



## **BOARD OF VETERANS' APPEALS**

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF

Represented by

Gordon A. Graham, Agent

SS XXX XX 9628

Docket No. 20-21 594

DATE: December 30, 2024

### **ORDER**

Entitlement to revision of the May 1993 rating decision on the basis of clear and unmistakable error (CUE) is denied.

### **FINDING OF FACT**

The correct facts, as known at the time, were before the VA adjudicators in May 1993 and the statutory and regulatory provisions extant at the time were correctly applied.

### **CONCLUSION OF LAW**

The criteria for entitlement to revision of the May 1993 rating decision on the basis of clear and unmistakable error (CUE) have not been met. 38 U.S.C. § 5109A, 7105; 38 C.F.R. § 3.105.

## REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty in the United States Army from October 1980 to August 1992.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a January 2019 rating decision from the Department of Veterans Affairs (VA) Regional Office (RO).

### **Entitlement to revision of the May 1993 rating decision on the basis of CUE.**

The Veteran's right-hand disability is rated at 60 percent, effective August 16, 1992.

The Veteran asserts that CUE was committed in the May 1993 rating decision when it deducted 10 percent for a preexisting injury under 38 C.F.R. § 3.306. He stated that the pre-service injury noted in the entrance examination, specifically the right index finger, was a transected flexor nerve resulting in rigidity of the finger. The Veteran was declared fit for active-duty service, and it was noted that there was no current disability. VA Form 9, April 2020.

The Veteran argues that his pre-existing right finger disability never worsened and was therefore never aggravated. Instead, the Veteran claims that the treatment for his finger, which includes four operations, caused the loss of use in the rest of his hand. The Veteran stated that surgical misadventure cannot be the basis for aggravating a pre-existing condition.

Further, the Veteran maintains that reasonable minds can only concur that the result of the intercurrent surgeries after entry are the sole reason for the loss of use of the Veteran's right hand. *See* Correspondence, January 2018; VA Form 9, April 2020.

Additionally, the Veteran argues that 38 C.F.R. § 4.25 does not permit simple subtraction, but instead that the combined ratings table must be used to determine the calculation of the disability. The Veteran argues that subtracting 10 percent from his 70 percent rating would net him 67 percent, which rounds to 70 percent.

He notes that if you were to add 10 percent to 60 percent then you would only get 64 percent which rounds to 60 percent. *Id.*

Initially, the Board notes that as a result of 38 C.F.R. § 3.322(a) and § 4.22, the rating of a condition found to be service connected on the basis of aggravation is derived by “deducting from the present degree of disability the degree, if ascertainable, of the disability existing at the time of entrance into active service.” 38 C.F.R. §§ 3.322(a), 4.22; *See Cotant v. Principi*, 17 Vet. App. 116, 129 (2003). Restated, the RO must subtract the pre-service evaluation from any current evaluation to which the Veteran is entitled (70– 10 = 60).

A previous RO determination that is final and binding 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).

Here, the May 1993 rating decision became final because the Veteran did not file a notice of disagreement (NOD) and new and material evidence was not received within a year of the May 1993 rating decision.

Once a decision becomes final, it may only be revised by a showing of CUE. 38 C.F.R. §§ 3.104, 3.105. CUE is a very specific and rare kind of “error.” It is the kind of error of 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 have been manifestly different but for the error. Simply to claim CUE on the basis that previous adjudication improperly weighed and evaluated the evidence can never rise to the stringent definition of CUE. Similarly, neither can broad-brush allegations of “failure to follow the regulations” or “failure to give due process,” or any other general, nonspecific claim of error.” *Fugo v. Brown*, 6. Vet. App. 40, 43-44 (1993). In addition, failure to address a specific regulatory provision involves harmless error unless the outcome would have been manifestly different. *Id.* at 44.

