APPENDIX TO THE
PETITION FOR A WRIT OF CERTIORARI

APPENDIX A

United States Court of Appeals for the Federal Circuit

CLINTON SIPLES,
Claimant-Appellant

v.

DOUGLAS A. COLLINS, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2022-1528

Appeal from the United States Court of Appeals for Veterans Claims in No. 19-7957, Judge Joseph L. Toth.

Decided: February 7, 2025

KENNETH DOJAQUEZ, Carpenter Chartered, Topeka, KS, argued for claimant-appellant.

BORISLAV KUSHNIR, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by BRIAN M. BOYNTON, ELIZABETH MARIE HOSFORD, PATRICIA M. MCCARTHY; JONATHAN KRISCH, Y. KEN LEE, Office of General Counsel,

United States Department of Veterans Affairs, Washington, DC.

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

CHEN, *Circuit Judge*.

Clinton Siples is a veteran of the United States Air Force (Air Force) who was granted service connection for bilateral shoulder subluxation by a Regional Office (RO) of the United States Department of Veterans Affairs (VA). After that decision became final, the United States Court of Appeals for Veterans Claims (Veterans Court) decided *Burton v. Shinseki*, 25 Vet. App. 1 (2011) (*Burton*), which deferred to the Secretary of Veterans Affairs' interpretation of 38 C.F.R. § 4.59 as not limited to cases of arthritis. Mr. Siples then filed a motion alleging clear and unmistakable error (CUE) in the RO's rating decision, contending that the newly interpreted § 4.59 would have required the VA to assign him a higher rating for his shoulder disability, which was not based on arthritis. The Veterans Court affirmed the Board of Veterans' Appeals' (Board) denial of Mr. Siples's CUE motion on the basis that, at the time of his rating decision, § 4.59 was not undebatably understood to apply to cases other than arthritis, and thus there was no error of the type required for CUE. *Siples v. McDonough*, No. 19-7957, 2021 WL 5919626 (Vet. App. Dec. 15, 2021) (*Decision*). Mr. Siples appeals. For the reasons explained below, *we affirm*.

BACKGROUND

I. Section 4.59

We begin with a history of 38 C.F.R. § 4.59. Section 4.59, unamended since its adoption in 1964, is titled "Painful motion" and provides in full:

> *With any form of arthritis*, painful motion is an important factor of disability, the facial expression, wincing, etc., on pressure or manipulation, should be carefully noted and definitely related to affected joints. Muscle spasm will greatly assist the identification. Sciatic neuritis is not uncommonly caused by *arthritis* of the spine. The intent of the schedule is to recognize painful motion with joint or periarticular pathology as productive of disability. *It is the intention to recognize actually painful, unstable, or malaligned joints, due to healed injury, as entitled to at least the minimum compensable rating for the joint.* Crepitation either in the soft tissues such as the tendons or ligaments, or crepitation within the joint structures should be noted carefully as points of contact which are diseased. Flexion elicits such manifestations. The joints involved should be tested for pain on both active and passive motion, in weight-bearing and nonweight-bearing and, if possible, with the range of the opposite undamaged joint.

38 C.F.R. § 4.59 (emphases added); *see* 29 Fed. Reg. 6718, 6725 (May 22, 1964). Prior to the Veterans Court's 2011 decision in *Burton*, non-precedential decisions of the Veterans Court were inconsistent as to whether § 4.59 applied to non-arthritis claims. *Compare*, *e.g.*, *Denk v. West*, 16 Vet. App. 460, 1999 WL 446865, at *4 (1999) (unpublished table decision) ("Because § 4.59 applies to arthritis and because the appellant has not been diagnosed as having arthritis, that regulation is not applicable to this claim." (citation omitted)), *with Abbey v. Principi*, 18 Vet. App. 13, 2001 WL 1181652, at *1–2 (2001) (unpublished table decision) (remanding for the Board to address § 4.59 in a non-arthritis claim). A pair of precedential Veterans Court decisions had also applied § 4.59 to arthritis-based claims, though without formally interpreting the regulation as limited to that context. *See Ferguson v. Derwinski*, 1 Vet. App. 428, 430 (1991); *Lichtenfels v. Derwinski*, 1 Vet. App. 484, 488 (1991).

In *Burton*, a veteran argued that § 4.59 was applicable to rating his shoulder pain not based on arthritis. The Secretary at first disagreed and argued that § 4.59 was applicable to only arthritis-based claims. *See Burton*, 25 Vet. App. at 3. A single-judge memorandum decision of the Veterans Court agreed with the Secretary. *See id.* at 2–3. The Veterans Court subsequently granted the veteran's motion for a panel decision and withdrew the memorandum decision in order to "clarify the law as to whether § 4.59 is applicable only to claims involving arthritis." *Id.* at 3. At that point, the

Secretary filed a supplemental brief that reversed course and conceded that § 4.59 may apply in cases other than arthritis, citing the earlier reflection of that position in VA Fast Letter 04-22 (Oct. 1, 2004).[1] *Id*.

In the panel decision, the Veterans Court recognized that § 4.59 begins by stating that "[w]ith any form of arthritis, painful motion is an important factor of disability," and that § 4.59 mentions arthritis again in the third sentence. *Burton*, 25 Vet. App. at 3–4 (quoting 38 C.F.R. § 4.59). On the other hand, the Veterans Court explained that "the majority of the regulation provides guidance for noting, evaluating, and rating joint pain, and that guidance is devoid of any requirement that the pain be arthritis related." *Id*. at 4. Looking also to the title of the regulation as a tool of interpretation, the court observed that the title—"Painful motion"—"implies no limitation to arthritis claims," in contrast to the title of a neighboring section, 38 C.F.R. § 4.58 ("Arthritis due to strain"), which deals exclusively with arthritis. *Id*. Accordingly, the Veterans Court deferred to the Secretary's interpretation of § 4.59 as not limited to arthritis claims, finding it reasonable and "not inconsistent with the regulation or otherwise plainly erroneous." *Id*. at 5; *see also id*. at 3. This court entered a judgment of affirmance without opinion pursuant to Federal Circuit Rule 36.

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[1] The Fast Letter was issued a little over two months after the RO's decision in Mr. Siples's case.

See Burton v. Shinseki, 479 F. App'x 978 (Fed. Cir. 2012) (per curiam).

II. Mr. Siples's Appeal

Mr. Siples served honorably in the Air Force from 1978 to 2003. After his discharge from the Air Force, Mr. Siples sought VA disability benefits for a history of dislocations and subluxations in both of his shoulders. In July 2004, the RO granted service connection and assigned him a 10% rating for bilateral shoulder subluxation, noting that Mr. Siples's "range of motion was limited by pain which is the major functional impact." J.A. 65; *see also id.* at 66. That rating decision became final after Mr. Siples did not appeal.

In June 2017, Mr. Siples filed a motion to revise the 2004 rating decision due to alleged CUE. He argued that § 4.59 required that "functional loss due to painful motion…be rated at least the minimum compensable rating," which he contended entitled him to a 20% rating for each shoulder. J.A. 26 (emphasis omitted). The RO and the Board denied the CUE motion. The Board observed that at the time of Mr. Siples's original rating decision, which was prior to *Burton*, the "VA only applied 38 C.F.R. § 4.59 in cases of arthritis," and Mr. Siples's x-rays were negative for arthritis. J.A. 36–37.

Mr. Siples appealed to the Veterans Court, which, in relevant part, affirmed the Board by a single-judge memorandum decision. Quoting our decision in *George v. McDonough*, 991 F.3d 1227,

1234 (Fed. Cir. 2021) (*George I*), *aff'd*, 596 U.S. 740 (2022) (*George II*), the Veterans Court applied the standard 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." *Decision*, 2021 WL 5919626, at *2. The Veterans Court began its analysis by noting that "*Burton* seems to be the first reported case in which a veteran argued that § 4.59 applied outside the arthritis context." *Id.* Like the *Burton* court, the Veterans Court in Mr. Siples's case highlighted that § 4.59 began with a sentence seemingly limited to the arthritis context. *Id.* It then reasoned that the *Burton* saga itself—including the opposite conclusions reached by the single-judge and panel decisions, and the Secretary's shift in position during the proceeding—supported the conclusion that § 4.59 was not "undebatably understood to apply to non-arthritis claims in 2004." *Id.* at *2–3.

Finally, the Veterans Court discussed VA General Counsel Precedent Opinion 9-98 but found that it did not change the assessment. *Id.* at *3; *see* VA Op. Gen. Counsel Prec. 9-98, 1998 WL 35275130 (Aug. 14, 1998) (G.C. Prec. 9-98). The subject of G.C. Prec. 9-98 is "Multiple Ratings for Musculoskeletal Disability and Applicability of 38 C.F.R. §§ 4.40, 4.45, and 4.59." The Veterans Court explained that, although the opinion could "be read to indicate that all three provisions apply when rating 'other musculoskeletal disabilities,'" that reading is "by no means compelled." *Decision*, 2021 WL 5919626, at

*3. The Veterans Court ultimately "discern[ed] no error in the Board's conclusion that the understanding of § 4.59 in July 2004 did not undebatably compel the RO to assign additional shoulder 20% ratings based on painful motion." *Id*.

Mr. Siples appealed to this court. We have jurisdiction under 38 U.S.C. § 7292.

DISCUSSION

Our jurisdiction to review decisions of the Veterans Court is limited by statute. *George I*, 991 F.3d at 1233. 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 Veterans Court. 38 U.S.C. § 7292(a). In doing so, we "shall decide all relevant questions of law." *Id*. § 7292(d)(1). We review assertions of legal error in a Veterans Court decision without deference. *George I*, 991 F.3d at 1233. But we "may not review (A) a challenge to a factual determination, or (B) a challenge 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).

I.

By statute, a veteran may seek revision of a final decision of the RO or the Board "on the grounds of clear and unmistakable error." 38 U.S.C. § 5109A (the RO); *id*. § 7111 (the Board). CUE is a "very

specific and rare kind of error." *George II*, 596 U.S. at 747 (quoting 38 C.F.R. § 20.1403(a)); 38 C.F.R. § 3.105(a)(1)(i).[2] Though the statutes do not define CUE, the regulations and case law reflect certain settled principles that Congress intended to capture when codifying CUE. *See George II*, 596 U.S. at 746 (holding that Congress "codified and adopted the [CUE] doctrine as it had developed under prior [VA] practice" (cleaned up)).

