

January 15, 2019

Mr. Gregory O. Block
Clerk of the Court
U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW
Washington, DC 20004

Re: **Jessie B. Lewis v. Robert L. Wilkie, Vet. App. No 18-2075**

Dear Mr. Block,

Pursuant to U.S. Vet. App. R. 30(b), Respondent, Robert L. Wilkie, Secretary of Veterans Affairs, hereby advises the Court of additional pertinent and significant authority that has come to the attention of the undersigned counsel since the Secretary filed his response to the Court's May 1, 2018, Order in the above referenced case. This is submitted in advance of the oral argument scheduled for January 22, 2019, at 10:00 AM.

Respondent informs the Court of *Pederson v. McDonald*, 27 Vet.App. 276 (2015), in which the Court determined that "representation by an attorney is a significant factor in [the Court's] determination that the appellant's abandonment of [an issue] and waiver of the right to judicial review was knowing and intentional." *Pederson*, 27 Vet.App. at 285 n.4 (citing *Janssen v. Principi*, 15 Vet.App. 370, 374 (2001)). The Court found that the appellant in *Pederson* abandoned his increased rating claims and waived his right to judicial review of those claims when he limited his arguments before the Court to other claims on appeal. *Pederson*, 27 Vet.App. at 285. The Court noted that "there is nothing in the record or the pleadings before the Court to indicate his abandonment is not knowingly or intentional." *Id.* This supplemental authority is submitted in furtherance of the argument presented on pages 8 and 9 of Respondent's Response to the Court's May 1, 2018, Order asserting that Petitioner abandoned his appeal of his sinusitis claim in the April 2015 Joint Motion for Partial Remand.

The Court in *Pederson* also noted that, "when a claim has not been reviewed *on the merits* by this Court, the Secretary may interpret his regulation to find that such a claim has not been 'decided by' this Court." 27 Vet.App. at 285 n.5 (citing 38 C.F.R. § 20.1400(b)). The Court made this statement in response to the Secretary indicating his position in his supplemental memorandum of law that, "regardless of whether the Board decision on an abandoned issue is affirmed on the basis that the absence of error was conceded or the appeal of that

issue is dismissed, a claimant is not foreclosed from subsequently attacking the Board decision on that issue on the basis of [clear and unmistakable error (CUE)].” 27 Vet.App. at 285 n.5 (citation omitted). Prior to *Pederson*, the Court concluded in *Cacciola v. Gibson*, 27 Vet.App. 45, 58 (2014), that “an appellant’s abandonment of the right to a decision by the Court on direct appeal of an issue in a Board decision does not otherwise preclude him from collaterally attacking the Board decision on that issue on the basis of CUE.” This is submitted in furtherance of the argument that the pleading requirements of U.S. Vet. App. R. 21(a) were unfulfilled on page 10 of Respondent’s Response to the Court’s May 1, 2018, Order, specifically that Petitioner has not indicated why he lacks inadequate alternative means to attack the July 2014 Board decision.

Next, Respondent informs the Court of the authority in *Carter v. Shinseki*, 26 Vet. App. 534 (2014). The Secretary cites this authority because, in that case, the Court reviewed the terms of the parties agreement in a joint motion for remand and stated that, “[w]hen parties enter into a joint motion for remand, they imply that the terms of the agreement will control.” *Carter*, 26 Vet.App. at 542-43. The Court also held that, depending upon the specificity of the agreement contained within a joint motion, “a veteran, through counsel, may make a strategic decision to enter into an agreement with the Secretary that tailors the Board’s duties on remand, in an effort to adjudicate the appeal more expeditiously.” *Id.* at 542. The supplemental authority is submitted in furtherance of the argument presented on pages 8 and 9 of Respondent’s Response to the Court’s May 1, 2018, Order asserting that the parties limited the scope of the appeal in a joint motion.

Respectfully submitted,

/s/ Joshua L. Wolinsky

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