

**IN THE UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS**

---

**ANTONIO PACHECO,**

Appellant,

v.

**ERIC K. SHINSEKI,**  
Secretary of Veterans Affairs,

Appellee.

---

ON APPEAL FROM THE  
BOARD OF VETERANS' APPEALS

---

BRIEF OF THE APPELLEE  
SECRETARY OF VETERANS AFFAIRS

---

**WILL A. GUNN**  
General Counsel

**R. RANDALL CAMPBELL**  
Assistant General Counsel

**KENNETH A. WALSH**  
Deputy Assistant General Counsel

**DEBORAH A. HOET**  
Appellate Attorney  
Office of the General Counsel (027J)  
U.S. Department of Veterans Affairs  
810 Vermont Avenue, N.W.  
Washington, D.C. 20420  
(202) 632-6944  
Attorneys for the Secretary

---

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
I. ISSUE PRESENTED.....	1
II. STATEMENT OF THE CASE.....	1
A. Jurisdictional Statement.....	2
B. Nature of the Case.....	2
C. Statement of the Facts.....	2
III. SUMMARY OF SECRETARY’S ARGUMENT.....	9
IV. LAW AND ARGUMENT.....	10
A. Standard of Review.....	10
B. The Court should affirm the Board’s determination that Appellant is not entitled to an effective date prior to January 23, 2002, for service connection for residuals of injury, status-post total hip replacement; service connection for pelvic asymmetry with mechanical short left leg; Dependent’s Education Assistance (DEA) under 38 U.S.C. Chapter 35, and for special monthly compensation (SMC) based on use of the lower right extremity. ....	12
C. Appellant’s contentions and the Secretary’s responses.....	15
V. CONCLUSION.....	18
CERTIFICATE OF SERVICE .....	19

## TABLE OF AUTHORITIES

### FEDERAL CASES

Allday v. Brown, 7 Vet.App. 517 (1995).....	10
Anderson v. City of Bessemer City, 470 U.S. 564 (1985).....	10, 11
Criswell v. Nicholson, 20 Vet.App. 501 (2006).....	13
Gilbert v. Derwinski, 1 Vet.App. 49 (1990).....	10
Hilkert v. West, 12 Vet.App. 145 (1999) .....	15
Jennings v. Mansfield, 509 F.3d 1362 (Fed. Cir. 2007).....	10
Leonard v. Principi, 17 Vet.App. 447 (2004), aff'd, 405 F.3d 1333 (Fed. Cir. 2005).....	13
Massie v. Shinseki, 25 Vet.App. 123 (2011).....	13
Newhouse v. Nicholson, 497 F.3d 1298, 1302 (Fed. Cir. 2007).....	10
Padgett v. Nicholson, 19 Vet.App. 133 (2005).....	11
Pullman-Standard v. Swint, 456 U.S. 273 (1982).....	11
Swann v. Brown, 5 Vet.App. 229 (1993).....	9
Johnston v. Brown, 10 Vet.App. 80 (1997).....	9
Washington v. Nicholson, 19 Vet.App. 362 (2005).....	11

### FEDERAL STATUTES

38 U.S.C. § 7104(d)(1).....	10
38 U.S.C. § 7252(a) .....	1
38 U.S.C. § 7261(a)(4).....	10

## FEDERAL REGULATIONS

38 C.F.R. § 3.156(c) .....	13
38 C.F.R. § 3.157(b).....	12, 13, 14
38 C.F.R. § 3.400(q)(1)(ii) .....	12

## RECORD CITATIONS

R. at 2-12 (Board decision) .....	<i>passim</i>
R. at 14-18 (Veteran's submissions) .....	9
R. at 34-40 (June 2011 memorandum decision).....	8, 12, 16
R. at 81-94 (April 2010 Board decision) .....	8
R. at 107-118 (March 2010 hearing testimony).....	8
R, at 159-170 (July 2009 SSOC).....	8
R. at 185-191 (January 2009 SSOC) .....	8
R. at 193-201 (Veteran's submissions) .....	8
R. at 202-203 (substantive appeal) .....	8
R. at 244-255 (August 2006 rating decision).....	8, 16
R. at 404 (VA medical record).....	2
R. at 480-499 (August 2005 SOC) .....	8
R. at 504-510 (August 2005 rating decision).....	12, 13
R. at 519-520 (VA Form 9) .....	8
R. at 525-537 (December 2004 rating decision) .....	7, 12

