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October 23, 2018

Gregory O. Block
Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, D.C. 20004-2950

**Re: *Simon v. Wilkie*, No. 17-1361
Supplemental Citation of Authority**

Dear Mr. Block:

Pursuant to U. S. Court of Appeals for Veterans Claims Rule 30(b), Appellant provides the following citations: *Simmons v. Wilkie* --- Vet.App ---, 2018 WL 4520468 (Sept. 20, 2018); *Sorakubo v. Principi*, 16 Vet.App. 120 (2002); and *Simunovich v. Wilkie*, No. 16-2604 (U.S Vet.App. Oct 17, 2018).¹

In *Simmons* this Court held that the “overall review of a Board decision finding no CUE in a prior, final RO decision is limited to determining whether the Board’s CUE finding was arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law, and whether it was supported by adequate reasons or bases on all material issues of fact and law.” 2018 WL 4520468 at * 4 (internal citations omitted). The Court continued, “[t]he components that lead to a valid CUE finding, however, are subject to review under the standards applicable to each component.” *Id.* “Whether applicable law or regulation was applied or was correctly applied is a question of law, which the Court review de novo.” *Id.* “Whether an error would have

¹Counsel is citing *Simunovich*, a memorandum decision for the persuasive value of its logic and reasoning as no precedent exists on point. U.S. Vet. App. R. 30(a).

manifestly changed the outcome of a VA benefits decision is a mixed question of law and fact because that questions ‘involves the application of law . . . to a specific set of facts.’” *Id.* at * 6 (citing *Butts v. Brown*, 5 Vet.App. 532, 358 (1993)).

The Court held that it had a “duty to consider whether the Board’s errors prejudiced [the Veteran] because the Board did not adequately address the ‘manifestly changed outcome’ portion of the CUE analysis.” *Id.* at * 7. It held that the Court’s prejudicial legal error analysis should be guided by the Supreme Court’s decision in *Sanders*. *Id.* at *7 - *8 (citing *Shinseki v. Sanders*, 556 U.S. 396, 407-412 (2009)). It noted that some errors have “the ‘natural effect’ of being prejudicial.” *Id.* at *9.

In *Sorakubo*, this Court held: “the March 1977 Board decision in failing to address 38 C.F.R. § 3.344 abused its discretionary authority. Accordingly, the Board’s February 2001 conclusion that the 1977 decision did not contain CUE is not in accordance with law and must be reversed.” 16 Vet.App. at 124.

In *Simunovich*, a memorandum decision, this Court noted: “[t]he parties agree that the Board erred in finding that the appellant’s disability rating for his bilateral hearing loss was not stabilized and, therefore, § 3.344 was not applicable.” No. 16-2604 at *7. The Court continued that, despite the fact that “the parties agree that the appellant’s 80% disability rating was in effect for less than 5 years, both parties acknowledge that the Board failed to address the fact that the appellant’s previous 40% disability rating for his bilateral hearing loss had been in effect for more than 5 years.” *Id.* “Accordingly, the parties concede, and the Court agrees, that the appellant’s disability rating was stabilized at 40% when the RO proposed to recued his disability rating.” *Id.* As a result, the Court decided: “the Board’s finding that the reduction of a rating from 80% to 20% was proper is not in accordance with law, and the decision of the Board as to this matter is rendered void ab initio.” *Id.* The Court “reverse[d] the Board’s decision and the matter [was] remanded for the Board to reinstate the appellant’ disability rating prior to the reduction.” *Id.*

In his opening brief and on reply, the Veteran argued that 38 C.F.R. § 3.344 applied to his 30 percent rating and therefore the Board was wrong that there was no clear and unmistakable error in the September 1974 rating decision. Appellant’s Br. at 5-10; Reply Br. at 1-4. He also argued that if the Regional Office had applied the regulation, there would have been a manifestly different outcome: no reduction of his rating. Appellant’s Br. at 10-14; Reply Br. at 5-11.

The Secretary argued that the Board was correct that section 3.344 did not apply to the Veteran's claim; and even if the regulation did apply, there was no CUE in the 1974 rating decision because the application of the regulation would not have manifestly changed the outcome. Secretary's Br. at 9-30.

Very truly yours,

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