IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

ELAINE BILLINGTON,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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	)	
v.	)	Vet. App. No. 18-6265
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

ISSUES PRESENTED

Should the Court dismiss Appellant's appeal to the extent it involves a freestanding claim for an earlier effective date with respect to the Veteran's posttraumatic stress disorder (PTSD) and depressive disorder benefits?

Even if the Court considers Appellant's appeal of the issue of an earlier effective date for his rating for service-connected PTSD and depressive disorder, should the Court entertain her argument that an earlier effective date is warranted under 38 C.F.R. § 3.299 (1949) from the Veteran's date of discharge when this argument was raised for the first time on appeal, Appellant was represented by the same counsel below, and her counsel raised different arguments below?

Is Appellant precluded from receiving an earlier date for the resumption of the Veteran's benefits when the Veteran renounced his compensation benefits in 1947 and did not pursue reinstatement of his benefits until September 2010?

Was any action of the Veteran required to trigger the resumption of his compensation payments when he returned from active duty under 38 C.F.R. § 3.299 (1949)?

STATEMENT OF THE CASE

A. Jurisdictional Statement

The U.S. Court of Veterans Appeals for Veterans Claims has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252

B. Nature of the Case

Appellant, Elaine Billington, appeals the March 22, 2017, Board decision that denied the Veteran, Herbert M. Billington, entitlement to an effective date earlier than September 28, 2009, for his 70% rating for PTSD and depressive disorder, and for his total disability rating based on individual unemployability due to service-connected disabilities (TDIU). Appellant's brief focuses on effective date for PTSD and depressive disorder, so the Secretary's brief is likewise focused on that issue.

C. Statement of Relevant Facts

The Veteran first served on active duty in the United States Army from April 18, 1941, to September 4, 1945. [R. at 678]. Appellant filed a claim for compensation for, among other issues, being "very nervous" in October 1945. [R. at 774-75]. The following month, the Veteran was service connected for a "nervous condition" and was assigned a 50% rating, effective September 5, 1945. [R. at 772-73]. He was also service connected for malaria and lower right leg wound, and he was assigned noncompensable ratings for those conditions. *Id.*

The Veteran re-enlisted in the United States Army and served from October 25, 1945, until August 7, 1947. [R. at 644]; *see also* [R. at 623].

In June 1947, the Veteran sent the Veterans Administration a letter stating, "I feel now in the best of health and am doing very well that I wish to waive compensation now as there are so many other men that deserve it and until such time that I think I need it, which I hope is never again, I do not wish compensation from the V.A." [R. at 634-35]. He also indicated that, "[i]f in the future anything should developed I will contact your office." *Id.* at 634. Later that month, the Veterans Administration Regional Office (RO) responded that it had terminated his compensation payments, effective June 16, 1947. [R. at 759]. The letter also informed the Veteran that, "[i]f in the future you desire to reopen your claim, you should notify this office to that affect in writing, at which time you will be further advised." *Id.* In November 1947, the Veteran also sent the Veterans Administration a letter notifying it that he had "no claim with the VA at present and do not request any at all." [R. at 633 (632-33)].

In March 1948, the RO sent the Veteran a letter explaining that it had identified an overpayment from September 5, 1945, to June 16, 1947, because the Veteran had received disability compensation payments at the same time he was in receipt of active service pay. [R. at 718]. The letter noted that his present address was that of a military installation but that his case file did not otherwise show that he was again on active duty. *Id.* The letter further stated that, "[i]f your status at present is that of a civilian, and if you desire to file a new claim for disability

compensation, you are requested to complete and return to this office the enclosed Form 526, Veterans Administration For Pension Or Compensation For Disability Resulting From Service In The Active Military Or Naval Forces Of The United States." *Id*.

The Veteran re-enlisted again in the United States Army and served from August 26, 1947, to July 26, 1950. [R. at 229].

In October 1995, the Veteran requested the U.S. Department of Veterans Affairs (VA) reinstate his "service connected disability (Neurosis – 50%, Malaria – 0%, Scars – 0%" that he was awarded in 1945. [R. 590]. In January 1996, VA responded by sending the Veteran a letter explaining that he "may reopen [his] claim by submitting all discharge documents from the time [he] reentered military service until [his] final discharge" and providing "current medical evidence to show the extent of [his] disability." [R. 588]. The Veteran never responded.

On September 28, 2010, the Veteran submitted an informal claim for disability benefits. [R. 586]. The next month, VA sent the Veteran a letter acknowledging receipt of his informal claim; noting that he had been previously service connected for neurosis, malaria, and scars but that his compensation was terminated when he reentered active duty; informing the Veteran that he would need to inform VA of the name of his claimed disability if he wished to reopen his claim; and asking the Veteran to provide information and to provide VA with a copy of his DD-214. [R. 584 (584-85)]. In December 2010, VA received a statement in support of the claim from the Veteran clarifying that he was seeking benefits for

his PTSD and attaching his latest DD-214. [R. 571-75]. After affording the Veteran a medical examination, [R. at 542-59], VA issued a rating decision in April 2011 that granted the Veteran a 30% rating for PTSD (formally claimed as combat-induced anxiety) with an effective date of September 28, 2010, [R. at 521 (514-25)].