R. at 538-543 (November 2004 VA exam).....	7
R. at 544-560 (June 2004 Board decision) .....	7
R. at 590-592 (NPRC response) .....	5
R. at 614 (May 2001 VA medical record) .....	6, 12
R. at 651-688 (September 2003 hearing testimony) .....	7
R. at 699-700 (substantive appeal and CUE allegation) .....	7
R. at 702-712 (February 2003 SOC) .....	6
R. at 720-721 (NOD) .....	6
R. at 726-731 (December 2002 rating decision) .....	6
R. at 754-758 (VCAA letter) .....	6
R. at 769-772 (claim for aid and attendance).....	6
R. at 780-782 (Veteran Statement) .....	6
R. at 803-815 (VA medical records).....	6, 13
R. at 815-832 (July 2000 Board decision).....	5, 14
R. at 913 (NPRC response) .....	3
R. at 956-970 (August 1997 hearing testimony) .....	5
R. at 981-982 (VA Form 9) .....	5
R. at 990-995 (June 1997 SOC).....	4
R. at 998-1002 (June 1996 rating decision) .....	4
R. at 1143-1150 (VA medical records).....	4
R. at 1177 (September 1995 claim to reopen) .....	4
R. at 1181-1185 (January 1992 Board decision) .....	4

R. at 1197-1200 (January 1991 rating decision) .....4

R. at 1201-1205 (private medical records for hip treatment).....4

R. at 1206-1212 (February 1990 SOC).....4

R. at 1213 (NOD) .....4

R. at 1219-1223 (February 1989 claim to reopen) .....4

R. at 1224-1226 (January 1989 rating decision) ..... 3, 4

R. at 1279 (Ro denial to reopen) .....3

R. at 1280-1283 (claim to reopen 1982) .....3

R. at 1285-1287 March 1978 rating decision) .....3

R. at 1288-1301 (morning reports) .....3

R. at 1302-1306 (private treatment records) .....3

R. at 1308 (Veteran’s statement) .....3

R. at 1316 (DD-214) .....2

R. at 1318-1321 (claim for service connection for malaria).....3

R. at 1370 (1974 rating decision) .....3

R. at 1371 (VA inquiry) .....3

R. at 1386-1387 (original service connection claim 1974) .....2

**IN THE UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS**

<b>ANTONIO PACHECO,</b>	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 12-0389
	)	
<b>ERIC K. SHINSEKI,</b>	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

---

**ON APPEAL FROM THE  
BOARD OF VETERANS' APPEALS**

---

---

**BRIEF OF THE APPELLEE  
SECRETARY OF VETERANS AFFAIRS**

---

**ISSUE PRESENTED**

Whether Court should affirm the Board's determination that Appellant is not entitled to an effective date prior to January 23, 2002, for service connection for residuals of injury, status-post total hip replacement; service connection for pelvic asymmetry with mechanical short left leg; Dependent's Education Assistance (DEA) under Chapter 35 of Title 38, and for special monthly compensation (SMC) based on loss of use of the lower right extremity.

## **STATEMENT OF THE CASE**

### **A. Jurisdictional Statement**

This Court has jurisdiction under 38 U.S.C. § 7252(a).

### **B. Nature of the Case**

Appellant, Antonio Pacheco, appeals the Board's determinations that he is not entitled to an effective date prior to January 23, 2002, for service connection for residuals of injury, status-post total hip replacement; service connection for pelvic asymmetry with mechanical short left leg; Dependent's Education Assistance (DEA) under Chapter 35 of Title 38, and for special monthly compensation (SMC) based on loss of use of the lower right extremity. Record Before the Agency [R.] at 2-12.

### **C. Statement of Pertinent Facts**

Appellant was born in November 1919 and is currently 93 years of age. He served on active military duty in the United States Army from January 1942 to November 1945, including combat service in the Asian Pacific Theater. [R. at 1316]. There is no medical evidence dated between Appellant's separation and 1974. In February 1974, Appellant sought entitlement to service connection for a right leg injury that he sustained in 1942. [R. at 1386-1387]. Department of Veteran Affairs (VA) medical records at that time showed treatment for depressive neurosis and osteoarthritis of the back only. [R. at 404]. A VA Regional Office (RO) requested his service medical records (SMRs) but they had



been destroyed in the 1973 fire at the National Personnel Records Center (NPRC). [R. at 913, 1371].

