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

No. 22-3069

ROBERTO PEREZ-SOTO, APPELLANT,

v.

DENIS McDONOUGH,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENBERG, *Judge*.

**MEMORANDUM DECISION**

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

GREENBERG, *Judge*: Appellant Roberto Perez-Soto through counsel appeals a February 10, 2022, Board of Veterans' Appeals decision that denied an October 25, 2021, motion to revise a December 31, 2020, Board decision on the basis of clear and unmistakable error (CUE). Record (R.) at 5-13. The appellant argues that the Board erred by not sympathetically reading the appellant's *pro se* filing by his accredited agent alleging CUE in the December 2020 Board decision regarding the applicability of the provisions of 38 C.F.R. § 3.157(b)(1) (1971) and 38 C.F.R. § 3.103(1971). For the following reason, the Court will set aside the February 10, 2022, Board decision and the remand the matter for readjudication.

Justice Alito noted in *Henderson v. Shinseki* that our Court's scope of review in this appeal is "similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. § 706." 562 U.S. 428, 432 n.2 (2011); *see* 38 U.S.C. § 7261. The creation of a special court solely for veterans, and other specified relations, is consistent with congressional intent as old as the Republic. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792) ("[T]he objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress."). "The Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court." 38 U.S.C. § 7254. Accordingly, the

statutory command of Congress that a single judge may issue a binding decision, pursuant to procedures established by the Court, is "unambiguous, unequivocal, and unlimited." *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993); *see generally Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The appellant served on active duty in the U.S. Army from July 1968 to July 1970 as a cook. R. at 6019 (DD Form 214).

On September 10, 1970, the appellant applied for outpatient treatment by submitting a VA Form 10-2827 to VA, which confirmed his admission to a VA hospital for treatment of hepatitis. R. at 5843-45. On September 17, 1971, using VA Form 21-526, the appellant formally filed for service connection for his postservice disabilities of "abdominal pain" and "liver conditions." R. at 6007-10.

On March 23, 1972, VA denied the appellant service connection for abdominal and liver conditions. R. at 5986. The decision acknowledges that the appellant was hospitalized in September 1970 for viral hepatitis, but the decision cites a December 1971 VA examination that found no evidence of a stomach condition or "liver stigmata." *Id.* The decision lists viral hepatitis as a non-service-connected condition. *Id.*

In a May 2017 decision, the RO reopened the claim for and granted service connection for "viral hepatitis also claimed as liver conditions now claimed as chronic persistent viral hepatitis C," effective May 5, 2014. R. at 4185-88. The appellant appealed the rating and effective date and submitted arguments from his nonattorney representative alleging CUE in the March 1972 rating decision. R. at 3765-74.

The appellant filed a supplemental claim through his nonattorney representative in January 2020, again seeking revision of the March 1972 rating decision, on the basis of CUE. R. at 2286-87. The appellant's representative argued that because the 1972 adjudicator did not consider the records reflecting hepatitis diagnoses rendered shortly after service, the adjudicator's purported failure to acknowledge the existence of an informal service-connection claim constituted CUE, warranting revision and entitlement to an effective date 1 day following separation. *See* R. at 2289-91 (citing 38 C.F.R. §§ 3.155 (1970), 3.157 (1970), 3.400 (1970), 3.303(d)) (1970)).

On December 31, 2020, the Board denied revision of VA's March 1972 rating decision that denied service connection for viral hepatitis. R. at 269-76. The decision does not mention the appellant's § 3.157-based CUE contention. *See id.*

In October 2021, the appellant, through his nonattorney representative, filed a request to revise the December 31, 2020, Board decision based on CUE, arguing that the March 1972 rating decision failed to properly apply §§ 3.157, 3.103. R. at 28-35.