CUE requires a party to establish three elements. First, "[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." *Willsey v. Peake*, 535 F.3d 1368, 1371 (Fed. Cir. 2008) (citation omitted). Second, the error must be outcome determinative and "undebatable," *id.* (citation omitted), such that "reasonable minds could not differ," 38 C.F.R. § 3.105(a)(1)(i); *see Willsey*, 535 F.3d at 1371, 1373. Last, "[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." *Willsey*, 535 F.3d at 1371. Crucial to this appeal, "a legal-based CUE requires a

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[2] 38 C.F.R. § 20.1403 applies to decisions of the Board, while 38 C.F.R. § 3.105 applies to decisions of the RO. The language of the two regulations is virtually identical, due in part to an amendment to § 3.105 in 2019 to conform that regulation to § 20.1403. *See George I*, 991 F.3d at 1234 n.5; *Perciavalle v. McDonough*, 74 F.4th 1374, 1379 n.4 (Fed. Cir. 2023).

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." *George I*, 991 F.3d at 1229; see 38 C.F.R. § 3.105(a)(1), (a)(1)(iv).

II.

Mr. Siples acknowledges that a VA decision cannot be collaterally attacked for CUE based on a subsequent change in law or interpretation thereof. But, he argues, "the *first* time a regulation is interpreted by an authority that binds the VA"—such as the Veterans Court's decision in *Burton* with respect to § 4.59—"that interpretation controls how the law should have been applied in *all prior* [RO] decisions." Appellant's Br. 16 (emphases added); *see also*, *e.g.*, *id.* at 7. Thus, Mr. Siples asserts the Veterans Court erred in this case by not applying *Burton's* interpretation of § 4.59 when assessing CUE in the RO's 2004 decision. The government responds in the first instance that *Burton* changed the interpretation of § 4.59, citing the Veterans Court's earlier decisions in *Lichtenfels* and *Ferguson* as support. *See* Appellee's Br. 13. The government then adds that regardless of whether *Burton* is characterized as a "change in interpretation" or a "first interpretation," it may not be relied on to establish CUE because CUE must be based on the body of law that existed at the time of the original decision. *Id.* at 13–18. We agree with the government's latter point and need not decide whether *Burton* represents a change in

interpretation or an initial interpretation, for neither may be the basis of CUE.

Mr. Siples's argument cannot be squared with the precedent of both this court and the Supreme Court. In *George I*, we addressed the question of whether a VA decision applying a regulation that is later invalidated can give rise to CUE. 991 F.3d at 1229. We held that it could not because "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." *Id*. at 1234. The Supreme Court affirmed in *George II*. The Court explained that "authorities dating back to 1928 confirm that a determination that there was 'clear and unmistakable error' must be based on the record and the law *that existed at the time of the prior VA decision*," and thus CUE could not encompass a change in law or a change in interpretation of law. 596 U.S. at 747 (cleaned up). In other words, the historical basis for the change-in-interpretation exception to CUE is that CUE must be based on the body of law extant at the time of the VA's decision. *See also id*. ("[A] subsequent legal change could not [constitute CUE], *because* only the law that existed at the time of the prior adjudication can be considered in this posture." (cleaned up) (emphasis added)); 38 C.F.R. § 3.105(a)(1) ("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." (emphasis added)).

Even more recently than *George II*, we addressed the correct standard for CUE in *Perciavalle*.[3] There, we reviewed a splintered decision of the en banc Veterans Court. In relevant part, we assessed whether the concurring opinion of a Veterans Court judge rested on a legally erroneous understanding of CUE. *See Perciavalle*, 74 F.4th at 1380, 1382. The concurrence had reasoned that CUE claims were barred where the alleged legal error "has yet to be identified as erroneous by a court decision or VA publication," such as a General Counsel precedential decision. *Id.* at 1382 (citation omitted). We held that view to be too restrictive because "[i]t is clear from the Supreme Court's recent decision in George that the correct CUE inquiry is simply whether the original decision was a 'correct application of a binding regulation' or law, *regardless of later changes in the law or later decisions* by the agency or a court." *Id.* (emphasis added) (quoting *George II*, 596 U.S. at 749). In other words, where the regulation is sufficiently clear on its face, "the language of the regulation itself can establish the existence of CUE." *Id.*; *see*, *e.g.*, *Glover v. West*, 185 F.3d 1328, 1332 (Fed. Cir. 1999) (evaluating CUE based on the plain language of a regulation); *Groves v. Peake*, 524 F.3d 1306, 1309–10 (Fed. Cir. 2008) (same). Though Perciavalle addressed a different question than the one now before us, its logic and

[3] In November 2023, we ordered the parties to address by supplemental briefing this court's decision in *Perciavalle*. *See* ECF Nos. 32–34.

conclusion based on the Supreme Court's decision in *George II* are equally applicable here: CUE must be based on the law at the time, "regardless of…later decisions by the agency or a court." *Perciavalle*, 74 F.4th at 1382; *see George II*, 596 U.S. at 747.

Additionally, we note that the Veterans Court has already concluded that neither a first nor a changed interpretation may be relied on to establish CUE, including in a decision that was issued just prior to Congress's codification of CUE and that the Supreme Court relied on in *George II*. See 596 U.S. at 747 (citing *Berger v. Brown*, 10 Vet. App. 166, 170 (1997)). In *Berger*, the Veterans Court rejected the notion that its initial interpretation of a statute and implementing regulation in 1993 could "be the basis of an adjudicative error in [the RO's] 1969" decision, as "a simple recitation of the time sequence [should] make that clear." 10 Vet. App. at 170. The Veterans Court "specifically h[e]ld that opinions from [the Veterans] Court that formulate new interpretations of the law subsequent to an RO decision cannot be the basis of a valid CUE claim," because CUE is concerned with only the body of law that existed at the time of the decision. *Id.*; *see also Lamb v. Peake*, 22 Vet. App. 227, 234–35 (2008). Our own court, too, recently arrived at the same conclusion, albeit in a non-precedential decision. *See Steele v. McDonough*, 856 F. App'x 878, 881 (Fed. Cir. 2021) ("[O]ur precedent does not support the view that a new judicial pronouncement can retroactively apply to final decisions of the VA. Consequently, we need not decide whether [a later decision] was an authoritative statement or a change in

interpretation because neither can form the basis for CUE." (citation omitted)).

Mr. Siples retorts that "the first, binding interpretation of the regulation tells us what the law has *always* required." Appellant's Reply Br. 4 (emphasis added). But *Burton* did not purport to offer such a definitive interpretation of § 4.59. *Burton* merely deferred to the Secretary's interpretation of the regulation, as reflected in an October 2004 Fast Letter, which itself post-dated the RO's July 2004 decision. *See* 25 Vet. App. at 3–5; *see*, *e.g.*, *id*. at 5 ("[The Secretary's interpretation] is a reasonable interpretation from examining the regulation as a whole…."). Even if Mr. Siples were correct, general principles of finality prohibit a new judicial pronouncement like *Burton's* from being applied retroactively to collaterally attack a final RO decision on the basis of CUE. *See George I*, 991 F.3d at 1236–37; *George II*, 596 U.S. at 751. Mr. Siples argues that his position "does not mean that he is asking for a retroactive application of any law." Appellant's Suppl. Br. 6. Yet we fail to see how Mr. Siples is asking for anything but.

Because CUE must be based on the law as understood at the time of the RO's July 2004 decision, Mr. Siples's argument relying on *Burton's* later-in-time interpretation of § 4.59 fails regardless of whether *Burton* represents an initial or a changed interpretation.

III.

Our inquiry is not yet over. We must next address whether the Veterans Court otherwise applied the correct standard for assessing a legal-based CUE, which turns on whether the RO's 2004 decision was undebatably erroneous based on § 4.59 as understood based on the law at the time of the decision. *See Willsey*, 535 F.3d at 1373. We agree with the Veterans Court that the understanding of § 4.59 in July 2004 did not undebatably require the RO to assign a higher rating to Mr. Siples's non-arthritic shoulder disability.

As mentioned above, although a later-in-time interpretation of a regulation cannot itself establish CUE, a regulation's meaning may be so clear on its face as to compel the existence of CUE in a VA decision that was contrary to that meaning. *See Perciavalle*, 74 F.4th at 1382. To interpret a regulation, we look at its plain language and consider the terms in accordance with their common meaning. *Lane v. Principi*, 339 F.3d 1331, 1340 (Fed. Cir. 2003). The Veterans Court aptly recognized that although § 4.59 states in general terms that "painful motion" is "productive of disability" and an "actually painful" joint should receive "at least the minimum compensable rating for the joint," the regulation prefaced these statements with the pronouncement—in its opening sentence—that "*[w]ith any form of arthritis*, painful motion is an important factor of disability." 38 C.F.R. § 4.59 (emphasis added); *see Decision*, 2021 WL 5919626, at *2. The regulation mentions arthritis again in the

third sentence. *See* § 4.59. Of course, "the plain meaning that we seek to discern is the plain meaning of the whole statute or regulation, not of isolated sentences." *Boeing Co. v. Sec'y of Air Force*, 983 F.3d 1321, 1327 (Fed. Cir. 2020) (cleaned up). But given the regulation's express references to arthritis, we cannot say that the plain language of § 4.59 as a whole clearly applies to cases beyond those involving arthritic painful motion.

After the RO's July 2004 decision, the Secretary evidently determined that § 4.59 should not be limited to arthritis. *See Burton*, 25 Vet. App. at 3, 5. We emphasize that we are not called upon in this case to conclusively determine the correct interpretation of § 4.59. Nor, for that matter, was the *Burton* court, which simply deferred to the Secretary's interpretation as reasonable. Rather, our decision is limited to the conclusion that § 4.59, on its face, did not undebatably apply to non-arthritic conditions.[4]

The Veterans Court in this case also correctly noted the apparent lack of a settled interpretation of § 4.59 prior to *Burton*. *See Decision*, 2021 WL

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[4] For the avoidance of doubt, our decision today does not disturb or cast doubt upon the Veterans Court's decision deferring to the Secretary's interpretation in *Burton* and that court's directive that, going forward, the VA address the applicability of § 4.59 in non-arthritis claims. *See* 25 Vet. App. at 5.

