UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-2179

ROBERT YOUNG, APPELLANT,

V.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appeal from the Board of Veterans' Appeals

(Decided March 11, 2019)

Joel Ban, of Salt Lake City, Utah, was on the brief for the appellant.

James M. Byrne, General Counsel; *Mary Ann Flynn*, Chief Counsel; *Kenneth A. Walsh*, Deputy Chief Counsel; and *Brent A. Bowker*, all of Washington, D.C., were on the brief for the appellee.

Before PIETSCH, BARTLEY, and TOTH, *Judges*.

TOTH, *Judge*: Generally, VA is permitted to revise a "final and binding" rating decision under 38 C.F.R. § 3.105(a) if it determines that the decision contained clear and unmistakable error (CUE). The question in this case is whether VA may do so after a claimant files a Notice of Disagreement (NOD) as to the decision being challenged as CUE. Here, veteran Robert Young filed an NOD as to a June 2012 rating decision granting service connection and assigning staged ratings; he also asked for review by a decision review officer (DRO). The DRO then determined that there was CUE in the June 2012 rating decision and revised it accordingly. The Board issued an April 2017 decision finding no impropriety in these circumstances. The Court, in a September 7, 2018, single-judge memorandum decision, affirmed the Board's decision. Mr. Young filed a motion for panel review, which the Court grants.

Mr. Young argues that VA wasn't allowed to revise the June 2012 rating decision because CUE revision is initiable only against a final decision, and the appealed rating decision wasn't final. Because VA regulations expressly provide that VA may initiate CUE proceedings under the circumstances present in this case, the Court withdraws the September 7, 2018, single-judge

memorandum decision, and, for the following reasons, in this panel opinion affirms the Board decision currently on appeal.[1]

I. BACKGROUND

Mr. Young served in the U.S. Navy from 1970 to 1974. During and after service, he experienced severe neck and back pain. In 2003, he sought disability compensation for a cervical spine condition; VA granted non-service-connected pension benefits but determined that his spine condition wasn't related to service and denied compensation benefits. Mr. Young appealed this decision and received a favorable ruling when a June 2012 rating decision granted service connection for degenerative disc disease of the cervical spine under 38 C.F.R. § 4.71a, diagnostic code (DC) 5243-5237, and assigned a 10% rating from January 8, 2003, to May 25, 2011, and a 40% rating thereafter. Mr. Young disagreed with this determination and requested review by a DRO, arguing that he was entitled to at least 40% since 2003.

However, a March 2013 DRO decision determined that there was CUE in the June 2012 rating decision's assignment of a 40% rating and proposed to assign a 20% rating. It explained that the evidence at the time of the June 2012 rating decision didn't support the assignment of a 40% rating and notified Mr. Young that he had 60 days to submit evidence or argument opposing this finding. He didn't submit any. Accordingly, in a June 2013 rating decision, VA revised the June 2012 rating decision on the basis of CUE, revising Mr. Young's cervical spine rating to 20%, effective September 1, 2013. The veteran pursued an appeal of the June 2013 rating decision to the Board.

The Board in April 2017 concluded that there was CUE in the June 2012 rating decision because, at the time that decision was issued, the evidence didn't show, and Mr. Young hadn't alleged, any ankylosis of the spine. For point of reference, under DC 5243-5237, a 40% rating requires "unfavorable ankylosis of the entire cervical spine." 38 C.F.R. § 4.71a (2018). He appealed to this Court.

[1] The Board also remanded a claim for increased ratings for a cervical spine disorder in excess of 10% prior to May 26, 2011; 40% from May 26, 2011, to August 31, 2013; and 20% since September 1, 2013, and the issue of a total disability rating based on individual unemployability. Because remands are not final Board determinations, the Court has no jurisdiction over those matters. *See Foreman v. Shulkin*, 29 Vet.App. 146, 147 n.1 (2018).

II. ANALYSIS

Mr. Young first argues that VA wasn't permitted to revise the June 2012 rating decision on the basis of CUE because § 3.105(a) only permits revision of "final" decisions. And since the veteran filed an NOD as to the June 2012 rating decision, he contends that it was in appellate status and therefore not final. He bases this argument on the language of 38 C.F.R. §§ 3.105(a) and 3.160(d). The former provides that "previous determinations which are final and binding . . . will be accepted as correct in the absence of clear and unmistakable error." 38 C.F.R. § 3.105(a) (2018). The latter regulation, titled "Status of claims," says that a "finally adjudicated claim" is a "claim that is adjudicated by [VA]" and either (1) not appealed within the time allotted by regulations or (2) disposed of on appeal. 38 C.F.R. § 3.160(d) (2018).