In July 1974, VA denied service connection for a right leg injury because there was no record of residuals of a right leg injury. However, the RO granted a non-service connected pension. [R. at 1370]. In October 1977, Appellant sought entitlement to service connection for, *inter alia*, a right leg condition. [R. at 1318 [R. at 1318-1321]. He asserted that he had been hospitalized in service in 1943. [R. at 1308].

In January 1978, VA received private treatment records, showing treatment for a back condition since 1973. There was no mention of a right leg condition. [R. at 1302-1306]. Also at that time, VA received copies of morning reports from Appellant's unit dated in 1943 that show that he was hospitalized but the underlying condition was not noted. [R. at 1288-1301]. In March 1978, the RO denied service connection for a right leg disability because there was no evidence of residuals of a right leg injury. [R. at 1285-1287].

In April 1982, Appellant sought to reopen his claim for service connection for a right leg condition. [R. at 1280-1283]. The RO responded that his claim would not be reopened because he had not submitted new and material evidence. [R. at 1279].

In October 1988, Appellant again sought service connection for a right leg condition. [R. at 1224]. In a January 1989 confirmed rating decision, the RO continued the denial of Appellant's claim because there was no evidence that he

had residuals of a right leg injury. [R. at 1224-1226]. In February 1989, Appellant again sought to reopen his claim, which the RO declined to do in March 1989, because there was no evidence that service had caused an impairment of the right leg. [R. at 1219-1223]. Appellant filed a Notice of Disagreement (NOD) in February 1990. [R. at 1213]. The RO subsequently issued another rating decision and a Statement of the Case in February 1990. [R. at 1206-1212]. In May 1990, Appellant submitted private medical records, showing treatment for back and hip complaints, and attempted to perfect his appeal to the Board. [R. at 1201-1205]. The RO considered the new evidence and determined that it did not warrant reopening Appellant's previously denied claims. [R. at 1197-1200]. In January 1992, the Board dismissed Appellant's appeal of the March 1989 rating decision because his appeal was not timely. [R. at 1181-1185].

In September 1995, Appellant again sought to reopen his previously denied claim. [R. at 1177]. VA medical records dated in 1995 show treatment for hip and pelvic conditions, including a right total hip replacement, but provided no information as to the etiology of Appellant's right leg condition or hip condition. [R. at 1143-1150].

In June 1996, the RO determined that new and material evidence had not been submitted sufficient to reopen Appellant's claims for service connection for a right leg condition. [R. at 998-1002]. Appellant filed an NOD and the RO issued a Statement of the Case in June 1997. [R. at 990-995]. In August 1997, Appellant

perfected his appeal to the Board. [R. at 981-982]. He testified before an RO Hearing Officer in March 1998. [R. 956-970].

In January 1999, the RO received a copy of a letter from NPRC to Appellant, which stated:

In an effort to be responsive to your request, we recently attempted a search of unit rosters for Co M, 126th Infantry, to see if we could determine when you no longer appeared as assigned to that unit, due to hospitalization. A remark on the April 1943 roster does indicate that you were transferred to the Detachment of Patients, 155th Station Hosp (Camp Cable, Queensland, Australia) on the 12th of that month. A search of that unit's later rosters shows you still assigned there at the end of May 1943, but not present at the end of June, July or August. We were unable to locate any rosters that verified your assignment during summer of 1943, though it would appear that you were with the 4th Replacement Depot (Australia), that entire time, since that was the unit you were transferred from when joining the 118th General Hospital on August 12, 1943. We regret that we are unable to locate any alternate record sources containing remarks pertaining to diagnosis or treatment, but we hope that this evidence of your confinement at the 155th Station Hospital for two months in spring 1943 will be of some value. Copies of all roster remarks we located are attached for your review.

[R. at 590-592].