5919626, at *3.[5] As mentioned above, unreported decisions of the Veterans Court prior to or around the time of the RO's July 2004 decision diverged on the applicability of § 4.59 to non-arthritis claims. *See supra* Background Section I. And the two reported Veterans Court cases applying § 4.59 to arthritis-based claims suggest that the regulation was understood as being so limited. *See Ferguson*, 1 Vet. App. at 430; *Lichtenfels*, 1 Vet. App. at 488. Furthermore, the *Burton* court itself noted the previous lack of clarity regarding § 4.59, and that lack of clarity was the reason the Veterans Court undertook the case by a panel decision. *See* 25 Vet. App. at 3.[6]

Finally, we agree with the Veterans Court that G.C. Prec. 9-98 does not change the assessment. *See Decision*, 2021 WL 5919626, at *3. This precedential opinion of the VA General Counsel addressed several questions that the opinion characterized as "pertain[ing] to the applicability of 38 C.F.R. §§ 4.40, 4.45, and 4.59 in rating arthritis *and other musculoskeletal disabilities*." G.C. Prec. 9-98, 1998

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[5] At oral argument, Mr. Siples agreed that the understanding of § 4.59 was unsettled in 2004. *See* Oral Arg. at 3:32–55 (available at https://oralarguments.cafc.uscourts.gov/default.aspx?fl=22-1528_1107202 4.mp3).

[6] While CUE is evaluated without regard to a later decision's impact on the law, *see Perciavalle*, 74 F.4th at 1382, the CUE inquiry does not preclude reference to a later decision to the extent it is informative of the state of the law at the relevant time, as *Burton* is here.

WL 35275130, at *1 (emphasis added). However, that passing statement did not necessarily mean that each of the three identified regulations applied to "other musculoskeletal disabilities." *Id.* The questions presented and answered by the opinion did not concern whether § 4.59 applied to non-arthritis claims, and the opinion did not purport to provide such an interpretation of § 4.59. *See id.* at *1, *4. Indeed, the opinion repeatedly discusses § 4.59 in the context of arthritis and diagnostic codes related to arthritis. *See, e.g.*, *id.* at *2 ("Given the findings of osteo-arthritis (another term for degenerative arthritis), the availability of a separate rating under DC 5003 in light of sections 4.40, 4.45, and 4.59 must be considered. Even if the claimant technically has full range of motion but the motion is inhibited by pain, a compensable rating for arthritis under DC 5003 and section 4.59 would be available."). At best, G.C. Prec. 9-98 contributes to the lack of clarity regarding the applicability of § 4.59 to non-arthritis claims at the time of the RO's July 2004 decision.

In short, CUE must be based on the law at the time of the decision. And at the time of the RO's decision in Mr. Siples's case, § 4.59 was not undebatably understood as applying to cases other than arthritis, nor was it so clear on its face as to compel applicability to non-arthritis claims.

CONCLUSION

We have considered Mr. Siples's remaining arguments and find them unpersuasive. For the reasons explained above, we affirm.

AFFIRMED

APPENDIX B

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-7957

CLINTON SIPLES, APPELLANT,

V.

DENIS MCDONOUGH,
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*: Air Force veteran Clinton Siples appeals a Board decision finding no clear and unmistakable error (CUE) in a July 2004 rating decision that assigned only one 10% rating each for left and right shoulder subluxation disabilities. He contends that the law at the time mandated the assignment of an additional 20% rating per shoulder. He asks the Court to reverse the Board with respect to that issue and to vacate and remand the portion of the decision addressing an allegation of CUE that he never raised with instructions to dismiss. For the following reasons, the Court affirms the Board's

finding that the regional office (RO), in 2004, did not commit CUE in not assigning an additional shoulder rating. As for the gratuitous portion of its CUE discussion, the Court vacates but sees no need to remand.

Following decades of service from 1978 to 2003, Mr. Siples sought compensation for bilateral shoulder problems following a history of dislocations and subluxations. VA provided an exam, and the examiner recorded the following ranges of shoulder motion and the point at which pain occurred (if at all), as well as what VA considered the normal range of motion:

Movement	Normal ROM	Right		Left	
		Rom in degree	Degree that pain occurs	Rom in Degree	Degree that pain occurs
Flexion	180	180		180	180
Abduction	180	150	150	180	180
Ext Rotation	90	80		80	
In Rotation	90	70		80	

R. at 2038. With respect to both shoulders, the examiner further stated that pain limited range of motion and had a "major functional impact" but that fatigue, weakness, lack of endurance, and incoordination were not additional limiting factors. *Id*. Recurrent subluxation with decreased ranges of motion was diagnosed in each shoulder.

In the July 2004 decision at issue here, the RO granted service connection for recurrent subluxation in each shoulder. Although the RO recounted the examiner's findings regarding ranges of motion, it assigned two 10% ratings by analogy under diagnostic code (DC) 5203, which compensated for malunion of the clavicle or scapula. 38 C.F.R. § 4.71a (2004). Mr. Siples did not appeal this decision.

Thirteen years later, he filed a motion to revise the 2004 decision. He asserted that the RO committed CUE by not also assigning a separate 20% rating for each shoulder under DC 5201 by virtue of 38 C.F.R. § 4.59. DC 5201 provided a minimum 20% rating when the arm cannot be raised higher than shoulder level. *See* 38 C.F.R. § 4.71a (2004). And § 4.59 provided in relevant part: "With any form of arthritis, painful motion is an important factor of disability….It is the intention to recognize actually painful, unstable, or malaligned joints, due to healed injury, as entitled to at least the minimum compensable rating for the joint." 38 C.F.R. § 4.59 (2004). But the RO denied the CUE motion, concluding simply that "VA policy at the time of the prior decision did not allow a 20 percent evaluation for painful motion of the shoulder." R. at 719, 720.

In the decision under this Court's review, the Board first concluded that it was not CUE for the RO in 2004 to assign a shoulder disability rating by analogy under DC 5203. As for whether additional ratings should have been assigned, the Board initially observed that the VA examiner did not find

Mr. Siples's arm motion to be so limited as to warrant a compensable rating under DC 5201 alone. Next, the Board acknowledged that the veteran suffered from painful and decreased arm motion in 2004 but determined that, at that time, VA understood § 4.59 to apply solely to cases of arthritis—which the veteran didn't have—and this interpretation of the regulation was not officially rejected until some years later in *Burton v. Shinseki*, 25 Vet.App. 1, 3-5 (2011). For this reading of § 4.59, the Board cited, among other things, VA General Counsel Precedent Opinion 9-98 (Aug. 14, 1998) [hereinafter G.C. Prec. 9-98]. Thus, the Board concluded that the 2004 RO decision contained no undebatable error but for which additional 20% ratings would manifestly have been assigned.

To establish CUE in a prior decision, the veteran must demonstrate that (1) the adjudicator either ignored the correct facts of record or incorrectly applied statutes or regulations in effect at the time; (2) the alleged error was undebatable, not merely a disagreement as to how the facts were weighed or the law was applied; and (3) the commission of the alleged error, at the time it was made, manifestly changed the outcome of the decision at issue. *Young v. Wilkie*, 31 Vet.App. 51, 56 (2019). When reviewing a Board finding of no CUE, the Court cannot conduct a "plenary review" but is limited to determining whether the finding was not in accordance with the law or was not supported by adequate reasons or bases. *Simon v. Wilkie*, 30 Vet.App. 403, 408 (2018).

Before the Court, Mr. Siples reiterates his argument before the Agency and contends that the Board misread G.C. Prec. 9-98, which held: "If a musculoskeletal disability is rated under a specific diagnostic code that does not involve limitation of motion and another diagnostic code based on limitation of motion may be applicable, the latter diagnostic code must be considered in light of sections 4.40, 4.45, and 4.59." 1998 VAOPGCPREC LEXIS 234 4 at *10 . In other words, he maintains that the Board legally erred in concluding that, at the time of the July 2004 RO decision, § 4.59 applied only when arthritis was involved because G.C. Prec. 9-98 noted that "remaining questions pertain to the applicability of 38 C.F.R. §§ 4.40, 4.45, and 4.59 in rating arthritis *and other musculoskeletal disabilities*." *Id.* at *2-3 (emphasis added). This, coupled with the opinion's remark that "a claimant should be compensated for all manifestations of a disability to the extent authorized under the regulations," means in the veteran's view that § 4.59 was understood even in 1998 to apply with respect to disabilities other than arthritis.

Although he, too, believes that the Board misread the General Counsel opinion as applying only to cases of arthritis, the Secretary urges affirmance, contending that such error is harmless because the opinion mandated only the *consideration* of an additional rating based on limitation of motion and not the automatic award of one. Based on the evidence of record at the time, he argues, Mr. Siples

has not shown that additional 20% ratings undebatably would have been awarded under § 4.59.

The Court discerns no error in the Board's reading of the law in July 2004. "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." *George v. McDonough*, 991 F.3d 1227, 1234 (Fed. Cir. 2021). At the time the RO assigned Mr. Siples shoulder ratings, § 4.59 stated that an "actually painful" joint should be "entitled to at least the minimum compensable rating for the joint," but it also prefaced this statement with the observation that "painful motion is an important factor of disability" "[w]ith any form of arthritis." 38 C.F.R. § 4.59 (2004). *Burton* seems to be the first reported case in which a veteran argued that § 4.59 applied outside the arthritis context. Initially, the Secretary rejected that reading. 25 Vet.App. at 3. And, in a nonprecedential memorandum decision, the Court agreed that "the plain language of § 4.59 limits its application to 'any form of arthritis'" and that reading the regulation in any other manner "would render the use of the word arthritis superfluous." *Burton v. Shinseki*, No. 09-2873, 2011 U.S. App. Vet. Claims LEXIS 669, at *4 (Mar. 29, 2011). But the veteran moved for panel review, and the Secretary relented. Citing an October 2004 VA fast letter, the Secretary agreed that § 4.59 could apply in non-

arthritis cases.* 25 Vet.App. at 3. On panel review, the Court concluded that the Secretary's revised interpretation of § 4.59's scope was "not inconsistent with the regulation or otherwise plainly erroneous." *Id*. at 5. While the first sentence could "lead one to consider that the regulation might apply only to the evaluation of arthritis claims," we found the Secretary's revised understanding to be valid based on the overall text of § 4.59. *Id*. at 4. This decision was summarily affirmed without written opinion. *Burton v. Shinseki*, 479 F. App'x 978 (Fed. Cir. 2012).

So, *Burton* stands for one of two propositions: Before 2011, there was a prevailing interpretation that § 4.59 *did not* apply to non-arthritis claims, or there was not yet a settled interpretation that § 4.59 *did* apply to non-arthritis claims. Either way, it cannot be said that § 4.59 was undebatably understood to apply to non-arthritis claims in 2004.

