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

NO. 11-3739

CHRISTOPHER A. MEKUS, 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, Christopher A. Mekus, through counsel, appeals an August 10, 2011, Board of Veterans' Appeals (Board) decision, which concluded that a June 2002 regional office (RO) decision appropriately discontinued a 100% disability rating under 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5012 (1988-1992), for service-connected pigmented villonodular synovitis (PVS) of the left hip, status post partial resection, with left extensor hallucis longus weakness. Record of Proceedings (R.) at 3-30. The Board remanded the appellant's claims for a disability rating in excess of 60% for PVS of the left hip, from June 4, 2002, and special monthly compensation based on the need for the regular aid and attendance of another person or housebound status. Therefore, those claims are not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 483 (1997). 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). 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.

## I. BACKGROUND

The appellant served on active duty in the U.S. Air Force from October 1985 to July 1988. R. at 2671. In January 1989, the RO granted the appellant's claim for service connection for his left hip PVS[1] and assigned a 100% prestablization disability rating under 38 C.F.R. § 4.71a, DC 5020[2] (1988), for synovitis.[3] R. at 2651-52. The RO noted that the appellant "underwent a biopsy and excision of the left hip lesion in October 1987" and that a "bone scan done [two] weeks later revealed abnormal increased activity in the left hip consistent with post surgical changes and/or residual tumor." R. at 2651. The evidence also showed that in February 1988, the appellant was unable to walk with crutches, could not bend at the waist greater than 90 degrees, could not lift, push, or pull more than 20 pounds, and could not stand more than 15 minutes without experiencing hip pain. *Id*. In May 1988, the appellant was still ambulating on crutches and reported that his hip and leg would give way as a result of weakness and severe pain. *Id.* A physician from the Walter Reed Army Medical Center noted that "repeat imaging studies suggested *continued* [PVS] in the joint with no motor involvement." *Id*. (emphasis added).

Following an April 1989 routine examination, the RO, in a June 1989 rating decision, noted that the appellant required Canadian crutches for ambulation, lacked internal rotation, and had a 27-centimeter scar on the lateral aspect of his left hip. R. at 2622-23. The RO rated the appellant's PVS

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[1] "PVS" is defined as "synovial proliferation forming brown nodular masses, probably caused by hemangiomas of synovial membrane that become traumatized, resulting in synovial hyperplasia and inflammation; it is characterized by episodic monoarticular pain and swelling, with joint locking and hemorrhagic effusions." DORLAND'S ONLINE ILLUSTRATED MEDICAL DICTIONARY (31st ed. 2007), available at http://www.dorlands.com/def.jsp?id=100105060.

[2] In 1988, and today, diseases under DCs 5013 through 5024, except gout, are "rated on limitation of motion of affected parts, as arthritis, degenerative." 38 C.F.R. § 4.71a, DC 5013-5024 (1988-2013). DC 5020 governs the rating for "synovitis." 38 C.F.R. § 4.71a, DC 5020.

[3] "Synovitis" is defined as an "inflammation of a synovium; it is usually painful, particularly on motion, and is characterized by a fluctuating swelling due to effusion within a synovial sac." DORLAND'S ONLINE ILLUSTRATED MEDICAL DICTIONARY (31st ed. 2007), available at http://www.dorlands.com/def.jsp?id=100105060.

as 100% disabling under DC 5012[4] and not DC 5020. *Id.* The RO, however, did not provide any explanation why DC 5012 was used rather than DC 5020.

The appellant underwent another VA examination in May 1990 at which he reported extreme pain, impaired sleep as a result of pain, limited ability to sit for more than 25 minutes, and extreme difficulty driving. R. at 2596. The VA examiner recorded that the appellant used Canadian crutches to walk, lacked internal rotation of the left hip, had a 25-centimeter scar along the lateral aspect of the left hip, and had no neurological deficit. R. at 2598. The diagnostic assessment was "[status post] arthrotomy l[eft] hip for [PVS]." R. at 2599. Based on the May 1990 examiner's findings, in August 1990, the RO issued a confirmed rating decision, which continued the appellant's 100% evaluation for PVS, noting that the appellant should appear for an examination in two years. R. at 2593.

