UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 17-2574

VICTOR B. SKAAR, APPELLANT,

V.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before DAVIS, *Chief Judge*, and SCHOELEN, PIETSCH, BARTLEY, GREENBERG, ALLEN, MEREDITH, TOTH, and FALVEY, *Judges.*

O R D E R

The appellant Victor B. Skaar appeals an April 14, 2017, Board of Veterans' Appeals (Board) decision that denied service connection for leukopenia, including as due to radiation exposure. On December 11, 2017, he filed a motion for class certification or aggregate resolution, requesting that the Court certify a class of veterans "who were present at the 1966 cleanup of plutonium dust at Palomares, Spain[,] and whose application for service-connected disability compensation based on exposure to ionizing radiation [VA] has denied or will deny." Appellant's Dec. 11, 2017, Motion (Mot.) at 1; *see Monk v. Shulkin*, 855 F.3d 1312, 1318 (Fed. Cir. 2017) (holding that this Court has the authority to entertain class actions in the petition context). He contends in part that the methodology VA uses to estimate ionizing radiation doses for Palomares veterans is not "sound scientific evidence" under 38 C.F.R. § 3.311(c)(3).[1] *See* Appellant's Dec. 11, 2017, Mot. at 3-6.

Before the Board issued its April 2017 decision, the appellant had expressly challenged the methodology VA used to measure radiation exposure under 38 C.F.R. § 3.311. *See* Record at 106-107, 778-83. Yet, the Board failed to adjudicate or address that argument whatsoever. The Board is required to "adjudicate all issues reasonably raised" by the record and, of course, those that are expressly raised. *Brannon v. West*, 12 Vet.App. 32, 35 (1998); *see also Urban v. Principi*, 18 Vet.App. 143, 145 (2004). The Board did not do that here, and that failure is error. *See Robinson v. Peake*, 21 Vet.App. 545, 552 (2008) (the Board is required to consider all issues raised either by the claimant or by the evidence of record). Moreover, without an adequate statement of reasons or bases from the Board, we cannot effectively and efficiently review the instant appeal, including deciding the motion for class certification. *See Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see also* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

---

[1] The appellant also challenges VA's omission of the Palomares cleanup from the list of radiation-risk activities in 38 C.F.R. § 3.309. *See* Appellant's Dec. 11, 2017, Mot. at 2-6. Because the facts surrounding that argument are undisputed, the Court will hear that argument despite the Board's failure to address it below. *See Emerson v. McDonald*, 28 Vet.App. 200, 206 (2016) (addressing an argument in the first instance because it "was raised below and presents a legal issue and the relevant facts . . . are not in dispute"); *see also Blubaugh v. McDonald*, 773 F.3d 1310, 1312 (Fed. Cir. 2014) (deciding in the first instance whether 38 C.F.R. § 3.156(c) was applicable in a case where the facts were undisputed). Thus, the Board should *not* address it on remand.

Accordingly, we order a limited remand for the Board to provide a supplemental statement of reasons or bases addressing the appellant's expressly raised argument in the first instance. On remand to the Board, the appellant has 90 days to submit any additional evidence he may have, including the evidence submitted to this Court, to the Board. *See Clark v. O'Rourke*, 30 Vet.App. 92, 97 (2018). Further, under *Cook v. Snyder*, 28 Vet.App. 330, 343 (2017), the appellant has the right to request a Board hearing. The Board must then provide a supplemental statement of reasons or bases addressing the appellant's argument concerning 38 C.F.R. § 3.311, within 30 days after the 90-day evidence-submission period expires or within 30 days after the appellant affirmatively waives his right to submit evidence, whichever comes first. *See Clark*, 30 Vet.App. at 97 (holding that the 90-day evidence-submission period can be shortened with "a voluntary, knowing, and intentional waiver of that right"). Once the Board issues that supplemental statement, the Secretary will file it with the Court within 3 days after the Board issues the statement. The parties will then submit supplemental briefs concerning the effect, if any, of the Board's supplemental statement on the issues raised in this appeal, including class certification. We hold the appellant's motion for class certification in abeyance until the parties have fully complied with this order.

We will retain jurisdiction over this matter. "It is a common practice among the Courts of Appeals to retain jurisdiction over an appeal while making a limited remand for additional findings or explanations." *In re Lipitor Antitrust Litig.*, 855 F.3d 126, 151 (3d Cir. 2017). Appellate courts may retain jurisdiction for the "purpose of facilitating immediate review of further trial court proceedings." C. WRIGHT, 16 FEDERAL PRACTICE AND PROCEDURE § 3937.1, at 847-48 (3d ed. 2012). This Court has ordered such limited remands before. For example, in *Mayfield v. Nicholson*, the Court ordered the Board to "provide a supplemental statement of reasons or bases" and instructed it to "not take any further action beyond the response required by this order unless and until the Court relinquishes jurisdiction over the matter." 20 Vet.App. 98, 99 (2006) (per curiam order); *see also, e.g.*, *Sellers v. Shinseki*, No. 08-1758, 2011 WL 2110038, at *2 (U.S. Vet. App. May 27, 2011) (unpublished per curiam order).

Other Federal appellate courts also frequently use limited remand orders. *See, e.g.*, *Media v. Garcia*, 874 F.3d 1118, 1122 (9th Cir. 2017); *Casanova v. Dubois*, 289 F.3d 142, 147 (1st Cir. 2002); *Cent. States v. Creative Dev. Co.*, 232 F.3d 406, 423 (5th Cir. 2000) (same); *Asani v. I.N.S.*, 154 F.3d 719, 729 (7th Cir. 1998); *Amrine v. Bowersox*, 128 F.3d 1222, 1230 (8th Cir. 1997); *see also* FED. R. APP. P. 12.1(b) (discussing limited remands in the context of an "indicative ruling" by a district court). Such limited remands are not restricted only to district courts but extend to agencies as well. *See, e.g.*, *Ucelo v. Gonzales*, 464 F.3d 163, 172 (2d Cir. 2006); *Caterpillar, Inc. v. NLRB*, 138 F.3d 1105, 1107 (7th Cir. 1998); *Am. Gas Assn'n v. FERC*, 888 F.2d 136, 142 (D.C. Cir. 1989); *Sierra Club v. Gorsuch*, 715 F.2d 653, 661 (D.C. Cir. 1983); *Sharron Motor Lines, Inc. v. ICC*, 633 F.2d 1115, 1118-19 (5th Cir. 1981); *Consol. Nine, Inc. v. F.C.C.*, 403 F.2d 585, 595 (D.C. Cir. 1968).