In May 2011, the Veteran submitted a claim for increased compensation, to include TDIU, for his service-connected PTSD. [R. 495]; *see also* [R. at 475-78] (August 2011 Veteran's Application for Increased Compensation Based on Unemployability); [R. at 484] (June 2011 Report of General Information). In January 2012, VA issued a rating decision continuing the Veteran's 30% rating for PTSD and denying entitlement to TDIU. [R. at 420 (416-23)]. In February 2012, the Veteran filed a Notice of Disagreement (NOD). [R. 409]. Specifically, the Veteran stated he "disagree[d] with [VA's] finding of 30% PTSD and appeal the decision" and "disagree[d] with [VA's] finding on the claim of unemployability." *Id*.

In March 2012, the Veteran appointed Appellant's current counsel as his representative. [R. at 371-77].

In February 2014, VA concurrently issued a rating decision and a Statement of the Case (SOC). [R. at 291-313]; [R. at 268-74, 285-90]. In the rating decision, VA increased the Veteran's PTSD rating to 70% and granted the Veteran entitlement to TDIU, both effective September 28, 2010. [R. at 287]. In the SOC, VA continued the 70% rating for PTSD and noted that, since the rating decision granted entitlement to TDIU, the issue was no longer on appeal. [R. at 293]. In

May 2014, the Veteran, through his counsel, filed a Notice of Disagreement stating that the Veteran was entitled to an earlier effective date for his PTSD and TDIU. [R. 246-47]. He argued that he was entitled to an earlier effective date of January 1, 2006, under 38 C.F.R. § 3.157 as he received mental health treatment from VA on that date or that he was entitled to an earlier effective date of January 11, 1996, under 38 C.F.R. § 3.654 as that was the date of his request for his resumption of benefits. *Id.* at 247.

Following an informal Decision Review Officer (DRO) conference, [R. at 150], VA issued a rating decision and SOC concurrently in May 2015. [R. at 111-38]; [R. at 96-101, 139-43]. In the rating decision, VA granted an earlier effective date of September 28, 2009, for the Veteran's 70% PTSD rating and TDIU under 38 C.F.R. § 3.654(b)(2). [R. at 140-41]. The SOC continued to deny an effective date earlier than September 28, 2009, for entitlement to a 70% rating for PTSD or entitlement to TDIU. [R. at 136-37]. The SOC noted that the only issue on appeal was the effective date for the 70% PTSD evaluation and TDIU because the Veteran did not file a timely VA Form 9 following the February 14, 2014, SOC concerning the prior PTSD evaluation appeal. [R. at 136].

In April 2015, the Veteran filed a VA Form 9. [R. at 104]. He argued that he was entitled to an earlier effective date for PTSD and TDIU of at least January 1, 2006, under 38 C.F.R. § 3.157 because he was treated at VA for his psychiatric disability on January 1, 2006. [R. 104].

The Veteran passed away on November 18, 2015. [R. 36]. Appellant was substituted as the claimant in her late husband's appeal. [R. 16-17].

In March 2017, the Board issued its decision that is before the Court on appeal. [R. 1-13]. The Board continued the denial of the Veteran's claim for an earlier effective date because September 28, 2009, was the earliest effective date permitted by law. *Id*. at 2. First, the Board responded to the Veteran's argument that he should receive an earlier effective date of January 11, 1996, under 38 C.F.R. § 3.654. *Id.* at 8. The Board explained when resumption of service-connected payments may be effective under 38 C.F.R. § 3.654(b)(2):

> [P]ayments will resume effective the day following release from active duty if the claim for recommencement of payments is received within one year from the date of such release; otherwise payments will be resumed effective one year prior to the date of receipt of a new claim.

Id. The Board reasoned that, because VA was not aware of Appellant's discharge until December 2010 and Appellant's claim to resume his benefits was received September 28, 2010, the law does not permit an effective date prior to September 28, 2009. *Id*. at 8-9. Additionally, the Board responded to Appellant's argument that an earlier effective date of January 1996 should be granted. *Id.* at 9. The Board explained that Appellant's compensation benefits were reinstated in the April 2011 rating decision, and that Appellant only disagreed with the rating and not the effective date in his February 2011 NOD. *Id*. at 9. The Board explained that "the April 2011 rating decision is final with regard to the effective date assigned to the reinstatement of the Veteran's service-connected compensation for his

PTSD and depressive order," and that "there can be no freestanding claims for earlier effective dates." *Id*.

SUMMARY OF THE ARGUMENT

This is an appeal of a freestanding claim for an earlier effective date for Appellant's PTSD and depressive disorder. The Veteran did not file a timely NOD regarding the effective date assigned for the reinstatement (and increase) of his service-connected PTSD and depressive disorder compensation benefits in the April 2011 rating decision. The April 2011 rating decision was, therefore, final as to the effective date, and Appellant may not challenge the effective date assigned in this decision without pleading clear and unmistakable error. As such, the Board decision should be vacated insomuch as it adjudicated a freestanding earlier effective date claim, and the Court should dismiss the appeal of this issue.