VA requested a compensation and pension examination in March 1992. R. at 2556. The VA examiner indicated that the appellant's condition was "unchanged since last visit – altho[ugh] he does [illegible] a gradual deterioration." R. at 2558. The examiner noted that the appellant used Canadian crutches to ambulate, took Valium and Codeine for sleep, and gave up driving because his pain caused a lack of concentration. *Id*. In June 1992, the RO issued another confirmed rating decision, which stated that "[t]he 100% evaluation of the veteran's . . . left hip condition is confirmed as the evidence of record shows it causes total industrial impairment. The evaluation is considered permanent." R. at 2555. No future medical examination was scheduled. *Id.*

Ten years later, in June 2002, the RO found that the rating decisions from June 1989 through June 1992, which continued a 100% disability evaluation under DC 5012 for the appellant's left hip condition, were clearly and unmistakably erroneous. R. at 1109-17. The RO explained that a 100% disability rating under DC 5012 is "assigned during active malignancy or antineoplastic therapy," and that "[o]ne year following completion of treatment, residual disability is determined by findings from a VA examination conducted at that time." R. at 1112. Accordingly, the RO found that the

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[4] In 1988, and today, a 100% disability rating is authorized under DC 5012 for "[b]ones, new growths of, malignant." 38 C.F.R. § 4.71a, DC 5012 (1988-2013). The note accompanying DC 5012 states that "[t]he 100 percent rating will be continued for 1 year following the cessation of surgical, X-ray, antineoplastic chemotherapy or other therapeutic procedure. At this point, if there has been no local recurrence or metastases, the rating will be made on residuals." *Id.*

August 1990 and June 1992 rating decisions should not have continued a 100% disability rating "without a scheduled routine future exam[ination]" and that a "permanent evaluation under [DC] 5012 should not have been established as there was no malignancy." R. at 1112. Thus, the RO assigned a 60% disability rating under DC 5255, which addresses impairment of the femur (R. at 1111), and assigned a total disability rating based on individual unemployability (R. at 1112-13), both effective June 4, 2002.

The appellant appealed the RO's decision to the Board. R. at 1096-97. In June 2004, the Board remanded the matter for additional development (R. at 786-91), and in January 2008, found that the earlier rating decisions that granted and continued a 100% disability rating under DC 5012 were the product of clear error (R. at 281-304).

In April 2010, the Court vacated the Board's decision and remanded the matter for further adjudication because the Board failed to provide a statement of reasons or bases to facilitate the Court's review. R. at 158-67. The Court found that the Board failed to adequately explain why the RO's continuation of the 100% disability rating, despite the temporal requirement in DC 5012, amounted to "clear error" when the Board failed to discuss any evidence reflecting the appellant's physical condition or whether his condition "had improved to the degree that he had 'no local recurrence or metastases' so that his disability was to be rated on residuals." R. at 162. The Court also found that the Board "compounded the problem when it wholly ignored its own finding that the [appellant's] condition was rated as analogous to DC 5012," and, thus, its terse statement that the appellant did not have a malignant condition was an insufficient basis for finding "clear error" when a rating under an analogous DC contemplates that all objective criteria will not be met. *Id*.

On August 10, 2011, the Board issued the decision here on appeal that determined the June 2002 RO decision, which discontinued the appellant's 100% disability rating on the basis of clear and unmistakable error (CUE), was proper. R. at 3-30. In reaching this determination, the Board found that the RO erred in June 1989 when it rated the appellant's condition by analogy under DC 5012 because rating by analogy is only appropriate for unlisted conditions and PVS is a listed condition under DC 5020 – synovitis. R. at. 20. Even assuming that DC 5020 was not applicable and rating by analogy was appropriate, the Board found that evaluating the appellant's condition under DC 5012, "which specifically refers to a ***malignant*** process, was clearly erroneous." *Id.* Finally, even assuming that it was not CUE to rate the appellant's disability under DC 5012, the

Board found that it was CUE for the RO to have continued the 100% disability rating beyond the one-year temporal requirement in the DC where there was "no evidence . . . that the [appellant's] PVS was manifested by any kind of process that could reasonably be considered functionally or anatomically analogous to 'local recurrence or metastases' of a malignant tumor." *Id.*

