No. 22-3069

In the

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

APPELLANT'S REPLY BRIEF

Re

ROBERTO PEREZ-SOTO,

Appellant,

versus

DENIS MCDONOUGH,

Secretary of Veterans Affairs,

Appellee.

KENNETH M. CARPENTER
Carpenter, Chartered
1525 Southwest Topeka Boulevard
Post Office Box 2099
Topeka, Kansas 66601
785-357-5251

Attorney for Appellant

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Summary of Rebuttal Arguments

The Secretary seeks to re-litigate Mr. Perez-Soto's appeal rather than addressing his averment of error by the Board. The Secretary argues that the Board adequately supported its finding by explaining that the Board in its December 2020 decision did not commit CUE in its consideration of Mr. Perez-Soto's January 2020 motion because the theories submitted in that motion failed to meet the level of specificity required to properly plead CUE. This argument begs the question of law presented by Mr. Perez-Soto's appeal, which is whether the Board erred by not sympathetically reading Mr. Perez-Soto's *pro se* filing by his accredited agent alleging clear and unmistakable error by the December 2020 Board regarding the applicability of the provisions of 38 C.F.R. § 3.157(b)(1)(1971) and 38 C.F.R. § 3.103(1971).

I.

The Board made a prejudicial error of law by not sympathetically reading Mr. Perez-Soto's *pro se* pleadings.

A. Applicable Law.

The Secretary in the first subsection of his brief purports to address "Applicable Law." Sec.Brf., pp. 13-16. In this subsection, the Secretary offers a single citation to the applicable provision of law, Sec.Brf., p. 15, in which he correctly notes that, "The Secretary has a duty to "sympathetically read a veteran's *pro se* CUE motion to discern

all potential claims." *Andrews v. Nicholson*, 421 F.3d 1278 (Fed. Cir. 2005)." *Id.* In the next sentence, the Secretary relies upon the following:

> However, while a sympathetic reading "requires the Secretary to fill in omissions and gaps that an unsophisticated claimant may leave in describing his or her specific dispute of error with the underlying decisions," it does not require him to "supply a theory that is absent" or to "imagine ways in which the original decision might be defective." *Acciola v. Peake*, 22 Vet.App. 320, 326-27 (2008).

Id. The Secretary did not cite to *Acciola* for its clear holding that this Court reviews "whether an applicable law or regulation was not applied" under the *de novo* standard. *Acciola*, 22 Vet. App. 324; *See also Joyce v. Nicholson*, 19 Vet. App. 36, 42-43 (2005). In fact, the Secretary chose not to discuss the applicable standard of review and, in accordance with this Court's decision in *MacWhorter v. Derwinski,* 2 Vet.App. 133 (1992), this Court should deem the issue of this Court's standard of review under the *de novo* standard to have been conceded.

B. Mr. Perez-Soto's appeal presents a single averment of error by the Board.

Mr. Perez-Soto made a single averment of error, which was that:

> The Board erred by not sympathetically reading Mr. Perez-Soto's *pro se* filing by his accredited agent alleging clear and unmistakable error by the December 2020 Board regarding the applicability of the provisions of 38 C.F.R. § 3.157(b)(1)(1971) and 38 C.F.R. § 3.103(1971).

Appellant's Op. Brf., pp. 5-11. His averment of error presents a question of law regarding whether the Board in its decision sympathetically read his pleadings. Instead

of responding to the question of law presented, whether the Board sympathetically read Mr. Perez-Soto's pleadings as required by law, the Secretary attempts to argue that the question of CUE was properly decided, as shown in his issue statement:.

> The Board Properly Determined that the December 2020 Board Decision Did Not Commit CUE in its Consideration of the January 2020 Motion to Revise the March 1972 Rating Decision.

Sec.Brf., pp. 16-25. If this Court finds that the Board did not sympathetically read Mr. Perez-Soto's pleadings, then reversal of the Board's denial of CUE is required and remand with instructions for the Board to do so.