In March 1999, the RO issued a Supplemental Statement of the Case that continued the denial of Appellant's claim because there was no evidence that a chronic right leg injury occurred in or was caused by service. [907-903]. In July 2000, the Board determined that new and material evidence had not been submitted sufficient to reopen Appellant's claim for a right leg/hip disorder because there was no evidence that his right hip disorder was related to an in-service right leg injury. [815-832]. Appellant did not appeal that decision.

On January 23, 2002, the RO received a letter from Appellant's then representative, appearing to request reopening of the previously denied claim, and an opinion from Dr. Mel Olivares, Jr., who stated that an in-service injury to Appellant's right leg caused his current right hip condition. Appellant also submitted VA medical records dated in 2001 that showed treatment for back and hip conditions. [R. at 803-815]. A May 2001 VA treatment note showed that the examiner described Appellant's arthritis as "probable post-traumatic." [R. at 614].

In May 2002, Appellant alleged that he was in need of aid and attendance due to his disabilities. [R. at 769-772]. In August 2002, Appellant submitted a statement detailing the circumstances of his in-service injuries. He specifically stated that he "should [have] reported [his right leg injury] but I never did because after a few days later[,] I didn't feel the pain too much." [R. at 780-782]. In October 2002, the VA RO advised Appellant of how to reopen his previously denied claim for service connection for a right leg impairment and advised him of how to substantiate his claim for aid and attendance benefits. [R. at 754-758]. In a December 2002 rating decision, VA denied entitlement to service connection for a right hip disability because there was no indication that Appellant's arthritis of that and other joints, or his hip replacement, were related to service. R. at 726-731]. Appellant filed his NOD in January 2003. [R. at 720-721]. In February 2003, the RO issued a Statement of the Case. [R. at 702-712]. Appellant perfected his appeal to the Board in April 2003 and alleged "CUE in earlier

decisions, particularly failure to mention combat, hospitalization, findings of VA medical personnel.” [R. at 699-700].

Appellant testified before the Board in September 2003. [R. at 651-688]. He stated that he injured his right leg in service when several fellow servicemen jumped on top of him in a trench. He stated he “could hardly walk, [but] then with time . . . it [went] away. I didn’t feel much with my leg after that. I was strong and young . . . at that time.” [R. at 661].

In June 2004, the Board remanded Appellant’s claim for service connection for a right leg and hip disability so that he could be provided with a medical examination and opinion regarding the etiology of that condition. [R. at 544-560].

In November 2004, Appellant underwent a VA examination. [R. at 538-543]. The examiner concluded that Appellant’s right hip disorder was “a result of the service related injury occurring in October of 1942.” [R. at 543]. In December 2004, the RO granted service connection and a 90 percent rating for residuals of a right hip injury, effective from May 6, 2002, the date the RO mistakenly believed was the date of Appellant’s most recent claim to reopen. The RO also granted service connection and a 10 percent rating for pelvic asymmetry, secondary to the service-connected residuals of a right hip injury, including total hip replacement, effective from November 16, 2004, the date of the prior VA examination. [R. at 525-537]. The RO also granted DEA and SMC benefits, based on loss of use of the right lower extremity, effective from May 6, 2002. *Id.*

In a March 2005 appeal to the Board, Appellant averred that he should be entitled to an effective date in 1974. [R. at 519-520]. In August 2005, the RO granted an effective date of January 23, 2002, the date of Appellant's claim to reopen, for service connection for a right hip disability, pelvic asymmetry, DEA and SMC for loss of use of right lower extremity. [504-510]. The RO also issued a Statement of the Case at that time. [R. at 480-499]. In August 2006, VA also granted aid and attendance benefits. [R. at 244-255].

In March 2008, the RO issued a Supplemental Statement of the Case regarding the effective date claims. [208-212]. In April 2008, Appellant appealed to the Board, [R. at 202-203], and in October 2008 and subsequently, he submitted additional statements in support of his claim, including copies of morning reports that had already been considered. [R. at 193-201]. In January and July 2009, the RO issued Supplemental Statements of the Case. [R. at 159-170, 185-191]. In March 2010, Appellant testified at a Video Conference Hearing before the Board. [107-118].

