



Department of Veterans Affairs
Office of General Counsel
Washington DC 20420

In reply refer to : **027D**

• Ms. Tiffany M. Wagner
Clerk of the Court
U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW
Washington, DC 20004

Re: **MARTIN D. SPIGNER III**
Vet. App. No. 22-2636

November 29, 2023

Dear Ms. Wagner,

Pursuant to U.S. Vet. App. R. 30(b), the Secretary hereby advises the Court of additional, pertinent, and significant authorities that undersigned counsel has become aware of since the Secretary filed his brief in the instant matter on April 3, 2023.

In *Davis v. McDonough*, the Court explained that “[c]onsistent with Congress’s AMA goal of streamlining the appeals process, [38 U.S.C. §] 7113(c) provides a limited 90-day window within which to submit evidence.” 36 Vet.App. 142, 155 (2023) (internal citations removed); see Veterans Appeals Improvement and Modernization Act (AMA), Pub. L. No. 115-55, 131 Stat. 1105 (2017). The Court also found that a brief submitted to the Board outside the 90-day window, and which cited evidence not otherwise reviewable because it was not constructively before the Board, is not reviewable under § 7113(c), as “[t]o conclude otherwise would effectively circumvent AMA record restrictions as it

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would enable veterans to ‘create’ constructive possession of evidence where actual possession would be prohibited under section 7113(c).” *Davis*, 36 Vet.App. at 154 (internal citations removed).

In *Kriner v. McDonough*, the Court held that, under the 2015 “intent to file” process, an intent to file must be submitted in one of the three forms prescribed in 38 C.F.R. § 3.155(b), and thus that a claimant’s letter cannot serve as an intent to file. No. 20-0774, slip op. at 15 (Vet. App. Oct. 25, 2023).

The authorities are relevant to the scope of the authority to review evidence under 38 U.S.C. § 7113(b), on which the parties presented arguments in the instant matter. See Appellant’s Brief at 20-26; Secretary’s Brief at 16-27; Appellant’s Reply Brief at 9-15.

Sincerely,

/s/ Brian S. Carey

BRIAN S. CAREY

Appellate Counsel

Counsel for the Secretary