In *Cleary v. Brown*, 8 Vet.App. 305, 308 (1995), the Court held that "when this Court remands for a new and discrete [Board] decision, it loses jurisdiction over the matter until such time, if at all, as a new [Board] decision is properly appealed." *Cleary* effectively stands for the proposition that decisionmaking should not simultaneously occur at both the Board and the Court. This is not a new concept. Indeed, *Cleary* supported its holding by citing *Cerullo v. Derwinski*, 1 Vet.App. 195 (1991), which held it inappropriate for the Board to vacate, *sua sponte*, a decision

on appeal after a timely Notice of Appeal had been filed. To the extent *Cleary* could be read to prohibit the Court from *ever* retaining jurisdiction over a remand to the Board, we clarify that the Court may, in certain circumstances, retain jurisdiction over limited remands to the Board. It is also worth noting that, unlike *Cleary*, where there was nothing left to review of the original Board decision, here the decision is still pending at the Court and what we require from the Board is not a new decision, but a supplemental statement of reasons or bases pertaining to a claim it already decided.

We do not here attempt to lay out the circumstances in which we will employ such limited remands; however, this particular case involves a situation where the Court does not need to vacate the Board decision on appeal—a distinguishing characteristic in both *Mayfield* and *Sellers*. Instead, we require a supplemental statement of reasons or bases from the Board concerning the appellant's expressly raised challenge to § 3.311, without which we cannot meaningfully consider the appellant's class certification motion. Soliciting a supplemental response from the Board, without vacating the decision on appeal, for the discrete purpose of evaluating a class certification motion arising from that appeal—an issue of first impression at the Court—is undoubtedly a unique circumstance. Accordingly, the Court deems it appropriate under the facts of this case to retain jurisdiction while ordering a limited remand.

Upon consideration of the foregoing, it is

ORDERED that the case is REMANDED to the Board solely for the Board to provide a supplemental statement of reasons or bases addressing the appellant's expressly raised argument concerning 38 C.F.R. § 3.311. It is further

ORDERED that the Court will retain jurisdiction over this matter. It is further

ORDERED that, regardless of the outcome of the Board's determination on remand, the Board shall not take any further action beyond the response required by this order unless and until the Court relinquishes jurisdiction over the matter. It is further

ORDERED that, on remand to the Board, the appellant, absent waiver, will have 90 days to submit to the Board any additional evidence he may have, including the evidence he submitted to this Court. It is further

ORDERED that the Board will provide a supplemental statement of reasons or bases addressing the appellant's argument concerning 38 C.F.R. § 3.311 within 30 days after the 90-day evidence-submission period expires or within 30 days after the appellant affirmatively waives right to submit evidence within the remaining time to submit evidence, whichever comes first. It is further

ORDERED that the Secretary will file the Board's supplemental statement with the Court within 3 days after the statement is issued. It is further

ORDERED that the appellant submit a supplemental brief, not to exceed 10 pages, concerning the effect, if any, of the Board's supplemental statement on the issues raised in this appeal, within 10 days after the Secretary files the supplemental statement. It is further

ORDERED that the Secretary submit a supplemental brief, not to exceed 10 pages, concerning the effect, if any, of the supplemental statement on the issues raised in this appeal, within 10 days after the appellant files his supplemental brief. It is further

ORDERED that the appellant may file a reply, not to exceed 5 pages, in response to the Secretary's supplemental brief, within 5 days after the Secretary files his supplemental brief. It is further

ORDERED that the Secretary will timely file a revised record of proceedings after the parties complete the supplemental briefing directed in this order. It is further

ORDERED that the appellant's motion for class certification is held in abeyance pending the parties' compliance with this order. And it is further

ORDERED that the Court will not entertain any motion for an extension of time with respect to the timeframes set forth in this order, absent compelling circumstances.

DATED: February 1, 2019 PER CURIAM.

DAVIS, *Chief Judge*, concurring: I write separately to emphasize how important it is that this Court overrule *Cleary* and follow other Federal appellate courts to issue limited remands when the court determines that it is important to do so. I otherwise concur with the majority's decision.

As the majority acknowledges, a limited remand is an important tool often used by Federal appellate courts—a tool this Court should not be reluctant to use. *See In re Lipitor Antitrust Litig.*, 855 F.3d 126, 151 (3d Cir. 2017) (stating that it is a common practice for appellate courts to retain jurisdiction over an appeal while ordering a limited remand); *see also ante* at 2. But this Court has been conserving its use of limited remands to seemingly avoid conflict with *Cleary,* a case, in my view, that is based more on Court politics than on law. I believe this Court has, like other Federal appellate courts, broad discretion to define the scope of its remand authority—limited or general. *See, e.g. United States v. Obi,* 542 F.3d 148, 154 (6th Cir. 2008) (stating that Sixth Circuit precedent establishes that 28 U.S.C. § 2106 provides appellate courts with broad discretion to define the scope of a given remand). *Compare* 28 U.S.C. § 2106 (explaining that courts of appellate jurisdiction may remand matters or require further proceedings "as may be just under the circumstances."), *with* 38 U.S.C. § 7252(a) (explaining that this Court has the power to remand matters "as appropriate"). Thus, when the time comes to make a decision in this matter, *Cleary* should be explicitly overruled and the Court's inherent authority to order limited remands should be clarified. Contrary to my concurring colleague's suggestion, I believe that the Court's use of limited remands should not be narrowly defined but used as a regular part of its decisionmaking when the Court determines that it is appropriate.

SCHOELEN, *Judge*, concurring: I agree with the majority's conclusion that this Court has the legal authority to order limited remands. I also find it prudent to issue a limited remand in Mr. Skaar's case. I write separately, however, because I share the dissent's concern that the majority's unacknowledged overruling of *Cleary v. Brown*, 8 Vet.App. 305 (1995), insufficiently explains why the Court is diverging from precedent. I also believe that if it were to be used in "ordinary" cases, the limited-remand mechanism could be detrimental to judicial efficiency, and I therefore

present a set of limiting principles that I believe the Court should employ in determining when limited remands are appropriate.

Initially, I fully subscribe to the majority's characterization of the relevant, persuasive caselaw and am satisfied that, as a general legal principle, this Court is well within its jurisdiction to issue limited remand orders. I would add only that, contrary to the majority position in *Cleary*, I do not believe anything in our jurisdictional statute precludes limited remands. *See* 38 U.S.C. § 7252(a) (2018).

Mayfield partially walked back *Cleary*'s sweeping pronouncement, albeit in a way that purportedly avoided *Cleary*'s holding. *See Mayfield v. Nicholson*, 20 Vet.App. 98, 99 (2006) (per curiam order) (distinguishing *Zevalkink v. Brown*, 102 F.3d 1236, 1244 (Fed. Cir. 1996), and *Erspamer v. Derwinski*, 1 Vet.App. 3, 11-12 (1990), from *Cleary*, and emphasizing *Cleary*'s language that "the Court properly could not have retained jurisdiction over the *reversed* [Board] decision *while the matter was being readjudicated*," 8 Vet.App. at 307-08 (emphasis in original)). My dissenting colleagues seem to acknowledge this historical divergence from *Cleary*, but take issue with how the majority here attempts to avoid *Cleary*. I share some of the dissent's concerns and agree that if we are overruling *Cleary*, we should not be opaque about it.