Even if the Board had jurisdiction over the effective date issue, the Court should decline to consider Appellant's argument on appeal because this argument is being raised for the first time on appeal. Appellant has been represented by the same counsel since March 2012 and declined to raise this argument before the agency. This argument is substantially different from the two arguments raised before, and addressed by, the Board. Appellant now asks the Court to interpret 38 C.F.R. § 3.299 (1949), and to grant an earlier effective date of July 27, 1950. In contrast, below, Appellant argued for different earlier effective dates of January 1, 2006, and January 11, 1996, under different regulations, specifically 38 C.F.R. §§ 3.157, 3.654.

If the Court is inclined to consider Appellant's argument in the first instance, the Court should find that an earlier effective date is not warranted because the Veteran renounced his compensation benefits in 1947 and did not request that VA reinstate his benefits until at least 1995. Additionally, even if renouncement did not occur here, he never informed VA of his discharge from active duty and or desire for resumption of his benefits. The plain language of VA's regulations at the time of his discharge contemplated a claim for such resumption, rather than an automatic resumption that Appellant advocates for here. And even if the Court finds the regulations ambiguous, the Court should afford deference to VA's interpretation of its regulation that the Veteran was required to provide a claim informing VA of his intent to reinstate benefits after returning from active duty.

ARGUMENT

I. The Portion of the April 2011 Rating Decision Assigning an Earlier Effective Date for the Award of the Veteran's Increased Rating for His Service-Connected PTSD is Final, and Appellant Filed an Impermissible Freestanding Claim for an Earlier Effective Date

The portion of the April 2011 rating decision granting Appellant an effective date of September 28, 2010, for the reinstatement of his PTSD benefits was a final decision, so Appellant cannot attack that effective date with an impermissible earlier effective date claim.

A challenge to a rating decision assigning an effective date with which a claimant disagrees may be made through a direct appeal of the rating decision, commencing with the timely filing of an NOD. *See* 38 U.S.C. § 7105. Alternatively,

if the decision assigning an effective date has become final, a claimant may pursue one of the statutory exceptions to challenge the finality of that decision. *See DiCarlo v. Nicholson*, 20 Vet.App. 52, 56-57 (2006) (discussing the types of collateral attack authorized to challenge a final decision by the Secretary). The Court held, in *Rudd v. Nicholson*, 20 Vet.App. 296, 299 (2006), that claimants may not properly file, and VA has no authority to adjudicate, a freestanding earlier effective date claim in an attempt to overcome the finality of an unappealed VA decision. The Court reasoned that to allow such claims would vitiate the rule of finality. *See Rudd*, 20 Vet.App. at 300. Although there are exceptions to the rule of finality and application of res judicata within the VA adjudication system, a freestanding claim for an earlier effective date is not one of the recognized statutory exceptions to finality. *See id*. at 299-300. In *Rudd*, the Court dismissed the appellant's appeal to the extent that he had impermissibly raised a freestanding claim for an earlier effective date. *Id.* at 300. Here, Appellant is likewise asserting a freestanding earlier effective date claim because he did not file an NOD with respect to the effective date assigned in the April 2011 rating decision. As such, the Board should have dismissed the earlier effective date claim.

An NOD is as a "written communication from a claimant or his or her representative expressing dissatisfaction or disagreement with an adjudicative determination by the agency of original jurisdiction and a desire to contest the result." 38 C.F.R. § 20.201 (2011); *see Gallegos v. Principi*, 283 F.3d 1309, 1313-14 (Fed. Cir. 2002). An NOD must be written "in terms which can be reasonably

construed as disagreement with that determination and a desire for appellate review," and "the specific determinations with which the claimant disagrees must be identified." 38 C.F.R. § 20.201 (2011). "In determining whether a written communication constitutes an NOD, the Court looks at both the actual wording of the communication and the context in which it was written." *Jarvis v. West*, 12 Vet.App. 559, 561 (1999) (citing *Drenkahn v. Derwinski*, 2 Vet.App. 207, 208 (1992)). Under 38 C.F.R. § 20.202(a) (2011), "if the agency of original jurisdiction decision addressed several issues, the [NOD] must identify the specific decision and issue or issues therein with which the claimant disagrees." "Thus, an NOD relates to a specific adjudicative determination on a specific date." *Ledford v. West*, 136 F.3d 776, 777 (Fed. Cir. 1998). Whether a rating decision has become final and whether a document constitutes an NOD are determinations reviewed by the Court de novo. *See Young v. Shinseki*, 22 Vet.App. 461, 466 (2009); *Dinsay v. Brown*, 9 Vet.App. 79, 87 (1996); *Tablazon v. Brown*, 8 Vet.App. 359, 361 (1995).

Here, Appellant did not file an NOD with respect to the effective date assigned in the April 2011 rating decision. The RO issued a rating decision in April 2011 reinstating the Veteran's compensation benefits for PTSD and granting an increased rating of 30%, effective September 28, 2010. [R. at 513-25]. The April 2011 rating decision addressed both the rating for his PTSD and the effective date of the rating, so it contained multiple determinations. *See D'Amico v. West*, 209 F.3d 1322, 1326 (Fed. Cir. 2000) ("A claim for veteran's disability benefits has

five elements: (1) veteran status; (2) existence of a disability; (3) service connection of the disability; (4) degree of disability, and (5) effective date of the disability." (citing *Maggitt v. West*, 202 F.3d 1370, 1375 (Fed. Cir. 2000))). Despite being represented by counsel within a year of the April 2011 rating decision, [R. at 371-77], the Veteran did not disagree with the effective date assigned in the April 2011 rating decision. Instead, in May 2011, the Veteran formally requested an increase in benefits, specifically entitlement to TDIU, and he did not disagree with the effective date assigned in the April 2011 rating decision. [R. at 495]; *see also* [R. at 475-78]; [R. at 484]. As such, the May 2011 filing does not constitute an NOD with respect to the effective date assigned in the April 2011 rating decision. *See Gallegos*, 283 F.3d at 1313-14.

