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February 29, 2016

Mr. Gregory O. Block, Clerk of the Court
United States Court of Appeals for Veterans Claims
625 Indiana Avenue, N.W., Suite 900
Washington D.C. 20004-2950

In RE: *Emerson v. McDonald, Secretary of Veterans Affairs*
Docket No. 14-2968
Appellant's Second Notice of Supplemental Authority

Dear Mr. Block:

Pursuant to Rule 30(b) of the Court's rules of Practice and Procedure, the appellant cites the following decision which is pertinent to this appeal:

Spencer v. Brown, 4 Vet. App. 283 (1993), *aff'd*, 17 F.3d 368 (Fed. Cir. 1994).

Spencer, 4 Vet. App. at 288-289 discusses the legal effect of an intervening change in law or regulation which creates a new basis for entitlement. *Spencer* is relevant to the Court's February 26, 2016 Order, specifically –

- regarding Question # 1: whether Mr. Emerson's 2000 claim, which was denied in 2003 (RBA 299-307), is the same claim which VA's 2011 Rating Decision (RBA 192-199) granted, effective 2010, because of a change in the law; and,
- regarding Question # 2: whether the "award" as used within the meaning of Section 3.156(c)(3) refers to 1) the award for which entitlement arose after VA's receipt of service department records and VA's reconsideration of the original claim, or 2) the award for which entitlement arose based on the

separate claim arising years later because a subsequent liberalization of the law created a new basis of entitlement.

Spencer, 4 Vet. App. at 288-289 states:

When a provision of law or regulation creates a new basis of entitlement to benefits, as through liberalization of the requirements for entitlement to a benefit, an applicant's claim of entitlement under such law or regulation is a claim separate and distinct from a claim previously and finally denied prior to the liberalizing law or regulation. The applicant's latter claim, asserting rights which did not exist at the time of the prior claim is necessarily a different claim. *See, e.g., Sawyer v. Derwinski*, 1 Vet. App. 130, 133 (1991). Section 7104(b) provides that "when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered." Where a claim is based upon a substantive right created by a statutory or regulatory provision that did not exist at the time of the prior final denial of the claim, adjudication of the latter claim is not a "reopening" of the first, such as would be prohibited, absent new and material evidence, by section 7104(b). And the fact of the intervening change in law is itself sufficient to change the factual basis such that the latter claim is not "a claim based upon the same factual basis" as the former claim. . . .

Moreover, there is no indication that Congress or VA has intended to preclude, by operation of the finality provisions of section 7104(b), a claimant's entitlement to benefits under an intervening law providing a new basis for entitlement to benefits. That is particularly so in light of the nature of the VA benefits adjudication process, which operates with "a high degree of informality and solicitude for the claimant" (*Walters v. Nat'l Assn' of Radiation Survivors*, 473 U.S. 305, 311, 105 S. Ct. 3180, 3184, 87 L.Ed.2d 220 (1987)) and VA's policy, stated in its regulations, "to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government." 38 C.F.R. §3.103(a) (1992); *see also* 38 C.F.R. §3.159 (1992).

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Very truly yours,

/s/Sandra E. Booth
Sandra E. Booth

SEB/mc
cc: Mr. Everett Emerson