Whatever shortcomings might exist in *Mayfield*'s terse analysis, there should be no debate about what we are doing in Mr. Skaar's case: We are not simply remanding the matter for the same type of "supplemental statement of reasons or bases" we see in *Mayfield*; rather, we are overruling more than 2 decades of Court caselaw and changing long-established procedural norms in order to provide a mechanism for the Board to cure any "common" legal defects that exist in a named appellant's case in order for class action litigation to continue unencumbered. *Infra* Dissent at I(B) (calling reasons-or-bases errors "one of our most common reasons for remanding cases"). In this case, the common legal defect is a reasons-or-bases error stemming from the Board's failure to address Mr. Skaar's expressly raised challenge to the method VA used to measure radiation exposure under 38 C.F.R. § 3.311. Record at 106-07; 778-833. The Court would be well within its rights to deny the class certification motion, vacate the Board decision, and remand the matter for the Board to clean up the legal issues underlying Mr. Skaar's case. *See Robinson v. Peake*, 21 Vet.App. 545, 553 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009); *see also Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate"). However, the considerable time that has already been invested in litigation before the en banc Court, coupled with the harm that could potentially befall a sizeable class of veterans, takes what would be a common legal error and escalates it to an extraordinary circumstance that I believe warrants a limited remand. Stated differently, I respectfully believe the dissent is too myopic in seeing this as a "common" error, and that the Court must look at the situation as a whole, not just at the discrete legal error that necessitates remand. Thus, I concur that overruling *Cleary* and exercising procedural authority that we retain by nature of our existence as a Federal appellate court is the proper course of action, and any precedent we set today should make clear when it is appropriate to use a limited remand to clear up something such as a reasons-or-bases error.

Accordingly, I suggest the following boundaries for limited remands where the Court maintains jurisdiction: (1) As a threshold matter, the case must concern a precedential matter (i.e., the case is being considered before a panel of Judges or the en banc Court), and (2) once the Court determines that threshold has been met, it must decide whether some extraordinary circumstance[2] is present.[3]

Here, the case is before the en banc Court, so the threshold determination is met. As for extraordinary circumstances, I will not attempt to define what an "extraordinary circumstance" is in every case; however, as stated above, evaluating a class certification motion arising from an appeal – an issue of first impression at the Court – is undoubtedly a unique and extraordinary circumstance. I therefore concur that a limited remand is appropriate in this case.

PIETSCH, *Judge*, with whom MEREDITH and FALVEY, *Judges*, join, dissenting: As the majority well illustrates, many courts of various stripes have chosen to implement a mechanism that allows them to retain jurisdiction over cases that they have decided to remand in certain circumstances, a process that we refer to as a "limited remand." The majority wishes to follow their lead. That other courts – with different jurisdictional restraints – have exercised authority to order limited remands is of interest but no legal import. We must determine whether this Court, given the closely circumscribed limits on its statutorily created jurisdiction, has the authority to retain jurisdiction over a claim after it has found prejudicial error in the Board decision on appeal and remanded the claim for further proceedings. We believe that the majority has exercised limited remand authority in this matter without adequately confronting restrictions on its power to do so.

Moreover, the majority employs this mechanism without requesting supplemental briefing or argument addressing these restrictions. Prior to the September 2018 oral argument, the Court informed the parties that it would be focusing on the motion for class certification and its authority to entertain class actions in the appeals context – i.e., not on the merits of the appellant's claims. *See Skaar v. Wilkie*, 2018 WL 2293485, at *1 (May 21, 2018) (en banc order). Now, however, the majority addresses *only* the merits – finding that a reasons-or-bases error necessitates remand – while *not* addressing the motion for class certification. *Cf.* FED. R. CIV. P. 23(c)(1)(A) ("At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action."). The majority compounds this lack of full merits discussion by providing a remedy that neither party requested. *See* Oral Argument at 11:35-13:13, *Skaar v. Wilkie*, U.S. Vet. App. No. 17-2574 (oral argument held Sept. 25, 2018), http://www.uscourts.cavc.gov/oral_arguments_audio.php (appellant's counsel opposing a limited remand). Indeed, the whole notion of using the limited remand mechanism in this context first emerged at oral argument, and the suggestion came from the bench, not one of the litigants.

---

[2] I believe that limited remands should be reserved for precedential cases because extraordinary circumstances should only be found in precedential matters. This ensures that the procedural mechanism will not be abused in cases where the only concern is that the Board has simply failed to explain its reasoning or made some other common, traditionally remandable error. This limitation also addresses the dissent's concerns about clogging our docket with cases where limited remand orders have been issued by a single Judge, as was the case pre-*Cleary*.

[3] However, I would not disturb our authority to issue a limited remand in substitution cases, as that involves the determination of the appropriate appellant in a case before the Court rather than the merits review of a decision containing error by VA. *See Breedlove v. Shinseki*, 24 Vet.App. 7 (2010).

Because we disagree with both the substance of the majority's order and the process it follows, we respectfully dissent.

I. LIMITED REMANDS AT THE COURT

The key case in this area, *Cleary v. Brown*, 8 Vet.App. 305 (1995), warrants careful review. A single Judge initially decided that case on the merits. The Judge's memorandum decision, favorable to the appellant, "used ambiguous language purporting to retain jurisdiction." *Id.* at 306. The Court then remained involved with the case while the Board reconsidered it and did not enter judgment until the appellant declared that he would not seek further judicial review. *Id.* at 306-07. The case came before a panel when the appellant's attorney sought attorney fees for work performed at VA during the period of retained jurisdiction after the Court issued its memorandum decision. *Id.* at 307.

In response to the Court's request for briefing, the appellant argued that the Court has "inherent authority . . . to retain jurisdiction over a decision remanded to the [Board]." *Id.* The Court's unequivocal response: "The Court finds that it does not have the authority to retain general and continuing jurisdiction over a decision remanded to the [Board] for a new adjudication." *Id.* To hold otherwise, the Court explained, would be to impinge on the statutory requirement that a *claimant* must initiate an appeal of a new final Board decision by filing a timely Notice of Appeal (NOA). *Id.* The Court wrote:

> Nowhere has Congress given this Court either the authority or the responsibility to supervise or oversee the ongoing adjudication process which results in a [Board] decision. Hence, this Court has no more jurisdiction to intervene in the adjudication of the "new" decision of the [Board] than it did to intervene in the adjudication process which led to the initial decision which precipitated the initial appeal.

