IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

PATRICIA L. ROMERO,	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 19-3687
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
Appellee.	)	

APPELLEE'S RESPONSE IN OPPOSITION TO APPELLANT'S MOTION FOR ORAL ARGUMENT

Pursuant to U.S. Vet.App. Rule 27(b)(2), the Secretary submits this response in opposition to Appellant's July 20, 2020, motion for oral argument. This Court should deny Appellant's motion for oral argument because Appellant fails to provide a legitimate justification in support of her motion. *See* U.S. Vet.App. R. 34(b); *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990) (setting forth the criteria for panel consideration by this Court).

1. Appellant seeks oral argument on a nondispositive matter where there is binding precedent available, making the matter appropriate for a single judge decision

Pursuant to U.S. Vet.App. R. 34(b), a motion for oral argument must explain "why such argument will aid the Court." This Court has held that oral argument will be allowed only at the order and discretion of the Court, where it "believes that oral argument will materially assist in the disposition of [an] appeal." *Hackett v. Principi*, 18 Vet.App. 477, 478 (2004) (per curiam); *see Janssen v. Principi*, 15 Vet.App. 370, 379 (2001) (denying motion for oral argument where Court does not believe it will materially assist in the disposition

of the appeal); *Winslow v. Brown*, 8 Vet.App. 469, 471 (1996) (same). Further, "[o]ral argument normally is not granted on nondispositive matters or matters being decided by a single Judge." U.S. Vet.App. R. 34(b).

This Court has explained that single-judge disposition is appropriate when a case on appeal is of relative simplicity and the case (1) does not establish a new rule of law; (2) does not alter, modify, criticize, or clarify an existing rule of law; (3) does not apply an established rule of law to a novel fact situation; (4) does not constitute the only recent binding precedent on a particular point of law; (5) does not include a legal issue of continuing public interest; and (6) the outcome is not reasonably debatable. *Frankel*, 1 Vet.App. at 25-26.

This case involves the application of the presumption of regularity to VA's standard mailing practices. In his motion, Appellant relies on *Routen v. West*, 142 F.3d 1434 (Fed. Cir. 1998), and *Ashley v. Derwinski (Ashley II)*, 2 Vet.App. 307 (1992), to present a general argument that this case presents issues that are not of relative simplicity and also presents novel issues as to the proper interpretation of Court precedent. *See* Appellant's Motion for Oral Argument (AM) at 1. However, Appellant ignores recent precedent and the actual holdings issued in *Routen* and *Ashley II*, and relies on a misrepresentation of the evidence of record. Contrary to Appellant's argument, this case presents no novel or complicated issues that would not be appropriate for review by a single judge.

As discussed in the Secretary's brief, while Appellant relies on *Routen* for her argument that the presumption of regularity should not attach in this case,

Routen did not involve the presumption of regularity and is, thus, inapplicable to this case. *See* Secretary's Brief (Sec. Br.) at 13. Rather, it related to the presumption of aggravation, holding that a presumption is not evidence and that "the misapplication of, or failure to apply, a statutory or regulatory burden-shifting presumption does not constitute 'new and material evidence' for the purpose of reopening a claim under 38 U.S.C. § 5108." *Routen*, 142 F.3d at 1436. Therefore, *Routen* is unpersuasive and inapplicable to the issues on appeal as it did not involve the presumption of regularity. To the extent that she relies on *Routen* to argue that a presumption requires an evidentiary foundation, as stated in the Secretary's brief, she ignores the clearly delineated regular practice of mailing Statements of the Case (SOCs) as well as the fact that the cover letter of SOC reflects evidence of mailing. SB at 13; 38 U.S.C. § 7105(d)(1), (3); 38 C.F.R. § 19.30; *see Boyd v. McDonald*, 27 Vet.App. 63, 72 (2014); *Crain v. Principi*, 17 Vet.App. 182, 186 (2003) (holding that "[i]n order for this presumption to attach, VA must provide notice to the latest address of record for the claimant"). She also ignores that the Court has clearly held that the presumption of regularity attaches when VA mails notice to the latest address of record. *See Ashley II*, 2 Vet. App. at 309; *Crain*, 17 Vet.App. at 186.

As for Appellant's reliance on *Ashley II*, she ignores the interpretation of *Ashley II* in more recent binding precedent in which the Court held that, in addition to asserting nonreceipt, a claimant bears the burden of producing clear evidence that VA did not follow its regular mailing practices or that its practices

were not regular. *See Clarke v. Nicholson*, 21 Vet.App. 130, 133 (2007) *citing Woods v. Gober*, 14 Vet.App. 214, 220 (2000); *Ashley II*, 2 Vet.App. at 309; *see also Jones v. West*, 12 Vet.App. 98, 102 (1998) (an "assertion of nonreceipt, standing alone, does not rebut the presumption of regularity in VA's mailing process"). The Secretary highlights that Appellant fails to comply with the Court's instructions in *Clarke* and *Woods* to provide clear evidence that either VA did not follow its regular mailing practices or that its practices were not regular. Instead, Appellant's arguments regarding irregularity in VA's mailing practice rest on a complete misrepresentation of the findings within a 2017 Government Accountability Office Report as the report was with regard to the cost-effectiveness of VA's operations and not in regard to the reliability or regularity of its actual mailing of documents. *See* AM at 1; *see also*, *e.g*., Appellant's Brief (App. Br.) at 5-6, 11, 17, 23; SB at 9-10, 14, 22

Thus, contrary to Appellant's assertion, there are no novel questions surrounding the attachment and rebuttal of VA's presumption of regularity as VA has a clear and delineated regular practice of mailing copies of SOCs to claimants and their representatives, which was followed in this case, such that the presumption of regularity attaches to VA's mailing in this case and this presumption may only be rebutted by a claimant producing clear evidence that VA did not follow its regular mailing practices or that its practices were not regular, which Appellant failed to show. *See Clarke*, 21 Vet.App. at 133; *Woods v. Gober*, 14 Vet.App. 214, 220 (2000); *Ashley II*, 2 Vet.App. at 309. The matter

before this Court is not one of first impression given the extensive, binding caselaw concerning the presumption of regularity to VA's mailing practices that are directly applicable to this case. Appellant's attempt to circumvent binding precedent and distract from the factual basis of the evidence she relies upon does not meet this Court's requirements for panel consideration, *see Frankel*, 1 Vet.App. at 25-26, and this Court should deny Appellant's motion for oral argument as it does not even purport to meet the standards set forth in U.S. Vet.App. R. 34(b) or *Frankel*, 1 Vet.App. at 25-26.

WHEREFORE, the Secretary responds in opposition to Appellant's motion for oral argument.

Respectfully submitted,

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