While the Veteran filed an NOD with respect to the January 2012 rating decision that adjudicated the Veteran's May 2011 increased rating claim, [R. at 409], the January 2012 rating decision (continuing the Veteran's rating for PTSD at 30% disabling and denying entitlement to TDIU) and his NOD did not address any issues regarding the effective date of the Veteran's claims, [R. at 409]; [R. at 416-23]. The February 2012 NOD specifically stated that he "disagree[d] with [VA's] finding of 30% PTSD and appeal the decision" and "disagree[d] with [VA's] finding on the claim of unemployability." [R. at 409]. Appellant contends that the Veteran generally disagreed with VA's "finding[s]," but the Veteran's language only indicates that he disagreed with the rating assigned and not its effective date. *Id*.;

see 38 C.F.R. § 20.201 (requiring that the appellant identify "the specific determinations with which [he] disagree[d]").

Thus, none of the Veteran's filings within one year of the April 2011 decision expressed any disagreement with the effective date assigned in that decision, and that assignment is final. 38 U.S.C. § 7105(c) (2011). When the Veteran's May 2014 submission requested an earlier effective date for his PTSD benefits, this was a freestanding earlier effective date claim. This May 2014 submission was received by VA over 3 years after the April 2011 rating decision that assigned the Veteran's effective date for his PTSD benefits. [R. 246-47]. The May 2014 submission was a valid NOD with regard to the February 2014 rating decision, which increased the rating for the Veteran's PTSD, but was not a timely NOD with regarding to the effective date assigned in the April 2011 rating decision. 38 U.S.C. § 7105. As such, the May 2014 request for an earlier effective date for his PTSD benefits was a freestanding earlier effective date claim. *See Rudd*, 20 Vet.App. at 299-300.

The Board provided adequate reasons or bases on this issue. The Board explained that, "[a]lthough the Veteran disagreed with the 30 percent disability rating assigned in a February 2012 [NOD], he did not disagree with the effective date assigned within one year of the issuance of that rating decision." [R. at 9]. Furthermore, the Board explained that the "April 2011 rating decision is final with regard to the effective date" and cited to this Court's holding in *Rudd* for the proposition that "there can be no freestanding claims for earlier effective dates."

Id. (citing *Rudd*, 20 Vet.App. at 300). The Board's only error was that it denied the earlier effective date claim, instead of dismissing the claim; like a claimant cannot file, VA cannot adjudicate, a freestanding claim for an earlier effective date because doing so would compromise the rule of finality. *See Rudd*, 20 Vet.App. at 300.

Additionally, the Federal Circuit's holding in *Collaro v. West*, 136 F.3d 1304, 1309 (Fed. Cir. 1998), is not applicable in the instant matter because the February 2012 NOD was not "vague." In *Collaro*, the pro-se veteran had a TDIU rating that was changed to a total schedular rating for a neuro-psychiatric disability and eventually decreased to a 70% schedular rating due to statutory and regulatory changes governing entitlement to evaluations in excess of 70%. *Id*. at 1305-06. After his initial reduction in benefits, the veteran submitted a timely and "vague" NOD that challenged this reduction in benefits. *Id*. at 1305. Eventually, the veteran made an explicit constitutional and statutory argument regarding the reduction of his benefits, and this Court dismissed the claim due to lack of jurisdiction, specifically because the veteran "had not filed an NOD addressing the constitutionality" of the agency action. *Id*. at 1307. The Federal Circuit reversed this decision and found that the veteran's "vague" NOD did encompass the constitutionality of the agency action because, in part, it was "unclear from the face of the NOD what agency action [the veteran] meant to contest" and VA "insufficiently characterized the full extent of his disagreement." *Id*. at 1309.

In the instant matter, when filing an NOD in February 2012, the Veteran, who was represented by counsel, filed a clear NOD in which he "disagree[d] with [VA's] finding of 30% PTSD and appeal the decision" and "disagree[d] with [VA's] finding on the claim of unemployability" in its January 2012 rating decision. [R. at 409]; *see* [R. at 371-77]. This is factually similar to the circumstances in *Ledford* where the Federal Circuit affirmed this Court's dismissal for lack of jurisdiction to hear a constitutional claim, in part, because a veteran's NOD "specifically identified and thus limited his issue to" one element of a VA benefits claim. *Collaro*, 136 F.3d at 1309 (citing *Ledford*, 136 F.3d at 779-80). Here, like in *Ledford*, the Veteran's NOD "relates to a specific adjudicative determination" of the PTSD rating issue, and not the effective date issue, so the Veteran did not file an NOD in response to the effective date assigned by the April 2011 rating decision. *Ledford*, 136 F.3d at 780.