The Secretary's argument that the Board properly determined that the December 2020 Board decision did not commit CUE begs the question of law presented and, as such, is not relevant to the disposition of this appeal. The Federal Circuit in *Bean v. McDonough*, 2023 WL 3083442 addressed the Board's handling of an allegation of CUE in the context of this Court's jurisdiction to consider whether a veteran had unadjudicated or pending claims. Although this decision concerned this Court's jurisdiction to hear arguments presented to but unaddressed by the Board, it is instructive in this matter. *Bean*, as in this case, involved a request for revision based on CUE in which this Court upon reconsideration at the request of the Secretary dismissed for lack of jurisdiction. Here, the Secretary asks that this Court exceed its jurisdiction by not addressing the question of law presented by Mr. Perez-Soto.

Further, in *Bean* the Federal Circuit noted that:

> A prerequisite to Veterans Court jurisdiction is a decision of the Board. *Andre v. Principi*, 301 F.3d 1354, 1360 (Fed. Cir. 2002); *Maggitt*, 202 F.3d at 1375; *Ledford*, 136 F.3d at 779; *see May v. McDonough*, 61 F.4th 963, 965 (Fed. Cir. 2023).

Bean, 2023 WL 3083442 *7. Here, the Secretary does not dispute that this Court has jurisdiction, but attempts to argue that, because the question of CUE was properly decided by the Board, then *sub silentio* the Board sympathetically read Mr. Perez-Soto's pleadings. In *Bean*, the Federal Circuit observed:

> Relevant to this case, in *Maggitt* we stated that "[a] 'decision' of the Board, for purposes of the Veterans Court's jurisdiction under section 7252, is the decision with respect to the benefit sought by the veteran." 202 F.3d at 1376. Denial of a claim, which includes the failure of the Board to consider a claim that was reasonably raised before it, constitutes a decision of the Board—reviewable by the Veterans Court. *See id.; Travelstead*, 1 Vet. App. at 346 ("When the [Board] makes a decision (implicitly or explicitly) not to deal with an issue considered at the [RO] level, then that decision not to decide an issue is a decision by the [Board] which is properly before this Court."). In addition, the Veterans Court, upon exercising jurisdiction in such circumstances, has repeatedly held—as did the Veterans Court in its withdrawn April 2021 decision in the present case—that the Board commits error in not deciding such issues. *Smith*, 10 Vet. App. at 314 ("Where the [Board] fails to adjudicate a claim that was reasonably raised before it, the net outcome for the veteran amounts to a denial of the benefit sought. Accordingly, the Court holds as a matter of law that the Board's failure to adjudicate the TDIU claim that was properly before it constitutes a final adverse [Board] decision with respect to that claim."); *Owens*, 7 Vet. App. at 433 (remanding to the Board for consideration a claim not

> addressed by the Board and stating, "[w]hen the appellant reasonably raises a claim for a particular benefit, the Board is required to adjudicate the issue of the claimant's entitlement to such a benefit, or if appropriate, to remand the issue to the RO for development and adjudication of the issue"); *see also Robinson v. Peake*, 21 Vet. App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009).

Id. This analysis of this Court's jurisdiction is relevant to this matter because—like a claim that was reasonably raised before the Board constituting a decision of the Board--whether the Board sympathetically read Mr. Perez-Soto's pleadings is reviewable as a question of law, *de novo*, by this Court. The Secretary's effort to have this Court review whether the Board properly determined that the Board's December 2020 decision did not commit CUE is an evasion of this Court's jurisdiction and Mr. Perez-Soto's right to judicial review.

The Secretary ignores, as this Court may not, that the Board made a clearly erroneous finding of material fact that there were no clear and specific arguments before the Board in December 2020 that the March 1972 rating decision clearly and unmistakably erred in its application of 38 C.F.R. § 3.157(b)(1)(1971) and 38 C.F.R. § 3.103(1971). RBA 4-15 at 5. This clearly erroneous finding of material fact substantiates Mr. Perez-Soto's averment of error by the Board that it did not sympathetically read Mr. Perez-Soto's pleadings, which is evident based on its finding that there were no clear and specific arguments before the Board in December 2020 that the March 1972 rating decision clearly and unmistakably erred in its application of 38 C.F.R. § 3.157(b)(1)(1971)

and 38 C.F.R. § 3.103(1971).

