Date: May 12, 1995 VAOPGCPREC 14-95

From: General Counsel (022)

Subj: Reviewability of Unappealed Regional-Office Decision for Clear and Unmistakable Error--Effect of Subsequent Board of Veterans' Appeals Action

To: Under Secretary for Benefits (20)

QUESTIONS PRESENTED:

a. Whether a final, unappealed Department of Veterans Affairs (VA) regional-office decision is subject to review for clear and unmistakable error (CUE) under 38 C.F.R. § 3.105(a), where, upon subsequent reopening, the Board of Veterans' Appeals (BVA or Board) denied the claim.

b. Whether a final, unappealed VA regional-office decision is subject to review for CUE, where the Board subsequently denied reopening of the claim.

COMMENTS:

1. The first question presented arose in connection with a claim raising allegations of CUE in a 1976 regional-office denial of service connection for particular disabilities. The veteran did not appeal the 1976 decision, and it became final. The veteran reopened the claim in 1979 by submitting new and material evidence. The regional office denied the reopened claim, and the veteran appealed to the BVA. In 1981, the BVA, after reviewing the evidence of record, denied service connection for the disabilities at issue. In 1986, upon reconsideration, the BVA affirmed the 1981 decision, concluding that the decision did not involve obvious error and is final. The veteran now alleges CUE in the original, 1976 regional-office decision.

2. Under 38 C.F.R. § 3.105(a), previous determinations which are final and binding will be accepted as correct in the absence of CUE. Where evidence establishes CUE, the prior decision will be reversed and amended. In Smith v. Brown, 35 F.3d 1516 (Fed. Cir. 1994), the United States Court of Appeals for the Federal Circuit held that section 3.105(a) applies only to decisions of agencies of original jurisdiction (AOJ) (e.g., regional offices) and not to BVA decisions. In so holding, the court noted that to hold

otherwise would permit an inferior tribunal, i.e., a regional office, to collaterally review the actions of a superior one, i.e., the Board. 35 F.3d at 1526.

3. When the BVA affirms a decision of an AOJ, the AOJ determination "is subsumed by the final appellate decision" pursuant to 38 C.F.R. § 20.1104. Thus, the AOJ decision is not reviewable for CUE because it merges with the BVA decision and ceases to have any independent effect once the BVA renders a final decision, see Olson v. Brown, 5 Vet. App. 430, 433 (1993), which final decision, as noted in Smith, is itself not reviewable for CUE. In several precedential decisions issued since the Federal Circuit decided Smith, the United States Court of Veterans Appeals (CVA) has acknowledged the principle that an AOJ decision which has been the subject of an appeal to the Board may not be reviewed for CUE. See Mykles v. Brown, 7 Vet. App. 372, 374-75 (1995); Duran v. Brown, 7 Vet. App. 216, 224 (1994); Scott v. Brown, 7 Vet. App. 184, 191 (1994).

4. Neither the CVA nor the Federal Circuit has resolved the issue of whether a prior, unappealed regional-office decision may be reviewed for CUE where the BVA, in considering a reopened claim, renders a decision denying the benefits denied in the earlier, final regional-office decision. In Allday v. Brown, No. 93-644, 1995 WL 221855 (Vet. App.
Apr. 14, 1995), the CVA, while holding that, under the Smith decision, a BVA determination could not be reviewed for CUE, also found that it lacked jurisdiction to review claims of CUE in two prior, unappealed regional-office decisions because the CUE claims had not been raised to or adjudicated by the BVA. Id. at *12. In dismissing the appeal as to the prior regional-office decisions "without prejudice to the appellant's properly raising such a CUE claim in VA's administrative adjudication process," id., the court seemed to suggest that the issue of CUE in the earlier decisions could properly be raised administratively. However, it does not appear that the court considered the issue of whether the

prior regional-office decisions had essentially been subsumed in the later BVA decision concerning the same disabilities. Further, since the CVA lacked jurisdiction over the claims for procedural reasons, the court's statement constituted, at most, dicta and cannot be considered dispositive of the question presented.

5. A review of the history of 38 C.F.R. § 3.105(a) sheds no light on the issue in question. The history of 38 C.F.R. § 20.1104 is also not dispositive. The immediate predecessor to section 20.1104, codified at former 38 C.F.R. § 19.193 (1983), had provided that an AOJ determination affirmed by the BVA "becomes a part of the appellate decision." This regulation replaced former 38 C.F.R. § 19.154 (1965), which had provided that, "[w]here an appeal is timely filed and perfected, the decision of the agency of original jurisdiction, if affirmed, does not become final until the date of the appellate decision." This language referred only to regional-office decisions actually appealed to the BVA. When former section 19.154 was replaced by former section 19.193, the transmittal sheet accompanying the amendment, Transmittal Sheet 9 (Feb. 4, 1983), indicated that the prior regulation was merely being "[r]evised for clarity." However, this explanation is inconsistent with the scope of the amendment, which changed a provision referring to the status of a decision during the pendency of an appeal to a provision stating the future effect on a prior decision of a subsequent appellate decision. This change in the nature of the provision renders former section 19.154 of little value in resolving the issue at hand.

6. We turn next for guidance to the broader statutory framework in which the regulations in question operate. Once the BVA has decided a claim, the Board's decision is final and binding upon VA. See 38 U.S.C. §§ 7103(a). When a claim is disallowed by the BVA, the claim may not thereafter be reopened and allowed, except upon receipt of new and material evidence, and a claim based on the same factual basis may not be considered. 38 U.S.C. § 7104(b). Exceptions to the finality of BVA decisions are very limited. The Chairman of the Board may order reconsideration under 38 U.S.C. § 7103(a), the Board on its own motion may correct an obvious error in the record under 38 U.S.C. § 7103(c),

or, under 38 U.S.C. §§ 5108 and 7104(b), a previously-denied claim may be reopened upon submission or procurement of new and material evidence. Permitting review for CUE of a prior, unappealed regional-office decision, where the BVA has reviewed the matter upon reopening, would, as discussed below, tend to undermine the finality of BVA decisions established by the referenced statutes.

