

CLEAR AND UMISTAKABLE ERROR

Clear and Unmistakable Error

What is CUE?

Injustice is NOT the same as CUE

- *Scenario* – Philip Cushman served in a USMC combat infantry battalion in Vietnam
 - A sandbag fell on his back damaging his spine
 - Filed a VA claim in October 1974
 - Awarded a 60% disability rating

Clear and Unmistakable Error (cont'd)

Facts Cont'd:

- His condition worsened and he was reevaluated in 1976
 - Examiner comment - "Is worse + must stop present type of work."
 - Filed for IU in May 1977, which was denied
- Filed for SSDI in 1982, VA forwarded his medical records to the SSA and his claim was denied

Clear and Unmistakable Error (cont'd)

Facts Cont'd:

- In 1997, the veteran became aware of discrepancy in VA Medical records
 - “Is worse + must stop present type of work”
now read “Is worse + must stop present type of work, or at least [] bend [] stoop lift.”
- Sued in Federal Court and secured past due *SSDI* benefits
- Filed CUE claims for the 1977 denial of TDIU

Is this CUE?

NO!

So What is CUE?

CUE is a very specific and rare kind of error

- Error of fact or law

- would render the decision “manifestly different”
- “If it is not absolutely clear that a different [and favorable] result would have ensued, the error complained of cannot be CUE”

So What is CUE? (cont'd)

CUE is **NOT**:

- “A disagreement as to how the facts were weighed or evaluated.” *Russell v. Principi*, 3 Vet. App. 310, 313 (1992).
 - **NOT** a challenge to the VA’s decision to find the nurse practitioner’s three line opinion more persuasive than the dean of Harvard Medical School’s three page opinion

So What is CUE? (cont'd)

It has to be more than that because of its power:

- Allows a veteran to revisit any final decision
- Success results in the effective date that should have been assigned in the absence of CUE. 38 U.S.C. §§ 5109A, 7111; 38 C.F.R. § 3.400(k).

So What is CUE? (cont'd)

A CUE motion is an allegation that:

- “The facts known at the time,” were not before the VA; **OR**
- “The law then in effect was incorrectly applied”; **AND**
- If not for this error the outcome would have been manifestly different. *See, e.g., Bouton v. Peake*, 23 Vet.App. 70, 71 (2008).

So What is CUE? (cont'd)

It is NOT CUE if:

- The BVA relied on an incorrect medical diagnosis
- The BVA did not comply with the duty to assist
- There is merely a disagreement about how facts should be weighed
- There is a later change in the way a law is interpreted

The CUE Motion Itself

The Motion must be specific:

- Set forth the alleged error(s) of fact/law
- Set forth the basis for such a claim; **and**,
- Explain why the result would have been manifestly different. *See* 38 C.F.R. § 20.1404(b).

The CUE Motion Itself (cont'd)

Pertinent question - Did the RO commit CUE or did the BVA?

- RO Decisions “Subsumed” by the BVA
 - RO decision cannot be reviewed for CUE if that decision was appealed to and decided by the BVA
 - “Inferior” tribunal would review the “superior” tribunal

The CUE Motion Itself (cont'd)

RO Decision and “Delayed Subsuming”

- BVA grants a veteran’s request to reopen a claim, **and** reviews the merits
 - CUE must be lodged against the later BVA decision
 - BVA is essentially reviewing the earlier RO decision and thus the RO decision is “subsumed.” *Donovan v. Gober*, 10 Vet.App. 404 (1997), *aff’d sub nom Donovan v. West*, 158 F.3d 1377 (Fed. Cir. 1998).

Further Limitations

Certain rules do not apply to a CUE motion:

- “Benefit of the Doubt” rule
- “New and Material Evidence” rule
- VA’s duty to develop the claim (notice/records request)
- VA’s general duty to assist (38 U.S.C. § 5107(a))

How has CUE been Used?

CUE – Failure to Give a Sympathetic Reading

- 1994 - submitted a claim for depression secondary to his service-connected prostatitis
 - Awarded service connection and TDIU
 - Assigned an effective date of June 1994

- Veteran claimed CUE with assigned effective date
 - Reasoned claims and evidence of record prior to 1994 sufficient to raise an informal claim
 - The Federal Circuit agreed that the VA owed a duty to sympathetic read

How has CUE been Used? (cont'd)

CUE – Failure to Properly Apply the Rating Schedule

- VA assigned a 0% rating for a “through and through” gunshot wound in the thigh
 - Applicable regulation stated wound must be rated as “at least a moderate injury”
 - VA failed to rate the injury as such, and therefore committed CUE. *Myler v. Derwinski*, 1 Vet. App. 571, 574 (1991).

How has CUE been Used? (cont'd)

CUE – Imposing Additional Requirements for Service Connection

- Failed to correctly apply 38 C.F.R. § 3.303(b)
 - VA require that the veteran show a medical nexus for a chronic disease diagnosed in service
 - CUE because the requirement of medical nexus evidence was contrary to the regulation. *Groves v. Peake*, 524 F.3d 1306 (Fed. Cir. 2008).

Recent CUE Cases

CUE – Failure to Apply Presumption of Aggravation

■ *Peoples v. Shinseki*

- Filed a CUE claim with a 1958 VA decision denying service connection for schizophrenic reaction
- Board in 2009 denied the CUE motion because the evidence demonstrated that the condition preexisted service

Recent CUE Cases – Peoples v. Shinseki (cont'd)

- To rebut the presumption of soundness in 1958, VA was required to find:
 - Clear and unmistakable evidence that (a) condition preexisted service and (b) condition was not aggravated by such military service
- In other words, VA must show (a) no in-service increase in disability or (b) any in-service increase was due to the natural progression of the disease.

Recent CUE Cases – Peoples v. Shinseki (cont'd)

- The Court found CUE existed in the 1958 decision because the VA misinterpreted the regulation

Recent CUE Cases – Santiago-Ayala v. Shinseki

CUE – Reduction of a Disability Rating

- *Santiago-Ayala v. Shinseki*
 - Filed a CUE claim with a 1981 rating decision, which reduced his 100% disability rating for service-connected schizophrenia

Recent CUE Cases – Santiago-Ayala (cont'd)

- 1981 decision reduced the veteran's disability rating to 70%
 - based on a psychiatric examination that revealed "marked" improvement in his service-connected disability
- Relevant law in 1981:
 - Reducing a 100% rating requires "material improvement." 38 C.F.R. § 3.343(a) (1981).

Recent CUE Cases – Santiago-Ayala (cont'd)

- Arguably contained CUE because
 - (a) the rating reduction was not based on relevant law in 1981
 - (b) but for the CUE, the result would have been manifestly different (the 100% disability rating would not have been reduced)