Id. at 308.

The *Cleary* panel explained that a new Board decision prompted by a Court remand "is nevertheless just that, a *new* and separate decision, one which can only be appealed if an NOA is filed within 120 days." *Id.* The Court further reasoned that, once the Court found error in the first Board decision and remanded the case,

> the Court had completed its appellate review of *that* initial decision. Legally and factually, there was nothing left to "review" of the remanded decision; there was nothing left to which our "jurisdiction to review decisions of the [Board]" could attach. . . . Therefore, notwithstanding its language purporting to retain jurisdiction, the Court properly could not have retained jurisdiction over the reversed [Board] decision while the matter was being readjudicated.

Id. (quoting 38 U.S.C. § 7252(a)). The Court finished its discussion with the only sentence that the majority in this case quotes: "[W]hen this Court remands for a new and discrete [Board]

decision, it loses jurisdiction over the matter until such time, if at all, as a new [Board] decision is properly appealed."[4] *Id.*

The majority's response to *Cleary* falls into three broad categories. First, it minimizes the import of *Cleary* and notes that the Court has issued limited remands despite its precedent. Second, it suggests that *Cleary* does not apply to what the majority is doing in this case. Finally, it suggests that the majority is creating a new rule allowing for limited remands in "certain circumstances." *Ante* at 3. We respectfully find these attempts to circumvent *Cleary* unconvincing.

A. The Full Import of *Cleary* and the Majority's Response

Regarding the majority's first response, the history of limited remands at this Court is instructive. Prior to *Cleary*, the Court used the limited remand mechanism several times, including in multiple panel cases.[5] The Court often instructed the Secretary to inform it when the Board issued a new decision and the appellant to state whether he or she wished to continue the appeal. Occasionally, the Court actively managed the future development of otherwise straightforward remands.[6]

In one panel decision, the Court explained that it retained jurisdiction "since the appellant should not have to be burdened with the requirement of a new [N]otice of [A]ppeal or the fulfilling of other procedural steps . . . because if the Board decides against the appellant on remand, the Court will not have spoken on the ultimate issue with respect to which the veteran sought judicial review." *Schaper*, 1 Vet.App. at 437 (internal quotation marks omitted). The Court further reasoned that "the appellant has throughout the administrative process attempted to obtain a review of the validity of the asserted debt and, through no fault of his own, has been denied that review." *Id.* at 438. The majority's reasoning tracks closely to this pre-*Cleary* view of limited remands.

In the 18 months immediately after *Cleary*, the Court used its new precedent to remove limited remand cases from its docket.[7] Once that task was complete, the Court then applied *Cleary*

---

[4] Although *Cleary* may hold open the possibility that the Court has the authority to initiate a limited remand to obtain a clarification from the Board concerning a factual finding necessary for the Court to reach a final decision about the Board decision on appeal, we need not take a position on that question now. What matters for present purposes is that *Cleary* instructs that, once the Court finds prejudicial error in a Board decision and remands a case for additional proceedings, the Court's jurisdiction over the matter ends.

[5] *Jones v. Brown*, No. 91-1402, 1994 WL 157867, at *6 (U.S. Vet. App. Apr. 7, 1994) (mem. dec.); *Lasovick v. Brown*, 6 Vet.App. 141, 152 (1994); *Gregory v. Brown*, No. 92-1070, 1993 WL 500908, at *5 (U.S. Vet. App. Nov. 16, 1993) (mem. dec.); *Andrews v. Brown*, No. 91-2110, 1993 WL 426372, at *6 (U.S. Vet. App. Oct. 8, 1993) (mem. dec.); *Jones v. Principi*, 3 Vet.App. 396, 401 (1992) (mem. dec.); *Russell v. Principi*, 3 Vet.App. 310, 320 (1992) (en banc); *Masors v. Derwinski*, 2 Vet.App. 181, 189-90 (1992); *Douglas v. Derwinski*, 2 Vet.App. 103, 111 (1992); *Schaper v. Derwinski*, 1 Vet.App. 430, 437-38 (1991); *Godwin v. Derwinski*, 1 Vet.App. 419, 428 (1991); *Jones v. Derwinski*, 1 Vet.App. 210, 218 (1991); *Hatlestad v. Derwinski*, 1 Vet.App. 164, 171 (1991); *Myers v. Derwinski*, 1 Vet.App. 127, 130 (1991); *Littke v. Derwinski*, 1 Vet.App. 90, 93 (1990); *Gilbert v. Derwinski*, 1 Vet.App. 49, 59 (1990); *Jolley v. Derwinski*, 1 Vet.App. 37, 40 (1990); *see AB v. Brown*, 6 Vet.App. 35, 37 (1993).

[6] The Court also in those days regularly announced that it was retaining limited jurisdiction for the purpose of adjudicating an application for attorney fees and expenses.

[7] *Bond v. Brown*, No. 93-0146, 1996 WL 139156, at *1 (U.S. Vet. App. Mar. 14, 1996); *Lewis v. Brown*, No. 91-1305, 1996 WL 140572, at *1 (U.S. Vet. App. Mar. 7, 1996) (per curiam order); *Manley v. Brown*,

faithfully and declined to issue limited remands on a number of occasions.[8] It also issued three panel decisions that reaffirmed the *Cleary* principle. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) (holding that the appellant's argument that the Court retained jurisdiction over claims that it remanded by order of the Clerk of the Court "fails because the Clerk's order did not purport to retain jurisdiction and the Court does not have the power to retain general and continuing jurisdiction over a decision remanded to the [Board] for a new adjudication" (quoting *Cleary*, 8 Vet.App. at 307) (internal quotation marks omitted)); *Bruce v. Principi*, 15 Vet.App. 27, 29 (2001) (per curiam order) (denying the appellant's request to "retain jurisdiction over his claim" because, in *Cleary*, the Court "found that it did not have authority to retain general and continuing jurisdiction over [a] decision remanded to [the] Board for [a] new adjudication"); *Moore v. Gober*, 10 Vet.App. 436, 438 (1997) ("Although the Court subsequently purported to modify [an order granting the Secretary's motion to remand] by retaining jurisdiction over the case for purposes of a possible [Equal Access to Justice Act] application [for attorney fees], the Court could not properly have retained jurisdiction over the remanded [Board] decision because concurrent or dual plenary jurisdiction is impermissible." (internal quotation marks omitted) (quoting *Cleary*, 8 Vet.App. at 308)).[9]

Matters changed when the Court issued *Mayfield v. Nicholson*, 20 Vet.App. 98, 99 (2006) (per curiam order). In that case, the Court retained jurisdiction and ordered a limited remand for the Board to determine whether notice given to the appellant was sufficient. *Id. Mayfield* became the basis for a handful of other limited remands that the Court has issued in the last decade. *See,*