As such, this Court must conclude that the Secretary has failed to address the question of law presented by Mr. Perez-Soto's appeal regarding whether the Board erred by not sympathetically reading Mr. Perez-Soto's *pro se* filing by his accredited agent alleging clear and unmistakable error by the December 2020 Board regarding the applicability of the provisions of 38 C.F.R. § 3.157(b)(1)(1971) and 38 C.F.R. § 3.103(1971). As in *Bean*, the Board was obligated as a matter of law to sympathetically read Mr. Perez-Soto's *pro se* filing. The Board did not. Instead, the Board's finding of fact was that there were no clear and specific arguments before the Board in December 2020, that the March 1972 rating decision clearly and unmistakably erred in its application of 38 C.F.R. § 3.157(b)(1)(1971) and 38 C.F.R. § 3.103(1971). The purported finding of fact was not based upon a sympathetic reading Mr. Perez-Soto's *pro se* filing.

C. The Board did not properly determine this question of law regarding the applicability of 38 C.F.R. § 3.103(1971).

The Secretary concludes his brief with the assertion that:

> The Board Properly Determined that the December 2020 Board Decision Did Not Commit CUE Due to Any Failure to Consider a "Defective Notice" Theory Not Previously Raised.

Sec.Brf., pp. 25-27. This assertion appears to be in direct contradiction to the Board's finding of fact that there were no clear and specific arguments before the Board in December 2020 that the March 1972 rating decision clearly and unmistakably erred in

its application of 38 C.F.R. § 3.103(1971).

This assertion by the Secretary is further bewildering in light of the following statements by the Board in the decision on appeal, which are:

> The second major argument in the motion is that VA erred in notifying the Veteran of the March 1972 rating decision. It contends that 38 C.F.R. § 3.103 (1971) was not considered and the April 1972 notice of the March 1972 rating decision was defective as a matter of law because VA had actually adjudicated a claim for entitlement to service connection for abdominal pain and a liver condition when the notice related to hepatitis.
>
> . . . .
>
> 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. As a result, the Board is unable to now determine that the December 2020 decision clearly and unmistakably erred in adjudicating a theory of CUE that was not before the Board.

RBA 4-15 at 9 and 12. Further confusing to Mr. Perez-Soto is the Secretary's opening paragraph, in which he indicates:

> **In his opening brief, Appellant parrots the "defective notice" CUE theory first introduced by his prior representative in the October 2021 motion**. *See* [App. Brf. at 5-7]; [R. at 30-33]. Essentially, he alleges that the Board in 2020 committed CUE by failing to consider and apply 38 C.F.R. § 3.103 (1971), which he argues required VA "to include in its notice of VA's denial the reason for its decision." [R. at 32]. He supports this allegation by conjuring an inconsistency between the March 1972 rating decision and

> the April 1972 notification of that decision. In particular, he notes that the April 1972 letter expressly states that hepatitis was not incurred in or aggravated by service. *See* [R. at 5993]. The March 1972 rating decision, however, states the issues as pertaining to an original claim filed on September 17, 1971, on the issues of a back condition, feet conditions, abdominal pains, and liver condition. *See* [R. at 5986]. He appears to decline to recognize that the March 1972 rating decision expressly references viral hepatitis twice, however. *See id.* Nevertheless, because he interprets the March 1972 rating decision as not having adjudicated the service connection claim for hepatitis, he alleges that the April 1972 notification to the contrary is "defective" and thus inconsistent with 38 C.F.R. § 3.103 (1971). *See* [App. Brf. at 25-26]; [R. at 30-33].

Sec.Brf., pp. 25-26. (emphasis added). The point the Secretary is making is unclear since his second paragraph then contends that "the Board here found that this specific CUE theory is not of record prior to the October 2021 motion, which requested revision of the 2020 Board decision on the basis of CUE. Compare [R. at 28-35] with [R. at 2288-94]." Sec.Brf., p. 26. Mr. Perez-Soto is unable to reconcile the Secretary's assertion that he is parroting the "defective notice" CUE theory first introduced by his prior representative in the October 2021 motion and the Board's finding that this specific CUE theory is not of record prior to the October 2021 motion. Why would his theory of Board CUE have been of record prior to the October 2021 motion?