"Finality is variously defined," and, "like many legal terms, its precise meaning depends on context." *Clay v. United States*, 537 U.S. 522, 527 (2003). One notion of finality addresses the legal effect of failing to timely appeal a decision before this Court or VA: in that sense, a decision is final after appellate review has been exhausted or the time to take advantage of such review has expired. *See, e.g.*, *Smith v. Shinseki*, 26 Vet.App. 406, 410 (2014) ("[W]hen mandate enters at the expiration of the appeal period, the decision of the Court is final and unappealable."); *Ervin v. Shinseki*, 24 Vet.App. 318, 325–26 (2011) ("Our caselaw establishes that a claim is not finally decided where the appellant files a timely appeal," that is, an NOD or Notice of Appeal). That's the sense finality has in § 3.160(d) and that Mr. Young suggests should obtain in § 3.105(a). But that's not right for a few reasons.

In the first place, § 3.105(a), unlike § 3.160(d), doesn't use the term "finally adjudicated claim"—it instead says that "final and binding" decisions are subject to revision based on a finding of CUE—and there's no apparent reason to think that the different language used in these regulations means the same thing. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) ("Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally."). So, the question is: what is a "final and binding" decision?

The answer to that question is found in the section preceding § 3.105: "A decision of a duly constituted rating agency or other agency of original jurisdiction [AOJ] shall be *final and binding* on all field offices of the Department of Veterans Affairs as to conclusions based on the evidence on file at the time VA issues written notification in accordance with 38 U.S.C. § 5104." 38 C.F.R.

§ 3.104(a) (2018) (emphasis added); *see Smith v. Brown*, 35 F.3d 1516, 1521 (Fed. Cir. 1994) (describing § 3.104(a) as the "companion" regulation to § 3.105(a)). In § 3.104, titled "Finality of decisions," "final" does not refer to the expiration of the time to appeal a decision, as it does in § 3.160(d), but to the end of any internal review of a matter by an AOJ; an example of a "final and binding" determination is a rating decision. *See* 38 U.S.C. § 5104 ("In the case of a decision . . . affecting the provision of benefits to the claimant, the Secretary shall . . . provide to the claimant . . . notice of such decision."); *see also, e.g.*, R. at 2655 ("This rating decision represents a full and final determination of this issue on appeal. As such, this issue is considered resolved in full.").[2] In other words, "final and binding" in § 3.104 does not mean unappealable as Mr. Young contends; rather, it means that the AOJ's review is complete and the AOJ (or another AOJ) cannot reach a different decision on the same evidence, except as otherwise provided. Since § 3.105(a) expressly provides that "final and binding" decisions are subject to CUE, it follows that VA was permitted to revise the June 2012 rating decision despite the filing of an NOD.

But if that's not enough to settle the matter, § 3.104(a) also provides that a "final and binding agency decision shall not be subject to revision . . . except as provided in § 3.105 and § 3.2600 of this part." Significantly, § 3.2600(a), which addresses "[r]eview of benefit claims decisions," provides that "a claimant who has filed a[n] [NOD] . . . with a decision of an [AOJ] . . . has a right to a review of that decision." 38 C.F.R. § 3.2600(a) (2018). It goes on to list the different types of review, including review by a DRO. *Id.* Subsection (e) expressly authorizes reviewers to revise rating decisions on the basis of CUE *even if* there's a pending NOD:

> Notwithstanding any other provisions of this section, the reviewer may reverse or revise (even if disadvantageous to the claimant) prior decisions of an [AOJ] (including the decision *being reviewed* or any prior decision that has become final due to failure to timely appeal) on the grounds of clear and unmistakable error (see § 3.105(a)).

38 C.F.R. § 3.2600(e) (emphasis added).[3] And, as VA explained in the May 2001 final rule codifying § 3.2600, VA "amended § 3.104 to make clear that not only § 3.105 but also new § 3.2600 are valid bases for revision of decisions on the same factual basis as the initial decision

[2] This is the concept of finality the Court refers to when it says that its jurisdiction is confined to final adverse decisions of the Board. *See, e.g., Patricio v. Shulkin*, 29 Vet.App. 38, 42 (2017).

