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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 24-9088

DOMINGO M. LEDESMA, APPELLANT,

V.

DOUGLAS A. COLLINS,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

PIETSCH, *Judge*: Domingo M. Ledesma appeals through counsel a November 8, 2024, decision by the Board of Veterans' Appeals (Board) that denied Mr. Ledesma's motion to revise, on the basis of clear and unmistakable error (CUE), a January 27, 2016, rating decision reducing Mr. Ledesma's disability rating for his service-connected back disability, from 40% to 10%. Record (R.) at 5-16. For the reasons that follow, the Court reverses the Board's decision and remands this matter for reinstatement of the 40% rating, effective from April 1, 2016, the effective date of the reduction.

I. BACKGROUND

Mr. Ledesma served in the U.S. Army from November 1983 to November 1986, and from February 1987 to September 2004. R. at 1948, 2411. In an October 2004 rating decision, he was granted service connection for his back disability, and a 10% disability rating was assigned. R. at 4333-40. Later, a 40% disability rating was assigned to Mr. Ledesma's back disability, effective from April 2014.[1] R. at 2548.

[1] The record before the Court does not include a copy of the decision that assigned this rating, but the decision is reflected in a codesheet that accompanied a subsequent decision. R. at 2548.

An incomplete March 2015 private treatment record describes employment limitations caused by Mr. Ledesma's service-connected back disability and radiculopathy. R. at 2994. The record states that Mr. Ledesma could not lift any weight; that he could use his upper extremities for only one-third of an 8-hour workday; that he could stand or walk for approximately 10 minutes during a normal workday; and that he could sit "on/off" for approximately 4 hours during a workday. *Id*. The record concludes that Mr. Ledesma "[c]annot attend work at all." *Id*.

Mr. Ledesma also submitted a March 2015 statement from his wife, attesting to her personal observations of the limitations caused by Mr. Ledesma's back disability. R. at 3272. Mrs. Ledesma reported that even the slightest movement caused her husband pain, resulting in sleepless nights and difficulty walking, shopping for groceries, and driving. *Id*. Mr. Ledesma was also unable to participate in physical activities with his grandchildren. *Id*.

In April 2015, Mr. Ledesma filed a claim for a total disability rating based on individual unemployability, based in part on the limitations imposed by his service-connected back disability. R. at 3216-18.

A June 2015 VA examination of Mr. Ledesma's spine, *see* R. at 2974-82, revealed flexion of the thoracolumbar spine that was limited to 80 degrees, with painful motion beginning at 80 degrees, R. at 2975. Extension of the thoracolumbar spine and right and left lateral flexion were each limited to 10 degrees, with painful motion beginning at 10 degrees. *Id*. Mr. Ledesma exhibited full right lateral rotation with no limitations, and left lateral rotation was limited to 15 degrees, with pain beginning at 15 degrees. *Id*. There was no additional limitation of motion after repetition. R. at 2976. Functional impairment was described as less movement than normal, incoordination of movement with an "impaired ability to execute skilled movements smoothly," and painful motion. *Id*.

In September 2015, VA proposed to reduce the rating for Mr. Ledesma's back disability from 40% to 10%, pointing out that examination of limitation of motion showed improvement. R. at 2611-12. VA effected the reduction in a January 27, 2016, rating decision that reduced Mr. Ledesma's back rating to 10%, effective April 1, 2016. R. at 2547-52. The January 2016 rating decision recites the findings of the June 2015 VA examination, noting that forward flexion of the spine that was limited to more than 60 degrees but less than 85 degrees, along with a combined range of motion of the spine more than 120 degrees but not more than 235 degrees, warranted a 10% disability rating under the rating criteria. R. at 2551. The decision also finds that Mr.

Ledesma's back disability did not meet the criteria for a 20% disability rating. *Id*. The decision notes further that the Agency received "medical records from Dr. Ryan Bergeson and Metroplex,"[2] but "these records do not show a continued evaluation at 40% disabling." *Id*. "The current evidence," VA concluded, "warrants a 10% evaluation." *Id*.

VA increased Mr. Ledesma's back rating from 10% to 20% in an August 2016 rating decision. R. at 2446-48. The rating decision states that a claim for a higher rating was filed on June 20, 2016.[3] R. at 2446. Mr. Ledesma's back rating was increased from 20% to 40% in a March 2018 rating decision. R. at 1402-06.

