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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 10-2391

PETER J. KONDOS, APPELLANT,

V.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before SCHOELEN, *Judge.*

MEMORANDUM DECISION

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

SCHOELEN, *Judge*: The appellant, Peter J. Kondos, through counsel, appeals a March 22, 2010, Board of Veterans' Appeals (Board) decision in which the Board determined that a June 8, 1962, rating decision did not contain clear and unmistakable error (CUE). Record (R.) at 20. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Both parties filed briefs, and the appellant filed a reply brief. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will reverse the Board's decision to the extent that it determined that the June 1962 rating decision was not the product of CUE. The matter will be remanded for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Navy from March 1943 to February 1946. R. at 876. Prior to entering service, the appellant had worked as a lawyer. *Id.* At discharge, he was granted entitlement to service connection for psychoneurosis, traumatic, symptomatic, and awarded a 50% disability rating. R. at 735. A September 1946 VA neuropsychiatric examination revealed that the appellant "appears to be entirely unable" to practice law. R. at 743-44. His disability rating

was increased to 70% in March 1947 upon evidence showing "more disablement socially and industrially." R. at 697. In September 1948, his condition was characterized as anxiety reaction with conversion symptoms, severe, and his disability rating was reduced to 50%. R. at 673.

In February 1949, the appellant reported that he was able to do "a little legal practice" but that he was unable "to present his cases at trials as he used to do previous to service." R. at 665. A February 1950 rating sheet shows that the appellant, because of his disability, was "unable to earn from his meager source of employment an annual sum commensurate with that which ordinarily should be earned by a person with like training." R. at 621. Subsequent examinations revealed that the appellant was performing limited work as an attorney, although the extent of this work is not entirely clear. R. at 593-99, 615, 626-27, 665. A January 1951 rating sheet noted that "[b]ecause of his condition the veteran has lost about 60% of time from his work." R. at 604.

In January 1961, a VA examiner stated that "[t]here has been no improvement in this veteran's condition, and I consider him basically an inadequate person." R. at 580. The examiner noted that the appellant "has taken the attitude that he is totally incapacitated for any legal work." *Id.* The examiner requested a field examination be conducted "to find out how this veteran occupies his time, and how the family supports itself." R. at 580-82. In January 1962, a field examiner met with the appellant and his wife. R. at 555-57. The appellant's wife stated that the appellant worked as an attorney with his brother; however, she indicated that the money the appellant received from his brother was in reality a charity and not money he was actually earning for his work. R. at 555. In May 1962, the field examiner met with the appellant's brother, who stated that he did not know how much the appellant was earning but that he had given him approximately $2,000 as a gift. R. at 553. The brother stated that he believed the appellant's condition was worsening. *Id.* The field examiner also interviewed the appellant in May 1962, and at that time the appellant indicated that he could only practice law part time and that the work he was doing was "of minor importance." R. at 551. The field examiner obtained information showing that, in 1960, the appellant had earned a net profit of $13,393.56, for his work as a lawyer. R. at 545.

In a June 1962 rating decision, the regional office (RO) reduced the appellant's disability rating to 30%. R. at 539-42. The RO discussed both the January 1961 VA medical examination as well as the reports of the field examiner. *Id.* The disability rating was reduced because the appellant

"has returned to the practice of law and has a substantial practice." R. at 540. The RO stated that "[a]lthough [the appellant] has many neurotic tendencies and complaints it cannot be held that he has not made a substantially fair economic adjustment." *Id.* This decision became final.

In March 2005, the appellant asserted that the June 1962 rating decision contained CUE because rating protections afforded under 38 C.F.R. § 3.344 (1962) were not applied. R. at 374-80. In a January 2006 decision, the RO determined that the June 1962 rating decision did not contain CUE. R. at 243-44.

