

**Department of
Veterans Affairs**

Memorandum

Date: May 28, 2004 VAOPGCPREC 4-2004

From: General Counsel (022)

Subj: Reconciliation of Moody v. Principi, 360 F.3d 1306 (Fed. Cir. 2004), and Case Law on CUE Claims

To: Chairman, Board of Veterans' Appeals (01)
Under Secretary for Benefits (20)

QUESTION PRESENTED:

How can the Department of Veterans Affairs (VA) reconcile the decision of the United States Court of Appeals for the Federal Circuit (Federal Circuit) in Moody v. Principi, 360 F.3d 1306 (Fed. Cir. 2004), and law on claims alleging clear and unmistakable error (CUE) in final VA decisions?

COMMENTS:

The Moody Decision

1. On March 10, 2004, the United States Court of Appeals for the Federal Circuit decided Moody v. Principi. It vacated and remanded a decision of the United States Court of Appeals for Veterans Claims (CAVC) that affirmed the Board of Veterans' Appeals (Board) denial of Mr. Moody's claim alleging CUE in a 1996 VA regional office (RO) decision. 360 F.3d at 1307. A 1996 VA RO decision had granted Mr. Moody's claim for service connection of a psychiatric disorder secondary to his service-connected prostatitis, assigned a 70-percent disability rating for the psychiatric disorder, and granted a total disability rating based on individual unemployability (TDIU), all effective June 24, 1994, the date determined by the RO to be when Mr. Moody had first made a claim for secondary service connection. Id. at 1309. Several years later, after that 1996 RO decision had become final, Mr. Moody sought an earlier effective date for his TDIU rating, alleging that the RO's failure to find that he had filed a claim for secondary service connection before June 24, 1994, was CUE. Id. He asserted that prior benefit claims combined with the evidence in the record at the time were sufficient to raise an informal secondary-service-connection claim. Id. The Board rejected the CUE claim, finding that there was no undebatable error that would have manifestly changed the outcome when it was made. Id. While Mr. Moody's case was pending before the CAVC, the Federal Circuit issued its decision in Roberson v. Principi, 251 F.3d 1378 (Fed. Cir. 2001). 360 F.3d

at 1309. In Roberson, the Federal Circuit “held”¹ that VA must consider a CUE claim using the standard applicable to claims to reopen with new and material evidence, that is, “VA is ‘to fully and sympathetically develop the veteran’s claim to its optimum before deciding it on its merits.’” Roberson, 251 F.3d at 1384 (quoting Hodge v. West, 155 F.3d 1356, 1362 (Fed. Cir. 1998)). In Moody, the CAVC refused to remand the case to determine if an earlier claim for secondary service connection had been raised under the standard set out in Roberson and affirmed the Board’s decision. Moody, 360 F.3d at 1309.

2. The Federal Circuit held in Moody that the CAVC erroneously interpreted Roberson by concluding that VA’s obligation to fully and sympathetically develop a veteran’s claim is limited to cases in which a claimant alleges that the pleadings raised an informal TDIU claim. 360 F.3d at 1310. The Federal Circuit stated that “‘Roberson requires . . . that the VA give a sympathetic reading to the veteran’s filings by ‘determining all potential claims raised by the evidence, applying all relevant laws and regulations.’” Id. (quoting Szemraj v. Principi, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (quoting Roberson, 251 F.3d at 1384)). The court also held that the CAVC erred by requiring Mr. Moody to demonstrate that the “‘evidence undebatably established that an informal claim for secondary service connection was filed prior to 1994.’” Moody, 360 F.3d at 1310. The court held, in addition, that ambiguity in Mr. Moody’s pleadings should be resolved in his favor. Id. The Federal Circuit found that the CAVC’s legal error with regard to its construction of Roberson is not harmless and vacated and remanded the decision to the CAVC for a determination on whether the Board sympathetically read Mr. Moody’s pre-June 24, 1994, pleadings in determining whether he filed an informal claim for secondary service connection prior to that date. Id.

3. Because the Federal Circuit’s holdings in precedent decisions like Moody bind VA in adjudicating similar CUE claims, it is important to accurately identify those holdings for VA personnel adjudicating claims. In addition, portions of the court’s Moody opinion are complex. To promote consistent decisionmaking by VA, we provide the following analysis to guide future adjudications of CUE claims.

Law on CUE

4. A claim of CUE is a collateral attack on a final decision by a VA RO or the Board. Cook v. Principi, 318 F.3d 1334, 1342 (Fed. Cir. 2002) (en banc), cert.

¹ Although the Federal Circuit’s Roberson opinion states, “we hold that [VA] is thus required to consider a CUE claim using the standard of Hodge,” the “holding” is actually obiter dictum because the Court did not apply that standard to the CUE claim in that case. Instead, by sympathetically reading Mr. Roberson’s filings, the Court found a pending, unadjudicated claim, rather than CUE in a decision that had become final.