CUE is established when the following conditions are met: (1) either (a) the correct facts in the record were not before the adjudicator, or (b) the statutory or regulatory provisions in existence at the time were incorrectly applied; (2) the alleged error must be “undebatable,” not merely “a disagreement as to how the facts were

weighed or evaluated[;]" and (3) the commission of the alleged error must have "manifestly changed the outcome" of the decision being attacked on the basis of CUE at the time the decision was rendered. *Evans v. McDonald*, 27 Vet. App. 180, 185 (2014), *aff'd*, 642 F. App'x 982 (Fed. Cir. 2016); *Damrel v. Brown*, 6 Vet. App. 242, 245 (1994); *Russell v. Principi*, 3 Vet. App. 310, 313-14 (1992).

The error must be of a type that is outcome-determinative, and subsequently developed evidence may not be considered in determining whether an error existed in the prior decision. *See Porter v. Brown*, 5 Vet. App. 233, 235-36 (1993); *Glover v. West*, 185 F. 3d 1328 (Fed. Cir. 1999). A manifest change in outcome of an adjudication means that, absent the alleged CUE, the benefit sought would have been granted at the outset. *King v. Shinseki*, 26 Vet. App. 433, 441 (2014). The standard is not whether it is reasonable to conclude that the outcome would have been different. *Id.* at 442.

As a threshold matter, the Board finds the argument advanced by the Veteran allege CUE with the requisite specificity. *See Simmons v. Principi*, 17 Vet. App. 104 (2003). The Board will therefore adjudicate the merits of his claims.

In the May 1993 rating decision, the RO found that service connection is established for loss of use of the Veteran's right (dominant) hand evaluated as 60 percent disabling.

According to the rating schedule, loss of use of the major hand would be evaluated as 70 percent disabling. The RO noted that the February 1980 entrance examination shows injury to right index finger with subsequent surgeries at age six and nine and it was noted that the Veteran had limited flexion to PIP joint, but he could grip and pick up small objects. The RO found that the pre-service disability was 10 percent disabling. In cases involving aggravation by active service, the RO explained that the rating will reflect only the degree of disability over and above the degree existing at the time of entrance (38 CFR 4.22). For this reason, the Veteran's right-hand disability is evaluated as 60 percent disabling.

Turning to the relevant evidence extant at the time of the May 1993 rating decision, the Veteran filed his service connection claim for a right-hand disability in August

1992. *See* VA Form 21-526 Veterans Application for Compensation or Pension, August 1992.

A review of the service treatment records shows that on the February 1980 Report of Medical History, for the purposes of enlistment, the Veteran reported a history of a right-hand surgeries as a child. It was noted that the Veteran has “R lac[eration] of flexor tendon + the index finger has some residuals but good function” and “NCD” (no current disability). It was noted that he had limited flexion to PIP joint, but he could grip and pick up small objects. The Veteran was declared fit for service.

The pertinent laws and regulations extant at the time of the May 1993 rating decision were as follows:

38 U.S.C. §1111 governs the presumption of sound condition and reads as it does in current time. It states that for the purposes of 38 U.S.C § 1110, every veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service.

38 C.F.R. §3.304(b) also governs presumption of soundness. Only such conditions as are recorded in examination reports are to be considered as noted. The regulation further states that history of preservice existence of conditions recorded at the time of examination does not constitute a notation of such conditions but will be considered together with all other material evidence in determinations as to inception. Determinations of a preexisting disability should not be based on medical judgment alone as distinguished from accepted medical principles, or on history alone without regard to clinical factors pertinent to the basic character, origin and development of such injury or disease. They should be based on thorough analysis of the evidentiary showing and careful correlation of all material facts, with due regard to accepted medical principles pertaining to the history, manifestations, clinical course, and character of the particular injury or disease or residuals thereof. 38 C.F.R. §3.304(b)(1)-(2).

In *Crowe v. Brown*, 7 Vet. App. 238 (1994), the Court of Appeals for Veterans Claims (Court or CAVC) held the lay veteran's history does not constitute medical evidence of preexisting disability.