In April 2010, the Board issued a decision which dismissed Appellant's motion for a finding of CUE as insufficient and denied entitlement to an effective date prior to January 23, 2002, for the grant of service connection for residuals of a right leg/ hip disorder. [R. at 81-94]. Appellant filed a timely appeal to this Court and in June 2011, this Court by Memorandum Decision, vacated the denial of earlier effective dates and affirmed the Board's decision to dismiss Appellant's CUE claim in an unidentified VA decision. [R. at 34-40]. In August 2011,

Appellant submitted a statement regarding his contentions regarding only the earlier effective dates on appeal. [R. at 15-18].

The effective date claims were returned to the Board and the Board issued the decision on appeal on September 22, 2011. [R. at 2-12]. In the decision, the Board determined that Appellant's May 2001 VA treatment record does not constitute a claim to reopen his service connection for a right leg disorder so as to provide him with a basis for an effective date prior to January 23, 2002. [R. at 9-10]. Appellant continues his appeal to this Court.

### **III. SUMMARY OF THE ARGUMENT**

The Board's denial of an effective date prior to January 23, 2002, for service connection for residuals of injury, status-post total hip replacement; service connection for pelvic asymmetry with mechanical short left leg; DEA under Chapter 35 of Title 38, and SMC based on use loss of of the lower right extremity, should be affirmed because the assignment of that date is not clearly erroneous, has a plausible basis in the relevant evidence of record and has been adequately explained by the Board. The Board has fully complied with the prior remand Order of this Court and Appellant has failed to demonstrate any basis for error.

## IV. ARGUMENT

### A. Standard of review.

The determination of a proper effective date is a finding of fact that the Court reviews under the “clearly erroneous” standard in 38 U.S.C. § 7261(a)(4). See *Johnston v. Brown*, 10 Vet.App. 80, 84 (1997); *Swann v. Brown*, 5 Vet.App. 229, 232 (1993). Under this standard of review, the Court cannot “substitute its judgment for that of the BVA on issues of material fact.” *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). If there is a plausible basis in the record for the Board’s factual determinations, this Court cannot reverse them. *Id.* The Supreme Court has held that findings of fact may be based on credibility determinations, physical or documentary evidence, or inferences drawn from other facts. See *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) (explaining how an appellate court reviews factual findings under the “clearly erroneous” standard). Additionally, the Supreme Court has held that under the clearly erroneous standard of review, “[w]here there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” *Id.*

The Board’s decision must be based on all the evidence of record and the Board must provide a “written statement of [its] findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record.” 38 U.S.C. § 7104(d)(1). “The statement must be adequate to enable a claimant to understand the precise basis for the Board’s decision, as well as to facilitate review in this Court.” *Allday v. Brown*, 7 Vet.App.



517, 527 (1995). However, section 7104(d)(1) does not require the Board to use any particular statutory language or “terms of art.” *Jennings v. Mansfield*, 509 F.3d 1362, 1366 (Fed. Cir. 2007). Additionally, the Board is presumed to have considered all the evidence of record, even if the Board does not specifically address each item of evidence. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007).

When the Board incorrectly applies the law, fails to provide an adequate statement of reasons or bases for its determination, or where the record is not adequate, remand is the appropriate remedy. *Washington v. Nicholson*, 19 Vet.App. 362, 371 (2005). Reversal is the appropriate remedy “only in cases in which the only permissible view of the evidence is contrary to the Board’s decision.” *Id*; see *Anderson*, 470 U.S. at 574; see also *Padgett v. Nicholson*, 19 Vet.App. 133, 150 (2005) (reversing the Board’s decision when the “only plausible resolution” of a factual issue was contrary to the Board’s finding), *citing Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982) (“a remand is the proper course unless the record permits only one resolution of the factual issue”).

**B. The Court should affirm the Board's determination that Appellant is not entitled to an effective date prior to January 23, 2002, for service connection for residuals of injury, status-post total hip replacement; service connection for pelvic asymmetry with mechanical short left leg; DEA under Chapter 35 of Title 38, and SMC based on loss of use of the lower right extremity.**

When this case was previously before this Court in 2011, it was remanded for the Board to address whether the May 2001 treatment record constituted an informal claim to reopen service connection for a right hip/leg disorder prior to receipt of the January 23, 2002, formal claim to reopen under 38 C.F.R. § 3.157(b). [R. at 34-40].