Appellant's alternative argument is that April 2011 rating decision was not final because it characterized Appellant's claim as a claim for an increased rating rather than a claim to reinstate benefits. App. Br. 10. However, assuming 38 C.F.R. § 3.654(b)(2) applies here, the RO was required to determine the level of the Veteran's degree of disability at the time of recommencement of his benefits under that provision. Regardless of how the RO characterized the Veteran's claim, the rating decision informed the Veteran that the effective date of the evaluation was September 28, 2010, which was the date his claim was received. *See* [R. at 523 (514-25)]. Also, as discussed above, the Veteran did not present an NOD as

to the effective date or characterization of his claim, so the April 2011 rating decision was final. [R. at 495]. Because this decision was final, it may not be reversed or revised in the absence of clear and unmistakable error (CUE). *See* 38 U.S.C. § 5109A. Here, Appellant has not sufficiently pled a valid CUE claim, and, even if Appellant did, a new theory of CUE presented to the Court in the first instance must be dismissed for lack of jurisdiction. *Acciola v. Peake*, 22 Vet.App. 320, 324 (2008).

II. Appellant is Not Entitled to Earlier Effective Date of July 27, 1950

A. The Court Should Decline to Entertain Appellant's Argument Raised for the First Time on Appeal Because He Choose to Raise Other Arguments Below and the Same Attorney has Represented Appellant Since March 2012

The Court should not consider Appellant's argument regarding 38 C.F.R. § 3.299 (1949) because, by Appellant's own admission, this argument is being raised for the first time on appeal. App. Br. 11. Where an argument is raised for the first time before this Court, it need not, and ordinarily should not, consider such arguments. *See Maggitt v. West,* 202 F.3d 1370, 1377 (Fed. Cir. 2002) (holding that, where an appellant raises an issue before the Court that was not raised below, the Court has discretion to decline hearing the argument in the first instance); *Fugere v. Derwinski*, 1 Vet.App. 103, 105 (1990) ("Advancing different arguments at successive stages of the appellate process does not serve the interests of the parties or the Court. Such a practice hinders the decision-making process and raises the undesirable specter of piecemeal litigation.").

Here, the Court should find the doctrine of issue exhaustion appropriate because Appellant has been represented by the same counsel since at least March 2012, [R. at 371-77], and his counsel raised different arguments below. *See Massie v. Shinseki*, 25 Vet.App. 123, 126-28 (2011) (finding that representation by counsel before the agency is a significant factor for the Court to consider in exercising its discretion to entertain an argument raised for the first time on appeal). In Appellant's May 2014 NOD, [R. at 247], and April 2015 Appeal to the Board, [R. 104], Appellant, through counsel, specifically argued that Appellant was entitled to an effective date of January 1, 2006, under 38 C.F.R. § 3.157 or an effective date of January 11, 1996, under 38 C.F.R. § 3.654. The Board responded to both these arguments in its decision. *See* [R. at 7-12]; *Massie v. Shinseki*, 25 Vet.App. 123, 131 (2011) ("[T]he Board . . . was entitled to assume that the arguments presented by [Appellant] were limited for whatever reason under the advice of counsel and that those were the theories upon which he intended to rely."). Instead of asserting error in the Board's analysis of the two issue she raised below,[1] Appellant, now, for the first time on appeal and through the same counsel, raises a new argument of a different earlier effective date entitlement of July 1950 under a different regulation, 38 C.F.R. § 3.299 (1949).

[1] The Court should find that Appellant has abandoned any arguments with respect to the issues raised below. *See Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1332-33 (Fed. Cir. 2001); *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008) (explaining it is well settled that an appellant is not permitted to assert later new arguments not raised in appellant's opening brief).

Appellant argues that, "[a]lthough [she] did not raise this specific argument to the agency and the Board did not address it," she has continually argued that she is entitled to an effective date earlier than September 28, 2009, and her argument us closely related to arguments she raised to agency. App. Br. 12. However, at the same time, she frames the issue as a "novel" issue that "requires interpreting regulations from the 1940s and 1950s." *Id.* This new theory of entitlement requires regulatory interpretation of a VA regulation that was replaced over a half-century ago, which is completely different than the analysis involved in the arguments Appellant pursued below as she referenced VA's current regulation, 38 C.F.R. § 3.654, in her argument below.

Invoking the requirement of issue exhaustion is appropriate where, as here, Appellant and her attorney have had multiple opportunities to make a legal argument but declined to do so, and where Appellant was represented by legal counsel throughout the appeals process. *See Bozeman v. McDonald*, 814 F.3d 1354, 1358 (Fed. Cir. 2016); *Massie*, 25 Vet.App. at 126-28*; see also Dickens v. McDonald*, 814 F.3d 1359, 1361 (Fed. Cir. 2016) (finding issue exhaustion appropriate where the claimant waited 3 years to raise an argument despite earlier opportunities to do so). As noted above, Appellant's counsel has been present throughout this appeal since March 2012, which this Court has found to be a key consideration when finding issue exhaustion appropriate. *See Massie*, 25 Vet.App. at 127. To allow a claimant, through her attorney, to raise different arguments at different stages would promote inefficient resolution of claims, so the

Court should decline to address Appellant's argument raised for the first time on appeal to this Court.