In February 2022, the Board denied the October 2021 motion to revise the December 31, 2020, Board decision on the basis of CUE. R. at 5-13. The Board found that the appellant's CUE argument pertaining to § 3.157 "did not represent a proper claim to revise the March 1972 decision on the basis of CUE" because the CUE allegation regarding § 3.157 was not "clear and specific enough for the Board to adjudicate" and thus not a basis for finding CUE in the December 2020 Board decision. R. at 11. The Board added that

even had the Board determined in December 2020 that the § 3.157 arguments been properly pled, it is unclear how the downstream issue of when the actual claim was filed could have had any impact on the ultimate question in March . . . 1972[,] . . . whether the criteria for service connection for liver disease and/or hepatitis were met. Although the Veteran now makes substantial arguments that the Regional Office erred in March 1972 with its sloppiness in describing the disability on appeal as hepatitis rather than liver disease (or vice versa), it is undebatable from the record that the Regional Office at that time had recognized there was a claim relating to the Veteran's liver. After recognizing that the claim was filed, the specific date of the submission of such a claim was irrelevant to the ultimate question decided in the March 1972 decision[,] . . . whether the criteria for service connection were met.

R. at 12. The Board concluded that even assuming the appellant's CUE allegation based on § 3.157 was properly before the Board, the October 2021 CUE motion does not explain how "any failure to recognize that the claim was submitted in 1970 rather than 1971 resulted in a manifestly different outcome . . . [regarding] the grant of the underlying claim of service connection." R. at 12.

The Board noted that the appellant's October 2021 motion contained a CUE allegation related to a notice defect under 38 C.F.R. § 3.103, yet the Board concluded that the appellant's January 2020 CUE motion did not contend that the

notification of the March 1972 decision contained any legal defect, as the Veteran's representative now contends. . . . The October 2021 motion does not explain in any detail why the Board erred in failing to discuss the notice provisions of 38 C.F.R. § 3.103 when there is no indication that the Veteran had raised that theory of entitlement up until that point.

R. at 12. This appeal followed.

"The government's interest in veterans['] cases is not that it shall win, but rather that justice shall be done," which includes construing veterans' submissions sympathetically, particularly

when the veteran is self-represented or represented by a nonattorney."*" Comer v. Peake*, 552 F.3d 1362, 1369-70 (Fed. Cir. 2009) (quoting *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006)). This principle of sympathetic construction applies to CUE motions. *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001). "Roberson requires the RO and the Board to 'fully and sympathetically' develop a veteran's pro se CUE motion 'to its optimum before deciding it on the merits.'" *Andrews v. Nicholson*, 421 F.3d 1278, 1282-83 (Fed. Cir. 2005) (quoting *Roberson*, 251 F.3d at 1384). That task requires VA to "fill in omissions and gaps that an unsophisticated claimant may leave in describing his or her specific dispute of error with the underlying decision." *Acciola v. Peake*, 22 Vet.App. 320, 326-27 (2008). As with any material issue of fact or law, the Board must provide a statement of reasons or bases that is "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see also* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990).

The Court concludes that the Board provided an inadequate statement of reasons or bases when it failed to address whether the appellant's CUE contentions submitted by a nonattorney were being construed sympathetically. *See* 38 U.S.C. § 7104(d); *see also* *Roberson*, 251 F.3d at 1384. The Board rejected the appellant's January 2020 argument pertaining to 38 C.F.R. § 3.157 because it found that the pleading was not "clear and specific enough" to adjudicate. R. at 11. The appellant's October 2021 CUE contention regarding § 3.103 was rejected because the Board determined that the January 2020 CUE motion did not contend that the "notification of the March 1972 decision contained any legal defect." R. at 12. Yet, it is unclear whether these determinations would have been different if VA had "fully and sympathetically" developed these CUE motions to their optimum before deciding on them on the merits. *See Andrews*, 421 F.3d at 1282-83. Remand is required for the Board to provide an adequate statement of reasons or bases regarding whether the December 31, 2020, Board decision contained CUE. 38 U.S.C. § 7104(d)(1).

On remand, the appellant may present, and the Board must consider, any additional evidence and arguments. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). This matter is to be provided expeditious treatment. *See* 38 U.S.C. § 7112; *see also* *Hayburn's Case*, 2 U.S. (2 Dall.) at 410, n. ("[M]any unfortunate and meritorious [veterans], whom Congress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one.").

Based on the foregoing reason, the February 10, 2022, Board decision is SET ASIDE, and the matter is REMANDED for readjudication.

DATED: November 15, 2023

Copies to:

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