The Secretary respectfully submits that the Board's determination that the May 2001 VA treatment record is not an informal claim to provide Appellant an earlier effective date prior to January 23, 2002 under 38 C.F.R. § 3.157(b) for the grant of service connection is plausibly based, not clearly erroneous and adequately explained, and that the Board has fully complied with the Court's decision. Accordingly, the Secretary respectfully submits that the Board decision should be affirmed.

The May 2001 VA treatment record contained medical evidence that indicated that Appellant's degenerative joint disease was probably due to trauma, and this was the basis of the Board's reopening of Appellant's previously denied claim for service connection for a right leg condition and for the RO's ultimate grant of service connection. [R. at 614, 504-510, 525-537, 614]. The RO

determined that the effective date of the grant of service connection should be January 23, 2002, the date of his receipt of Appellant's claim to reopen and his submission of the medical opinion of Dr. Olivares. [R. at 504-510, 808-813].

The Board properly determined that the effective date for the right hip/leg service connection claim would be the date the claim to reopen was received pursuant to 38 C.F.R. § 3.400(q)(1)(ii). [R. at 7 (3-12)]. Unless the award of disability compensation benefits resulting from a claim to reopen is based on service records not previously associated with the claim when it was denied, see, e.g., 38 C.F.R. § 3.156(c), the date of the claim to reopen is the earliest effective date authorized by law. *Leonard v. Principi*, 17 Vet.App. 447, 451 (2004), *aff'd*, 405 F.3d 1333 (Fed. Cir. 2005) (“[I]t is well established that the effective date for an award based on a claim to reopen is the date of the claim to reopen.”). Further, unless the evidence of record demonstrates the Veteran's intent to seek benefits for a particular disability, the mere existence of medical evidence referencing the disability, such as the May 2001 VA treatment record at issue here, does not raise an informal claim for such benefits. See *Criswell v. Nicholson*, 20 Vet.App. 501, 503–04 (2006).

There are two exceptions to the general rule that a medical record, by itself, is insufficient to establish an informal claim: (1) When an underlying claim has been awarded and the medical records demonstrate that the Veteran's disability has increased; or (2) or a formal claim for compensation disallowed for the reason that the service-connected disability is not compensable in degree

and the medical records provide new and material evidence sufficient to reopen the claim. See 38 C.F.R. § 3.157(b); see also *Massie v. Shinseki*, 25 Vet.App. 123, 131–32 (2011) (discussing the requirements of § 3.157(b)).

The Board explained that the record does not contain an attempt to reopen the previously denied right hip/leg disorder service connection claim until Appellant's January 23, 2002, submission because there is no document which evidences any intent to reopen Appellant's claim for service connection for the right hip/leg disorder during the period between the final July 2000 Board decision and the January 23, 2002 claim to reopen. [R. at 4-5 (3-12), 815-832]. The Board addressed the requirements of 38 C.F.R. § 3.157(b) and explained that the May 2001 VA treatment record could not be considered an informal claim under 38 C.F.R. § 3.157(b) because it does not meet the threshold criteria, namely that a formal claim for pension or disability had never been denied or disallowed and Appellant had never been granted service connection for his disabilities until after the date of the May 2001 VA treatment record. [R. at 12(3-12)]. A treatment record preceding the grant of service connection cannot, therefore, fit the exception of section 3.157(b). [R. at 12 (3-12)]. Nor had Appellant previously filed a claim for service connection and been disallowed for the reason that the service-connected disabilities are not compensable in degree so as to fit the exception of section 3.157(b). Thus, the Board properly determined that neither exception is applicable for the May 2001 VA treatment

record to provide the basis for an earlier effective date for the right hip/leg disorder service connection claims on appeal.

The Board determined that the May 2001 VA treatment record did not meet the criteria of 38 C.F.R. § 3.157(b), and that the record does not show any submission evidencing intent to reopen the claim. [R. at 9 (2-12)]. The Secretary respectfully submits that the Board's determinations are not clearly erroneous and are plausibly based upon all of the evidence of record. Appellant did not provide, and the evidence did not show, that he had any right leg condition that was related to an in-service right leg injury until May 2001. [R. at 14]. Because there is no submission earlier than January 23, 2002, evidencing intent to reopen, the Secretary respectfully submits that the Court should affirm the Board's decision.

