

# APPENDIX

## A

*Designated for electronic publication only*

**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 21-7609

BYRON R. FISHER, APPELLANT,

v.

DENIS McDONOUGH,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before FALVEY, *Judge*.

**MEMORANDUM DECISION**

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

FALVEY, *Judge*: Self-represented Army veteran Byron R. Fisher appeals two Board of Veterans' Appeals decisions, both issued on October 20, 2021. The first Board decision granted an effective date of March 3, 2021, but no earlier, for dermatitis with hyperpigmented lichenification of both hands and wrists (skin condition). The second decision granted an effective date of March 3, 2021, but no earlier, for venous insufficiency status post great saphenous vein ablation of the left lower extremity (venous insufficiency) and dismissed the veteran's request for an effective date before October 20, 2010, for left pes planus with calcaneal spurs (left foot pes planus).<sup>1</sup> The appeal is timely, the Court has jurisdiction, and single-judge disposition is appropriate. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

We are asked to decide whether a November 2010 VA rating decision contained clear and unmistakable error (CUE) and, if so, whether the veteran is entitled to earlier effective dates for his disabilities. But because Mr. Fisher did not present his CUE argument to the Board, we will dismiss the appeal.

---

<sup>1</sup> The Board's grants of earlier effective dates for the veteran's skin condition and venous insufficiency are favorable findings of fact that the Court may not disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007), *aff'd in part sub nom. Medrano v. Shinseki*, 332 F.App'x 625 (Fed. Cir. 2009).

## I. BACKGROUND

Mr. Fisher served on active duty from July 1999 to February 2002 and from June 2006 to October 2010. Record (R.) at 6, 992. In July 2010, he filed pre-discharge disability benefits claims for a skin condition, a left ankle condition, and a "swollen left foot." R. at 1945-46.

In November 2010, the regional office (RO) issued a rating decision denying service connection for a skin condition and a left ankle condition and granting service connection for left foot pes planus with a noncompensable rating, effective October 20, 2010. R. at 1089-90. Mr. Fisher did not appeal this decision and it became final. R. at 9, 24.

In March 2021, the veteran filed a supplemental claim seeking benefits for the skin and left ankle conditions and a rating increase for his left foot pes planus. R. at 236, 648. In April 2021, the RO reconstrued the claimed left ankle condition as venous insufficiency and granted service connection with a 10% rating, effective March 23, 2021. Also in April 2021, the RO increased the veteran's left foot pes planus rating to 20%, effective March 3, 2021. R. at 116, 152. In May 2021, the RO granted service connection for the skin condition with a 60% rating, effective March 23, 2021. R. at 79.

In April 2021 and May 2021 Notices of Disagreement, Mr. Fisher appealed these rating decisions, requesting earlier effective dates for each of the three disabilities—February 28, 2008, for his skin condition and September 1, 2008, for each of his other two conditions. R. at 59, 139.

In October 2021, the Board issued the decisions on appeal, finding that Mr. Fisher had first tried to file his supplemental claims for his skin condition and venous insufficiency on March 3, 2021, and that this was thus the proper effective date for those disabilities. R. at 9-13, 29-31. The Board also noted that the veteran had claimed these disabilities before leaving active duty in October 2010. R. at 9, 28. But the Board found that the RO had denied service connection for these conditions in November 2010, that this decision had become final, and that Mr. Fisher had not alleged that the decision contained CUE. R. at 9, 12-13, 28, 30. Thus, the Board determined, the 2010 claim could not be used to establish an earlier effective date. R. at 12, 30.

Similarly, as to Mr. Fisher's requested earlier effective date for left foot pes planus, the Board found that he had presented no argument to revise the RO's final November 2010 rating decision based on CUE. R. at 24-26. The Board thus dismissed the left foot pes planus matter for failure to present a valid claim. R. at 26. This appeal followed.

## II. ANALYSIS

Because Mr. Fisher represents himself, we liberally construe his informal brief. *See De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992). He asks the Court to change the effective dates for his skin condition, venous insufficiency, and left foot pes planus to October 20, 2010—the day after he left active duty. Appellant's Brief (Br.) at 3; *see* R. at 992. He asserts that the RO's November 2010 rating decision contained CUE because the RO found that his skin was healthy and that he had no left ankle edema.<sup>2</sup> App. Br. at 1-2. He contends that these findings were incorrect because, before November 2010, he had been diagnosed with a skin condition as well as chronic edema in his left foot and ankle. Appellant's Br. at 2.

CUE is a rare type of error that allows final VA decisions to be reversed or revised. 38 U.S.C. § 7111; 38 C.F.R. § 3.105 (2022). Generally, a final VA decision may not be reversed or revised unless it contains CUE. *MacKlem v. Shinseki*, 24 Vet.App. 63, 68 (2010). Before the Court can review a VA decision for CUE, however, the veteran must first present the issue of CUE to the Board. *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."); *Sondel v. Brown*, 6 Vet.App. 218, 220 (1994) ("If . . . the appellant has failed to raise the specific issue [of CUE] before the Board, the appeal must be dismissed as to that issue because it is improperly and improvidently raised for the first time before this Court.").