No. 90-1304, 1996 WL 91869, at *1 (U.S. Vet. App. Mar. 4, 1996); *Dondero v. Brown*, No. 90-1396, 1996 WL 91789, at *1 (U.S. Vet. App. Feb. 23, 1996); *Sibley v. Brown*, No. 90-0553, 1996 WL 91724, at *1 (U.S. Vet. App. Feb. 23, 1996); *Lasovick v. Brown*, No. 91-1591, 1996 WL 91861, at *1 (U.S. Vet. App. Feb. 23, 1996) (per curiam order); *Gettis v. Brown*, No. 90-1456, 1996 WL 91828, at *1 (U.S. Vet. App. Feb. 23, 1996); *Cahn v. Brown*, No. 92-0968, 1996 WL 91740, at *1 (U.S. Vet. App. Feb. 23, 1996); *Andrews v. Brown*, No. 91-2110, 1996 WL 91858, at *1 (U.S.Vet. App. Feb. 23, 1996); *Parmley v. Brown*, No. 90-1578, 1996 WL 78118, at *1 (U.S. Vet. App. Feb. 21, 1996); *Miller v. Brown*, No. 91-0361, 1995 WL 761265, at *1 (U.S. Vet. App. Dec. 15, 1995); *Jones v. Brown*, No. 91-1402, 1995 WL 761275, at *1 (U.S. Vet. App. Dec. 15, 1995); *Parker v. Brown*, No. 90-1512, 1995 WL 761256, at *1 (U.S. Vet. App. Dec. 15, 1995); *Elliott v. Brown*, No. 91-0676, 1995 WL 761261, at *1 (U.S. Vet. App. Dec. 15, 1995); *Johnson v. Brown*, No. 91-1619, 1995 WL 761238, at *1 (U.S. Vet. App. Dec. 14, 1995); *Genous v. Brown*, No. 91-1433, 1995 WL 761219, at *1 (U.S. Vet. App. Dec. 14, 1995); *Belin v. Brown*, No. 91-1319, 1995 WL 761252, at *1 (U.S. Vet. App. Dec. 14, 1995); *Gregory v. Brown*, No. 92-1070, 1995 WL 761069, at *1 (U.S. Vet. App. Dec. 4, 1995); *Grossman v. Brown*, No. 91-1161, 1995 WL 717162, at *1 (U.S. Vet. App. Nov. 22, 1995); *see Taylor v. Brown*, No. 95-1250, 1996 WL 37320, at *1 (U.S. Vet. App. Jan. 22, 1996).

[8] *See Edwards v. Nicholson*, No. 06-1425, 2006 WL 2406173, at *1 (U.S. Vet. App. July 25, 2006); *Chandler v. Nicholson*, No. 06-1247, 2006 WL 1724093, at *3 (U.S. Vet. App. May 24, 2006); *Christiansen v. Nicholson*, No. 05-0074, 2005 WL 1073917, at *1 (U.S. Vet. App. Apr. 15, 2005); *Winsett v. Principi*, No. 02-1548, 2003 WL 22764874, at *1 (U.S. Vet. App. Aug. 20, 2003); *Belton v. Principi*, No. 02-2096, 2003 WL 1344832, at *1 (U.S. Vet. App. Mar. 19, 2003); *Hawkins v. Principi*, No. 01-1233, 2001 WL 1079048, at *3 (U.S. Vet. App. Sept. 4, 2001); *Barlow v. Brown*, No. 95-0587, 1997 WL 34947, at *7 (U.S. Vet. App. Jan. 22, 1997) (mem. dec.); *Hines v. Brown*, No. 96-1236, 1996 WL 606499, at *3 (U.S. Vet. App. Oct. 15, 1996); *Love v. Brown*, No. 96-0201, 1996 WL 227737, at *1 (U.S. Vet. App. Apr. 24, 1996); *see also Dixon v. Brown*, No. 94-0523, 1996 WL 375239, at *1 (U.S. Vet. App. June 18, 1996) (noting that, when the Court expressly holds an issue in abeyance, that issue is not subject to a final decision and *Cleary* does not apply).

[9] One other precedential decision quotes *Cleary* but seems to leave open the possibility that the Court may "specifically retain[]" jurisdiction. *In re Fee Agreement of Mason*, 13 Vet.App. 79, 84-85 (1999).

e.g., *Robinson v. Shulkin*, No. 15-3549, 2017 WL 747939, at *1-2 (U.S. Vet. App. Feb. 27, 2017) (retaining jurisdiction while the Board made a factual finding necessary for the Court to resolve a dispute concerning the record before the agency); *Tagupa v. Gibson*, No. 11-3575, 2014 WL 2751056, at *1-4 (U.S. Vet. App. June 18, 2014) (per curiam order) (remanding the claim on appeal for the Board to consider a document that the Secretary submitted to the Court during the pendency of the appeal regarding the Army's delegation of document verification to another agency), *withdrawn*, 2014 WL 3632990 (July 24, 2014); *Spencer v. Shinseki*, No. 11-3010, 2013 WL 1283462, at *1-6 (U.S. Vet. App. Mar. 29, 2013) (mem. dec.) (noting that the Court previously remanded the matter on appeal for the Board to consider "whether the failure of VA medical personnel to use bed rails or side rails during [the appellant's] inpatient treatment" constitutes "carelessness" as defined by 38 U.S.C. § 1151); *Sellers v. Shinseki*, No. 08-1758, 2011 WL 2110038, at *1-2 (U.S. Vet. App. May 27, 2011) (per curiam order) (remanding the matter on appeal for the Board to determine whether a document submitted to the Court was "authentic" and whether the decision was "subjected to an invalid" extraordinary award procedure); *see also Murphy v. West*, No. 97-1209, 1999 WL 561637, at *1-2 (U.S. Vet. App. June 21, 1999) (noting that, previously, the Court remanded the matter on appeal for the Board to "specifically address[] the question of jurisdiction"). Aside from this handful of cases, the Court has continued to issue decisions faithfully applying *Cleary*.[10]

The majority affirmatively cites *Mayfield* to support a limited remand decision on the merits. We believe that its reliance on *Mayfield* is misplaced because the scope of the limited remand in *Mayfield* was much narrower than what the Court requires here. *See Bonhomme v. Nicholson*, 21 Vet.App. 40, 45 (2007) (per curiam order) (the Court, without mentioning *Cleary*, explained that in *Mayfield*, the Court ordered a limited remand "to permit the Board to make the necessary factual findings based on the evidence then in the record" and that "[t]he limited remand in that case was not based on the proffer of new evidence").