Nothing in G.C. Prec. 9-98 changes this assessment. Mr. Siples is correct that the opinion addressed "the applicability of 38 C.F.R. §§ 4.40, 4.45, and 4.59 in rating arthritis *and other musculoskeletal disabilities*." 1998 VAOPGCPREC LEXIS 234 at *10 (emphasis added). But there are three separate regulations mentioned in that

* Notably, this fast letter—whatever its substance—was not issued until three months after the RO decision at issue in this case.

sentence. Perhaps it can be read to indicate that all three provisions apply when rating "other musculoskeletal disabilities." But that reading is by no means compelled.

And reviewing the rest of the opinion undermines that reading. In fact, most of the document is about clarifying the applicability of §§ 4.40 and 4.45. For example, the opinion thought it "unclear as to whether sections 4.40 and 4.45 apply only to diagnostic codes that are based on limitation of motion." 1998 VAOPGCPREC LEXIS 234, at *3. But because "[l]imitation of motion in the affected joint or joints is a common manifestation of arthritis," and because caselaw "has indicated that DC 5003"—pertaining to arthritis confirmed by x-ray—"is to be read in conjunction with section 4.59 and…is complemented by section 4.40," G.C. Prec. 9-98 concluded that "sections 4.40, 4.45, and 4.59 all appear to be applicable in evaluating arthritis." *Id.* at *4 (quotation marks omitted). Yet the conclusion that §§ 4.40 and 4.45 apply within the context of arthritis does not clearly establish that § 4.59 applies outside the context of arthritis. Where the opinion specifically discusses § 4.59 in isolation, it does so with respect to arthritis. *E.g.*, *id.* at *6 ("Even if the claimant technically has full range of motion but the motion is inhibited by pain, a compensable rating for arthritis under DC 5003 and section 4.59 would be available."), *9-10 ("A separate rating for arthritis could also be based on X-ray findings and painful motion under 38 C.F.R. § 4.59.").

CUE "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*, 991 F.3d at 1232 (cleaned up); *see also Steele v. McDonough*, 856 Fed. App'x 878, 881 (Fed. Cir. 2021) (describing *George* as clarifying that, "whether an interpretation is a first interpretation or a change in existing interpretation, it cannot serve as a basis for CUE"). Thus, the Court discerns no error in the Board's conclusion that the understanding of § 4.59 in July 2004 did not undebatably compel the RO to assign additional shoulder 20% ratings based on painful motion. To this extent, the Court affirms the Board decision.

Both parties concur that the Board unnecessarily concluded that it was not CUE for the RO in July 2004 to rate Mr. Siples's shoulder disabilities by analogy under DC 5203. The Court agrees. The Board may not address CUE allegations with respect to an RO decision that have not first been presented to the RO for resolution. *See Jarrell v. Nicholson*, 20 Vet.App. 326, 333 (2006) (en banc). The veteran didn't challenge the RO's decision to rate him under DC 5203. Instead, he challenged the RO's decision not to assign an *additional* rating under DC 5201. Assessing the applicability of DC 5201 didn't require the Board to address the propriety of the RO's original choice of DC 5203. When the Board adjudicates a CUE theory over which it lacks jurisdiction, the proper disposition is for the Court to

vacate the relevant portion of the Board decision. *Id.* at 334. Mr. Siples also asks the Court to "remand…with instructions to dismiss," Appellant's Br. at 9, but there is nothing for the Board to dismiss, since the veteran asserts that it simply addressed an issue he didn't raise. Vacating that portion of the Board decision permits the veteran to raise such a CUE motion before the RO, if he chooses.

Accordingly, the Court VACATES the July 23, 2019, Board decision as it relates to the RO's original choice of DC 5203 and otherwise AFFIRMS.

DATED: December 15, 2021

Copies to:

Kenneth H. Dojaquez, Esq.

VA General Counsel (027)

APPENDIX C

BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF Redacted

CLINTON SIPLES Docket No. 180619-286

REPRESENTED BY

JAMES J. PERCIAVALLE, Agent

DATE: July 23, 2019

ORDER

The claim that the July 2004 rating decision, that assigned an initial 10 percent rating for recurrent right shoulder subluxation disability, contained clear and unmistakable error (CUE) is denied.

The claim that the July 2004 rating decision, that assigned initial 10 percent rating for recurrent left shoulder subluxation disability, contained clear and unmistakable error (CUE) is denied.

REMANDED

Entitlement to an effective date prior to January 31, 2017 for award of 20 percent rating for recurrent left shoulder subluxation is remanded.

Entitlement to effective date prior to January 31, 2017 for award of 20 percent rating for recurrent right shoulder subluxation is remanded.

Entitlement to an effective date prior to January 31, 2017 for award of service connection for left shoulder impairment of the humerus is remanded.

Entitlement to an effective date prior to January 31, 2017 for award of service connection for right shoulder impairment of the humerus is remanded.

Entitlement to service connection for tinnitus is remanded.

Entitlement to service connection for a left knee disorder is remanded.

Entitlement to service connection for left ankle disorder is remanded.

Entitlement to service connection for right ankle disorder is remanded.

Entitlement to service connection for pes planus (claimed as flat feet) is remanded.

Entitlement to service connection for sinusitis (also claimed as allergies) is remanded.

Entitlement to service connection for sleep apnea, to include as secondary to service-connected disabilities, is remanded.

Entitlement to an initial evaluation in excess of 10 percent for gastroesophageal reflux disease (GERD) disability is remanded.

Entitlement to an initial evaluation in excess of 20 percent for left shoulder impairment of the humerus disability is remanded.

Entitlement to an initial evaluation in excess of 30 percent for right shoulder impairment of the humerus disability is remanded.

Entitlement to an evaluation in excess of 20 percent for recurrent left shoulder subluxation disability is remanded.

Entitlement to an evaluation in excess of 20 percent for recurrent right shoulder subluxation disability is remanded.

Entitlement to an evaluation in excess of 10 percent for lumbar spine disability is remanded.

FINDINGS OF FACT

1. In a July 2004 rating decision, the RO awarded service connection for bilateral recurrent shoulder subluxation disability and assigned an initial 10 percent rating for each shoulder.

2. There is no outcome determinative legal or factual error in the July 2004 rating decision that awarded initial 10 percent rating for right shoulder disability.

3. There is no outcome determinative legal or factual error in the July 2004 rating decision that awarded initial 10 percent rating for left shoulder disability.

CONCLUSIONS OF LAW

1. The criteria for finding that there was clear and unmistakable error in a July 2004 rating decision that assigned initial 10 percent rating for recurrent right shoulder subluxation disability have not been met. 38 U.S.C. § 5019A; 38 C.F.R. § 3.105 (a) (2018)

2. The criteria for finding that there was clear and unmistakable error in a July 2004 rating decision that assigned initial 10 percent rating for recurrent left shoulder subluxation disability have not been met. 38 U.S.C. § 5019A; 38 C.F.R. § 3.105 (a) (2018)

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty in the United States Air Force from September 1978 to March 2003.

The Board notes that the rating decision on appeal was issued in May 2018. In May 2018, the Veteran elected the modernized review system. 84 Fed. Reg. 138, 177 (Jan. 18, 2019) (to be codified at 38 C.F.R. § 19.2(d)). In his June 19, 2018 appeal to the Board, the Veteran selected the evidence submission option, and the Veteran was advised that he had 90-days

from the date of selection to submit evidence to the Board.

On September 30, 2019, additional evidence was added to the claims file during a period of time when new evidence was not allowed. Therefore, the Board may not consider this evidence. 84 Fed. Reg. 138, 182 (Jan. 18, 2019) (to be codified at 38 C.F.R. § 20.300). The Veteran may file a Supplemental Claim and submit or identify this evidence. 84 Fed. Reg. 138, 182 (Jan. 18, 2019) (to be codified at 38 C.F.R. § 3.2501). If the evidence is new and relevant, VA will issue another decision on the claim, considering the new evidence in addition to the evidence previously considered. *Id*. Specific instructions for filing a Supplemental Claim are included with this decision.

In June 2019, the Veteran's attorney submitted a statement requesting a hearing before the Board. The request for a hearing is denied as the request was not submitted on the proper Notice of Disagreement on the form as prescribed by the Secretary. See VA Claims and Appeals Modernization, 84 Fed. Reg. 138, 180-81 (Jan. 18, 2019) (to be codified at 38 C.F.R. § 20.202)

Clear and Unmistakable Error

1. Whether there was CUE in the July 2004 rating decision, that assigned an initial 10 percent rating for recurrent right shoulder subluxation disability.

2. Whether there was CUE in the July 2004 rating decision that assigned initial 10 percent rating for recurrent left shoulder subluxation disability.

The Veteran asserts that earlier effective dates should be awarded based on clear and unmistakable error in a July 2004 rating decision that awarded initial 10 percent rating each for right shoulder and left shoulder disabilities.

The record establishes that within a year of his separation from service, the Veteran initiated a claim for entitlement to service connection for bilateral shoulder disorder. In the July 2004 rating decision, the Veteran was awarded service connection for right and left shoulder disabilities and each shoulder was assigned a 10 percent rating under Diagnostic Code 5299-5203, effective from April 1, 2003 (date following discharge from service). VA did not receive any new evidence regarding the claim within one year of notice of the decision. The Veteran did not file a timely notice of disagreement. Thus, the July 2004 rating decision is final. 38 U.S.C. § 7105 (2002); 38 C.F.R. §§ 3.156, 20.200, 20.201, 20.302 (2004).

Previous determinations which are final and binding, including decisions for 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 CUE. Where evidence establishes such error, the prior

decision will be reversed or amended. 38 C.F.R. § 3.105 (a) (2018).

Any claim of CUE must be pled with specificity. *See Andre v. Principi*, 301 F. 3d 1354 (Fed. Cir. 2002). Such a motion must set forth clearly and specifically the alleged clear and unmistakable error, or errors, of fact or law in the VA 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 that requirement. Motions which fail to comply with the regulatory requirements shall be dismissed, without prejudice to refiling. 38 C.F.R. § 20.1404 (b) (2018); *see* Disabled American *Veterans v. Gober*, 234 F.3d 682 (Fed. Cir. 2000).

