

*Designated for electronic publication only*

**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 21-3218

LEWIS BROWN, APPELLANT,

v.

DENIS McDONOUGH,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before LAURER, *Judge*.

**MEMORANDUM DECISION**

*Note: Pursuant to U.S. Vet. App. R. 30(a),  
this action may not be cited as precedent.*

LAURER, *Judge*: United States Army veteran Lewis Brown appeals, through counsel, a May 3, 2021, Board of Veterans' Appeals (Board) decision dismissing his request for higher-level review (HLR) of an August 19, 2019, rating decision.<sup>1</sup> Appellant buried his ultimate objective beneath a pile of legal proceedings. He's seeking effective dates earlier than September 13, 2011, for his left and right lower extremity radiculopathy ratings.

The Court ordered the case to a panel on September 6, 2022, stayed the appeal pending a decision in *Encarnacion v. McDonough*,<sup>2</sup> and then requested supplemental briefing. The parties presented oral argument on September 19, 2023. About a month after oral argument, appellant informed the Court that the Board had granted him an effective date of May 2, 1977, for his left and right lower extremity radiculopathy.<sup>3</sup> Despite the Board's grant of earlier effective dates, appellant contends that his appeal isn't moot.<sup>4</sup> He explains that, since he has yet to receive proper

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<sup>1</sup> Record (R.) at 5-8.

<sup>2</sup> 36 Vet.App. 194 (2023), *overruled on other grounds by Kernz v. McDonough*, 36 Vet.App. 372 (2023) (en banc order), *appeal docketed*, No. 24-1171 (Fed. Cir. Nov. 21, 2023).

<sup>3</sup> Appellant reported that the Board issued its decision on October 25, 2023. Appellant's *Solze* Notice at 1-2.

<sup>4</sup> Appellant's Response to Nov. 2, 2023, Court Order at 2-3.

notice of the August 2019 Board decision, there's still a continuing case or controversy.<sup>5</sup> As explained below, there's no longer a live controversy here. So a panel is no longer necessary, and the Court dismisses the appeal since it's moot.<sup>6</sup>

## I. FACTS

First, the Court will review the appeal's procedural history. In May 1977, appellant filed a claim for a "back injury."<sup>7</sup> In September 2011, appellant filed claims for his "back [and] feet."<sup>8</sup> Eventually, VA granted appellant service connection for a lumbar spine disability with separate ratings for left and right lower extremity radiculopathy.<sup>9</sup> Then in a February 2019 rating decision, VA denied effective dates earlier than November 5, 2013, for appellant's left lower extremity radiculopathy and earlier than June 7, 2018, for right lower extremity radiculopathy.<sup>10</sup> In May 2019, Mr. Brown appealed to the Board and elected the direct review docket.<sup>11</sup>

On August 13, 2019, the Board granted appellant an earlier effective date of September 13, 2011, for both his left and right lower extremity radiculopathy.<sup>12</sup> The Board rejected appellant's argument that he warranted an effective date of May 1977.<sup>13</sup> The Board also granted a 40% rating for appellant's left lower extremity radiculopathy and denied an effective date before September

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<sup>5</sup> Appellant's Response to Nov. 2, 2023, Court Order at 2-3.

<sup>6</sup> See *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). The Court, in a separate order issued contemporaneously with this memorandum decision, dissolved the panel.

<sup>7</sup> R. at 4993-96.

<sup>8</sup> R. at 4546.

<sup>9</sup> The VA agency of original jurisdiction (AOJ) denied service connection for the lumbar spine with radiculopathy in May 2013, and appellant filed a Notice of Disagreement (NOD) with that decision in June 2013. See R. at 4102, 2356. The AOJ in February 2016 granted appellant service connection for a degenerative disc disease of the lumbar spine with bilateral radiculopathy and assigned a 40% rating from May 2, 1977. R. at 2356. VA's grant of service connection was for a single disability and grouped appellant's radiculopathy with his lumbar spine disability. R. at 2354, 2360-61. Appellant filed another NOD on January 30, 2018, and in an August 28, 2018, rating decision, VA granted a total disability rating based on individual unemployability (TDIU) and separate ratings for appellant's lumbar spine disability, his right lower extremity radiculopathy, and his left lower extremity radiculopathy, effective from June 7, 2018. R. at 1635-36. Appellant in January 2019 opted in to the modernized system, requested HLR, and argued that the evidence warranted earlier effective dates for his radiculopathy and TDIU. R. at 1529-35.

<sup>10</sup> R. at 1504-10.

<sup>11</sup> R. at 1473.

<sup>12</sup> R. at 1458-65.

<sup>13</sup> R. at 1461, 1534, 2632.