Furthermore, the *Mayfield* analysis contains three problematic features that the Court should not ignore. First, to the extent that the *Mayfield* panel attempted to overturn *Cleary* without convening full-Court review, it acted improperly and its decision would not carry the force of law. *See Bethea v. Derwinski*, 2 Vet.App. 252, 254 (1992) ("Only the en banc Court may overturn a panel decision."). Second, *Mayfield* supports its assertion that the Court "will retain jurisdiction" by leaving it to the readers of its decision to "[c]ompare" *Cleary* with two other cases. The *Mayfield* panel engaged in no comparative analysis of its own. Finally, neither of the cases that *Mayfield* places counter to *Cleary* arose in the context of an appeal, as is the case here, and they do not, as a consequence, directly respond to *Cleary*'s reasoning. *Mayfield*, 20 Vet.App. at 99; *cf. Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 865-66 (1992) ("The Court's power lies . . . in its legitimacy . . . . [, which] depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.").

[10] *See Ali v. Shinseki*, No. 12-1877, 2012 WL 6554772, at *1 (U.S. Vet. App. Dec. 17, 2012); *Smith v. Shinseki*, No. 12-1723, 2012 WL 2360801, at *1 (U.S. Vet. App. June 21, 2012); *Lawrence v. Shinseki*, No. 11-0913, 2012 WL 1082459, at *2 (U.S. Vet. App. Apr. 3, 2012) (mem. dec.); *Bilecki v. Shinseki*, No. 08-4332, 2010 WL 2232479, at *2 (U.S. Vet. App. June 3, 2010) (mem. dec.); *Thibodeaux v. Peake*, No. 07-0567, 2008 WL 5268529, at *2 (U.S. Vet. App. Dec. 17, 2008) (mem. dec.).

One of the cases on which the *Mayfield* majority relied, *Erspamer v. Derwinski*, 1 Vet.App. 3 (1990), involved a petition for extraordinary relief. *Erspamer* predates *Cleary*, and its holding is inapposite in the present appeals context: The Court may retain jurisdiction over a petition for extraordinary relief while waiting to observe whether the Secretary adheres to the timetable for claims processing suggested by his counsel. *Id*. at 11-12.

The second case, *Zevalkink v. Brown*, 102 F.3d 1236 (Fed. Cir. 1996), which involved a motion to substitute, states that, "[w]hile the Court of Veterans Appeals could perhaps remand the question of whether [a movant] qualifies as an accrued benefits claimant to [the VA regional office (RO)], we will not require the Court . . . to make such a limited referral." *Id*. at 1244. The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) qualified its statement with *two* signifiers of equivocation ("could perhaps"). *Id*. A statement softened by such equivocation is not sufficient to distinguish *Cleary*, particularly given the weight of precedential history discussed above. *Mayfield* should not have used it for that purpose, and the Court should not now use *Mayfield* or any of its progeny to support its decision.

Moreover, in the context of a motion to substitute, if the Secretary does not concede that the movant is an eligible accrued-benefits claimant, the appropriate remedy for the Court is to vacate the underlying Board decision and dismiss the appeal, and possibly remand the matter to the RO to adjudicate the accrued-benefits issue. *See Breedlove v. Shinseki*, 24 Vet.App. 7, 20-21 (2010) (per curiam order); *see also Reeves v. Shinseki*, 682 F.3d 988 (Fed. Cir. 2012) (not disagreeing with *Breedlove*). In such a situation, because the Board decision is vacated, the Court would not retain jurisdiction over the matter. Therefore, although the Federal Circuit in 1996 may have, as *Mayfield* characterized it, "suggest[ed]" remand to the Board to answer the accrued benefits question, that is not the current practice of the Court. Indeed, the Court's current practice suggests that it should not retain jurisdiction over remanded issues.

The majority concludes that "*Cleary* effectively stands for the proposition that decisionmaking should not simultaneously occur at both the Board and the Court," which is, in its view, "not a new concept." *Ante* at 2. The majority continues to "clarify that the Court may, in certain circumstances, retain jurisdiction over limited remands to the Board." *Ante* at 3. The majority provides very little support for these positions and makes no effort to grapple with the jurisdictional restrictions discussed in *Cleary*. It cites only *Mayfield* and *Sellers*, a nonprecedential order that relied on *Mayfield*. The majority provides little analysis of the history of limited remands and does not acknowledge or engage authority that calls its analysis into question. *See, e.g.*, *Moore*, 10 Vet.App. at 442 ("In *Cleary*, the Court held that its jurisdiction ended when it remanded a claim to the Board for readjudication.").

If the majority's decision can be read to overturn *Cleary* in whole or in part, we do not believe that its analysis contains the reasoned justification necessary to do so.[11] *See Kimble*

[11] Judge Schoelen "share[s] some" of our concerns and agrees "that if we are overruling *Cleary*, we should not be opaque about it." *Ante* at 5. It is, in fact, legally impermissible for the Court to be opaque about it. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014) ("[T]his Court has always held that 'any departure' from the doctrine [of stare decisis] 'demands special justification.'" (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984))). Furthermore, our concurring colleagues seem not to agree whether the Court is in fact overturning *Cleary* in this order.

v. Marvel Ent., LLC, 135 S. Ct. 2401, 2409 (2015) (stare decisis requires that, "[t]o reverse course, . . . a 'special justification' – over and above the belief 'that the precedent was wrongly decided'" – is required (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014))). Also, to the extent that there is a conflict in our caselaw over limited remands, the majority should have resolved that conflict, stated the circumstances when, if ever, limited remands are warranted, supported those holdings with a discussion of our jurisdiction, history, and caselaw, and then applied its findings to the facts of this case. The majority's two paragraphs of declarative statements accompanied by a brief explanation is simply not sufficient for a holding of this magnitude and is destined to create further confusion in the future.[12]

B. Distinguishing *Cleary*

Next, the majority attempts to reframe what it is doing here in a way that allows it to avoid *Cleary* and move this case closer to the type of limited remand issued in *Mayfield* and *Sellers*. The majority states that "what we require from the Board is not a new decision, but a supplemental statement of reasons or bases pertaining to a claim it already decided." *Ante* at 3. That is not, in our view, an accurate interpretation of this limited remand.

The majority's primary reason for remanding this matter is that the Board did not address an argument raised by the appellant and thus violated *Robinson v. Peake*, 21 Vet.App. 545, 553 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). That is one of our most common reasons for remanding cases.[13] The majority further concludes that the Board's statement of reasons or bases is inadequate as a result. Despite the majority's attempt to reframe the issue, the Court requires more than a factual clarification to review the final Board decision. Indeed, the majority found error in this final Board decision. To our knowledge, such an error has

---

Chief Judge Davis writes about what should happen "when the time comes to make a decision in this matter," while Judge Schoelen states that the majority overruled *Cleary* without acknowledgment. *Ante* at 4. If the Court did not overturn *Cleary*, then it is acting contrary to law. If it did overturn *Cleary*, then it did not do so to a degree sufficient for at least one of the members of the majority to recognize. In either case, its decision is insupportable.