Here, the Board acknowledged that the only way for Mr. Fisher to seek earlier effective dates for his disabilities based on his 2010 claim would be to allege that the final November 2010 decision contained CUE. R. at 12-13, 26, 30. But the Board found that the veteran had not raised CUE as an issue. R. at 13, 26, 30-31. Mr. Fisher does not dispute this finding. *See* Appellant's Br. at 1-3; *see also Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant has the burden of proving error), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). Because Mr. Fisher did not raise the issue of CUE before the Board, he cannot now raise it here. *See Andre*, 301 F.3d at 1361; *Sondel*, 6 Vet.App. at 220. Thus, we will dismiss the part of his appeal alleging CUE. *See Sondel*, 6 Vet.App. at 220.

---

<sup>2</sup> Although Mr. Fisher alleges that the Board committed these errors, his citations to the record make it clear that he is referring to the RO's November 2010 rating decision. *See* Appellant's Br. at 2.

After reviewing and liberally construing Mr. Fisher's informal brief, we find no allegations of error aside from his CUE arguments about the final November 2010 RO decision. *See* Appellant's Br. at 1-3. What's more, he offers no argument to support an earlier effective date for his left foot pes planus. *See id.*; *see also Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain undeveloped arguments). As there is nothing left for us to review, we will dismiss the appeal.

### III. CONCLUSION

Based on the above considerations, Mr. Fisher's appeal of the two October 20, 2021, Board decisions is DISMISSED.

DATED: August 23, 2022

Copies to:

Byron R. Fisher

VA General Counsel (027)

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

---

**BYRON R. FISHER,**  
*Claimant-Appellant*

v.

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

---

2023-1119

---

Appeal from the United States Court of Appeals for  
Veterans Claims in No. 21-7609, Judge Joseph L. Falvey,  
Jr.

---

**JUDGMENT**

---

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

**DISMISSED**

FOR THE COURT

April 5, 2023

Date

/s/ Peter R. Marksteiner

Peter R. Marksteiner  
Clerk of Court

NOTE: This disposition is nonprecedential.

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

---

**BYRON R. FISHER,**  
*Claimant-Appellant*

v.

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

---

2023-1119

---

Appeal from the United States Court of Appeals for  
Veterans Claims in No. 21-7609, Judge Joseph L. Falvey  
Jr.

---

Decided: April 5, 2023

---

BYRON FISHER, Peekskill, NY, pro se.

PATRICK ANGULO, Commercial Litigation Branch, Civil  
Division, United States Department of Justice, Washing-  
ton, DC, for respondent-appellee. Also represented by  
BRIAN M. BOYNTON, ERIC P. BRUSKIN, PATRICIA M.  
MCCARTHY; AMANDA BLACKMON, BRIAN D. GRIFFIN, Office  
of General Counsel, United States Department of Veterans  
Affairs, Washington, DC.

---

Before LOURIE, TARANTO, and STARK, *Circuit Judges*.

PER CURIAM.

Byron R. Fisher, a veteran of the U.S. Army, appeals a decision of the United States Court of Appeals for Veterans Claims (“Veterans Court”). The Veterans Court dismissed Fisher’s appeal of a decision of the Board of Veterans’ Appeals (“Board”) that denied Fisher earlier effective dates for his disabilities. Because Fisher’s arguments are beyond the limited jurisdiction of our court, we dismiss the appeal.

I

Fisher served in the U.S. Army from July 1999 to February 2002 and from June 2006 to October 2010. In 2010, Fisher filed a pre-discharge benefits claim seeking service connection for, among other things, a skin condition, a left ankle condition, and a swollen left foot. In a decision dated November 23, 2010 (“2010 Decision”), a Department of Veterans Affairs (“VA”) regional office (“RO”) denied service connection for the skin condition and the left ankle condition and granted service connection for left foot pes planus with a 0 percent rating, effective October 20, 2010.<sup>1</sup> Fisher did not appeal this decision and it became final.

On March 3, 2021, Fisher filed a disability claim for venous insufficiency, a left ankle condition, a left foot condition, and eczema in both hands. Later that month, on March 23, 2021, Fisher filed a supplemental claim seeking benefits for edema in his left foot and ankle, eczema, and pes planus. In April 2021, the RO increased the disability rating for Fisher’s pes planus to 20 percent, effective March 3, 2021, and granted service connection for venous

---

<sup>1</sup> A medical examiner diagnosed Fisher’s swollen left foot as pes planus.