B. Appellant Renounced His Compensation Benefits in June 1947

Even if the Court entertains Appellant's argument that an effective date of July 27, 1950, should be awarded for the reinstatement of the Veteran's compensation benefits for a mental health disability, this case is governed by the renouncement provisions of Veterans Regulation Number 10, now present at 38 C.F.R. § 3.106, because the Veteran renounced his compensation benefits in June 1947. The first two paragraphs of 38 C.F.R. § 3.106[2] provide the following:

> (a) Any person entitled to pension, compensation, or dependency and indemnity compensation under any of the laws administered by the Department of Veterans Affairs may renounce his or her right to that benefit but may not renounce less than all of the component items which together comprise the total amount of the benefit to which the person is entitled nor any fixed monetary amounts less than the full amount of entitlement. The renouncement will be in writing over the person's signature. Upon receipt of such renouncement in the Department of Veterans Affairs, payment of such benefits and the right thereto will be terminated, and such person will be denied any and all rights thereto from such filing.

[2] This current regulation, 38 C.F.R. § 3.106, is based on the 38 U.S.C. § 5306. Previously, in 1947, pursuant to Public Law 78-144, Veterans Regulation Number 10 provided the procedures regarding renouncement. An Act to Provide More Adequate and Uniform Administrative Provisions in Veterans' Laws Pertaining to Compensation, Pension, and Retirement Pay Payable by the Veterans' Administration, and For Other Purposes, Pub. L. No. 78-144, § 3, 57 Stat. 554, 554 (July 13, 1943). The statute regarding renouncement was later amended and its substance has remained unchanged since 1958, when all the laws administered by the Veterans' Administration were consolidated into one Act and the provision was located at 38 U.S.C. § 3106 (1958). An Act to Consolidate Into One Act All the Laws Administered by the Veterans' Administration, and For Other Purposes, Pub. L. No. 58-857, 72 Stat. 1105 (Sept. 2, 1958).

> (b) The renouncement will not preclude the person from filing a new application for pension, compensation, or dependency and indemnity compensation at any future date. Such new application will be treated as an original application, and no payments will be made thereon for any period before the date such new application is received in the Department of Veterans Affairs.

38 C.F.R. § 3.106.

Here, the Veteran renounced his compensation benefits in 1947. The Veteran sent the Veterans Administration a letter in June 1947 stating, "I feel now in the best of health and am doing very well that I wish to waive compensation now as there are so many other men that deserve it and until such time that I think I need it, which I hope is never again, I do not wish compensation from the V.A." [R. at 634-35]. He also indicated that, "[i]f in the future anything should developed I will contact your office." *Id.* at 634. The Veteran signed his name to this letter. *Id*. The Veterans Administration responded later that month, stating that it had terminated his compensation payments, effective June 16, 1947, and that, "[i]f in the future you desire to reopen your claim, you should notify this office to that affect in writing, at which time you will be further advised." [R. 759]. The Veteran even reiterated that he had no claim for benefits pending with the Veterans Administration in November 1947. [R. at 633 (632-33)] ("I wish to notify you at this time that I have no claim with the VA at present and do not request any at all."). As such, the Veteran renounced his right to compensation benefits in his 1947 letter because the renouncement was in writing, and for all of his benefits, and he signed the waiver. *See* § 3, 57 Stat. at 554. Likewise, VA responded and informed

the Veteran that his benefits were terminated and that he was not precluded from filing a new claim pursuant to 38 U.S.C. § 5306(a) & (b) and 38 C.F.R. § 3.106(a) & (b). The Veteran did not pursue a claim to reinstate his benefits until September 2010, so, under 38 U.S.C. § 5306(b) and 38 C.F.R. § 3.106(b), Appellant is not entitled to an earlier effective date due to his 1947 renouncement of benefits because VA could not reinstate his benefits until it received a new claim.

Because the facts regarding renouncement are indisputable, remand to the Board for an explicit finding on renouncement is not necessary. *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd* 232 F.3d 908 (Fed. Cir. 2000) (stating the burden is on the appellant to demonstrate error in a challenged Board decision); *see also, e.g., Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990) ("an issue not raised by an appellant in his opening brief . . . is waived").

C. Even if the Veteran Had Not Previously Renounced His Benefits, Appellant Would Not Be Entitled to an Earlier Effective Date under 38 C.F.R. § 3.299 (1949)

If the Court reaches Appellant's argument that an earlier effective date is warranted under 38 C.F.R. § 3.299 (1949), though it should not because the Veteran previously renounced his benefits, the Court should reject Appellant's argument that VA's regulations required automatic resumption of payment of the Veteran's compensation benefits after he was released from active duty. When read in the context of the regulatory scheme as a whole, the plain language of VA's

regulations required a trigger for resumption—the filing of a claim—and, even if its regulations are ambiguous on this issue, the Court should afford deference to VA's reasonable interpretation of its own regulations.