13, 2011, for TDIU.<sup>14</sup> The fallout from the August 2019 Board decision set the stage for the appeal here.

VA effectuated the Board's grant in an August 19, 2019, rating decision.<sup>15</sup> And in an August 27, 2019, letter, VA told appellant that "[t]he [Board] decided your appeal on August 13, 2019."<sup>16</sup> VA explained that "if you are not satisfied with the decision of the [Board], please refer to it for detailed information on seeking additional review."<sup>17</sup>

#### A. First Appeal to the Court

In December 2019, Mr. Brown appealed the August 13, 2019, Board decision to the Court.<sup>18</sup> The Court vacated the Board's decision denying effective dates before September 13, 2011, for appellant's left and right lower extremity radiculopathy and TDIU.<sup>19</sup> Because appellant didn't challenge the part of the Board's decision denying a rating above 40% for left lower extremity radiculopathy, the Court determined that he'd abandoned that issue, and the Court dismissed that portion of the appeal.<sup>20</sup> Appellant appealed the Court's decision to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), which dismissed his appeal on March 14, 2023.<sup>21</sup>

#### B. HLR at the Agency

Along with appealing the Board's August 13, 2019, decision to the Court, appellant requested HLR on August 26, 2020, identifying August 27, 2019, as the "date of VA decision notice" he sought to appeal.<sup>22</sup> Appellant specified that he wanted to appeal the effective dates for

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<sup>14</sup> R. at 1458-65.

<sup>15</sup> R. at 105-10.

<sup>16</sup> R. at 76.

<sup>17</sup> R. at 76.

<sup>18</sup> *Brown v. McDonough (Brown I)*, No. 19-8563, 2021 WL 2169764, at \*1 (Vet. App. May 28, 2021), *appeal dismissed, Brown II*, No. 2021-2238, 2023 WL 2491329 (Fed. Cir. Mar. 14, 2023).

<sup>19</sup> *Id.* at \*1-2.

<sup>20</sup> *Id.* at \*1.

<sup>21</sup> *Brown II*, 2023 WL 2491329, at \*4.

<sup>22</sup> R. at 61-62.

his left and right lower extremity radiculopathy.<sup>23</sup> He also noted that his claims for earlier effective dates were “currently on appeal before the [U.S.] Court of Appeals for Veterans[] Claims . . . .”<sup>24</sup>

On September 3, 2020, VA informed appellant that it couldn’t process his request for HLR “because a claimant may not request an HLR of an HLR, or an HLR of a Board decision involving the same issue.”<sup>25</sup> Mr. Brown appealed the September 2020 determination with an NOD filed in January 2021.<sup>26</sup> He argued that VA’s regulation—38 C.F.R. § 3.2500(c)(3), which precluded HLR of an AOJ decision implementing a Board decision—was invalid since it conflicted with the plain language of 38 U.S.C. § 5104C(a)(1).<sup>27</sup> And in framing his argument, he acknowledged that “[t]he sole issue before the Board is whether the [VA regional office (RO)] must approve [his HLR] request.”<sup>28</sup>

### C. The Board’s Dismissal

In May 2021, the Board dismissed “[t]he appeal of a September 2020 VA determination rejecting an August 2020 HLR request as to an August 2019 implementing rating decision.”<sup>29</sup> The Board explained that, since the August 2019 Board decision granted earlier effective dates and the August 2019 rating decision carried out the Board’s decision, the August 2019 implementing rating decision was not appealable to the Board because the Board had already finally decided the matter.<sup>30</sup> The Board also noted that Mr. Brown had appealed the August 2019 Board decision to

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<sup>23</sup> R. at 62.

<sup>24</sup> R. at 62.

<sup>25</sup> R. at 59.

<sup>26</sup> R. at 52.

<sup>27</sup> R. at 23-24; *see* 38 U.S.C. § 5104C:

(a) Within One Year of Decision.- (1) Subject to paragraph (2), in any case in which the Secretary renders a decision on a claim, the claimant may take any of the following actions on or before the date that is one year after the date on which the agency of original jurisdiction issues a decision with respect to that claim:

(A) File a request for higher-level review under section 5104B of this title.

(B) File a supplemental claim under section 5108 of this title.

(C) File a notice of disagreement under section 7105 of this title.

<sup>28</sup> R. at 22.

<sup>29</sup> R. at 5.

<sup>30</sup> R. at 7 (first citing *Harris v. Nicholson*, 19 Vet.App. 345 (2005); then citing *Smith v. Brown (Jesse)*, 35 F.3d 1516 (Fed. Cir. 1994); and then citing *Donovan v. Gober*, 10 Vet.App. 404, 409 (1997)).

the Court, and “his appeal is currently pending.”<sup>31</sup> Mr. Brown appealed the May 2021 Board decision to the Court.