In July 2019, Mr. Ledesma filed a motion to revise, on the basis of CUE, the January 2016 rating decision. R. at 1043-44. In a letter accompanying his motion, Mr. Ledesma asserted that VA improperly reduced the disability rating for his back when it failed to discuss whether evidence at the time established that the improvement of his back symptoms could be maintained under the "ordinary conditions of life." R. at 1047 (citing *Brown v. Brown*, 5 Vet.App. 413, 421 (1993)). VA denied the motion in August 2019. R. at 925-27. After unsuccessfully challenging that decision via a request for higher-level review, *see* R. at 652-55, 720-21, Mr. Ledesma appealed to the Board. R. at 134.

In the November 2024 decision on appeal, the Board found no CUE in the January 2016 rating decision. R. at 5-16. The Board found that the decision "implicitly found that [Mr. Ledesma's] low back disability had improved and [the decision] reduced [his] rating to reflect this improvement." R. at 14. The Board pointed out that the June 2015 VA examination report showed improvement, and that VA relied on this examination when reducing Mr. Ledesma's rating. R. at 15. The Board conceded that "private medical records cited by [Mr. Ledesma] in his CUE motion do reflect that [his] ability to function under ordinary conditions of life and work were impaired and there was no sustained improvement." R. at 15. Yet, the Board went on, the January 2016 rating decision reflects that those records were reviewed. *Id*. Thus, the records do "not constitute undebatable evidence" that Mr. Ledesma's back disability "had not improved under the ordinary conditions of life and work." *Id*. "To the contrary," the Board continued, "the RO [regional office]

[2] It does not appear that this evidence is included in the record before the Court. The record includes one incomplete private treatment record that is not signed by Dr. Ryan Bergeson and does not reference "Metroplex." R. at 2994.

[3] This claim was not included in the record before the Court.

determined that this private evidence merely weighed against such a finding." *Id*. The Board also found that the January 2016 rating decision "appears to have afforded greater probative weight" to the June 2015 VA examination report; thus, the January 2016 rating decision "did not clearly and unmistakably err" in finding that Mr. Ledesma's back disability had improved, "including [through] sustained improvement in the ability to function under ordinary conditions of life and work." *Id*. Therefore, Mr. Ledesma's argument is "essentially a disagreement with how [VA] weighed the evidence" in January 2016, which cannot constitute CUE. *Id*. (citing *Russell v. Principi*, 3 Vet.App. 310, 313 (1992) (en banc)).

II. PARTIES' ARGUMENTS

Mr. Ledesma argues that the Court should reverse the Board's decision and reinstate his 40% disability rating, effective from April 1, 2016, on the grounds that VA's errors in the January 2016 rating decision made the reduction void ab initio. Appellant's Brief (App. Br.) at 9-12.

Mr. Ledesma challenges the Board's finding that the rating decision includes an "implicit" finding that there was improvement in Mr. Ledesma's back condition, *see* R. at 14; he asserts that an implicit finding in a rating-reduction decision violates a requirement that VA notify a veteran of "all material facts and reasons" for a reduction. App. Br. at 10 (citing 38 C.F.R. § 3.105(e) (2025)). He also asserts that the rating decision fails to comply with the requirement that in any rating reduction case, VA must consider whether an improvement will be "maintained under the ordinary conditions of life." *Id*. (citing *Brown*, 5 Vet.App. at 420-21).

Mr. Ledesma argues further that the January 2016 rating decision improperly shifts the burden of proof from the Government to the veteran, noting that VA bears the burden of demonstrating that a reduction is warranted. *Id*. at 11-12 (first citing *Brown*, 5 Vet.App. at 421; and then citing *Kitchens v. Brown,* 7 Vet.App. 320, 325 (1995)). He asserts that VA improperly shifted that burden of proof by requiring that Mr. Ledesma's back disability meet the rating criteria for a 40% rating. *Id*. at 12. This improper burden-shifting, he argues, renders the rating decision void ab initio. *Id*. at 12 (citing *Brown*, 5 Vet.App. at 422).