### **C. Appellant's contentions and the Secretary's responses.**

The Secretary respectfully submits that Appellant makes no argument on appeal meriting relief. An appellant bears the burden of persuasion of demonstrating error on appeal. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc). After review of Appellant's informal brief, it is plain that he has not articulated any factual or legal challenge to the issues on appeal to warrant the conclusion that the Board committed either reversible or remandable error.

Appellant makes the same argument in his informal brief which he has previously made to the Board, namely that he should have an effective date for

the grant of service connection for his right hip/leg disabilities back to 1974 because the 1974 records show nexus to his military service. *Informal brief generally.* The Secretary submits that the Board correctly determined that Appellant has not provided a legal justification for this theory and the law does not provide for such a benefit. [R. at 9 (2-12)]. Appellant has not demonstrated that he submitted anything indicating any intent to reopen his claim for service connection prior to January 23, 2002, and after July 2000, the last final prior denial of the claim. In fact, Appellant asserts that he appealed every VA decision from 1974. *Informal brief page 1.* However, he has not pointed to any evidence in the record to contradict the Board's determination that the July 2000 Board decision is a final unappealed decision.

Appellant further argues that his hip replacement was the result of his right leg/hip injury in service, but the Secretary submits that this fact is not in dispute or at issue here. *Informal brief page 2.*

As for Appellant's contention that there is CUE (clear and unmistakable error) in the Board decision, the Secretary submits that this issue is also not before the Court here as this Court affirmed the Board's dismissal of Appellant's claim of CUE in an unidentified VA adjudication in its June 2011 Memorandum Decision. [R. at 34-40].

It appears to the Secretary that the page which Appellant identifies as page 438 is, in the current RBA, page 250, a page from the August 2006 rating decision. [R. at 248-255]. *Informal brief page 3-4.* However, again, the issue of

prosthetic replacement of the hip is not before the Court and not the subject of the Board decision currently on appeal. Neither is Appellant's disagreement with his disability rating in 1995 relevant to the issue on appeal.

As for Appellant's claims that there are medical records missing from his claims file, particularly from the period of 1990 to 1995, the Secretary submits that Appellant has not asserted that these missing private medical records were submissions in an attempt to reopen his claim and thus prejudicial, but go only to his disagreement with his disability rating for his hip replacement in 1995, which is not at issue here. *Informal brief page 3.*

Finally, regarding Appellant's contention that he is not being paid at the appropriate rate because he is not receiving aid and attendance, the Secretary again submits that this issue is not on appeal. *Informal brief page 4.*

Construing Appellant's brief most liberally, the Secretary is unable to discern any argument or allegation that is relevant to the effective date issue that is on appeal. Appellant has not demonstrated that the July 2000 final unappealed Board decision is not final or that he submitted anything evidencing intent to reopen his claim prior to January 23, 2002. The Secretary respectfully submits that in the absence of any allegation of specific error with regard to the Board's application of the law to the facts in this case, Appellant is not entitled to relief from the Court.

## V. CONCLUSION

For the foregoing reasons, Appellee Eric K. Shinseki, Secretary of Veterans Affairs, respectfully submits that the September 22, 2011 Board decision should be affirmed, consistent with the foregoing.

Respectfully submitted,

**WILL A. GUNN**  
General Counsel

**R. RANDALL CAMPBELL**  
Assistant General Counsel

/s/ Kenneth A. Walsh  
**KENNETH A. WALSH**  
Deputy Assistant General Counsel

/s/Deborah A. Hoet  
**DEBORAH A. HOET**  
Appellate Attorney  
Office of the General Counsel (027J)  
U.S. Department of Veterans Affairs  
810 Vermont Avenue, N.W.  
Washington, D.C. 20420  
(202) 632-6944

Attorneys for Appellee  
Secretary of Veterans Affairs



**CERTIFICATE OF SERVICE**

On the 28<sup>th</sup> of January, 2013, a copy of the foregoing was mailed postage prepaid to:

Mr. Antonio Pacheco  
3169 NM Hwy 104  
HC 32 Box 420  
Las Vegas, NM 87701

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Deborah A. Hoet  
**DEBORAH A. HOET**  
Counsel for Appellee