**UNITED STATES COURT OF VETERANS APPEALS**

No. 96-1590

THEODORE J. DITTRICH, APPELLANT,

V.

TOGO D. WEST, JR.,
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appeal from the Board of Veterans' Appeals

(Decided January 6, 1998 )

*Kenneth M. Carpenter* was on the brief for the appellant.

*Robert E. Coy*, Acting General Counsel; *Ron Garvin*, Assistant General Counsel; *Adrienne Koerber*, Deputy Assistant General Counsel; and *Amy S. Gordon* were on the pleadings for the appellee.

Before FARLEY, HOLDAWAY, and GREENE, *Judges*.

FARLEY, *Judge*: This is an appeal from an August 30, 1996, decision of the Board of Veterans' Appeals (BVA or Board) dismissing the veteran's claim that a March 1960 rating decision denying service connection for a psychiatric disability was the product of clear and unmistakable error (CUE). This appeal is timely and the Court has jurisdiction pursuant to 38 U.S.C. § 7252(a). For the reasons that follow, the Court will affirm the Board's August 30, 1996, decision.

**I.**

The appellant, Theodore J. Dittrich, served on active duty in the U.S. Army from January 1953 to December 1954. Record (R.) at 29. In March 1960, the veteran's claim for service connection for psychosis was denied by the VA regional office (RO) which found no "evidence of a psychosis or of characteristic manifestations thereof to a disabling degree of 10% within a period

of 1 year following separation from active duty." R. at 128. The veteran did not submit a timely appeal to that decision.

In July 1965, after receiving a letter from VA confirming that he would continue to receive a non-service-connected pension (R. at 210), the veteran sent a letter to the RO stating that he wished to appeal the 1960 rating decision (R. at 212). The RO responded by letter informing the veteran that the time limit to appeal that decision had expired. R. at 215. The RO subsequently received additional evidence regarding the veteran's claim for service connection and, on December 16, 1968, issued a confirmed rating decision denying the veteran's claim because the evidence submitted was not new and material. R. at 228-29. The veteran filed a timely appeal and the Board issued its decision on June 18, 1969. R. at 252. The Board reopened the claim and found that (1) schizophrenic reaction was not present during the veteran's period of service, nor was it shown upon his discharge examination; and (2) schizophrenic reaction was not initially medically reported until over two years after the veteran's separation from service. R. at 255. The Board concluded that "[s]ervice connection [was] not warranted for schizophrenic reaction on the basis of incurrance or aggravation during service. It was not manifested to a degree of ten per cent [sic] (10%) or more within one year following termination of active wartime service." R. at 255.

The veteran's claims to reopen his claim for service connection were denied by the Board in 1979, 1980, 1986, 1991, and 1993. R. at 258-291. The veteran appealed the 1993 BVA decision and, on July 14, 1994, based upon the parties' joint motion, this Court dismissed the veteran's claim to reopen and remanded his claim of CUE in the March 1960 rating decision. R. at 311-20. The Board subsequently remanded the CUE claim to the RO. R. at 322-25. On June 9, 1995, the RO issued a rating decision concluding that a "well[-]grounded claim of clear and unmistakable error in [the] rating decision of 3-7-60 [had] not been presented." R. at 328. By letter dated July 24, 1996, the RO returned the file to the BVA stating that pursuant to *Smith v. Brown*, 35 F.3d 1516 (Fed. Cir. 1994), the RO had no jurisdiction to consider the claim. R. at 411.

It is not clear from the record on appeal whether the Board's August 30, 1996, decision was issued on the basis of an appeal by the veteran (*see* R. at 339), or as a result of the RO's July 1996 letter (R. at 411). In the August 1996 decision, the BVA found that the March 1960 rating decision had been subsumed by the June 1969 BVA decision. R. at 9-14. Accordingly, the Board concluded that no CUE claim existed as a matter of law and dismissed the claim. *Id*. This appeal followed.

**II.**

"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) (1996). To establish a valid CUE claim, "[e]ither 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). It is not enough for the appellant to merely disagree as to how the facts were weighed or evaluated.

In *Smith*, the Federal Circuit held, inter alia, that 38 C.F.R. § 3.105(a) was applicable only to "review of A[gency of] O[riginal] J[urisdiction] adjudicatory decisions and not to those of the Board." 35 F.3d at 1527. In *Donovan v. Gober*, 10 Vet.App. 404 (1997), this Court found that the reasoning and result in *Smith* applied to a situation in which a final, unappealed rating decision was reopened and adjudicated on the merits by the BVA. The Court held that the unappealed RO decision subsequently reviewed de novo on the merits by the Board was subsumed by that BVA decision and thus not subject to a claim of CUE as a matter of law. *Id*. at 408. Recently, in *Chisem v. Gober*, the Court affirmed the Board's dismissal of a claim of CUE in an unappealed RO decision which was subsumed by a later BVA decision addressing the same issue decided by the RO. __ Vet.App. __, __, No. 96-166, slip op. at 4 (November 14, 1997). The June 1969 BVA decision reopened and fully readjudicated the same claim that was the subject of the March 1960 rating decision. The 1960 decision was therefore subsumed by the 1969 BVA decision. *See Chisem, Donovan*, and *Smith* all *supra*. Accordingly, the Board did not err in dismissing the claim.

The Court has considered the recent act amending title 38 of the U.S. Code by inserting new sections 5109A and 7111. Pub. L. No. 105-111, 111 Stat. 2272 (November 21, 1997). This act codifies 38 C.F.R. § 3.105(a) and, abrogating *Smith, supra*, in part, makes BVA decisions subject to revision by the BVA based upon CUE. *Id*. Judicial review of a BVA decision denying a claim of CUE in an earlier BVA decision would then be available. The act, however, does not affect the Court's decisions in *Chisem* and *Donovan*. Pursuant to the Court's holdings in those cases, the March 1960 RO decision was subsumed by the June 1969 BVA decision and that RO decision, therefore, is not subject to a CUE claim. Although sections 5109A and 7111 may have made the June 1969 BVA decision itself subject a CUE claim, a BVA decision on such a claim is not now before this Court.

**III**.

Upon consideration of the record and the briefs of the parties, the Court holds that the appellant has not demonstrated that the Board committed either factual or legal error which would warrant reversal or remand. *Gilbert v. Derwinski*, 1 Vet.App. 49 (1990); *see also Anderson v. City of Bessemer City*, 470 U.S. 564 (1985); *Danville Plywood Corp. v. United States*, 899 F.2d 3 (Fed. Cir. 1990). The Court also is satisfied that the BVA decision meets the "reasons or bases" requirements of 38 U.S.C. § 7104(d)(1). *See Gilbert, supra*. Accordingly, the August 30, 1996, decision of the Board of Veterans' Appeals is AFFIRMED.