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May 13, 2024

Tiffany M. Wagner
Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

Re: CAVC Case No. 22-3528, Appellant Alexandra M. Jackson, Supplemental Citation of Authority

Dear Ms. Wagner:

Pursuant to U.S. Court of Appeals for Veterans Claims Rule of Practice and Procedure 30(b), Appellant provides the following supplemental authority: *Perciavalle v. McDonough*, --F.4th --, 2024 WL 2063920 (May 9, 2024).

In *Perciavalle*, the Federal Circuit reversed and remanded this Court's decision denying entitlement to attorney fees because "the Veterans Court relied on an incorrect legal standard in determining which version of [38 U.S.C.] § 5904(c)(1) applies." 2024 WL 2063920 at *1. The veteran in that case filed an October 2006 notice of disagreement with VA's initial rating for PTSD. *Id.* at 2. While that appeal was pending, he filed a new claim for benefits, including entitlement to TDIU. *Id.* Following VA's decision on that claim, he filed an NOD in May 2009, citing his PTSD as a disability contributing to his unemployability. *Id.* VA eventually awarded a 100% schedular rating for PTSD but denied entitlement to attorney fees because it found the NOD with respect to the case was filed in October 2006, prior to the effective date of the new version of 38 U.S.C. § 5904(c)(1), which shifted the fee trigger. *Id.* at *3.

The Veterans Court affirmed VA's decision because the October 2006 NOD "initiated the claim stream that led to grant of benefits." *Id.* at *4.

But the Federal Circuit reasoned that the May 2009 NOD "was part of the 'case' for which the fees at issue were sought." *Id.* at *7. It based this decision on "a broad view of the term" "case," which "encompasses 'all potential claims *raised by the evidence*, applying all relevant laws and regulations, regardless of whether the claim is specifically labeled . . . ." *Id.* at *5 (quoting *Jackson v. Shinseki*, 587 F.3d 1106, 1109 (Fed. Cir. 2009)) (emphasis in original). Because the May 2009 NOD concerned conditions that were evident in the record at the time of the September 2006 decision on PTSD, the 2009 NOD was filed in the case that included the PTSD claim. *Id.* at *7.

This authority is relevant to Ms. Jackson's argument that her request for an increased rating for the left hip disability is part of the same case as her initial claim for compensation for the left hip. Appellant's Br. at 14-16; Appellant's Reply Br. at 11-13. Ms. Jackson cited the same definition of "case" that the Federal Circuit used in *Perciavalle*. *Compare* Appellant's Br. at 14 *with* 2024 WL 2063920 at *5.

The Federal Circuit also rejected the Secretary's argument that "the scope of the case focus[es] on claim 'elements.'" *Id.* at *7. Instead, it made clear that 38 U.S.C. § 5904(c)(1) "does not presuppose that there is only one notice of disagreement in a case." *Id.* at *6. Nor does it "call for identifying a notice of disagreement for a particular 'element' in a case." *Id.*

This is relevant to Ms. Jackson's argument that the different elements of a compensation claim—service connection and rating—are part of the same case. Appellant's Br. at 15-16; Appellant's Reply Br. at 11-12.

Thus, Ms. Jackson provides the Federal Circuit's decision in *Perciavalle* as supplemental authority.

Respectfully submitted,
/s/ Jenna E. Zellmer

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