Alternatively, Mr. Ledesma asserts that the Board's decision should be reversed because it is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id*. at 13 (quoting *Simmons v. Wilkie*, 30 Vet.App. 267, 274 (2018) (describing the standard of review the Court employs when it evaluates a Board's finding of no CUE in a rating decision)). Mr.

Ledesma takes issue with the Board's reliance on the January 2016 rating decision's "implicit" finding of improvement, pointing out that even if an implicit finding satisfies regulatory requirements, the Board still failed to address whether the January 2016 decision complied with requirements when it did not address evidence that any improvement in his back condition was not maintained under ordinary conditions of life and work. *Id*. at 14-15 (citing R. at 2994, 3272). He argues that the March 2015 lay statement from his wife and the March 2015 private treatment record documenting the effects of his back disability on his employability constitute undebatable evidence that his back condition had not improved under the ordinary conditions of life and work. *Id*. at 16 (citing R. at 2994, 3272).

The Secretary concedes that the Board erred when it failed to address Mr. Ledesma's argument that the January 2016 rating decision did not discuss whether there was improvement of Mr. Ledesma's back condition under the ordinary conditions of life and work. Secretary's Brief (Sec. Br.) at 7. But the Secretary disagrees that reversal is the appropriate remedy. Instead, he urges the Court to remand this matter so that the Board can make the necessary findings of fact as to whether the January 2016 rating decision addressed improvement under the ordinary conditions of life and work. *Id*. at 7-8. The Secretary argues that without such findings, the Court cannot discern whether Mr. Ledesma's CUE motion would result in a "manifestly different outcome," a critical part of evaluating whether a decision contains CUE. *Id*. at 8-9 (citing *Stallworth v. Nicholson*, 20 Vet.App. 482, 487 (2006) (observing that a finding of CUE requires, in part, a finding that the outcome of a decision would have been manifestly different but for the error)).

In reply, Mr. Ledesma disagrees that remand, rather than reversal, is the appropriate remedy. Reply Brief at 2-4. He notes that in *Sorakubo v. Principi*, this Court held that a rating reduction not made in accordance with applicable regulations is void ab initio even if the decision was final and was being challenged on the basis of CUE. *Id*. at 2 (citing *Sorakubo*, 16 Vet.App. 120, 124 (2002)). He also urges the Court to reject the Secretary's proposed remand because the January 2016 decision's failure to address evidence that improvement was not maintained under the ordinary conditions of life and work improperly shifted the burden of proof onto the claimant, an error that renders the rating decision void ab initio. *Id*. at 3-4 (citing *Kitchens*, 7 Vet.App. at 325).

III. ANALYSIS

When a final decision contains CUE, that decision may be reversed or revised. 38 U.S.C. §§ 5109A, 7111; *see DiCarlo v. Nicholson*, 20 Vet.App. 52, 54-58 (2006); 38 C.F.R. §§ 3.105, 20.1400-1411 (2025). CUE exists when (1) the correct facts were not before the adjudicator or the law then in effect was incorrectly applied, (2) the error is undebatable and not merely a disagreement as to how the evidence was weighed, and (3) the error manifestly changed the outcome of the decision. *Russell v. Principi*, 3 Vet.App. 310, 313-14 (1992) (en banc); *see also Damrel v. Brown*, 6 Vet.App. 242, 245 (1994); *Bustos v. West*, 179 F.3d 1378, 1380-81 (Fed. Cir. 1999). CUE is a "very specific and rare kind of error" that compels the conclusion that the result would have been manifestly different but for the error. *Fugo v. Brown*, 6 Vet.App. 40, 43 (1993). "[I]f it is not absolutely clear that a different result would have ensued" based upon the facts and law that were understood at the time of the decision, then any error that may have occurred in a final decision is not clear and unmistakable. *Id*. at 44.

The Court reviews a Board determination that a prior decision did not contain CUE under the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard, and for an adequate statement of reasons or bases. 38 U.S.C. §§ 7261(a)(3)(A), 7104(d)(1); *see Cacciola v. Gibson*, 27 Vet.App. 45, 59 (2014); *Eddy v. Brown*, 9 Vet.App. 52, 57 (1996). Under this standard, the Court must affirm the decision if "the Board articulates a satisfactory explanation for its decision, including 'a rational connection between the facts found and the choice made.'" *George v. Shulkin*, 29 Vet.App. 199, 206 (2018) (quoting *Lane v. Principi*, 16 Vet.App. 78, 83 (2002)). Additionally, whether an error would have manifestly changed the outcome is a mixed question because it "'involves the application of law . . . to a specific set of facts.'" *Simmons*, 30 Vet.App. at 278 (quoting *Butts v. Brown*, 5 Vet.App. 532, 538 (1993) (en banc)).