#### D. Appellant Notifies the Court of His Earlier Effective Dates

As noted above, on October 27, 2023, after oral argument, appellant notified the Court that the Board granted him additional benefits.<sup>32</sup> In an October 25, 2023, decision, the Board granted an effective date of May 2, 1977, for his left and right lower extremity radiculopathy.<sup>33</sup> The Board readjudicated the claims that the Court had remanded in May 2021. The Board, on top of granting earlier effective dates for appellant, also granted TDIU, effective May 2, 1977, and special monthly compensation at the housebound rate—effective September 13, 2011.<sup>34</sup> In other words, the Board adjudicated the merits appeal that appellant has been simultaneously pursuing with this appeal. The Board’s grant of earlier effective dates appeared to give appellant the sole relief that he’d been seeking, so the Court ordered the parties to address whether there was any remaining case or controversy.<sup>35</sup> The Secretary maintains that there’s no case or controversy.<sup>36</sup> Essentially, since there’s a new effective date, the Secretary says that, if appellant wants to contest the Board’s October 2023 decision, he may file a new appeal with the Court.<sup>37</sup> Appellant contends that, even though he’s received additional benefits, there’s still a controversy because he’s still owed adequate notice of the 2019 Board decision.<sup>38</sup>

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<sup>31</sup> R. at 7.

<sup>32</sup> Appellant’s *Solze* Notice at 1-2.

<sup>33</sup> Appellant’s *Solze* Notice at Exhibit 1.

<sup>34</sup> Appellant’s *Solze* Notice at Exhibit 1.

<sup>35</sup> Nov. 2, 2023, Court Order (unpublished).

<sup>36</sup> Secretary’s Response to Nov. 2, 2023, Court Order at 1-2.

<sup>37</sup> Secretary’s Response to Nov. 2, 2023, Court Order at 2.

<sup>38</sup> Appellant’s Response to Nov. 2, 2023, Court Order at 3-4.

## II. ANALYSIS

### A. Legal Landscape

The Court must ensure that it has jurisdiction to decide an appeal.<sup>39</sup> And the Court can only act based on the authority Congress has provided it.<sup>40</sup> Generally, for the Court to take jurisdiction over an appeal from the Board, the Board must've adversely decided a matter against the claimant.<sup>41</sup> The Court also adheres to Article III of the U.S. Constitution's case-or-controversy jurisdictional requirements<sup>42</sup>—meaning that there must be a live issue for the Court to review.<sup>43</sup>

In all decisions, the Board must support its legal conclusions and factual determinations with adequate reasons or bases that enable appellant to understand the precise bases for its decision and facilitate this Court's review.<sup>44</sup> Appellant bears the burden of persuading the Court that it has jurisdiction<sup>45</sup> and that the Board committed an error.<sup>46</sup>

### B. The Appeal is Moot

The Court's detailed review of the procedural history clarifies a major point: despite appellant's jurisdictional challenge with the Board's dismissal, the heart of this appeal centers on his pursuit of earlier effective dates for his left and right lower extremity radiculopathy. When appellant filed his NOA, his effective date for his left and right lower extremity radiculopathy was

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<sup>39</sup> *Demery v. Wilkie*, 30 Vet.App. 430, 434 (2019) ("The Court has an independent obligation to ensure that it has jurisdiction to act."); *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011) ("[F]ederal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press." (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006))).

<sup>40</sup> 38 U.S.C. § 7252.

<sup>41</sup> *Clark v. McDonough*, 35 Vet.App. 317, 322 (2022), (per curiam order), *aff'd sub nom. Smith v. McDonough*, Nos. 2022-2213, 2022-2225, 2024 WL 981143 (Fed. Cir. Mar. 7, 2024) (nonprecedential per curiam judgment).

<sup>42</sup> *Kernz*, 36 Vet.App. at 381 ("This Court has adopted the Article III case-or-controversy requirements, which include mootness.") (citation omitted).

<sup>43</sup> *Id.* at 381 ("[T]he Court has an independent duty to ensure that a case or controversy still exists. If an appellant receives the benefit or relief sought before the Court reaches a decision, the case becomes moot and the appeal must be dismissed.") (citations omitted).

<sup>44</sup> 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

<sup>45</sup> *Dojaquez v. McDonough*, 35 Vet.App. 423, 428 (2022) (per curiam order) ("The ultimate burden of establishing jurisdiction rests with the appellant.").

