

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

CLIFFORD M. MOFFETT,
Claimant-Appellant

v.

**DENIS MCDONOUGH, SECRETARY OF
VETERANS AFFAIRS,**
Respondent-Appellee

2022-1183

Appeal from the United States Court of Appeals for
Veterans Claims in No. 20-4438, Senior Judge Robert N.
Davis.

Decided: September 7, 2022

J. BRYAN JONES, III, J B Jones III LLC, Lafayette, LA,
for claimant-appellant.

KYLE SHANE BECKRICH, Commercial Litigation Branch,
Civil Division, United States Department of Justice, Wash-
ington, DC, for respondent-appellee. Also represented by
BRIAN M. BOYNTON, PATRICIA M. MCCARTHY, LOREN MISHA
PREHEIM; CHRISTINA LYNN GREGG, Y. KEN LEE, Office of

General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before PROST, TARANTO, and STOLL, *Circuit Judges*.

PER CURIAM.

Clifford Moffett appeals from a judgment of the United States Court of Appeals for Veterans Claims affirming the decision of the Board of Veterans' Appeals. For the below reasons, we affirm-in-part and dismiss-in-part.

BACKGROUND

Mr. Moffett served in the Air Force from March 1959 through June 1960. On April 5, 1960, Mr. Moffett accidentally shot himself in the thigh. J.A. 24. Hospital records from that day indicate that Mr. Moffett incurred a “through and through” gunshot wound with “[n]o apparent artery, nerve, or bone involvement.” *Id.* An x-ray report from the following day states there was “no evidence [of] fracture or other abnormality of the femur. In one or two places one can suspect metallic fragments from [the] gunshot wound.” J.A. 22.

About three weeks after the incident, Mr. Moffett was discharged from the hospital. His discharge paperwork stated that he was “considered unfit” for “long walking, running, jumping, climbing[,] or driving a vehicle” for a few weeks—until June 1, 1960, at which time those restrictions would end. J.A. 23. That day, Mr. Moffett had another medical examination. The report from this examination states that he had “[s]cars on [his] thigh due to [a] gunshot wound,” but confirmed that he was qualified for general service. J.A. 29. Two weeks later, on June 14, 1960, Mr. Moffett received an honorable discharge from the Air Force. J.A. 27.

Shortly after being discharged, Mr. Moffett filed a claim for service connection for residuals of his gunshot

wound. In the subsequent medical examination, the physician noted “no deformity, no interference with normal mobility of [the] leg, knee, or ankle, nondisfiguring, with doubtful interference of sensation in lower leg.” J.A. 25. In December 1960, the VA Regional Office (RO) granted service connection for Mr. Moffett’s claim. J.A. 19. The RO determined the injury was “moderate” and assigned Mr. Moffett a 10 percent disability rating. *Id.* Mr. Moffett did not appeal that decision, and it became final.

In May 2010, fifty years after the RO’s December 1960 decision, Mr. Moffett sought revision of that decision on the basis of clear and unmistakable error (CUE). Over the next few years, Mr. Moffett raised a few different CUE claims which moved between the RO and the Board. In the case now on appeal, Mr. Moffett alleged two grounds of CUE: (1) that his injury should have been considered moderately severe, rather than moderate, because he was “‘declared unfit for duty’ and ‘was medically discharged from service’” because of the injury; and (2) that his injury should have been considered severe, rather than moderate, because “April 1960 x-rays showed the presence of suspected [metallic] fragments.” J.A. 2 (alteration in original) (quoting J.A. 9).

On April 28, 2020, the Board issued its decision finding that Mr. Moffett had not demonstrated CUE in the RO’s decision. Specifically, the Board found that Mr. Moffett “ha[d] not alleged an error of fact or law in the December 20, 1960, rating decision that compels the conclusion, to which reasonable minds could not differ, that the results would have been manifestly different but for the error.” J.A. 8. The Board explained that Mr. Moffett’s arguments were “essentially a disagreement as to how the facts were weighed or evaluated by the adjudicator” and that whether his “service-connected residuals of a gunshot wound to the right thigh should have been considered more than moderate in severity is debatable.” J.A. 15.

Mr. Moffett appealed to the Veterans Court. Before that court, Mr. Moffett reasserted the same two CUE grounds that he had presented to the Board—that his injury was more severe than the rating he had been assigned because he was discharged because of his injury and because x-rays taken in 1960 showed suspected metallic fragments. But Mr. Moffett also raised a new CUE theory: his injury was “consistent with a moderately severe disability” as evidenced by the fact that he spent three weeks in the hospital recovering from his gunshot wound. J.A. 4 (quotation omitted).

Regarding this new, third CUE theory, the Veterans Court explained that “[i]f the ‘appellant raises a new theory of CUE for the first time before the [Veterans] Court, the [Veterans] Court must dismiss for lack of jurisdiction.’” J.A. 4–5 (quoting *Acciola v. Peake*, 22 Vet. App. 320, 325 (2008)). Because Mr. Moffett had not previously raised this ground for CUE, the Veterans Court dismissed that ground because it did not have jurisdiction to consider it. J.A. 4–5 (quoting *Andre v. Principi*, 301 F.3d 1354, 1361 (Fed. Cir. 2002)).

The Veterans Court then turned to Mr. Moffett’s other two CUE grounds. The court stated that, “as the Board found and Mr. Moffett d[id] not challenge[,] the evidence here is not ‘undisputed.’” J.A. 6. This was enough to preclude a finding of CUE, the court explained, because CUE requires that “the alleged error must be ‘undebatable,’ not merely a ‘disagreement as to how the facts were weighed or evaluated.’” J.A. 6 n.34 (quoting *Russell v. Principi*, 3 Vet. App. 310, 313–14 (1992)). Because the facts in Mr. Moffett’s case were disputed, the court held that Mr. Moffett could not demonstrate CUE. The court thus affirmed the Board’s decision as to Mr. Moffett’s two CUE grounds over which the court had jurisdiction. Mr. Moffett appeals.

DISCUSSION

This court's jurisdiction to review decisions by the Veterans Court is limited. Except for constitutional issues, we may not review any "challenge to a factual determination" or any "challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2). Our review is limited to legal challenges regarding the "validity of any statute or regulation or any interpretation thereof . . . , and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." § 7292(c). We must affirm a Veterans Court decision unless it is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law." 38 U.S.C. § 7292(d)(1).

On appeal, Mr. Moffett again argues the same three grounds of CUE he presented to the Veterans Court: (1) that he was hospitalized for three weeks, indicating "extensive hospitalization" consistent with a moderately severe disability rating; (2) that he was discharged from service because of his injury, warranting a moderately severe disability rating; and (3) that records show the presence of metallic fragments as a result of his injury, warranting a severe disability rating. Appellant's Br. 4–5. In his Statement of the Issues section of his brief, Mr. Moffett frames a single issue, stating that "[t]he issue in this case is whether the examples" listed in the 1960 version of the schedule of disability ratings for muscle injuries "are deemed to be indicative of the degree of disability that should be assigned for gunshot wounds." *Id.* at 1.

We start with Mr. Moffett's argument that because he was hospitalized for three weeks following his injury, the VA should have assigned a moderately severe disability rating for his injury. For the Veterans Court to have

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