## II. ANALYSIS

### A. The Parties' Arguments

The appellant argues for reversal, and remand in the alternative, of the Board's determination that the RO did not err when it discontinued the appellant's 100% disability rating under DC 5012. Appellant's Brief (Br.) at 10-25. First, the appellant argues that the Board erred when it found that the RO should not have rated the appellant's condition by analogy. *Id*. at 11-12. The appellant argues that rating by analogy was appropriate because PVS and synovitis are not the same condition. *Id.* The appellant also argues that the Board erred when it found, assuming rating by analogy was appropriate, that DC 5012 was not an appropriate DC. *Id.* at 13-15. Finally, the appellant asserts that the Board erred when it found CUE in the RO's continuation of the 100% disability rating "because [the Board] never made a finding that [the appellant's] condition had met the temporal requirement of not having any local recurrence or metastas[e]s." *Id*. at 16. He argues that there is *no* evidence showing that his disease had not recurred, but instead, ample evidence showing a slow progression of his condition over the past 20 years. *Id*. The appellant does not dispute that he had residuals, but he asserts that this evidence shows that his condition "either never went away, or recurred quickly after surgical intervention." *Id*. at 19.

The Secretary argues that the Board correctly determined that the June 1989 RO decision was the product of CUE because it should not have rated the appellant's PVS by analogy. Secretary's Br. at 8-9. Assuming, as the Board did, that rating by analogy under DC 5012 was appropriate, the Secretary also argues that it was error to continue the appellant's rating more than one year after the October 1987 surgery because there was no evidence that the appellant had undergone any additional surgical intervention, chemotherapy, or other therapeutic procedure, and no evidence of local recurrence or metastases. *Id*. at 10-11. The Secretary asserts that the appellant conflates the issue of whether his condition was manifested by a process that could be considered

recurrence or metastases of malignant bone growth, with whether he continued to experience symptoms of his disability. *Id*.

The Secretary maintains that the Board complied with the April 2010 Court remand by analyzing the evidence reflecting the appellant's physical condition at the time of the previous RO decisions, but determined that the "'VA examination reports dated from September 1988 to March 1992 identified the residuals of surgery to be degenerative joint disease, requiring the use of Canadian crutches, a scar on the lateral aspect of the left hip, and a lack of internal rotation due to marked pain.'" *Id.* at 14-15 (quoting R. at 22).

In his reply brief, the appellant reiterates his assertions that PVS and synovitis are not the same conditions, and asserts that the Board's decision was arbitrary and capricious because the Board contradicted itself when it found that the appellant's condition is "listed" under DC 5020, but proceeded to rate him under DC 5255 after it affirmed discontinuance of the rating under DC 5012. Reply Br. at 1-3.

B. CUE

"Previous determinations which are final and binding, including decisions of . . . degree of disability . . . 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) (2013). A CUE motion may be instituted by the Secretary or upon request of the claimant. 38 U.S.C. § 5109A(c). When the Secretary initiates revision of a prior final decision, the burden is on the Government to establish that the prior decision was the product of CUE. *Cf. Stallworth v. Nicholson*, 20 Vet.App. 482, 487 (2006) (in a severance action, the burden of proof is on the Government to show that the award of service connection is clearly and unmistakably erroneous); *Graves v. Brown*, 6 Vet.App. 166, 170 (1994) (equating the standards for severance of service connection and for demonstrating CUE in a prior final VA decision). "[CUE] is a very specific and rare kind of error. It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error." 38 C.F.R. § 20.1403(a) (2013). CUE can be established by meeting the following conditions. First, either (1) the correct facts contained in the record were not before the adjudicator, or (2) the statutory or regulatory provisions in effect at the time were misapplied. *See Damrel v. Brown*, 6 Vet.App. 242, 245 (1994). Second, the alleged error must be "undebatable," not merely

"a disagreement as to how the facts were weighed or evaluated." *Russell v. Principi*, 3 Vet.App. 310, 313-14 (1992) (en banc). Finally, the error must have "manifestly changed the outcome" of the decision being attacked on the basis of CUE at the time that decision was rendered. *Id.* at 313-14, 320. The Court reviews a Board determination whether a prior rating decision contains CUE under the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard of review. *Id.* at 315.