The Court reviews VA's interpretation of statutes and regulations de novo. *Acevedo v. Shinseki*, 25 Vet.App. 286, 291 (2012). The Court begins its review of interpretation of regulations by examining the language of the regulation. *See Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993) ("The starting point in interpreting a statute [or regulation] is its language."); *Goodman v. Shulkin*, 870 F.3d 1383, 1386 (Fed. Cir. 2017) (stating that the rules of statutory construction apply to interpretation of regulations); *Petitti v. McDonald*, 27 Vet.App. 415, 422 (2015) ("Regulatory interpretation begins with the language of the regulation, the plain meaning of which is derived from its text and its structure."). If the plain meaning of the regulation is clear from its language, then that meaning controls. *Tropf v. Nicholson*, 20 Vet.App. 317, 320 (2006) (citing *Brown v. Gardner*, 513 U.S. 115, 120 (1994)). Recently, in *Kisor v. Wilkie*, the Supreme Court explained that, to determine if a regulation is clear from its language, a court "must exhaust all the traditional tools of construction" and "to make that effort, a court must carefully consider the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." 139 S. Ct. 2400, 2415 (2019) (citations omitted). Where there is ambiguity in the language of the regulation, then the Court must determine if it should defer to the agency's interpretation of its own regulation. *See id.* at 2416-18.

i. *The plain language of 38 C.F.R. § 3.299 (1949) Requires the Submission of a Claim Before VA Reinstates Benefits And, To Read It Otherwise, Would Render a Portion of the Regulation Superfluous*

In *Buffington v. Wilkie*, the Court recently held that 38 C.F.R. § 3.654(b)(2) provides that the effective date for the recommencement of payments following a veteran's release from active is 1 year prior to the date of receipt of a claim is a valid exercise of the Secretary's rulemaking authority and is not inconsistent with 38 U.S.C. § 5304(c). No. 17-4382, 2019 U.S. App. Vet. Claims LEXIS 1210, at *2 (Vet.App. July 12, 2019). Section 3.654 was promulgated in 1962. *Id.* at *11.

In *Buffington*, the Court also explained that Congress delegated its authority to VA to establish "forms of application" and that Congress did not speak to whether VA may predicate the recommencement of benefits on the date of the veteran's claim. *See id.* at *17-20. In 1950, the Veterans Administration required a claimant to file a claim to resume benefits under 38 C.F.R. § 3.299. Consistent with the informal claim requirements found in § 3.27,[3] 38 C.F.R. § 3.299 (1949) cross-referenced § 3.27 and stated that "payments *may* be resumed the day following release from active duty, *provided the person is otherwise entitled*" (emphasis added). As such, it did not provide for automatic resumption of benefits,

[3] "[A]ny communication from or active by a claimant or his duly authorized representative . . . which clearly indicates an intent to apply for disability or death compensation or pension may be considered an informal claim." 38 C.F.R. § 3.27 (1950).

but contemplated a claim showing some intent by a claimant for recommencement of compensation benefits after he was released from active duty.

To read 38 C.F.R. § 3.299 (1949) as requiring no claimant action before VA would resume payment of compensation following the termination of active duty would render portions of the regulation superfluous. The canon against surplusage requires courts to avoid an interpretation that results in portions of text being read as meaningless. *Sharp v. United States*, 580 F.3d 1234, 1238 (Fed. Cir. 2009); *see also Duncan v. Walker*, 533 U.S. 167, 174 (2001). The terms "may" and "provided the person is otherwise entitled" in § 3.299 are not compulsory and indicate that there must be some determination made before benefit payments are resumed. *See Evans v. Shinseki*, 25 Vet.App. 7 (2011) (finding the use of "may" in VA's regulation to permissive, not mandatory).

Moreover, following discussion of the potential effective date of resumption of payment of compensation, the regulation references the adjudication of "the claim." 38 C.F.R. § 3.299 (1949). The regulation provides that "*the claim* will be adjudicated upon a basis including the pertinent facts in the most recent period of active service." *Id.* (emphasis added). The regulation would not indicate that "the claim will be adjudicated" if the veteran was not first required to provide some communication requesting the resumption of benefits, specifically in the form of an informal claim. *Id.* The adjudication of the claim also required VA to determine the appropriate rating when resuming benefits because the regulation provides, while the "determination of service-connection . . . will not be disturbed," "[t]he

resumption of payment of compensation as to the amount will be at a rate commensurate with the degree of disability found to exist at the time of restoration of the award." *Id.* Furthermore, the regulation also instructs VA to "[secure] [t]he appropriate form of the 3101 series." *Id.*; *see also* [R. at 751] (example of VA Form 3101); [R. at 630] (example of Acknowledgement of VA Form 3101). Logically, VA would never know to submit a VA Form 3101 requesting information from the service department without a veteran first notifying VA that he had left active duty and desired reinstatement of benefits. The regulation, therefore, contemplates an adjudication of a veteran's request for reinstatement of benefits; without such a request, portions of its text would be rendered meaningless. *See Sharp*, 580 F.3d at 1238.