denied, 123 S. Ct. 2574 (2003); Bustos v. West, 179 F.3d 1378, 1380 (Fed. Cir.), cert. denied, 528 U.S. 967 (1999). Pursuant to 38 U.S.C. § 5109A(a), a RO decision is subject to revision on the grounds of CUE. See also 38 U.S.C. § 7111(a) (revision of Board decisions based on CUE). “In order for there to be a valid claim of [CUE], there must have been an error in the prior adjudication of the claim. Either the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions extant at the time were incorrectly applied.” Russell v. Principi, 3 Vet. App. 310, 313 (1992) (en banc); 38 C.F.R. § 20.1403(a) (upheld in Disabled Am. Veterans v. Gober, 234 F.3d 682, 696-97 (Fed. Cir 2000), cert. denied, 532 U.S. 973 (2001)). CUE exists only when the error is outcome determinative, that is, the error manifestly changed the outcome of the claim decision. 38 C.F.R. § 20.1403(a) and(c); Cook, 318 F.3d at 1344; Bustos, 179 F.3d at 1381; Disabled Am. Veterans, 234 F.3d at 696. “If it is not absolutely clear that a different result would have ensued, the error complained of cannot be clear and unmistakable.” 38 C.F.R. § 20.1403(c) (upheld in Disabled Am. Veterans, 234 F.3d at 697). Disagreements about how the facts were weighed or evaluated and failures of the duty to assist cannot be CUE. 38 C.F.R. § 20.1403(d)(2) and (3) (upheld in Disabled Am. Veterans, 234 F.3d at 697). If the evidence establishes CUE, an undebatable, outcome-determinative error, the prior decision must be reversed or revised, 38 U.S.C. §§ 5109A(a), 7111(a), and the decision constituting the reversal or revision “has the same effect as if the decision had been made on the date of the prior decision,” 38 U.S.C. §§ 5109A(b), 7111(b).

Former View of Roberson

5. Prior to the Szemraj and Moody decisions, VA's position was that Roberson should be construed narrowly and confined to the situation in which a claimant alleged the existence of a prior, unadjudicated TDIU claim. See VAOPGCPREC 12-2001. However, in Szemraj, the Federal Circuit rejected that narrow construction of Roberson and held that VA's obligation to fully and sympathetically develop a veteran's claim to its optimum applies “to all pro se pleadings” by a veteran. 357 F.3d at 1373. The Federal Circuit stated that, “when determining if CUE exists in an earlier decision, the VA must give a sympathetic reading to the veteran’s filings in that earlier proceeding to determine the scope of the claims.” Id.

6. However, the Federal Circuit also made clear in Szemraj that, apart from requiring that pro se pleadings be read sympathetically, Roberson “did not change the well-established legal standard for determining the existence of CUE in RO and [Board] decisions.” 357 F.3d at 1375. The court noted that (1) in Cook, it had held that, to constitute CUE, the alleged error must be both outcome determinative and based upon the evidence of record at the time of the original decision and (2) it had therefore rejected the contention that VA’s violation of its duty to assist in developing a veteran’s evidence could constitute CUE. Szemraj,

357 F.3d at 1376. The court stressed that Roberson, consistent with Cook, does not require VA to develop the veteran's evidence or to reconcile conflicting evidence; nor does Roberson change the legal standard for determining whether the VA correctly applied its regulations to a veteran's claims. Id. Because the CUE claim in Szemraj did not involve any question about the proper interpretation of the veteran's pleadings, the Federal Circuit held that the CAVC's improper construction of Roberson was harmless, and it affirmed the CAVC's decision finding of no CUE in a prior final decision. Id. at 1375-76. In Moody, the Federal Circuit reaffirmed the Szemraj holding that Roberson is not limited to its facts. Moody, 360 F.3d at 1310. The court further concluded that the CAVC's misunderstanding of Roberson was not harmless in Moody because a determination about whether there was CUE in the 1996 RO decision turns on construction of Mr. Moody's prior pleadings. Id.

Reconciliation

7. We believe that the requirement that VA fully and sympathetically develop a veteran's claim to its optimum can be reconciled with Federal Circuit and CAVC case law on CUE claims as follows: In deciding whether there was CUE in a final VA decision based upon an allegation that VA failed to recognize an earlier claim, the RO or Board should determine whether, construing the pleadings at issue in the veteran's favor, it is obvious or undebatable that there was an error in the decision and that the error clearly affected the outcome. For example, in Mr. Moody's case, Mr. Moody claims that there was CUE in the 1996 RO decision because the RO erroneously concluded that he did not raise an informal claim for secondary service connection for a psychiatric disorder before 1994. Resolution of his CUE claim requires a determination as to: (1) whether it is obvious or undebatable that, if Mr. Moody's earlier filings are construed liberally in his favor, he raised an informal claim for secondary service connection before 1994; and if so (2) whether the RO's error in concluding otherwise manifestly affected the outcome of his claim. Using this analysis, a conclusion that there was CUE in the 1996 RO decision would not be based on a "disagreement as to how the facts were weighed or evaluated." See 38 C.F.R. § 20.1403(d)(3). Rather, a finding of CUE would be based on a conclusion that there can be no disagreement that, if the facts were weighed or evaluated under the proper standard (i.e., his pleadings were read sympathetically), Mr. Moody raised an informal claim for secondary service connection for a psychiatric disorder. In other words, Roberson, Szemraj, and Moody can be understood to require only that a determination as to whether there was CUE in a final VA decision be made in light of the standards that governed the final decision, including the principle that a veteran's pro se pleadings are liberally construed. VAOPGCPREC 12-2001 is hereby superseded by this opinion.

HELD:

For a final Department of Veterans Affairs (VA) or Board of Veterans' Appeals decision to be reversed or revised under 38 U.S.C. § 5109A or 7111 (clear and unmistakable error) on the ground that VA failed to recognize a claim for veterans benefits, it must be concluded that: (1) it is obvious or undebatable that, when prior filings are construed in the claimant's favor, the pleadings constitute an earlier claim for the veterans benefit that was subsequently awarded by VA; and (2) VA's failure to recognize that claim manifestly affected the subsequent award of benefits. VAOPGCPREC 12-2001 is hereby superseded by this opinion.

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