[3] Section 3.2600(a) uses the term "final" in the manner the veteran argues, stating: "Only a decision that has not yet become final (by appellate decision or failure to timely appeal) may be reviewed." But subsection (e) makes clear that a decision need not be "final" in this sense before a reviewer can reverse or revise it on the basis of CUE.

by the [AOJ]," thereby giving the reviewer under § 3.2600(e) "the same [CUE] authority as any other VA adjudicator under § 3.105(a)." Review of Benefit Claims Decision, 66 Fed. Reg. 21,871, 21,873 (May 2, 2001). Thus, a "final and binding" decision, even in appellate status, is subject to sua sponte VA revision on the basis of CUE. *Murphy v. Shinseki*, 26 Vet.App. 510, 514 n.2 (2014) ("Decisions that were the product of CUE may be sue sponte revised . . . even if the revision is unfavorable to the claimant."). Here, Mr. Young filed an NOD as to a "final and binding" rating decision, as defined by § 3.104(a), and selected review by a DRO. Since § 3.2600(e) undoubtedly authorized the DRO ("the reviewer") to revise the June 2012 rating decision ("the decision being reviewed"), the Court discerns nothing improper with the actions taken by VA in this case.[4]

Mr. Young also cites several of our cases to support his argument, contending that they contain language suggesting that VA is not permitted to revise appealed and pending or appealable rating decisions on the basis of CUE.[5] But his arguments overlook two important things. *First*, as described above, VA regulations expressly permit VA to do so. *Second*, the cases he cites addressed claimant-initiated CUE motions instead of VA-initiated CUE revisions. The Court has consistently said that claimants may not collaterally attack rating decisions until they become unappealable for a simple and practical reason: claimants can directly appeal decisions that don't award a full grant of benefits. It makes no sense for claimants to challenge a decision on the basis of CUE when they still have recourse to direct review, which has a less demanding standard to show error. *See Gomez v. McDonald*, 28 Vet.App. 39, 43 n.1 (2015) (observing that it would be "illogical" for a claimant to "forfeit the right to direct review of a [VA] decision in exchange for review under the much higher scrutiny of a CUE motion"). But it is far more efficient—and beneficial to claimants—to allow VA to correct obvious errors at the time of identification of the error than to force it to wait until a claim is fully adjudicated and then pursue overpayments in the

[4] Mr. Young also argues that the alleged impropriety of VA's June 2013 rating decision stripped this Court of jurisdiction over the April 2017 Board decision. But this Court has jurisdiction to review final adverse Board decisions. 38 U.S.C. § 7266(a). The Board decision here meets those requirements.

[5] *E.g.*, *Palmer v. Nicholson*, 21 Vet.App. 434, 438 (2007) ("[R]equest for revision on the basis of CUE cannot lie as to a prior decision that is still open to direct review"); *Richardson v. Nicholson*, 20 Vet.App. 64, 70-71 (2006) ("[R]evision of a prior decision on the basis of CUE can only be based on a *final* decision by the RO or the Board."); *May v. Nicholson*, 19 Vet.App. 310, 320 (2005) ("CUE collateral attacks are not matters on direct review."); *Hines v. Principi*, 18 Vet.App. 227, 235-36 (2004) ("A CUE claim cannot be raised for the first time before this Court but that the claim must have been the subject of a final prior [Board] determination."); *Norris v. West*, 12 Vet.App. 413, 422 (1999) ("Thus, there is no final RO decision on this claim that can be subject to a CUE attack.").

form of recoupment. 38 U.S.C. § 3685 ("Whenever the Secretary finds that an overpayment has been made to a veteran . . . the amount of such overpayment shall constitute a liability of such veteran. . . .").

The veteran's remaining arguments concern not the impropriety of CUE in this context but how VA conducted its revision. He first argues that the Board failed to conduct a proper § 3.105(a) analysis because it relied on evidence postdating the June 2012 rating decision. For VA to establish CUE in a prior final decision, it must show that (1) the adjudicator either ignored the correct facts of record or incorrectly applied statutes or regulations in effect at the time; (2) the alleged error was undebatable, not merely a disagreement as to how the facts were weighed or the law was applied; and (3) the commission of the alleged error, at the time it was made, manifestly changed the outcome of the decision at issue. *Hime v. McDonald*, 28 Vet.App. 1, 6 (2016).

Here, the Board found that the evidence "at the time of the June 2012 rating decision" didn't meet the criteria necessary for it to assign a 40% rating under diagnostic code 5243-5237. R. at 9. Indeed, there was no evidence of ankylosis at that time. Although the Board also found that these criteria weren't met in March or June 2013, there's no indication that it relied on these particular findings to make its CUE determination. For these reasons, we aren't persuaded that the Board erred in the manner alleged.