[12] That confusion has already begun. As the two concurring statements show, our colleagues in the majority have widely divergent opinions about what is to be done with *Cleary*. Chief Judge Davis would overturn it, when the time comes, and give the Court, in panel and single-judge decisions, seemingly unlimited authority to issue limited remands. *See ante* at 4. Judge Schoelen would restrict limited remands to "extraordinary" panel cases, a rule that appears to be based on no supporting authority and that remains undefined. *See ante* at 5-6. Because the majority did not reach a consensus that is clearly stated and supported, this order offers no guidance for litigants. Further, given the discrepancy in the concurrences, the order also appears to lack instruction for the Court in future cases, particularly regarding what types of circumstances would warrant a limited remand.

[13] In the past 6 months alone, the Court has used *Robinson* on several occasions as at least one reason to remand claims. None of those were limited remands. *See Bourne v. Wilkie*, No. 17-2529, 2018 WL 5793245, at *6-7 (U.S. Vet. App. Nov. 5, 2018) (mem. dec.); *Esquilin v. Wilkie*, No. 17-1322, 2018 WL 5310171, at *5 (U.S. Vet. App. Oct. 26, 2018) (mem. dec.); *Shriver v. Wilkie*, No. 17-2490, 2018 WL 5291823, at *2 (U.S. Vet. App. Oct. 24, 2018) (mem. dec.); *Garland v. Wilkie*, No. 17-2210, 2018 WL 4692336, at *3 (U.S. Vet. App. Sept. 28, 2018) (mem. dec.); *Mendoza v. Wilkie*, No. 17-1914, 2018 WL 4190794, at *3 (U.S. Vet. App. Aug. 31, 2018) (mem. dec.); *Griffis v. Wilkie*, No. 17-2341, 2018 WL 3954330, at *4 (U.S. Vet. App. Aug. 17, 2018) (mem. dec.); *Tottingham v. O'Rourke*, No. 17-1540, 2018 WL 3699993, at *3 (U.S. Vet. App. July 26, 2018) (mem. dec.); *Bolte v. O'Rourke*, No. 17-1366, 2018 WL 3635137, at *3 (U.S. Vet. App. July 24, 2018) (mem. dec.); *Freymuller v. O'Rourke*, No. 17-2816, 2018 WL 3640902, at *5 (U.S. Vet. App. July 23, 2018) (mem. dec.); *Johnson v. O'Rourke*, No. 17-0617, 2018 WL 3492783, at *2 (U.S. Vet. App. July 20, 2018) (mem. dec.).

never served as the basis for a limited remand, at least not since *Cleary*. On the other hand, the Court has often and routinely vacated Board decisions when the Board failed to address an argument raised in support of a claim.

Further, the majority's assertion that it is not, in fact, asking the Board for a "new decision" and that it "does not need to vacate the Board decision on appeal" is similar to the explanation the Court gave for its limited remand authority before *Cleary*. *Ante* at 3; *cf. Schaper*, 1 Vet.App. at 437. However, such a procedure no longer comports with the way this Court generally remedies prejudicial error by the Board. Indeed, the majority's reasoning could be applied to just about any case. If the Board did not make an adequately supported credibility finding, sufficiently review the adequacy of a medical opinion, sufficiently implement Court remand instructions, or fully consider a key piece of evidence, etc., under the majority's reasoning, the Court could say that it does not require a "new decision," only a "supplemental statement of reasons or bases" and retain jurisdiction on that basis. *Cleary* forestalled such attempts to retain jurisdiction when it should be relinquished.[14]

The majority's assertion that, without supplemental reasons or bases, "we cannot effectively and efficiently review the instant appeal, including deciding the motion for class certification," may also be widely applied. *Ante* at 1. A reasons-or-bases error prevents the Court from "effectively and efficiently" reviewing for clear error, arbitrary and capricious decisionmaking, and the like. In such cases, the Court vacates the Board decision and remands the matter on appeal. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand generally is appropriate where the Board has failed to provide an adequate statement of reasons or bases for its determinations).

C. The Majority's Exception to *Cleary*

Finally, the majority suggests that they are making an exception to *Cleary*, stating, "in certain circumstances," the Court may retain jurisdiction. *Ante* at 3. As we have noted already and discuss in greater detail below, the majority does not explain its authority to create that exception. Furthermore, the only unique feature of this appeal identified by the majority is that it is accompanied by a motion for class certification. Pointing to the separate legal question whether aggregate action is appropriate does not explain why the error made in this appellant's individual case is not a common, traditionally remandable error. And, although class certification may be a novel issue at the Court now, if it were to become a normal practice here, it is unclear how class certification motions would continue to constitute unique circumstances.

[14] Judge Schoelen agrees with this point, but believes that basic errors "escalate[]" to "an extraordinary circumstance" when "considerable time . . . has already been invested in litigation before the en banc Court" and "harm . . . could potentially befall a sizeable class of veterans." *Ante* at 5. Judge Schoelen later states that because the Court is evaluating "a class certification motion arising from an appeal – an issue of first impression at the Court," it faces an "extraordinary circumstance" that warrants a limited remand. *Ante* at 6. It is unclear whether the "extraordinary circumstance" rule that she wishes to employ is the same as the "unique" circumstance rule referenced by the majority. *Ante* at 3. In either case, again, the majority and the concurrences offer no authority to support any such rule, nor an adequate definition, and we are unaware of any grounding in the law.

II. ADDITIONAL JURISDICTIONAL AND PRACTICAL CONCERNS

The majority's action raises several other jurisdictional and practical concerns. First, it leaves in full effect a decision denying the appellant entitlement to the benefits that he seeks, even though it found prejudicial error in that decision. By requiring a "supplemental statement of reasons or bases" and not a "new decision," the majority seems to force the Board to adhere to its current holding even if it determines that the appellant is entitled to the benefits that he seeks. What, then, would the Court do if the Board returns a decision granting the appellant's claim based on the narrow issue the Court instructs it to review – or stating that it would have granted the claim if the Court had allowed it to do so – while the prior Board decision denying his claim remains in force? Further, what happens if the Secretary wishes to exercise his right to appeal or the appellant wishes to argue for reversal? Has the Court insulated itself from further review by the Federal Circuit by refusing to issue judgment?