The Board issued the decision here on appeal in March 2010 and concluded that the June 1962 rating decision did not contain CUE, as the appellant asserted, for failing to apply § 3.344. R. at 3-20. The Board stated that

> [a] review of the entire record demonstrates that the January 1961 examination was at least as full and complete as those on which previous VA payments were authorized or continued. In this case all the evidence of record clearly warranted the conclusion that sustained improvement had been demonstrated. A material improvement in the [v]eteran's mental condition was clearly reflected and the evidence made it reasonably certain it would be maintained under the ordinary conditions of life.

R. at 16.

II. ANALYSIS

A claim of CUE is an exception to the rule of finality and is ground to reverse or revise a decision by the Secretary, where the evidence establishes CUE in a final RO or Board decision. *See* 38 U.S.C. §§ 5109A, 7111; 38 C.F.R. §§ 3.105(a), 20.1400-.1411 (2010); *see also DiCarlo v. Nicholson*, 20 Vet.App. 52 (2006). Where evidence establishes such error, the prior decision will be reversed or amended. *See id.*; *Cook v. Principi*, 318 F.3d 1334 (Fed. Cir. 2002) (en banc), *cert. denied*, 539 U.S. 926 (2003). For CUE to exist, either (1) the correct facts in the record were not before the adjudicator or (2) the statutory or regulatory provisions extant at the time were incorrectly applied. *See Damrel v. Brown*, 6 Vet.App. 242, 245 (1994). In addition, "the error must be 'undebatable' and of the sort 'which, had it not been made, would have manifestly changed the outcome at the time it was made.'" *Id.* (quoting *Russell v. Principi*, 3 Vet.App. 310, 313-14 (1992)); *see also Bustos v. West*, 179 F.3d 1378, 1380 (Fed. Cir. 1999) (expressly adopting "manifestly

changed the outcome" language of *Russell*). "In order for there to be a valid claim of [CUE], ... [t]he claimant, in short, must assert more than a disagreement as to how the facts were weighed or evaluated." *Russell*, 3 Vet.App. at 313. That is because, "even where the premise of error is accepted, if it is not absolutely clear that a different result would have ensued, the error complained of cannot be, ipso facto, clear and unmistakable." *Fugo v. Brown*, 6 Vet.App. 40, 43-44 (1993). The Court also reviews whether the Board's decision is supported by an adequate statement of reasons or bases. *See* 38 U.S.C. § 7104(d)(1); *Russell*, *supra*.

The appellant argues that the June 1962 rating decision contains CUE because the RO failed to comply with the provisions of § 3.344. Appellant's Brief (Br.) at 9-14. In the alternative, he contends that the Board's decision contains an inadequate statement of reasons or bases. *Id.* at 14-15. The Secretary disagrees that the June 1962 RO decision failed to apply § 3.344, and he contends that the RO properly evaluated the appellant's economic situation in reducing his disability rating. Secretary's Br. at 8-15. He asserts that the 1962 field investigation was "part and parcel of the 1961 examination." *Id.* at 11-12. He explains that "prior ratings were based largely upon [the appellant's] reported inability to earn a living practicing law," and that "the evidence showed that in 1960, [he] was earning substantial income from his law practice and, upon interview in 1962, was still operating a successful law practice." *Id.* at 13-14. In his reply brief, the appellant argues that there is no examination of record showing improvement in the appellant's condition. Reply Br. at 2. He contends that "a field examination, even if indicating improvement, cannot be used to reduce a protected rating, if there is no medical examination indicating improvement." *Id.* at 3. He states that "VA had the opportunity to obtain another examination report after completion of the field investigation, had it so decided in 1962; the failure to have obtained any medical examination reports, however, is fatal in this case." *Id.* at 4. He also argues that he is not asking the Court to reweigh evidence that was before the RO in June 1962 because, he asserts, there is *no* evidence demonstrating sustained improvement and that any sustained improvement was reasonably likely to continue under the ordinary conditions of life. *Id.* at 5-7.