Last, Mr. Young argues that VA failed to comply with the procedural requirements set out in 38 C.F.R. § 3.105(e). This provision applies "for compensation purposes" when VA is reducing a rating based on a "change in service-connected or employability status or change in physical condition." 38 U.S.C. § 5112(b)(6), *authorizing* 38 C.F.R. § 3.105(e). So, § 3.105(e) might come into play when a claimant is assigned a rating for a certain condition but that condition later improves. That's not what happened in this case.

Rather, the Board found that the DRO's revision of the June 2012 rating decision on the basis of CUE was correct given what the evidence reflected as of June 2012. Properly speaking, this action wasn't a "reduction" based on later evidence showing a change in the veteran's condition, but a revision based on the evidence of record at the time the original decision was made. R. at 7 ("Again, the RO did not allege an improvement in the veteran's cervical spine symptoms . . . the RO asserted that there was [CUE] in the June 2012 rating decision . . . ."). Therefore, the procedures set out in § 3.105(e) were not applicable in this case.

III. CONCLUSION

Based on the parties' briefs, the record, and the relevant law, the Court withdraws the September 7, 2018, single-judge memorandum decision, and AFFIRMS the April 20, 2017, Board decision.

PIETSCH, *Judge*, concurring in part, and dissenting in part: I concur with the outcome that the Court has reached. In my opinion, however, the majority's interpretation of the phrase "final and binding" in 38 C.F.R. § 3.105(a) is neither correct nor necessary to the outcome of this case. I therefore respectfully dissent from all of the majority's analysis except for its application of 38 C.F.R. § 3.2600(e) to the facts of this case.

As the appellant well demonstrated in his reply brief and motion for reconsideration and the majority acknowledges, the Court has, in the past, consistently concluded that the phrase "final and binding" in § 3.105(a) means that all opportunities for appeal of the referent decision have expired. *See Richardson v. Nicholson*, 20 Vet.App. 64, 70-71 (2006) ("[R]evision of a prior decision on the basis of CUE can only be based on a *final* decision by the RO or the Board. *See* 38 C.F.R. § 3.105(a) (providing for the revision of '[p]revious [RO] determinations which are final and binding" on the basis of CUE)"); *see also Palmer v. Nicholson*, 21 Vet.App. 434, 438 (2007) ("[R]equest for revision on the basis of CUE cannot lie as to a prior decision that is still open to direct review") (citing *May v. Nicholson*, 19 Vet.App. 310, 320 (2005)). If I read the Court's decision correctly, the meaning of "final and binding" now varies depending on who seeks to invoke it. Section 3.105(a), the majority directs, applies differently to veterans than it does to agency adjudicators.

I do not think such an outcome is either advisable or the proper interpretation of this provision.[6] More importantly, I find it wholly unnecessary to resolve this case. As the majority

[6] The Secretary apparently agrees. On January 18, 2019, he announced that, effective February 19, 2019, the phrase "final and binding" will henceforth not be part of the regulatory scheme that the Court interprets in this decision. 84 Fed. Reg. 138, 167 (January 18, 2019). The new version of 38 C.F.R. § 3.104(a) states that agency decisions will be "binding" on all VA field offices, but no longer includes any reference to finality. *Id.* The new version of 38 C.F.R. § 3.105(a) banishes the word "binding" and explains that decisions "are final when the underlying claim is finally adjudicated as provided in § 3.160(d)." *Id.* Consequently, the Secretary has cleared up the confusion at the heart of this case, and he has done so in a manner consistent with the interpretation that the appellant proffered in briefing.

well demonstrates, § 3.2600(e) allows the agency to proceed in the manner that it did in this case no matter what "final and binding" means.[7] Consequently, I conclude that the Board's decision should be affirmed because § 3.2600(e) gave the decision review officer the authority to find clear and unmistakable error while the appellant's Notice of Disagreement was pending, regardless of the meaning of § 3.105(a).

The appellant raised alternative arguments in his brief, and the Court addresses them in its decision. The appellant, however, wrote in his reply brief that he "waives previously briefed issues to narrow the scope of this [C]ourt's review on a threshold jurisdiction issue." Reply Brief at 3. He further wrote that "[b]ecause jurisdiction is a threshold issue, we waive other issues previously briefed. While we regret that the Secretary was compelled to respond to these issues, we now wish for this Court to only consider this jurisdiction issue: whether the decision to decrease Mr. Young's rating was subject to CUE." *Id*. The appellant did not mention his alternative arguments in his motion for reconsideration. Consequently, I accept his waiver and do not reach them. For this and the other reasons discussed above, I vote to affirm the Board's decision, but I do not join the Court's analysis save for its application of § 3.2600(e) to the facts of this case.

[7] Indeed, if "final and binding" is as the majority says, then it seems that § 3.2600(e) is largely superfluous.