Second, the majority's decision could be read as exceeding our jurisdiction to ensure that a motion for class certification – that is not ripe for review – will be considered. By remanding the matter for the Board to address in the first instance the scientific validity of the method followed pursuant to requirements set forth in 38 C.F.R. § 3.311, the majority implicitly acknowledges that, currently, the Court cannot provide the relief that the appellant seeks on a class-wide basis: a decision on whether VA relied on a scientifically flawed method to evaluate Palomares veterans' levels of ionizing radiation exposure under § 3.311. *See* Motion for Class Certification at 3-7. The Court cannot offer this relief because the Board did not address that question in the first instance and the materials that the appellant relies on to discredit the method were generally not before Board, *see* Appellant's Brief (Br.), Attachments A-Q; Reply Br., Attachments A-B; *see also* 38 U.S.C. § 7252(b) (instructing that the Court's review is limited to material contained in the "record of proceedings before the Secretary and the Board"). Rather than stretch the bounds of our statutory constraints to overcome this issue, the Court should instead acknowledge its inability to currently grant the remedy requested in the class certification motion and, accordingly, deny it. Indeed, that would allow the Court to "meaningfully consider the appellant's class certification motion." *Ante* at 3.

Also, the appellant has submitted numerous documents in support of his motion for class certification that are not in the record of proceedings and that are the subject of two motions to strike. The majority's decision suggests limited remands can serve as a tool to bring documents before the Court that otherwise would be struck. By stating in both the body of its order and in its decretal statements that the appellant may submit materials "including the evidence submitted to this Court," the majority highlights a way to defeat the Secretary's motions to strike and obtain review of documents the appellant otherwise would not be afforded. *Ante* at 2-3.

Further, although the majority appears to believe that the Court will have authority to consider newly added record materials, it is unclear how that would be permissible. *See Kyhn v. Shinseki*, 716 F.3d 572, 576-77 (Fed. Cir. 2013) (holding that the Court's review of affidavits generated after the Board decision on appeal "was in contravention of the jurisdictional requirement that '[r]eview . . . shall be on the record of proceedings before the Secretary and the Board'" (quoting 38 U.S.C. § 7252(b))). Because the NOA triggering our jurisdiction relates only to the April 2017 Board decision, the date of the Board's decision governs what materials are

considered part of the record of proceedings under section 7252(b). *See* U.S. VET. APP. R. 10(a)(1) (providing that the record before the agency consists of all evidence before the Board "on the date the Board issued *the decision from which the appeal was taken*" (emphasis added)). The majority cites no authority indicating that a "supplement" to the Board decision on appeal is legally sufficient for it to deem the date of the supplement to be the decision date and to then augment the record accordingly. That is an innovation with no grounding in law or this Court's precedent, and it raises the question how the Court canreview a supplemental analysis from the Board that is based on evidence added to the record after April 2017.

Third, the Court has not decided whether its jurisdiction allows it to certify a class in this matter, and the Court has not determined whether Rule 23 of the Federal Rules of Civil Procedure would counsel against forming a class in this case even if it has the authority to do so. There are, in our view (and the majority's as well, given its order of November 13, 2018) unadjudicated threshold matters that may, if properly decided, reveal that the majority's efforts to obtain a Board decision that is ripe for review were unnecessary to decide the class certification motion.

Fourth, the majority indicates that it will address the appellant's challenge to VA's omission of the Palomares cleanup from the list of radiation-risk activities in 38 C.F.R. § 3.309, even though the Board failed to address that issue below because the facts surrounding that argument are undisputed. *See ante* note 1, at 1. However, it is unclear how the Court could entertain an argument that the veteran may not have standing to bring. The U.S. Supreme Court has held that, to have standing, a person must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016) (finding that standing is a doctrine rooted in the traditional understanding of a case or controversy); *see Mokal v. Derwinski*, 1 Vet.App. 12, 13-15 (1990) (holding that this Court adheres to the case-or-controversy requirements imposed by Article III of the U.S. Constitution).

The Board did not deny service connection because Palomares is excluded from the list of radiation-risk activities in § 3.309.[15] Rather, the Board denied the appellant service connection under § 3.309 because he does not allege or point to evidence that he has one of the presumptive conditions listed in § 3.309. Record at 5. Thus, the appellant does not appear to have suffered an injury from Palomares's exclusion as a radiation-risk activity under that regulation. Also, although he argues that a claimant need not have a presumptive condition under § 3.309 to be injured by that regulation because entry onto the Ionizing Radiation Registry (IRR) is a benefit in and of itself, that is an assertion disputed by the parties. *Cf. Emerson v. McDonald*, 28 Vet.App. 200, 206 (2016) (the Court may address an argument in the first instance because the relevant facts were not in dispute). Moreover, the appellant's exclusion from the IRR was not a matter addressed or decided by the Board. *See Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000) ("[W]hen the Board has not rendered a decision on a particular issue, the court has no jurisdiction to consider it."); *see also Gilbert*, 1 Vet.App. at 56-57 (the Board must provide an adequate statement of reasons or bases for its decision). Further, it is unclear whether that matter was, or even could have been, before the Board. *See Jarrell v. Nicholson*, 20 Vet.App. 326, 330-32 (2006) (en banc)

[15] There are 21 types of cancers listed in § 3.309(d)(2) that will be service-connected if they become manifest in a radiation-exposed veteran.

(holding that the Board lacks jurisdiction over an issue not first presented to and adjudicated by the RO). We require further explanation before we can assess the majority's decision to take control of the § 3.309 issue, particularly where the appellant may lack standing to bring this argument. *See Spokeo*, 136 S. Ct. at 1547; *Howard*, 220 F.3d at 1344.

Finally, it is unclear why the majority insists that it "will not entertain any motion for an extension of time with respect to the timeframes set forth in this order, absent compelling circumstances." *Ante* at 4. This decision is novel, and the issue the majority remands is detailed and complicated and may require more time to address than the majority anticipates.

III. CONCLUSION

This case highlights some of the jurisdictional and practical challenges that would be inherent in entertaining class actions in an appeals context, given the statutory framework that governs our review of Board decisions. *See Ledford v. West*, 136 F.3d 776, 779 (Fed. Cir. 1998) ("[T]he court's jurisdiction is premised on and defined by the Board's decision concerning the matter being appealed."). Although we are sympathetic to the veterans who served in Palomares and may have suffered injuries as a result, a simple precedential decision on this issue when properly before the Court may more efficiently provide them with the answers they deserve. *See Harrison v. Derwinski*, 1 Vet.App. 438, 438-39 (1991) (en banc order) (denying an appellant's petition to establish class action procedures, in part because class action procedures would be "highly unmanageable" and class actions are "unnecessary," given the binding effect of the Court's precedential decisions in pending and future cases). We believe that the Board decision on appeal should be vacated and remanded based on the *Robinson* error that the Court identifies and that the motion for class certification should be denied because the appellant has not obtained a final Board decision concerning the class issue that he asks us to review. If, on remand, the appellant receives an adverse Board decision, then he may return and file a new NOA and motion for class certification.

For these reasons, we respectfully dissent.