In the instant case, the Board made three alternative findings in support of its determination that the appellant's 100% disability rating, continued and made permanent in rating decisions between June 1989 and June 1992, was the product of CUE. *See* R. at 20-22. The Court will address each in turn.

*1. Whether PVS is a "Listed" Condition*

In 1989, 38 C.F.R. § 4.20 provided: "When an unlisted condition is encountered it will be permissible to rate under a closely related disease or injury in which not only the functions affected, but the anatomical localization and symptomatology are closely analogous." 38 C.F.R. § 4.20 (1989 and 2013). In this case, the RO initially rated the appellant's PVS under DC 5020 for synovitis, but without explanation changed the bases for the appellant's 100% disability rating in June 1989 to DC 5012. In June 2002, the RO determined that the rating by analogy to DC 5012 amounted to clear error because there was "no malignancy," and the Board affirmed that finding in the decision on appeal. The Board stated "[a]lthough 38 C.F.R. § 4.20 permits an evaluation of an unlisted condition under the [DC] for a closely related disease or injury, synovitis is a ***listed*** condition." R. at 20. The Board, however, did not cite any medical evidence in the record to support its determination that synovitis and PVS are the *same* medical condition, and the Secretary makes the same omission when he argues for affirmance of the Board's determination. *See* R. at 20; Secretary's Br. at 8-9. Without independent medical evidence to support its decision, the Board impermissibly made a medical determination that cannot provide the bases for finding the 1989 final RO decision, which is presumed correct, clearly and undebatably erroneous. *See Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991) (holding that the Board "must consider only independent medical evidence to support [its] findings rather than provide [its] own medical judgment in the guise of a Board opinion").

*2. Whether the Selection of DC 5012 was CUE*

Assuming that DC 5020 was not applicable and rating by analogy was appropriate, the Board nevertheless found that it was CUE to evaluate the appellant's condition under DC 5012 because DC 5012 "specifically refers to a ***malignant*** process." R. at 20. The Board explained that "despite descriptions to the effect that PVS is subject to recurrence and can have 'malignant symptoms,'" it is not disputed "that PVS is medically categorized as a ***benign*** disorder." *Id.* Consequently, the Board stated that the appellant "should have been rated based on his degenerative joint disease and attendant pain, weakness and decrease in range of motion associated with his service-connected PVS of the left hip." *Id.*

Contrary to the Board's conclusion, its reasons for finding DC 5012 an inappropriate analogous rating code do not establish clear error in the RO's decision. In fact, the reasons provided by the Board support the RO's selection of DC 5012, or at the very least show that reasonable minds can differ on whether DC 5012 is a closely analogous code for the appellant's PVS. When a disability is rated under an analogous rating code, the disability is *not* expected to show all the objective criteria of the analogous rating. *Stankevich v. Nicholson*, 19 Vet.App. 470, 472 (2006) (finding error in Board decision that required objective criteria of rating code be met where disability was rated by analogy). Rather, § 4.20 contemplates selection of a DC for a related disease in which the "functions affected . . . anatomical localization[,] and symptomatology are closely analogous." 38 C.F.R. § 4.20.

Here, DC 5012 authorized a 100% disability rating for "[b]ones, new growths of, malignant." 38 C.F.R. § 4.71a, DC 5012. The note accompanying the DC 5012 stated that "[t]he 100 percent rating will be continued for 1 year following the cessation of surgical, X-ray, antineoplastic chemotherapy or other therapeutic procedure. At this point, if there has been no local recurrence or metastases, the rating will be made on residuals." *Id.*

In 1989, the evidence showed that the appellant's PVS required him to undergo surgery for removal of a left hip lesion in October 1987. R. at 2651. The evidence further showed that "a bone scan done [two] weeks [after the surgery] revealed abnormal increased activity in the left hip consistent with post surgical changes and/or *residual tumor*." *Id.* (emphasis added). Also, as noted by the Board, the appellant's PVS is "subject to recurrence and can have 'malignant symptoms.'" R. at 20; *see also* R. at 13 (referring to the May 1988 medical report noting that "PVS was a benign but

aggressive synovial disorder of the joint that could result in destruction of the hip joint and bony invasion, and that it was prone to recurrence"). Notwithstanding these similarities to disabilities rated under DC 5012, the Board found the RO's selection of DC 5012 clearly erroneous *solely* because PVS is a *benign* disorder. However, there is no per se prohibition in § 4.20 against rating a *benign* condition by analogy to a DC for a *malignant* condition.