Examples of situations which do not constitute CUE are: (1) a new medical diagnosis which "corrects" an earlier diagnosis considered in a decision; (2) VA failure to fulfill the duty to assist; (3) a disagreement as to how the facts were weighed or evaluated; and (4) the otherwise correct application of a statute or regulation where, subsequent to the decision challenged, there has been a change in the interpretation of the pertinent statute or regulation. 38 C.F.R. § 20.1403 (d)-(e) (pertaining to allegations of CUE in a prior Board decision).

In determining whether a prior decision involves CUE, the U.S. Court of Appeals for Veterans Claims

(CAVC) has established a three-prong test. The three prongs are: (1) either the correct facts, as they were known at the time, were not before the adjudicator (i.e., there must be more than simple disagreement on how the facts were weighed or evaluated), or the statutory/regulatory provisions extant at that time were not correctly applied; (2) the error must be "undebatable" and of the sort which, if it had 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 adjudication. *Damrel v. Brown*, 6 Vet. App. 242, 245 (1994), citing *Russell v. Principi*, 3 Vet. App. 310, 313-14 (1992) (en banc). *See also Bustos v. West*, 179 F.3d 1378, 1381 (Fed. Cir. 1999) (affirming that CUE must be outcome determinative).

CUE is a very specific and rare kind of "error." It is the kind of error in fact or law that, when called to the attention of later reviewers, compels the conclusion, to which reasonable minds could not differ, that the result would manifestly have been different but for the error. Generally, the correct facts, as they were known at the time, were not before the RO, or the statutory and regulatory provisions extant at the time were incorrectly applied. Even when the premise of error is accepted, if it is not absolutely clear that a different result would have ensued, the error complained of cannot be Ipso Facto clear and unmistakable. *Fugo v.*

Brown, 6 Vet. App. 40, 43-44 (1993), *citing Russell*, 3 Vet. App. at 313-14.

A claim of CUE is a collateral attack on an otherwise final rating decision by a VA regional office. *Smith*, 35 F.3d at 1527. As such, there is a presumption of validity that attaches to a final decision, and when such a decision is collaterally attacked the presumption becomes even stronger. *Fugo*, 6 Vet. App. at 43-44. Therefore, a claimant who seeks to obtain retroactive benefits based on CUE has a much heavier burden than that placed on a claimant who seeks to establish prospective entitlement to VA benefits. *Akins v. Derwinski*, 1 Vet. App. 228, 231 (1991).

The Veteran contends that RO in the July 2004 rating decision incorrectly applied the VA Schedule for Rating Disabilities, musculoskeletal disabilities, 38 C.F.R. § 4.71 (2004), when it failed to consider 38 C.F.R. § 4.59 for painful motion which directs for minimal compensable rating of 20 percent under Diagnostic Code 5201 based on limitation of motion in for each shoulder. In addition, the Veteran asserts the RO erred in failing assigned separate awards under Diagnostic Code 5202 (other impairment of humerus) for each shoulder in the July 2004 rating decision.

The July 2004 rating decision shows the RO assigned each shoulder disability a 10 percent rating under hyphenated Diagnostic Code 5299-5203, as analogous to a disability due to impairment of the clavicle or scapula.

In assigning the initial 10 percent ratings for right shoulder and left shoulder disabilities, the RO considered the service treatment records which showed the Veteran dislocated his left shoulder in March 1983 and he dislocated his right shoulder in January 1988, and he was taken to hospital both times for reduction. The RO also considered the subsequent service treatment that showed complaints of recurrent dislocation, painful motion, weakness, and instability in the shoulders. The service treatment records also showed that the Veteran received physical therapy records for his bilateral shoulder instability from June 2001 to September 2001 with good results.

The RO also considered the findings from an April 2004 VA examination report that showed the Veteran complained of painful motion, functional impairment, and recurrent subluxation in his shoulders, but he had denied any dislocation since initial injury. Range of motion testing revealed right shoulder was limited to 180 degrees on flexion, 150 degrees on abduction, 80 degrees on external rotation, and 70 degrees on internal rotation, and left shoulder was limited to 180 degrees on flexion, 180 degrees on abduction, 80 degrees on external rotation, and 80 degrees on internal rotation. There was additional limitation due to pain, but no evidence of weakness, fatigue, lack of endurance, or incoordination. X-ray film of each shoulder was negative. The VA examiner provided a diagnosis of recurrent shoulder subluxation, bilaterally, based on subjective complaints of subluxation with certain

movement and objective evidence of decreased range of motion.

The RO assigned each shoulder an initial 10 percent rating by analogy to impairment of the clavicle or scapula due to malunion and noted that higher 20 percent ratings were not warranted unless evidence of dislocation or nonunion with loose movement in the shoulder. After being provided with notice of the decision and appellate rights, VA did not receive any new evidence regarding the claim within one year of notice of the decision. *See* 38 C.F.R. § 3.156 (b) (2004). The Veteran did not file a timely notice of disagreement. Thus, the July 2004 rating decision is final. 38 U.S.C. § 7105 (2002); 38 C.F.R. §§ 3.156, 20.200, 20.201, 20.302 (2004).

The pertinent law and regulatory criteria in effect at the time of the July 2004 rating decision, as now, provided that disability ratings were determined by the application of the VA Schedule for Rating Disabilities (Rating Schedule), 38 C.F.R. Part 4 (2004).

When the particular service-connected disability is not listed in the rating schedule, it may be rated by analogy to a closely related disease in which not only the functions affected, but also the anatomical location and symptomatology are closely analogous. Unlisted disability requiring rating by analogy will be coded by the numbers of the most closely related body part and "99". 38 C.F.R. §§ 4.20, 4.27 (2004). Hyphenated diagnostic codes are used when a rating under one diagnostic code requires use of an

additional diagnostic code to identify the basis for the evaluation assigned, and the additional diagnostic code is shown after the hyphen.

Disabilities of the musculoskeletal system were rated under 38 C.F.R. § 4.71a (2004). Diagnostic Code 5203 provides a 10 percent disability rating is warranted for malunion or nonunion of the clavicle or scapula without loose movement. A 20 percent disability rating is warranted for nonunion of the clavicle or scapula with loose movement or dislocation of the clavicle or scapula. 38 C.F.R. § 4.71a. Alternatively, Diagnostic Code 5203 directs that impairment of the clavicle or scapula be rated based on impairment of function of the contiguous joint. 38 C.F.R. § 4.71a.

Diagnostic Code 5202 governs other impairment of humerus and provides a 20 percent rating is assigned when there is malunion of the humerus with moderate deformity. A 20 percent evaluation is also assigned for recurrent dislocation at the scapulohumeral joint with infrequent episodes and guarding at shoulder level. A 30 percent rating is assigned when there is malunion of the humerus with marked deformity. A 30 percent evaluation is also assigned when there is recurrent dislocation at the scapulohumeral joint with frequent episodes and guarding of all movements. A 50 percent evaluation is assigned when there is fibrous union of the humerus. 38 C.F.R. § 4.71a.

Diagnostic Code 5201 provides a 20 percent rating is assigned when limitation of arm motion is at

shoulder level. A 30 percent rating is assigned when limitation is midway between side and shoulder level. A 40 percent rating is assigned when limitation is to 25 degrees from the side. 38 C.F.R. § 4.71a.

Diagnostic Code 5200 addresses ankylosis of scapulohumeral articulation. 38 C.F.R. § 4.71a. Ankylosis is the fixation of a joint. *Dinsay v. Brown*, 9 Vet. App. 79 (1996).

After review of the record as it existed at the time of the July 2004 rating decision, the Board does not find CUE in the RO's July 2004 rating decision that assigned initial 10 percent ratings for right shoulder and left shoulder disabilities under Diagnostic Code 5203. The RO determined that the Veteran's bilateral recurrent shoulder subluxation was most appropriately rated with a 10 percent rating for each shoulder under Diagnostic Code 5203, pertaining to "impairment of clavicle or scapula." This decision by the RO to rate the Veteran's recurrent bilateral shoulder subluxation by analogy to impairment of clavicle or scapula under Diagnostic Code 5203 is not clear and unmistakable error.

There are several other diagnostic codes that are used for rating shoulder disabilities, as identified above. However, as a diagnostic code directly reflecting the Veteran's shoulder subluxation disorder was not listed, the RO rated the bilateral shoulder disorder by analogy. It is not undebatable that the decision to rate by analogy to the diagnostic code for impairment of clavicle or scapula was

incorrect. This diagnostic code for provides ratings for symptoms involving impairment of the shoulder. The April 2004 VA examination report showed that the Veteran's bilateral recurrent shoulder subluxation disability was manifested by painful motion that resulted in functional impairment, but with movement well-above shoulder level in each arm, and the Veteran specifically denied recurrence of shoulder dislocation. Therefore, it was reasonable, and not clear and unmistakable error, for the RO to rate by analogy to Diagnostic Code 5299-5203.

The Board is aware that the service treatment records show the Veteran received treatment for chronic intermittent dislocating shoulders. *See* July 1992 service orthopedic consult; October 1995 service orthopedic consult; and May 2001 service physical therapy referral. However, VA is not required to give precedence to past medical reports over the findings of the April 2004 VA examiner. *See Francisco v. Brown*, 7 Vet. App. 55, 58 (1994). Furthermore, any disagreement as to the correct diagnosis is one of assignment of probative weight, and not "undebatable" and of the sort which, if it had not been made, would have manifestly changed the outcome at the time it was made.

The RO's decision to rate the Veteran's bilateral shoulder disability under Diagnostic Code 5299-5203 instead of an alternative criterion applicable to shoulder disabilities is something on which reasonable minds could differ. This is merely a difference of opinion between the Veteran and the

RO as to which rating most closely approximated the Veteran's symptoms. Similarly, whether to award the Veteran's separate ratings based on other impairment of humerus was reasonably debatable give the findings in the April 2004 VA examination report. A difference of opinion is not CUE. *See* 38 C.F.R. § 3.105 (b) (2018). Therefore, the July 2004 rating decision should not be revised on the basis of CUE.

The Board has considered the Veteran's representative assertion that based on consideration of 38 C.F.R. § 4.59, minimal compensable rating of 20 percent for each shoulder was warranted under Diagnostic Code 5201 based on limitation of motion due to painful motion, even if range of motion was well-above shoulder level. In *Burton v. Shinseki*, 25 Vet. App. 1 (2011), the Court held that the minimal compensable rating for painful or limited motion under 38 C.F.R. § 4.59 does not require the presence of arthritis. However, since this decision was issued in August 2011, it cannot provide a basis for finding CUE in the July 2004 rating decision.