<sup>46</sup> *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) ("[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency's determination."); *see also Hilbert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) ("An appellant bears the burden of persuasion on appeals to this Court . . . ."), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

September 13, 2011.<sup>47</sup> Then during the appeal, VA granted appellant earlier effective dates for his left and right lower extremity radiculopathy to the exact date he requested—May 1977.<sup>48</sup> So appellant achieved what he wanted: the Board rereviewed and assigned the earlier effective dates he wanted for his lower extremity radiculopathy. Thus, without a dispute over the effective dates, the appeal is moot.<sup>49</sup>

Simply put, the dispute here is, at most, pretextual since the reason appellant filed his appeal with the Court—to obtain earlier effective dates—no longer exists.<sup>50</sup> Given the Board’s grant of earlier effective dates, there’s nothing else the Court can do for appellant. In fact, by granting more favorable effective dates, VA provided appellant relief beyond what the Court could’ve granted him.<sup>51</sup> He’s obtained all possible relief with the appeal of the May 3, 2021, Board dismissal.<sup>52</sup> Appellant fails to prove that a controversy remains with the May 3, 2021, Board dismissal and thus doesn’t prove that the Court has jurisdiction.<sup>53</sup> If appellant wants to challenge the effective dates assigned for his left and right lower extremity radiculopathy, he should focus his efforts on the October 2023 decision that established the May 1977 effective dates.

What’s more, appellant’s demand for proper notice of the Board’s August 2019 decision is irrelevant.<sup>54</sup> Even assuming that VA owes appellant notice,<sup>55</sup> he doesn’t support how his lack of notice harmed him. He generally alleges that, without notice, he couldn’t adequately pursue his

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<sup>47</sup> R. at 1458; *see also* R. at 84.

<sup>48</sup> *Compare* Appellant’s Solze Notice at Exhibit 1, *with* R. at 2632.

<sup>49</sup> *Kernz*, 36 Vet.App. at 381.

<sup>50</sup> R. at 62; *Kernz*, 36 Vet.App. at 383 (“The bottom line is that appellant has received all the relief the Court could have awarded if we had considered his appeal on the merits. That makes this case moot because there is no live controversy remaining between the parties.”).

<sup>51</sup> *See Foreman v. Shulkin*, 29 Vet.App. 146, 153 (2018) (“In general, the Court should not make factual findings and weigh evidence, actions required to determine the effective date for a service-connected disability.” (citing *Byron v. Shinseki*, 670 F.3d 1202, 1205-06 (Fed. Cir. 2012))).

<sup>52</sup> *Kernz*, 36 Vet.App. at 383.

<sup>53</sup> *Dojaquez*, 35 Vet.App. at 428.

<sup>54</sup> Appellant’s Response to Nov. 2, 2023, Court Order at 1-2.

<sup>55</sup> *See generally Encarnacion*, 36 Vet.App. 200 (“Clearly, an action that does nothing more than implement a grant of benefits already determined by another agency department falls outside the definition of ‘decision’ because it lacks the requisite assessment of legal or factual issues. Such action is ministerial rather than adjudicative in nature; it merely effectuates an earlier judgment and leaves no room during implementation for choice or discretion.”), *Greer v. McDonough*, 36 Vet.App. 220, 225 (2023) (“After the passage of the [Veterans Appeals Improvement and Modernization Act of 2017], Congress made clear that section 5104(a) is not applicable to Board decisions.”).

compensation claims.<sup>56</sup> But the Supreme Court has held that an appellant must *prove* that a notice error caused harm.<sup>57</sup> Appellant doesn't connect the alleged notice error to any specific evidence or argument that he would've submitted.<sup>58</sup> And so, even if the Board's October 2023 decision didn't moot the appeal, appellant fails to prove that any purported error harmed him.<sup>59</sup>

### III. CONCLUSION

For these reasons, the Court DISMISSES the appeal of the Board's May 3, 2021, order.

DATED: July 8, 2024

Copies to:

Kenneth H. Dojaquez, Esq.

VA General Counsel (027)

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<sup>56</sup> Appellant's Response to Nov. 2, 2023, Court Order at 2.

<sup>57</sup> *Sanders*, 556 U.S. at 413 (finding an error harmless, partly because appellant failed to tell the Court "what specific additional evidence proper notice would have led him to obtain or seek"). *But see Clark v. O'Rourke*, 30 Vet.App. 92, 99 (2018) (finding prejudice when appellant identified specific evidence that he would have submitted had the Board not prematurely issued its decision).

<sup>58</sup> *See Williams v. Wilkie*, 32 Vet.App. 46, 56 (2019), *aff'd*, 828 F. App'x 721 (Fed. Cir. 2020) (citing 38 U.S.C. § 7261(b)(2) and *Sanders*, 556 U.S. at 409, to require a claimant to "carry his burden of demonstrating that he was harmed" by an alleged notice error).

<sup>59</sup> *Sanders*, 556 U.S. at 409; *see also Hilbert*, 12 Vet.App. at 151.