A disability evaluation may be reduced based on a "change in service-connected or employability status or change in physical condition." 38 U.S.C. § 5112(b)(6); 38 C.F.R. § 3.105(e). "Reexaminations disclosing improvement, physical or mental, in [disabilities with ratings in effect for less than 5 years] will warrant reduction in rating." 38 C.F.R. § 3.344(c) (2025). But under 38 C.F.R. §§ 4.1 and 4.2, VA is "required in any rating-reduction case to ascertain, based upon review of the entire recorded history of the condition, whether the evidence reflects an actual change in the disability and whether the examination reports reflecting such change are

based upon thorough examinations." *Brown*, 5 Vet.App. at 421. And, under 38 C.F.R. §§ 4.2 and 4.10, VA must not only "determine[] that an improvement in a disability has actually occurred but also that that improvement actually reflects an improvement in the veteran's ability to function under the ordinary conditions of life and work." *Brown*, 5 Vet.App. at 421; *see also Hedgepeth v. Wilkie*, 30 Vet.App. 318, 324 (2018) (holding that VA may not reduce a disability rating without finding "that the veteran's service-connected disability has improved to the point that he or she is now better able to function under the ordinary conditions of life and work"). VA errs when it reduces a rating without complying with the "general VA regulations applicable to all rating-reduction cases, regardless of the rating level or the length of time that the rating has been in effect," including the specific requirements of §§ 4.2 and 4.10. *Faust v. West*, 13 Vet.App. 342, 349 (2000). Therefore, VA may not reduce a veteran's disability rating without first finding that the veteran's service-connected disability has improved to the point that he or she is now better able to function under the ordinary conditions of life and work. *See id.*; *Brown*, 5 Vet.App. at 421.

The January 2016 rating decision states only that a 10% rating was assigned; that the criteria for a 20% disability rating were not met; and that private treatment records "do not show a continued evaluation at 40% disabling." R. at 2551. The decision does not determine that an improvement occurred, or that an improvement could be sustained under the ordinary conditions of life and work. *See Brown*, 5 Vet.App. at 421.

The Board attempted to make these determinations in the decision on appeal. The Board found that there was an "implicit" determination of improvement in the January 2016 decision because the decision referenced the June 2015 VA examination. R. at 14. The Board also conceded that private treatment records showed no sustained improvement under the ordinary conditions of work and life but the Board found that because the private treatment records were considered in January 2016, the records were not undebatable evidence of sustained improvement under the ordinary conditions of life and work. R. at 15. But the Board's findings cannot cure the fact that the January 2016 rating decision did not make the necessary determinations that there was improvement in Mr. Ledesma's condition, and that the improvement could be sustained under the ordinary conditions of life and work. *See Brown*, 5 Vet.App. at 421. Because VA did not make those determinations in January 2016, the Court reverses the Board's findings to the contrary. *See Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004) ("[R]eversal is the appropriate remedy when the only permissible view of the evidence is contrary to the Board's decision.").

Because the January 2016 rating decision failed to make the necessary findings when reducing Mr. Ledesma's rating, the Court concludes that the decision contained CUE and that the Board's finding of no CUE in the decision was not in accordance with law. S*ee* 38 U.S.C. § 7261(a)(3)(A). Therefore, the Court will also reverse the Board's finding that there was no CUE in the January 2016 reduction decision. *See Gutierrez*, 19 Vet.App. at 10. The Court also finds that the January 2016 rating decision is void ab initio because it failed to make legally required determinations before reducing Mr. Ledesma's rating, and that reinstatement of his prior evaluation is required. *See Brown*, 5 Vet.App. at 422.

IV. CONCLUSION

Upon consideration of the foregoing, the Board's November 8, 2024, decision is REVERSED and the matter is REMANDED with instructions to reinstate the 40% disability rating for Mr. Ledesma's service-connected back disability, effective from April 1, 2016.

DATED: March 31, 2026

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