At the time of the 2004 rating decision, VA only applied 38 C.F.R. § 4.59 in cases of arthritis, and the April 2004 VA x-rays of the shoulders were negative in case. *See* VAGCOPPREC 9-98 (Aug. 1998), VAOPGCPREC 23-97 (July 1997); *see also Lichtenfels v. Derwinski*, 1 Vet. App. 484, 488 (1991) (holding that a separate compensable rating can be assigned for arthritis based on X- ray findings and

painful motion under 38 C.F.R. § 4.59 when involving a major joint or group of joints.)

The Board acknowledges that on his original March 2004 application for compensation the Veteran identified post-service treatment records at military medical facilities at Langley AFB and Portsmouth Naval Medical Center. Although the record does not show that the RO made any attempt to obtain those outstanding identified military medical records, the failure to fulfill the duty to assist cannot be CUE. *See Cook v. Principi*, 318 F.3d 1334, 1344-47 (Fed.Cir.2002) (38 holding that a breach of the duty to assist cannot form the predicate for a motion for revision of a finally decided claim based on CUE); *Baldwin v. West*, 13 Vet. App. 1, 5 (1999). Moreover, only VA treatment records, and not records from other federal agencies, are considered to be within VA's constructive possession at the time of rating decision. *See* U.S.C. § 5103A (2004); *Bell v. Derwinski*, 2 Vet. App. 611 (1992).

The Veteran's argument in this case is essentially a disagreement with how the facts were weighed and evaluated in the July 2004 rating decision, which is not CUE. Accordingly, the Board does not find CUE in the July 2004 rating decision based on the facts of record and the application VA laws and regulations before the RO at the time of the July 2004 rating decision. Thus, the 10 percent ratings for right shoulder and left shoulder disabilities under Diagnostic Code 5299-5203 were proper.

REASONS FOR REMAND

1. Entitlement to an effective date prior to January 31, 2017 for award of 20 percent rating for recurrent left shoulder subluxation disability

2. Entitlement to an effective date prior to January 31, 2017 for award of 20 percent rating for recurrent right shoulder subluxation disability

3. Entitlement to an effective date prior to January 31, 2017 for award of service connection for left shoulder impairment of the humerus disability

4. Entitlement to an effective date prior to January 31, 2017 for award of service connection for right shoulder impairment of the humerus disability

Prior to the May 2018 rating decision on appeal, the Veteran identified relevant outstanding records from VA medical facilities in Pensacola, Florida dated from 2006 to 2007. On remand, attempts should be made to obtain those identified outstanding treatment records.

Notably, prior to the March 24, 2015 amendment of VA regulations that required all claims governed by VA's adjudication regulations be filed on a standard form, VA regulations allowed for informal claims that included constructive receipt of VA reports of hospitalization or examination under 38 C.F.R. § 3.157. *See* 79 Fed. Reg. 57,660 (Sept. 25, 2014). The

outstanding VA treatment records need to reviewed prior to determining whether there is a document following the July 2004 rating decision to March 24, 2015 that indicates an intent to file a claim for an increased rating.

5. Entitlement to service connection for a left knee disorder

6. Entitlement to service connection for tinnitus

Prior to the May 2018 rating decision on appeal, the Veteran identified relevant outstanding records of pertinent treatment from VA medical facilities in Pensacola, and treatment records from medical facilities at Langley Air Force Base from May 2003 to September 2006, and from medical facilities at Eglin Air Force Base from September 2006 to October 2007. *See* July 2017 report of contact. On remand, attempts should be made to obtain those identified outstanding treatment records.

7. Entitlement to service connection for a left ankle disorder

8. Entitlement to service connection for a right ankle disorder

The issues of entitlement to service connection for right and left ankle disorder are remanded to correct a duty to assist error that occurred prior to the May 2018 rating decision on appeal. The Agency of Original Jurisdiction (AOJ) has not obtained a VA

medical opinion that addresses the nature and etiology of the Veteran's claimed bilateral ankle disorder prior to the rating decision on appeal.

In this regard, the Veteran's service treatment records show he injured his ankles during service. He injured his right ankle in June 1980 and January 1988 while playing basketball, and he injured his left ankle in November 1982 while playing basketball. Post-service private treatment records show diagnosis of chronic ankle pain and Achilles tendon strain. A remand is needed to obtain VA examination on whether the Veteran has current right ankle and/or left ankle disorder that is related to his period of service, to include ankle injuries.

9. Entitlement to service connection for pes planus (claimed as flat feet)

The issue of entitlement to service connection for pes planus is remanded to correct a duty to assist error that occurred prior to the May 2018 rating decision on appeal. The Agency of Original Jurisdiction (AOJ) has not obtained a VA medical opinion that addresses the nature and etiology of the Veteran's pes planus prior to the rating decision on appeal.

The Veteran's March 1978 enlistment examination shows his feet were evaluated as abnormal, and there appears to be an assessment of "pes valgus planus." A July 1992 periodic examination also shows that the Veteran's feet were evaluated as abnormal, and an assessment of bilateral pes planus, asymptomatic was provided. Current VA treatment

records show that the Veteran has bilateral pes planus and left heel spur.

A VA medical opinion is needed to address whether the Veteran had a foot disorder that clearly and unmistakably pre-existed his service and if so, whether it was not aggravated to a permanent degree in service beyond that which would be due to the natural progression of the disability.

10. Entitlement to service connection for sinusitis (also claimed as allergies)

The issue of entitlement to service connection for sinus disorder is remanded to correct a duty to assist error that occurred prior to the May 2018 rating decision on appeal. The Agency of Original Jurisdiction (AOJ) has not obtained a VA medical opinion that addresses the nature and etiology of the Veteran's claimed bilateral ankle disorder prior to the rating decision on appeal.

In this regard, the Veteran's service treatment records show he complained of upper respiratory complaints. Post-service private treatment records show diagnosis of allergic rhinitis. A remand is needed to obtain VA examination on whether the Veteran has current sinus disorder that had an onset during service or is otherwise related to his period of service.

11. Entitlement to service connection for sleep apnea, to include as secondary to service-connected disabilities

The issue of entitlement to sleep apnea is remanded to correct a duty to assist error that occurred prior to the May 2018 rating decision on appeal. The Agency of Original Jurisdiction (AOJ) did not obtain a VA examination prior to the May 2018 rating decision on appeal regarding whether the Veteran's sleep apnea is caused or aggravated by weight gain and obesity as result of functional impairment due to the Veteran's service-connected disabilities.

Obesity itself is not a disability that can be compensated by VA. *See Marcelino v. Shulkin*, No. 16-2149, 2018 U.S. App. Vet. Claims LEXIS 64 (Vet. App. Jan. 23, 2018). Obesity can be an "intermediate step" between a current disability and a service-connected disability if it is found that the service-connected disability caused the veteran to become obese, the obesity was a substantial factor in causing the claimed secondary disability, and the claimed secondary disability would not have occurred but for obesity caused by the service-connected disability.

Evidence associated with the claims file prior to the May 2018 rating decision, include service treatment record that note the Veteran had recent weight gain due change in life style and post-service medical records show the Veteran's service-connected back and shoulder disabilities cause functional impairment. The Board finds that a VA examination/medical opinion is required to determine whether the Veteran's sleep apnea is

caused or aggravated by weight gain and obesity due to service-connected disabilities.

12. Entitlement to an initial evaluation in excess of 10 percent for gastroesophageal reflux disease (GERD) disability

The issue of entitlement to GERD is remanded to correct a duty to assist error that occurred prior to the May 2018 rating decision on appeal. The Agency of Original Jurisdiction (AOJ) obtained an August 2017 examination report prior to the May 2018 rating decision on appeal. However, VA treatment records dated in November 2017 show that the Veteran's symptomatology had worsened, and the Veteran had identified increased symptomatology during a May 2018 Decision Review Officer informal conference. A remand is needed to afford the Veteran with a new VA examination to evaluate the severity of his GERD disability.

13. Entitlement to an evaluation in excess of 10 percent for lumbar spine disability is remanded.

14. Entitlement to an initial evaluation in excess of 20 percent for left shoulder impairment of the humerus disability is remanded.

15. Entitlement to an initial evaluation in excess of 30 percent for right shoulder impairment of the humerus disability is remanded.

16. Entitlement to an evaluation in excess of 20 percent for recurrent left shoulder subluxation disability is remanded.

17. Entitlement to an evaluation in excess of 20 percent for recurrent right shoulder subluxation disability is remanded.

The issues of entitlement to higher rating for left shoulder, right shoulder, and lumbar spine disabilities are remanded to correct a duty to assist error that occurred prior to the May 2018 rating decision on appeal. The Agency of Original Jurisdiction (AOJ) obtained August 2017 examination reports prior to the May 2018 rating decision on appeal. However, in these examination reports, the VA examiner did not provide an adequate opinion regarding additional loss of motion and functional impairment during flare-up.

In *Sharp v. Shulkin*, 29 Vet. App. 26, 35 (2017), the Court of Appeals of Veteran Claims held that an examiner must try to ascertain information about flare-ups through alternative means, including asking the Veteran to describe additional functional loss and estimating based on his reports, and only then after considering all the lay and medical evidence, can the examiner explain why he or she cannot render an opinion. *See Id*. Therefore, the Agency of Original Jurisdiction should obtain new VA examinations in compliance with *Sharp*.

The matters are REMANDED for the following action:

1. Obtain the Veteran's treatment records from medical facilities at Langley Air Force Base from May 2003 to September 2006, and from medical facilities at Eglin Air Force Base from September 2006 to October 2007. Document all requests for information as well as all responses in the claims file.

2. Obtain the Veteran's VA treatment records from VA medical facilities in Pensacola, Florida from 2006 to 2007.

3. Schedule the Veteran for a VA examination to determine the nature and etiology of his claimed left and right ankle disorders. The examiner must opine whether it is at least as likely as not related to an in-service injury, event, or disease, including ankle injuries.

4. Schedule the Veteran for a VA examination to determine the nature and etiology of his claimed flat feet. The examiner must opine whether there is clear and unmistakable evidence that the Veteran a foot disability prior to his entry onto active service, and whether there is clear and unmistakable evidence that it was NOT aggravated to a permanent degree in service beyond

that which would be due to the natural progression of the disability.

5. Schedule the Veteran for a VA examination to determine the nature and etiology of his claimed sinus disorder. The examiner must opine whether it is at least as likely as not had an onset during service, or is otherwise related to an in-service injury, event, or disease, including upper respiratory complaints.