There is no dispute between the parties that the June 1962 RO was required to apply § 3.344(a) before implementing a disability rating reduction. That section appeared as follows at the time of the rating decision:

> *Examination reports indicating improvement.* Rating agencies will handle cases affected by change of medical findings or diagnosis, so as to produce the greatest degree of stability of disability evaluations consistent with the laws and [VA] regulations governing disability compensation and pension. It is essential that the entire record of examinations and the medical-industrial history be reviewed to ascertain whether the recent examination is full and complete, including all special examinations indicated as a result of general examination and the entire case history. . . . Examinations less full and complete than those on which payments were authorized or continued will not be used as a basis of reduction. Ratings on account of diseases subject to temporary or episodic improvement, e.g., manic depressive or other psychotic reaction, epilepsy, psychoneurotic reaction, arteriosclerotic heart disease, bronchial asthma, gastric or duodenal ulcer, many skin diseases, etc., will not be reduced on any one examination, except in those instances where all the evidence of record clearly warrants the conclusion that sustained improvement has been demonstrated. . . . Moreover, though material improvement in the physical or mental condition is clearly reflected the rating agency will [consider] whether the evidence makes it reasonably certain that the improvement will be maintained under the ordinary conditions of life.

38 C.F.R. § 3.344(a) (1961).[1]

The Court holds that the Board's finding that the June 1962 RO correctly applied § 3.344(a) before reducing the appellant's disability rating cannot be sustained. The January 1961 medical evaluation plainly states that "[t]here has been no improvement in this veteran's condition." R. at 580. As such, it cannot be used as the basis for a rating reduction. There is no other evidence of record at the time of the June 1962 RO decision, including the report of a field investigator, that reasonably complies with § 3.344. It is therefore undebatable that the June 1962 RO did not afford the appellant the benefit of § 3.344 before reducing his disability rating. *See Damrel*, *supra*. Accordingly, the Court will reverse the Board decision on appeal to the extent that it found that the June 1962 RO did not incorrectly apply applicable law. *See Joyce v. Nicholson*, 19 Vet.App. 36, 43 (2005) (finding that, where the decision being collaterally attacked did not correctly apply applicable law, "the Board's failure to find, in the decision on appeal, such an error would be at least not in accordance with law if not also arbitrary, capricious, or an abuse of discretion").

The inquiry does not, however, end by holding that the Board decision on appeal erred in not concluding that the June 1962 rating decision had erred undebatably. In order for there to have been

[1]The relevant language of 38 C.F.R. § 3.344 has not been altered since it was promulgated in 1961.

CUE in the June 1962 rating decision, the outcome would have to have been manifestly different; that is, it must be clear that the appellant's disability rating would not have been reduced from 50% to 30% had the RO correctly applied § 3.344. *See Bustos* and *Russell*, both *supra*. The Board somewhat indirectly discussed this issue in the decision on appeal, stating that the June 1962 RO did not commit an undebatable error "which, had it not been made, would have manifestly changed the outcome of the decision." R. at 4. However, it is readily apparent to the Court that there was no examination of record in June 1962 that could have been used for the basis of a rating reduction under § 3.344, and as such, the appellant's disability rating would not have been reduced in June 1962 had that provision been correctly applied. As such, any finding by the Board that the error did not manifestly change the outcome of this case cannot stand. *See Sondel v. West*, 13 Vet.App. 213, 221 (1999) ("[W]hen it is clear, on the face of the decision being assailed for CUE, that the error alleged did in fact occur and would manifestly have changed the outcome of the case, the Court will reverse, rather than only vacate and remand, as to the [Board] decision.").

The Board's finding that the June 1962 RO decision did not contain CUE is therefore reversed, and the June 1962 RO decision is void ab initio. *See Hayes v. Brown*, 9 Vet.App. 67, 73 (1996) ("Where VA reduces the appellant's rating without observing applicable laws and regulations, the rating is void ab initio and the Court will set aside the decision as '"not in accordance with the law."'").

III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's March 22, 2010, decision is REVERSED, and the matter is REMANDED for further proceedings consistent with this decision.

DATED: December 28, 2010

Copies to:

Daniel G. Krasnegor, Esq.

VA General Counsel (027)