The regulations that the AOJ explicitly applied pertain to aggravation. According to 38 U.S.C. §1153, a preexisting injury or disease will be considered to have been aggravated by active military, naval, air, or space service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease. Clear and unmistakable evidence (obvious or manifest) is required to rebut the presumption of aggravation where the preservice disability underwent an increase in severity during service. 38 C.F.R. §3.306.

The AOJ also applied 38 C.F.R. §4.22, which governs ratings of disabilities aggravated by service. In cases involving aggravation by active service, the rating will reflect only the degree of disability over and above the degree existing at the time of entrance into the active service, whether the particular condition was noted at the time of entrance into the active service, or it is determined upon the evidence of record to have existed at that time. It is necessary therefore, in all cases of this character to deduct from the present degree of disability the degree, if ascertainable, of the disability existing at the time of entrance into active service, in terms of the rating schedule, except that if the disability is total (100 percent) no deduction will be made. The resulting difference will be recorded on the rating sheet. If the degree of disability at the time of entrance into the service is not ascertainable in terms of the schedule, no deduction will be made. 38 C.F.R. §4.22.

After a thorough consideration of the evidence, laws, and regulations extant at the time of the May 1993 rating decision, the Board finds that the AOJ did not commit CUE when assigning an initial 60 percent rating for the Veteran's right-hand disability.

The Board notes that a disorder such as right-hand disability can be asymptomatic, but still considered as "noted" on entrance. *Verdon v. Brown*, 8 Vet. App. 529, 534-535 (1996). Because the Veteran's right-hand disability was noted at the time of the Veteran's entrance into service, the Veteran is not entitled to the presumption of

soundness for this particular disability when entering service. *See* 38 U.S.C. § 1111; 38 C.F.R. § 3.304(b). In other words, he is not presumed sound upon entry into service due to his preexisting right-hand disability.

The Board also emphasizes that in awarding service connection for a right-hand disability based on aggravation of a preexisting condition, upon implementation of the award, the AOJ should apply the provisions of 38 C.F.R. § 4.22. That is, in cases involving aggravation by active service, the Veteran may only receive a compensable rating for the degree of right-hand disability over and above the degree of disability existing at the time of entrance into the active service. *Id.* In making this determination, since the Veteran's right-hand disability was noted upon entrance into service, the AOJ should consider the provisions of Diagnostic Code 5125 in considering whether at separation from service or at present a compensable or higher rating is warranted for the right-hand disability.

The Board finds that the Veteran's claim is essentially a disagreement with how the May 1993 adjudicator weighed or evaluated the evidence of record to determine the appropriate rating for the Veteran's right-hand disability when applying 38 C.F.R. § 4.22.

In reaching this determination, the Board notes that the face of the May 1993 rating decision makes clear that the RO weighed the Veteran's symptoms at entrance and weighed his symptoms during and following service. The RO discussed the February 1980 entrance examination, which shows injury to right index finger with subsequent surgeries, and the April 1993 VA examination, which shows loss of all real function capabilities of the Veteran's right hand.

Ultimately, "[i]t is the prerogative of the factfinder... to interpret the evidence and draw reasonable inferences from it." *See Evans*, 27 Vet. App. at 187 (citing *Kahana v. Shinseki*, 24 Vet. App. 428, 435 (2011); *Gilbert v. Derwinski*, 1 Vet. App. 49, 52 (1990)). A disagreement as to how the facts were weighed does not support a finding of CUE. *Fugo*, 6 Vet. App. at 43-44. Where, as here, the evidence, namely manifestations of the Veteran's right-hand instability, do not, in and of themselves, compel a specific rating, adjudicators must evaluate and weigh. Indeed, evaluating and weighing evidence is central to evaluating the severity of a right-hand disability.

In sum, as the Veteran's claim is a disagreement as to how the facts were weighed, the Board cannot find that the claim supports a finding a CUE. *Id.* Accordingly, entitlement to revision of the May 1993 rating decision on the basis of CUE to reflect a rating in excess of 60 percent for right-hand disability is not warranted.



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Board of Veterans' Appeals

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*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.*