6. Schedule the Veteran for an examination in conjunction with his claim for sleep apnea. The examiner must provide opinions on the following:

> (a.) Whether the Veteran's weight gain and obesity was caused or aggravated by the service-connected disability or disabilities.
>
> (b.) Whether the Veteran's sleep apnea, would not have occurred but for the obesity caused by functional impairment associated with his service-connected disability or disabilities?

7. Schedule the Veteran for an examination by an appropriate clinician to determine the current severity of his

service-connected GERD disability. The examiner should provide a full description of the disability and report all signs and symptoms necessary for evaluating the Veteran's disability under the rating criteria. To the extent possible, the examiner should identify any symptoms and functional impairments due to GERD disability alone and discuss the effect of the Veteran's disability on any occupational functioning and activities of daily living.

8. Schedule the Veteran for an examination of the current severity of his lumbar spine disability. The examiner must attempt to elicit information regarding the severity, frequency, and duration of any flare-ups, and the degree of functional loss during flare-ups. To the extent possible, the examiner should identify any symptoms and functional impairments due to lumbar spine disability alone and discuss the effect of the Veteran's disability on any occupational functioning and activities of daily living. If it is not possible to provide a specific measurement, or an opinion regarding flare-ups, symptoms, or functional impairment based on direct observation, the examiner should

provide an estimate, if at all possible, of the additional impairment due to flare-ups based on the other evidence of record and the Veteran's statements.

9. Schedule the Veteran for an examination of the current severity of his bilateral shoulder disability. The examiner must attempt to elicit information regarding the severity, frequency, and duration of any flare-ups, and the degree of functional loss during flare-ups. To the extent possible, the examiner should identify any symptoms and functional impairments due to bilateral shoulder disability alone and discuss the effect of the Veteran's disability on any occupational functioning and activities of daily living. If it is not possible to provide a specific measurement, or an opinion regarding flare-ups, symptoms, or functional impairment based on direct observation, the examiner should provide an estimate, if at all possible, of the additional impairment due to flare-ups based on the other evidence of record and the Veteran's statements |

[h/w signature]
K. J. ALIBRANDO
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD J. Murray, Counsel

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential, and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.

APPENDIX D

DEPARTMENT OF VETERANS AFFAIRS
Roanoke Regional Office
210 Franklin Rd SW
Roanoke VA 24011

CLINTON J. SIPLES

VA File Number
Redacted

Represented by:
AMVETS

Rating Decision
July 23, 2004

INTRODUCTION

The records reflect that you are a veteran of the Peacetime and Gulf War Era. You served in the Air Force from September 13, 1978 to March 31, 2003. You filed an original disability claim that was received on March 8, 2004. Based on a review of the evidence listed below, we have made the following decision(s) on your claim.

DECISION

1. Service connection for recurrent right shoulder subluxation (claimed as h/o bilateral shoulder dislocations, right hand dominate) is granted with an evaluation of 10 percent effective April 1, 2003.

2. Service connection for recurrent left shoulder subluxation (claimed as h/o bilateral shoulder dislocations, right hand dominate) is granted with an evaluation of 10 percent effective April 1, 2003.

3. Service connection for lumbar strain (claimed as lower back condition) is granted with an evaluation of 10 percent effective April 1, 2003.

4. Service connection for erectile dysfunction is granted with an evaluation of 0 percent effective April 1, 2003.

5. Entitlement to special monthly compensation based on Loss Of Use of a creative organ is granted from April 1, 2003.

6. Service connection for occasional hemorrhoid (claimed as h/o hemorrhoids with rectal fissure, also claimed as colonoscopy) is granted with an evaluation of 0 percent effective April 1, 2003.

7. Service connection for anemia is denied.

EVIDENCE

- Service Medical Records from March 11, 1978 through February 7, 2003

- VA Examination, QTC Medical Services, dated April 8, 2004

REASONS FOR DECISION

1. Service connection for recurrent right shoulder subluxation (claimed as h/o bilateral shoulder dislocations, right hand dominate).

We are granting service connection for recurrent right shoulder subluxation (claimed as h/o bilateral shoulder dislocations, right hand dominate) because your service medical records show you had complaints of right shoulder dislocation while playing basketball January 27, 1988. Radiologic examination revealed anterior right shoulder dislocation with no fracture identified. Your assessment was anterior right shoulder dislocation. August 11, 1992 you were diagnosed with anterior instability right shoulder, and you were scheduled for physical therapy. July 26, 2002 you had complaints of dull pain in your right shoulder over a 2 week period. Examination revealed you were negative for edema or ecchymosis but positive for TTP over supraspinatus, your strength was 5/5 for your upper extremities. You were diagnosed with right shoulder pain.

We have assigned a 10 percent disability evaluation based on your VA examination dated April 8, 2004 which reveals range of motion as flexion to 180 degrees, abduction to 150 degrees with pain at 150, external rotation to 80 degrees, and internal rotation to 70 degrees. Your range of motion was limited by pain which is the major functional impact. It was not limited by fatigue, weakness, lack of endurance, or incoordination. You reported

dislocating your shoulder in 1984 and 1991, and you reported current symptoms of pain but no dislocations since your initial bouts. You were diagnosed with recurrent right shoulder subluxation. An evaluation of 10 percent is assigned if there is a malunion or nonunion of the clavicle or scapula. A higher evaluation of 20 percent is not warranted unless the record shows dislocation of the clavicle or scapula, or nonunion of the clavicle or scapula with loose movement.

We have assigned April 1, 2003 as your effective date, the first day following your release from service.

2. Service connection for recurrent left shoulder subluxation (claimed as h/o bilateral shoulder dislocations, right hand dominate).

We are granting service connection for recurrent left shoulder subluxation (claimed as h/o bilateral shoulder dislocations, right hand dominate) because your service medical records show ;you complained of pain in your left shoulder over a two day period November 17, 1980. Objective examination revealed full range of motion of left arm with apparent pain or restriction. There was no tenderness over the left clavicle and you diagnosis was contusion, left shoulder. June 15, 1983 you were diagnosed with left shoulder strain after complaining of pain and tenderness. March 30, 1995 you injured your left shoulder playing basketball. X-ray examination of your left shoulder revealed anterior left shoulder dislocation.

We have assigned a 10 percent disability evaluation based on your VA examination dated April 8, 2004 which revealed range of motion for your left shoulder as flexion to 180 degrees with pain at 180, abduction to 180 degrees with pain at 180, external and internal rotation to 80 degrees. Range of motion was limited by pain, it was not limited by fatigue, weakness, lack of endurance or incoordination. X-ray examination revealed left shoulder within normal limits. You reported current symptoms of pain but no dislocations since your initial bouts. You were diagnosed with recurrent left shoulder subluxation. An evaluation of 10 percent is assigned if there is a malunion or nonunion of the clavicle or scapula. A higher evaluation of 20 percent is not warranted unless the record shows dislocation of the clavicle or scapula, or nonunion of the clavicle or scapula with loose movement.

We have assigned April 1, 2003 as your effective date, the first day following your release from service.

3. Service connection for lumbar strain (claimed as lower back condition).

We are granting service connection for lumbar strain (claimed as lower back condition) because your service medical records show you injured your lower back playing ball August 29, 1989. Your treatment report dated August 31, 1989 assessed you with mechanical low back pain. December 27, 1999 you had complaints of mid back pain and you were assessed with mid thoracic right muscle strain.

A treatment report from 1st Medical Group dated October 24, 2003 reflects an assessment for low back pain.

We have assigned a 10 percent disability evaluation based on your VA examination dated April 8, 2004 revealing your range of motion as extension to 30 degrees with pain at 30, flexion to 90 degrees, right and left lateral flexion to 30 degrees, and right and left rotation to 30 degrees. Your combined range of motion was 240 degrees. Your range of motion was limited by pain and pain is the major functional impact. Your spine was not additionally limited by fatigue, weakness, lack of endurance, incoordination, or ankylosis. Radiologic examination of your lumbar spine was within normal limits. You reported pain elicited by physical activity, relieved by rest. You were diagnosed with lumbar strain. A 10 percent evaluation is assigned for forward flexion of the thoracolumbar spine greater than 60 degrees but not greater than 85 degrees; or, combined range of motion of the thoracolumbar spine greater than 120 degrees but not greater than 235 degrees; or, muscle spasm, guarding, or localized tenderness not resulting in abnormal gait or abnormal spinal contour; or, vertebral body fracture with loss of 50 percent or more of the height. A higher evaluation of 20 percent is not assigned unless there is forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees; or, the combined range of motion of the thoracolumbar spine not greater than 120 degrees; or, muscle spasm or guarding severe

enough to result in an abnormal gait or abnormal spinal contour such as scoliosis, reversed lordosis, or abnormal kyphosis.

We have assigned April 1, 2003 as your effective date, the first day following your release from military service.

4. Service connection for erectile dysfunction.

We are granting service connection for erectile dysfunction because your service medical records show your retirement physical of February 2, 2002 shows erectile dysfunction, taking Viagra. A treatment report dated June 25, 2001 gives an assessment of history of erectile dysfunction, it also shows you were prescribed Viagra.

We have assigned a 0 percent disability evaluation based on your VA examination dated April 8, 2004 where you reported unable to achieve and maintain and erection; and you reported vaginal penetration with ejaculation is not possible. Examination of your genitalia was normal. You reported currently using Viagra. You were diagnosed with erectile dysfunction. A noncompensable evaluation is assigned whenever evidence fails to show penile deformity together with loss of erectile power which would warrant 20 percent.

We have assigned April 1, 2003 as your effective date, the first day following your discharge from service.

5. Entitlement to special monthly compensation based on Loss Of Use.

Entitlement to special monthly compensation is warranted in this case because criteria regarding Loss Of Use of a creative organ were met from April 1, 2003.

6. Service connection for occasional hemorrhoid (claimed as h/o hemorrhoids with rectal fissure, also claimed as colonoscopy).

We are granting service connection for occasional hemorrhoid (claimed as h/o hemorrhoids with rectal fissure, also claimed as colonoscopy) because your service medical records show you had complaints of a bump in your rectal area and assessed with questionable cyst. November 23, 1999 you were assessed with external hemorrhoids. November 29, 1001 you were assessed with rectal fissures after complaining of a "funny feeling in your testicle area." January 25, 2002 you had complaints of rectal area itch with slight discomfort. Your assessment was possible continued hemorrhoid. You underwent colonoscopy March 15, 2002 with an impression of non-bleeding internal hemorrhoids found.

