MOTION DENIED

For the Panel

October 29, 2020

Joseph L. Toth
Judge

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JAMES R. WELCOME, Appellant,	)	
v.	)	Vet. App. No. 18-4601
ROBERT L. WILKIE, Secretary of Veterans Affairs, Appellee.	)	

APPELLEE'S MOTION TO STRIKE APPELLANT'S JUNE 30, 2020, *SOLZE* NOTICE

In his brief, the Secretary argued that vacatur and remand of the August 2, 2018, decision of the Board of Veterans' Appeal (the Board) is warranted, in light of the Board's failure to address an argument raised by Appellant and by the record, concerning Appellant's potential eligibility for benefits under the Veterans' Retraining Assistance Program for periods beyond March 31, 2014. (Secretary's Brief at 4-6). In this regard, the Secretary observed that the Board's omission leaves unanswered certain "factual questions concerning the nature of Appellant's course of study and his enrollment subsequent to that date, which bear on his continued eligibility for the periods for which he seeks payment." (Secretary's Brief at 7).

On June 30, 2020, Appellant filed a notice, which he captioned as warranted by the Court's holding in *Solze v. Shinseki*, 26 Vet.App. 299 (2013). In this notice, he notes the above-cited passage in the Secretary's brief concerning unanswered factual questions, and he seeks to "clarify[] this point." (Appellant's *Solze* Notice

at 1). This clarification consists of his discussion of three pages of evidence that he attaches to his pleading, which discussion and evidence he states "could . . . affect the Court's decision." (Appellant's *Solze* Notice at 1 (internal citation omitted)). The Secretary hereby moves the Court to strike Appellant's *Solze* notice, as it is an inappropriate attempt to put before the Court evidence that was not before the Board.

Again, Appellant attached to his *Solze* notice three pages of evidence that he asks the Court to now consider. The first two pages are an undated "Official Transcript" of Appellant's studies at the George Stone Technical Center (GSTC). The third page is a record of GSTC "Fee Transactions" with some hand-written annotations. None of these documents is in the record that was before the Board, and Appellant does not suggest otherwise.[1] *See* U.S. Vet. App. Rule (R.) 10(a). Appellant also does not even suggest that the documents *should* be part of that record.[2] He simply offers them now and asks the Court to consider them for their probative value as to the unanswered factual questions identified by the Secretary.

Appellant suggests that this evidentiary submission is warranted under *Solze*. There, the Court emphasized that "[i]n all cases before this Court, the

[1] While the "Official Transcript" is undated, the "Fee Transactions" document is dated September 10, 2018, which post-dates the August 2, 2018, Board decision that is the subject of the instant appeal.

[2] Appellant's counsel advised the Secretary on April 19, 2019, that she accepted the record, as amended and served upon her on April 3, 2019, as being complete. (Secretary's April 23, 2019, Response to Court Order).

parties are under a duty to notify the Court of developments that could deprive the Court of jurisdiction or otherwise affect its decision." 26 Vet.App. at 301. "This duty is vital to ensure that the Court does not issue a decision absent a live case or controversy." *Id.* at 302.

Put most simply, Appellant's pleading has nothing at all to do with *Solze*. Nothing in the evidence attached to Appellant's *Solze* notice or in his discussion of that evidence in any way suggests any new developments that might moot the instant case or otherwise affect the Court's ability to render a decision. Indeed, Appellant seems to tacitly recognize as much, as he makes no attempt to explain how this new evidence actually implicates *Solze*, beyond simply and selectively noting its holding. All he offers in support of the view that this new evidence could "otherwise affect the Court's decision" (Appellant's *Solze* Notice at 1) is that it "clarif[ies] the point" discussed in the Secretary's brief that remand is warranted here for the Board to make factual findings.[3] As Appellant urges, the clarifying value of this evidence is that it demonstrates that he "pursued his program of education for 16 months and 6 days." (Appellant's *Solze* Notice at 2). This is simply to say that Appellant offers this new evidence to answer the factual

[3] Appellant replied to the Secretary's brief on November 22, 2019. In that reply brief, he responded to the Secretary's remand argument, urging that remand is unnecessary because, in his view, the only issues remaining open here are legal ones that the Court can resolve without remanding to the Board. (Appellant's Reply Brief at 1-5).

questions that the Secretary posited as having been left open by the Board's decision here.[4]

Of course, this Court has no jurisdiction to make de novo factual findings, and it has no jurisdiction to consider evidence that was not before the Board. *See Kyhn*, 716 F.3d at 577; *Murillo v. Brown*, 8 Vet.App. 278, 280 (1995) ("For the Court to base its review on documents not included in the Board's calculus at the time it rendered its decision would render the Court a fact finder de novo, exceeding its authority under the statutory scheme which establishes the Court as an appellate body."); *Obert v. Brown*, 5 Vet.App. 30, 32 (1993) ("By attempting to introduce new medical evidence before the Court, and then arguing for reversal on the basis of that evidence, appellant was, in effect, placing this Court in the position of finding . . . facts. That is not our function."); *Rogozinski v. Derwinski*, 1 Vet.App. 19, 20 (1990); *see also* 38 U.S.C. § 7261(c) ("In no event shall findings of fact made by [the Secretary] be subject to trial de novo by the Court."); U.S. Vet. App. R. 10(a)(1)-(2). This statutory limitation on the Court's jurisdiction amply demonstrates the folly in Appellant's suggestion that the new evidence he has submitted here "could 'otherwise affect [its] decision.'" (Appellant's *Solze* Notice at 1). This new evidence cannot possibly affect the Court's decision, for the simple reason that this Court has no jurisdiction to review it.

[4] This proposed use of this evidence demonstrates that it is not appropriate for judicial notice. *See Kyhn v. Shinseki*, 716 F.3d 572, 576 (Fed. Cir. 2013) (rejecting the judicial notice of extra-record material, where it is "evidentiary in nature")

Appellant's June 30, 2020, *Solze* Notice is a transparent and wildly inappropriate attempt to submit to the Court, for the first time and on the eve of oral argument, new evidence that was not before the Board and to invite the Court to make factual findings based on that evidence that are beyond the Court's jurisdiction. The Court should, therefore, strike Appellant's *Solze* Notice and reject his invitation to act as an initial finder of fact here.

Appellant's counsel opposes this motion and intends to file written opposition thereto.

WHEREFORE, Appellee respectfully moves the Court to strike Appellant's June 30, 2020, *Solze* Notice.

Respectfully submitted,

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