The Secretary appears to be under the misapprehension that Mr. Perez-Soto's notice argument under § 3.103 (1971) has something to do with VA's reasons or bases for its March 1972 rating decision. The Secretary persists by stating that:

> Appellant does not dispute that the "defective notice" theory was never articulated prior to the Board's 2020 decision, though he nonetheless maintains the theory in his opening brief. See [App. Brf. at 6-7]. He appears to allege that had the Board in 2022 sympathetically construed the January 2020 motion considered by the Board in December 2020, it necessarily "would have had to address whether VA's April 5, 1972[,] notice of its March 23, 1972[,] rating was defective notice under the provisions of 38 C.F.R. § 3.103(e)[.]" See [App. Brf. at 9]. Again, Appellant offers zero textual support for the underlying assumption that the specific "defective notice" theory can be gleaned from the January 2020 motion, sympathetically construed or otherwise. *But see Locklear*, 20 Vet.App. at 416; *Evans*, 12 Vet.App. at 31. And as explained above, the sympathetic-reading doctrine does not require the Board to supply a theory of CUE when none was raised. *See Acciola*, 22 Vet.App. at 326-27.

Sec.Brf., pp. 26-27. Based on the above, it is evident that the Secretary, like the Board, simply does understand the consequence at law of defective notice.

As explained in Mr. Perez-Soto's opening brief, the Federal Circuit in *Ruel v. Wilkie*, 918 F.3d 939 (2019) interpreted the provisions of 38 C.F.R. § 3.103(e)(1984) to mean that in order to meet the notice requirements of Veterans Affairs regulations, an explicit denial must state, or clearly identify in some other manner, the claim(s) being denied. Appellant's Op. Brf., p. 10. The holding in *Ruel* was that:

> Because the single sentence in the August 1984 letter, as a purported explicit denial, cannot meet the notice requirements of § 3.103, we reverse the Veterans Court decision. Since the Veterans Court and Board provide no other basis for finding that Mrs. Ruel's 1984 DIC claim was denied, we conclude that Mrs. Ruel's 1984 claim remained pending as of 2010, when the RO granted Mrs. Ruel's DIC

> claim. Thus, the correct effective date of Mrs. Ruel's DIC claim is July 6, 1984, and we direct the VA to dispense her benefits accordingly.

Ruel, 918 F.3d 943. In this matter, VA's April 5, 1972 notice regarding VA's March 23, 1972 rating decision only indicated that **a disability from hepatitis was not incurred or aggravated by service**. RBA 5993. (emphasis added). The March 23, 1972 rating decision, RBA 5986, identified the issue adjudicated as abdominal pain and liver condition. Thus, as in *Ruel*, because VA's April 5, 1972 notice was not an explicit denial that a disability from abdominal pain and liver condition had been denied in VA's May 23, 1971 rating decision, that notice cannot meet the notice requirements of § 3.103 and the Board's decision denying CUE must be reversed, as a matter of law.

The Secretary is simply wrong when he concludes:

> Because there is "no indication" in the record that Appellant raised this specific theory of CUE prior to the Board's 2020 decision, the Board here properly found that the "defective notice" theory failed to provide a viable basis for finding CUE in the December 2020 decision. See [R. at 12]. Appellant's contention otherwise is unpersuasive and underdeveloped.

Sec.Brf., p. 27. Therefore, the Secretary's request that this Court should reject Mr. Perez-Soto's so-called "attempt to relitigate the underlying merits of the March 1972 rating decision and affirm the decision on appeal," *id.*, is wholly without merit.

Conclusion

The Board's decision was not made in accordance with law and must be set aside

as unlawful.

Respectfully submitted by,

/s/Kenneth M. Carpenter
Kenneth M. Carpenter
Counsel for Appellant,
Roberto Perez-Soto
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