We have assigned a 0 percent disability evaluation based on your service medical records and your VA examination dated April 8, 2004 in which you reported recurrences twice per year. Your rectal examination revealed there is no evidence of hemorrhoids, fissures, or any other abnormalities. You reported hemorrhoidal flare-up occurs 1-2 times

per year and your current treatment is Anusol and Prep H. You were diagnosed with occasional hemorrhoid.

A noncompensable evaluation is assigned for mild or moderate hemorrhoids. A higher evaluation of 10 percent is not warranted unless there are large or thrombotic hemorrhoids which are irreducible with evidence of frequent recurrences.

We have assigned April 1, 2003 as your effective date, the first day following your release from service.

7. Service connection for anemia.

We grant service connection for a disability that you currently have if this disability began in military service or was caused by some event or experience in service. Your service medical records show a diagnosis for mild anemia with no evident medical etiology August 23, 1985. A letter concerning potentially disqualifying information dated August 30, 1996 from the 86th AMD shows there have been no recurrence of symptoms relating to anemia. Your VA examination dated April 8, 2004 reveals your CBC result was within normal limits, with a hemoglobin level of 13.7g/dL and a hematocrit level of 41.3 percent. Your CHEM 12 was within normal limits and your urinalysis was absent of protein, sugar and RBC's. You didn't report any current symptoms associated with anemia. Your examiner didn't render a diagnosis because the condition is resolved. Therefore, service connection for anemia is

denied because the medical evidence of record fails to show that this disability has been clinically diagnosed.

APPENDIX E

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

CLINTON SIPLES,
Claimant-Appellant

v.

DOUGLAS A. COLLINS, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2022-1528

Appeal from the United States Court of Appeals for Veterans Claims in No. 19-7957, Judge Joseph L. Toth.

ON PETITION FOR REHEARING EN BANC

Before MOORE, *Chief Judge*, LOURIE, BRYSON[1], DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.[2]

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

PER CURIAM.

O R D E R

Clinton Siples filed a petition for rehearing en banc. A response to the petition was invited by the court and filed by Douglas A. Collins.

National Organization of Veterans' Advocates and, Military-Veterans Advocacy separately requested leave to file briefs as amicus curiae, which the court granted.

The petition was first referred as a petition to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied

FOR THE COURT

[SEAL AND H/W SIGNATURE]

August 21, 2025
Date

Jarrett B. Perlow
Clerk of Court

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[2] Circuit Judge Newman did not participate.

APPENDIX F

United States Code
Title 38. Veterans' Benefits

38 U.S.C.A. § 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 G

United States Code
Title 38. Veterans' Benefits

38 U.S.C.A. § 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 H

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).

(b) Difference of opinion. Whenever an adjudicative agency is of the opinion that a revision or an amendment of a previous decision is warranted on the basis of the evidentiary record and law that existed at the time of the decision, a difference of opinion being involved rather than a clear and

unmistakable error, the proposed revision will be recommended to Central Office. However, a decision may be revised under § 3.2600 or § 3.2601 without being recommended to Central Office.

(c) Character of discharge. A determination as to character of discharge or line of duty which would result in discontinued entitlement is subject to the provisions of paragraph (d) of this section.

(d) Severance of service connection. Subject to the limitations contained in §§ 3.114 and 3.957, service connection will be severed only where evidence establishes that it is clearly and unmistakably erroneous (the burden of proof being upon the Government). (Where service connection is severed because of a change in or interpretation of a law or Department of Veterans Affairs issue, the provisions of § 3.114 are for application.) A change in diagnosis may be accepted as a basis for severance action if the examining physician or physicians or other proper medical authority certifies that, in the light of all accumulated evidence, the diagnosis on which service connection was predicated is clearly erroneous. This certification must be accompanied by a summary of the facts, findings, and reasons supporting the conclusion. When severance of service connection is considered warranted, a rating proposing severance will be prepared setting forth all material facts and reasons. The claimant will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor and will be given 60 days for the presentation of additional evidence to show that

service connection should be maintained. Unless otherwise provided in paragraph (i) of this section, if additional evidence is not received within that period, final rating action will be taken and the award will be reduced or discontinued, if in order, effective the last day of the month in which a 60–day period from the date of notice to the beneficiary of the final rating action expires.

(Authority: 38 U.S.C. 5112(b)(6))

(e) Reduction in evaluation—compensation. Where the reduction in evaluation of a service-connected disability or employability status is considered warranted and the lower evaluation would result in a reduction or discontinuance of compensation payments currently being made, a rating proposing the reduction or discontinuance will be prepared setting forth all material facts and reasons. The beneficiary will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor, and will be given 60 days for the presentation of additional evidence to show that compensation payments should be continued at their present level. Unless otherwise provided in paragraph (i) of this section, if additional evidence is not received within that period, final rating action will be taken and the award will be reduced or discontinued effective the last day of the month in which a 60–day period from the date of notice to the beneficiary of the final rating action expires.

(Authority: 38 U.S.C. 5112(b)(6))

(f) Reduction in evaluation—pension. Where a change in disability or employability warrants a reduction or discontinuance of pension payments currently being made, a rating proposing the reduction or discontinuance will be prepared setting forth all material facts and reasons. The beneficiary will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor, and will be given 60 days for the presentation of additional evidence to show that pension benefits should be continued at their present level. Unless otherwise provided in paragraph (i) of this section, if additional evidence is not received within that period, final rating action will be taken and the award will be reduced or discontinued effective the last day of the month in which the final rating action is approved.

(Authority: 38 U.S.C. 5112(b)(5))

(g) Reduction in evaluation—monetary allowance under 38 U.S.C. chapter 18 for certain individuals who are children of Vietnam veterans or children of veterans with covered service in Korea. Where a reduction or discontinuance of a monetary allowance currently being paid under 38 U.S.C. chapter 18 is considered warranted, VA will notify the beneficiary at his or her latest address of record of the proposed reduction, furnish detailed reasons therefor, and allow the beneficiary 60 days to present additional evidence to show that the monetary allowance should be continued at the present level. Unless otherwise provided in paragraph (i) of this section, if VA does not receive additional evidence within that

period, it will take final rating action and reduce the award effective the last day of the month following 60 days from the date of notice to the beneficiary of the proposed reduction.

(Authority: 38 U.S.C. 1805, 1815, 1821, 1832, 5112(b)(6))

(h) Other reductions/discontinuances. Except as otherwise specified at § 3.103(b)(3) of this part, where a reduction or discontinuance of benefits is warranted by reason of information received concerning income, net worth, dependency, or marital or other status, a proposal for the reduction or discontinuance will be prepared setting forth all material facts and reasons. The beneficiary will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor, and will be given 60 days for the presentation of additional evidence to show that the benefits should be continued at their present level. Unless otherwise provided in paragraph (i) of this section, if additional evidence is not received within that period, final adverse action will be taken and the award will be reduced or discontinued effective as specified under the provisions of §§ 3.500 through 3.503 of this part.

(Authority: 38 U.S.C. 5112)

(i) Predetermination hearings.

(1) In the advance written notice concerning proposed actions under paragraphs (d) through (h) of this section, the beneficiary will be

informed that he or she will have an opportunity for a predetermination hearing, provided that a request for such a hearing is received by VA within 30 days from the date of the notice. If a timely request is received, VA will notify the beneficiary in writing of the time and place of the hearing at least 10 days in advance of the scheduled hearing date. The 10 day advance notice may be waived by agreement between VA and the beneficiary or representative. The hearing will be conducted by VA personnel who did not participate in the proposed adverse action and who will bear the decision-making responsibility. If a predetermination hearing is timely requested, benefit payments shall be continued at the previously established level pending a final determination concerning the proposed action.

(2) Following the predetermination procedures specified in this paragraph and paragraph (d), (e), (f), (g) or (h) of this section, whichever is applicable, final action will be taken. If a predetermination hearing was not requested or if the beneficiary failed without good cause to report for a scheduled predetermination hearing, the final action will be based solely upon the evidence of record. Examples of good cause include, but are not limited to, the illness or hospitalization of the claimant or beneficiary, death of an immediate family member, etc. If a predetermination hearing was conducted, the final action will be based on evidence and

testimony adduced at the hearing as well as the other evidence of record including any additional evidence obtained following the hearing pursuant to necessary development. Whether or not a predetermination hearing was conducted, a written notice of the final action shall be issued to the beneficiary and his or her representative, setting forth the reasons therefor and the evidence upon which it is based. Where a reduction or discontinuance of benefits is found warranted following consideration of any additional evidence submitted, the effective date of such reduction or discontinuance shall be as follows:

(i) Where reduction or discontinuance was proposed under the provisions of paragraph (d) or (e) of this section, the effective date of final action shall be the last day of the month in which a 60–day period from the date of notice to the beneficiary of the final action expires.

(ii) Where reduction or discontinuance was proposed under the provisions of paragraphs (f) and (g) of this section, the effective date of final action shall be the last day of the month in which such action is approved.

(iii) Where reduction or discontinuance was proposed under the provisions of paragraph (h) of this section, the effective date of final action shall be as specified under the provisions of §§ 3.500 through 3.503 of this part.

(j) Supplemental claims and higher-level review. VA may revise an earlier decision denying benefits, if warranted, upon resolution of a supplemental claim under § 3.160(c) or higher-level review under § 3.2601.

APPENDIX I

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

38 C.F.R. § 20.1403

§ 20.1403 Rule 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 J

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

38 C.F.R. § 4.59

§ 4.59 Painful motion.

With any form of arthritis, painful motion is an important factor of disability, the facial expression, wincing, etc., on pressure or manipulation, should be carefully noted and definitely related to affected joints. Muscle spasm will greatly assist the identification. Sciatic neuritis is not uncommonly caused by arthritis of the spine. The intent of the schedule is to recognize painful motion with joint or periarticular pathology as productive of disability. It is the intention to recognize actually painful, unstable, or malaligned joints, due to healed injury, as entitled to at least the minimum compensable rating for the joint. Crepitation either in the soft tissues such as the tendons or ligaments, or crepitation within the joint structures should be noted carefully as points of contact which are diseased. Flexion elicits such manifestations. The joints involved should be tested for pain on both active and passive motion, in weight-bearing and nonweight-bearing and, if possible, with the range of the opposite undamaged joint.