7. BVA review of a claim to reopen a prior, final decision involves a "two-step" analysis. See, e.g., Allday, 1995 WL 221855 at *8, citing Manio v. Derwinski, 1 Vet. App. 140, 145 (1991). The BVA must first determine whether the evidence submitted or secured since the prior denial of the claim is "new and material" when viewed in the context of all the evidence. Allday, at *8, citing Colvin v. Derwinski, 1 Vet. App. 171, 174 (1991). If the evidence is found to be new and material, the BVA then reviews the new evidence "in the context of" the old to determine whether the prior disposition of the claim should be altered. Allday, at *8, citing Jones v. Derwinski, 1 Vet. App. 210, 215 (1991). Upon reopening a claim, the BVA reviews the entire record, including evidence on which any prior adjudications of the claim were based. See Manio, 1 Vet. App. at 145-47. Presumably, such review would uncover any "clear and unmistakable" error in a prior adjudication. A prior adjudication, the basis of which has thus been reviewed, may, in our view, be considered to have been essentially subsumed into the Board's decision and, therefore, to be unreviewable for CUE. Cf. McGinnis v. Brown, 4 Vet. App. 239, 244 (1993) (reopening deprives previous denial of finality).

8. Where a BVA decision involves review of evidence considered in a prior, unappealed regional-office decision con-cerning the same issues, consideration of a CUE claim regarding the prior regional-office decision would essentially permit review of an issue finally decided by the Board, in a manner not contemplated in the statutes governing finality of Board decisions. Such action would essentially allow a regional office to collaterally consider and overturn conclusions reached by the Board concerning the issues raised. This would give rise to the anomolous situation referred to by the Federal Circuit in Smith of an inferior tribunal reviewing the decisions of a superior one.

9. Further, such review would tend to conflict with 38 U.S.C. § 7104(b), in that it could be viewed as involving consideration and potential allowance of a claim on the same factual basis as a claim already denied by the Board. In considering the reopened claim, the Board would have had before it the same evidence considered by the regional office, together with whatever new evidence had been presented or developed in connection with reopening of the claim. While the factual basis considered by the Board would have been expanded and thus not have been identical to that previously considered by the regional office, the evidence subsequently considered by the regional office upon review of allegations of CUE in the prior decision would be identical to evidence previously before the Board upon its review of the reopened claim. Thus, the claim of CUE would lack the new factual basis necessary to overcome the finality of the Board decision. This impediment based on the lack of a new factual basis for review of the matter by the regional office would be equally applicable regardless of whether additional evidence developed upon reopening was favorable or unfavorable to the claimant. For the foregoing reasons, to permit inquiries into alleged CUE in prior adjudications of the same issues later determined by the BVA would undermine the finality of Board decisions, which is fundamental to VA's adjudication system.

10. In its 1981 decision in the matter which gave rise to the subject request for opinion, the BVA reviewed the entire record upon reopening of the claim, noting the unappealed regional-office decision in 1976 concerning the same issues raised in the reopened claim, i.e., service connection for particular conditions. Upon reconsideration, the BVA affirmed the conclusions of the 1981 decision. Based on the above analysis, we conclude that the 1976 regional-office decision may not be reviewed for CUE because such review would undermine the statutory finality of the later BVA decisions, which reviewed the evidence of record with respect to that decision and finally decided the issues raised in the prior adjudication.

11. The situation differs where the BVA, in connection with a subsequent claim to reopen, concludes that new and material evidence sufficient to support reopening has not been submitted. In deciding whether to reopen a claim, the

Board merely compares the evidence submitted in connection with reopening with the evidence previously of record to determine whether the newly-submitted evidence is "new and mate-rial." Evidence is "new" when it is not merely cumulative of other evidence of record; evidence is "material" when it is relevant and probative and, when viewed in the context of all the evidence, both new and old, is of sufficient weight and significance that there is a reasonable possibility that it would change the outcome. Allday, 1995 WL 221885 at *9, citing Cox v. Brown, 5 Vet. App. 95, 98 (1993). While, in considering whether a claim should be reopened, the Board views the new evidence in the context of the old, it does so for the narrow purpose of determining whether the new evidence is "new and material" for purposes of reopening. The Board does not decide the merits of the issues raised in the claim, if it determines that evidence sufficient to reopen has not been submitted. See McGinnis, 4 Vet. App. at 244; Kehoskie v. Derwinski, 2 Vet. App. 31, 34 (1991). In that situation, the prior regional-office decision would remain subject to review for CUE, because it was never appealed to the Board and because the Board never determined, based on the evidence of record, the issues raised in the prior regional-office adjudication.

HELD:

a. A claim of clear and unmistakable error under 38 C.F.R. § 3.105(a) concerning a final, unappealed regional-office decision may not be considered where the Board of Veterans' Appeals has reviewed the entire record of the claim following subsequent reopening and has denied the benefits previously denied in the unappealed decision.

b. If the Board of Veterans' Appeals concludes that new and material evidence sufficient to reopen a prior, unappealed

regional-office decision has not been submitted, and denies reopening, the Board's decision does not serve as a bar to a claim of CUE in the prior regional-office decision.

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