Given the evidence of record in 1989 and the Board's recognition that the appellant's PVS can recur and have *malignant* symptoms, the Court finds the Board's determination that there was CUE in the selection of DC 5012 "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance of law." 38 U.S.C. § 7261(a)(3)(A).

*3. Continuation of 100% Disability Rating Under DC 5012*

Even assuming that it was not CUE to rate the appellant's disability under DC 5012, the Board found that it was CUE for the RO to have continued the 100% disability rating beyond the one-year temporal requirement in DC 5012. R. at 21. When a veteran's disability is rated under a DC that contains a temporal component, the Court has stated that the Board must determine (1) the date of cessation of treatment for the veteran's condition to determine the start of the rating period during which the 100% disability must continue, and (2) whether the veteran suffered a local recurrence or metastases, which would warrant a continued 100% disability rating. *Tatum v. Shinseki*, 24 Vet.App. 139, 144-45 (2009) (remanding matter because the Board failed to discuss whether any of the veteran's postsurgery care "constituted treatment of malignant neoplasms within the meaning of [38 C.F.R. § 4.115b,] DC 7528, or whether he suffered a local recurrence or metastasis"); *see also Rossiello v. Principi*, 3 Vet.App. 430, 433 (1992) (refusing to reinstate the veteran's 100% disability rating under a DC with a two-year temporal requirement where the "rating ceased to exist two years 'following the cessation of surgical, x-ray, antineoplastic chemotherapy or other therapeutic procedure,'" and there was no evidence of local recurrence or metastases).

In finding the RO's continuation of the appellant's 100% disability rating clearly and unmistakably erroneous, the Board stated that the RO continued the rating for more than 12 months after the appellant's October 1987 surgery "even though there was no evidence that he had undergone any additional surgical intervention, chemotherapy, or other therapeutic procedure." R. at 21. Although the Board acknowledged that there was evidence (1) from the October 1987 surgery that less than all of the appellant's left hip lesion was removed, (2) from May 1988 that reconfirmed

the presence of bone involvement, and (3) from June 1991 that there had been a significant progression of arthritic disease in the left hip, the Board found that there was

> absolutely no evidence at the time of the RO decisions from June 1989 to June 1992 that the [v]eteran's PVS was manifested by any kind of process that could reasonably be considered functionally or anatomically analogous to "local recurrence or metastases" of a malignant tumor (for example, a new, postsurgical proliferation of cells or nodular masses associated with PVS).

R. at 21.

The Board does not point to any affirmative evidence of record between 1989 and 1992, which shows the appellant's PVS did *not* recur to compel the conclusion that the RO erroneously applied the DC by continuing the 100% disability rating rather than rate the condition on residuals. *See Horn v. Shinseki*, 25 Vet.App, 231, 235 (2012) (holding that the Board cannot rely on insufficient evidence of aggravation to satisfy VA's burden to prove, by clear and unmistakable evidence, that the veteran's condition was not aggravated by service). Instead, the Board acknowledged but disregarded, without explanation, medical evidence clearly showing the *continued* presence of the appellant's hip lesion and bone involvement, and significant progression of arthritic disease. This evidence was before the RO in 1990 and 1992 and presumably formed the basis for the RO's conclusion that the appellant's PVS (1) was manifested by a process that was functionally or anatomically analogous to local recurrence or metastases to warrant continuation of the 100% disability evaluation, and (2) caused "total industrial inadaptability," which was considered permanent and total (R. at 2555). The Board's finding that there was "absolutely no evidence . . . functionally or anatomically analogous to 'local recurrence or metastases' of a malignant tumor" but only evidence of residuals of the surgery amounts to nothing more than a disagreement with how the RO weighed the evidence in 1990 and 1992, which cannot constitute CUE. *See Damrel*, *supra.* The Court will reverse the Board's determination that the June 2002 rating decision properly discontinued the appellant's permanent 100% disability rating and remand the matter to the RO to reinstate the appellant's permanent and total 100% rating awarded in the June 1992 rating decision.

## III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's August 10, 2011, decision is REVERSED.

DATED: December 27, 2013

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