Cir. 2002) (“[E]ach ‘specific’ assertion of CUE constitutes a claim that must be the subject of a decision by the [Board] before the Veterans Court can exercise jurisdiction over it.”).

III. CONCLUSION

We have considered the remainder of Mr. Pride’s arguments and find them unpersuasive. For the reasons discussed above, we lack jurisdiction over whether Mr. Pride presented “new and material evidence” sufficient to reopen his 1987 schizophrenia service connection claim and find that the Veterans Court properly dismissed Mr. Pride’s CUE claim for lack of jurisdiction. We accordingly *dismiss in part* and *affirm in part*.

DISMISSED IN PART AND AFFIRMED IN PART

COSTS

No costs.

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-5729

FRED PRIDE, APPELLANT,

v.

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

Before TOTH, *Judge*.

MEMORANDUM DECISION

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

TOTH, *Judge*: Veteran Fred Pride served in the United States Marines Corps from 1966 to 1969 and saw combat in Vietnam during that time. He represents himself in this appeal.

In 1984, Mr. Pride was hospitalized and diagnosed with schizophrenia. In 1987, VA denied service connection for the disorder because there was no evidence of in-service symptoms or a nexus to service. Never appealed, that decision became final.

In 2008, VA granted service connection for a different condition, PTSD, and awarded a 30% rating. Soon after, Mr. Pride asked VA to reopen his schizophrenia claim. VA denied that request and he appealed to the Board.

A veteran may reopen a claim by submitting new and material evidence. Evidence is "new" if it has not previously been submitted to agency adjudicators and "material" if, whether considered alone or with other record evidence, it "relates to an unestablished fact necessary to substantiate the claim." 38 C.F.R. § 3.156(a) (2020); *see Shade v. Shinseki*, 24 Vet.App. 110, 121 (2010). "New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim." 38 C.F.R. § 3.156(a). The Board's assessment of whether new and material evidence has been received is reviewed for clear error. *Hill v. McDonald*, 28 Vet.App. 243, 255 (2016).

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In the July 2019 decision appealed here, the Board concluded that the newly received evidence from the veteran related to his diagnosis and was thus cumulative because the fact that he suffered from a mental disorder was already established when the 1987 rating decision issued. Because it did not relate to either of the unestablished facts—a nexus or an in-service event, injury, or disease—the evidence was not new and material and thus did not warrant reopening the schizophrenia claim.

Even generously construed, *see Gomez v. McDonald*, 28 Vet.App. 39, 43 n.1 (2015), Mr. Pride's arguments do not appear to challenge that determination, and the Court finds no clear error.

As best the Court can tell, his request to reopen his claim for schizophrenia is really one of two things. It's either a request for VA to reevaluate his effective date for PTSD. That is, because it's clear now that he suffers from PTSD, his 1987 claim for schizophrenia should have been treated as a claim for PTSD, entitling him to an earlier effective date. Or, it's a collateral challenge to the 1987 decision based on a mistake. In other words, the 1984 schizophrenia diagnosis may have been a mistake; the correct diagnosis may have been PTSD at the time.

Neither of these issues is appropriate for consideration here. If the former, entitlement to an earlier effective date for PTSD was not before the Board, so the Court lacks jurisdiction over the issue. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004). If the latter, a collateral challenge alleging mistake, the proper course is not to ask VA to reopen the claim but to submit a motion to reverse or revise the 1987 decision based on clear and unmistakable error. *See* 38 C.F.R. § 3.105 (2020).

Accordingly, the July 18, 2019, Board decision is AFFIRMED.

DATED: September 29, 2020

Copies to:

Fred Pride

VA General Counsel (027)

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0809

FRED PRIDE, APPELLANT,

v.

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

Before SCHOELEN, *Judge*.

ORDER

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

On January 28, 2019, appellant Fred Pride filed a Notice of Appeal (NOA) listing October 16, 2018, as the date of the Board of Veterans' Appeals (Board) decision being appealed. On April 3, 2019, the Secretary notified the Court that Mr. Pride had not obtained a final decision from the Board dated October 16, 2018, and instead, the VA regional office (RO) had issued a letter to Mr. Pride that day, informing him that his Substantive Appeal to the Board was untimely. The Secretary determined that Mr. Pride's appeal was premature and moved to dismiss this appeal. On May 7, 2019, the Court ordered Mr. Pride to show cause, within 20 days after the date of the Court's order, why this appeal should not be dismissed for lack of jurisdiction. On August 1, 2019, Mr. Pride filed his response to the May 7, 2019, Court order, and acknowledged that he had submitted his appeal to the Court prematurely. He included the first page of the July 18, 2019, Board decision that had denied his petition to reopen his service connection claim for schizophrenia. Based on the response and evidence submitted by Mr. Pride, it appears that he wishes to appeal the July 18, 2019, Board decision.

Pursuant to 38 U.S.C. § 7252 and 7266(a), in order for a claimant to obtain review of a Board decision by this Court, that decision must be final and the person adversely affected by that decision generally must submit an NOA to the Court within 120 days on which notice of the Board's decision was mailed. *See In re Quigley*, 1 Vet.App. 1 (1990). In the instant appeal, the Board issued no final decision dated October 16, 2018. The VA RO has determined that Mr. Pride's Substantive Appeal was filed late. They informed him of what to do if he disagreed with that determination, and it appears that Mr. Pride did, in fact, file an application to reopen his claim for service connection for schizophrenia, which the Board denied in the July 18, 2019, decision. Although his August 1, 2019, response is construed as an NOA of the July 18, 2019, Board

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decision, this August 2019 NOA is separate from the current appeal associated with the January 28, 2019, NOA.

However, no final Board decision had been issued when the January 28, 2019, NOA was filed, and the Court cannot act in the absence of a Board decision. It should be noted that in his January 28, 2019, NOA, Mr. Pride stated that not only did his attorney fail to submit a timely Notice of Disagreement to initiate his appeal, but he also allowed the 60-day time limit to perfect his appeal expire. If Mr. Pride has any concerns regarding his attorney's representation, he has the option of consulting with the attorney's State Bar.

Upon consideration of the foregoing, it is

ORDERED that the Secretary's motion is granted and this appeal is DISMISSED. It is further

ORDERED that the Clerk will open a new case using the appellant's August 1, 2019, NOA to the July 18, 2019, Board decision, and assign a new docket number to this case.

DATED: August 23, 2019

BY THE COURT:



MARY J. SCHOELEN
Judge

Copies to:

Fred Pride

VA General Counsel (027)