FISHER v. MCDONOUGH

3

insufficiency (claimed as edema in the left foot and ankle), assigning a 10 percent disability rating effective March 23, 2021. Shortly after, in May 2021, the RO granted service connection for dermatitis (claimed as eczema) with a 60% disability rating effective March 23, 2021. Fisher filed a notice of disagreement with the rating decisions of April 2021 and May 2021, seeking earlier effective dates for his left foot pes planus, venous insufficiency, and skin condition.

In October 2021, the Board issued two decisions. The Board found that Fisher first claimed his dermatitis (also claimed as a skin condition and eczema) and venous insufficiency (also claimed as edema in the left foot and ankle)<sup>2</sup> on March 3, 2021, so this was the earliest proper effective date for those disabilities. The Board observed that, while Fisher had also claimed these disabilities before leaving active duty in October 2010, the RO had denied service connection for those conditions in the 2010 Decision, which became final when Fisher did not appeal it. Therefore, Fisher's 2010 claim could not serve as a basis for an earlier effective date. As for the left foot pes planus, the Board found Fisher failed to allege that the 2010 Decision contained a clear and unmistakable error ("CUE"), as would be required to obtain revision or reversal of a final decision. Accordingly, the Board dismissed this portion of the appeal.

Fisher appealed the Board's decisions to the Veterans Court. In August 2022, the Veterans Court agreed with the Board that "the only way for Fisher to seek earlier dates for his disabilities based on his 2010 claim would be to allege that the final November 2010 decision contained

---

<sup>2</sup> The Board also construed Fisher's March 3, 2021 claim for a left ankle condition as a claim for venous insufficiency.

CUE.” S.A. 4.<sup>3</sup> Fisher, however, failed to raise the CUE issue before the Board, and he could not raise it for the first time at the Veterans Court. Thus, the Veterans Court dismissed Fisher’s appeal.

## II

We have exclusive, but limited, jurisdiction to review decisions of the Veterans Court. *See* 38 U.S.C. § 7292(c); *Sullivan v. McDonald*, 815 F.3d 786, 788-89 (Fed. Cir. 2016). “We may review legal questions, including the validity of any statute or regulation or any interpretation thereof.” *Sullivan*, 815 F.3d at 788-89. Such legal determinations are reviewed *de novo*. *See Cushman v. Shinseki*, 576 F.3d 1290, 1296 (Fed. Cir. 2009). We may not, however, review (1) “a challenge to a factual determination” or (2) “a challenge to a law or regulation as applied to the facts of a particular case,” unless the challenge presents a constitutional issue. 38 U.S.C. § 7292(d)(2).

Fisher’s appeal does not present any issue within the scope of our jurisdiction. Fisher first challenges the 2010 Decision’s finding that he did not have chronic swelling in his left foot and ankle. *See* Appellant’s Br. at 1. This argument presents an issue of fact which we lack jurisdiction to review. In the 2010 Decision, the RO explicitly discussed the medical records from September 2009 and March 2008 documenting the swelling of Fisher’s left foot and ankle, *see* S.A. 51, 53, and we lack jurisdiction to review the weight given to them, *see Goodman v. Shulkin*, 870 F.3d 1383, 1386 (Fed. Cir. 2017).

Second, Fisher argues his 2010 medical examination involved CUE because the RO “stat[ed] that [Fisher’s] skin was healthy based solely on a summer examination, despite acknowledging that the Appellant’s eczema started

---

<sup>3</sup> “S.A.” refers to the Supplemental Appendix filed with the Secretary’s brief.

FISHER v. MCDONOUGH

5

during the winter.” Appellant’s Br. at 2. This contention, too, presents an issue of fact which we lack jurisdiction to review. See *Prinkey v. Shinseki*, 735 F.3d 1375, 1382-83 (Fed. Cir. 2013).

Finally, Fisher argues that VA violated 18 U.S.C. §§ 1001 and 1519 because a medical examiner allegedly submitted false documents to the VA. See Appellant’s Br. at 1; Reply Br. at 1. Fisher identifies no express or implied reliance by the Veterans Court on a misinterpretation of these provisions in its decision. Further, Fisher did not adequately present this argument to the Veterans Court. See *Carbino v. West*, 168 F.3d 32, 35 (Fed. Cir. 1999) (“[T]he Court of Veterans Appeals properly declined to consider . . . untimely contentions” “raised for the first time in a reply brief.”). It is, therefore, forfeited. See *Emenaker v. Peake*, 551 F.3d 1332, 1337 (Fed. Cir. 2008) (“[W]ith limited exceptions, appellate courts do not consider issues that were not raised in the tribunal from which the appeal is taken, and we have held that those general principles of appellate practice apply in the context of appeals from the Veterans Court.”).

### III

We have considered Fisher’s remaining arguments and find them unpersuasive. For the reasons given, we dismiss Fisher’s appeal for lack of jurisdiction.

**DISMISSED**

COSTS

No costs.