Appellant argues that VA did not require a claim for benefits to be reinstated until it amended its regulation in 1962, but that 1962 amendment was intended to clarify the effective date of the resumption of benefits. App. Br. 18; *see Buffington*, 2019 U.S. App. Vet. Claims LEXIS 1210, at *11 ("In 1962, VA promulgated 38 C.F.R. 3.654(b), which establishes the effective date for the discontinuance of VA benefits when veterans return for recommencement of payments following their release from active duty."). In 1949, as noted above, § 3.299 included a reference to § 3.27 at the end of its regulation as it stated, "(See § 3.27)," and § 3.27 pertained to informal claims. With respect to resumption of benefits under § 3.299, § 3.27 provided, "When benefits are being resumed under § 3.299 and an informal claim has been filed for a disability incurred or aggravated in the second period of

service, the requirements of the seventh and eight sentences of this section are not for application." 38 C.F.R. § 3.27 (1949). The seventh and eight sentences of § 3.27 pertained to effective dates because they stated the following:

> When such informal claim is received and a formal application shall be considered as evidence necessary to complete the initial application, and, unless a formal application is received within 1 year from the date it was transmitted for execution by the claimant, no award shall be made by virtue of such informal claim. If received within 1 year in such instances, it will be considered filed as of the date of receipt of the informal claim of receipt of the informal claim by the Veterans' Administration.

Id. As such, in 1949, these sentences regarding effective dates were not applicable to the resumption of benefits under § 3.299. It was not until VA amended § 3.654 in 1962 would "payments . . . be resumed effective 1 year prior to the date of receipt of a new claim." 38 C.F.R. § 3.654 (1962); *see also* 27 Fed.Reg. 11886, 11890 (Dec. 1, 1962). As such, the 1962 amendment to 38 C.F.R. § 3.299 pertained to the effective date of the resumption of benefits. The amendment did not require for the first time that a claim needed to be filed because, as discussed above, the earlier version of the regulation in 1949 already contemplated a claim by the veteran for VA to adjudicate the resumption of his benefits.

ii. *If the Court Finds 38 C.F.R § 3.299 (1949) To Be Ambiguous, Then It Should Defer to the Agency's Interpretation of Its Regulation*

The Supreme Court recently issued its decision in *Kisor v. Wilkie*, explaining when a court should afford an agency deference in interpreting their own regulations, which is known as *Auer* deference. 139 S. Ct. 2400 (2019); *Auer v.*

Robbins, 519 U.S. 452, 461 (1997). A court should afford *Auer* deference where the agency's interpretation is reasonable and reflects it authoritative, expertise-based, and fair and considered judgment, and the agency takes into account the reliance interest and avoid unfair surprise. *See Kisor*, 139 S. Ct. 2400.

iii. VA's Interpretation of 38 C.F.R § 3.299 (1949) is Reasonable

If a rule is found to be generally ambiguous, per *Kisor*, then "the agency's reading must still be reasonable" and a court "must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." 139 S. Ct. at 2415-16. VA's interpretation of the regulation is reasonable and entitles VA to controlling weight. The Supreme Court held that a reasonable interpretation must "fall within the bounds of reasonable interpretation." *Id*. (quoting *Arlington v. FCC*, 569 U.S. 290, 296 (2013)). Here, the regulation instructed that VA "may" reinstate a veteran's benefits after active duty separation "provided the person is otherwise entitled" and employed language that the "claim will be adjudicated." 38 C.F.R. § 3.299 (1949). In order for VA to "adjudicate" the "claim" and determine if the veteran "is otherwise entitled," VA would need some type of notice or intent from the veteran to initiate the process. *Id*. The language of the regulation is clear that the resumption of benefits is not automatic, so this interpretation is reasonable.

Additionally, VA's interpretation should be entitled to controlling weight. This means that "the regulatory interpretation must be one actually made by the agency" and "must in some way implicate its substantive expertise." *Kisor*, 139 S.

Ct. at 2416. Here, the regulatory interpretation is reflected in an official letter sent by the Veterans Administration to the Veteran requesting he express his intent to reinstate his benefits in writing. Upon learning that he served on active duty again from October 1945 until August 1947, the Veterans Administration sent the Veteran a letter, in March 1948, stating "[i]f your status at present is that of a civilian, and if you desire to file a new claim for disability compensation, you are requested to complete and return to this office the enclosed [form]." [R. 718]. This letter confirms that the interpretation proffered in this brief was VA's policy at the time. *See Kisor*, 139 S. Ct. at 2416 (stating the Court "has declin[ed] to 'draw a radical distinction between' agency heads and staff for *Auer* deference" and that the Court has "deferred to official staff memoranda . . . even though never approved by the agency head") (citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566, n. 9, 567, n. 10 (1980)). Moreover, VA's interpretation of its regulation implicates its expertise regarding how it administers claims. This is similar to the Supreme Court's examples of policy expertise in *Kisor*:

> [M]ore prosaic-seeming questions also commonly implicate policy expertise; consider the TSA assessing the security risks of pâté or a disabilities office weighing the costs and benefits of an accommodation.

139 S. Ct. at 2417. Here, due to VA's expertise in administering a large volume of claims, especially in the years following World War II, the agency deserved deference, especially when Congress was completely silent on the process to reinstate benefits. Pub. L. No. 78-144, § 15, 57 Stat. 554, 559 (1943).

iv. VA's Interpretation of 38 C.F.R § 3.299 (1949) Reflects its Fair and Considered Judgment and Does Not Result in Unfair Surprises

Finally, VA's interpretation of 38 C.F.R § 3.299 (1949) reflects its "fair and considered judgment." *Kisor*, 204 L. Ed. 2d at 861 (quoting *Auer*, 519 U.S. at 462). An agency's interpretation should not create an "unfair surprise" or "[un]fair warning." *Kisor*, 204 L. Ed. 2d at 861; *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 161 (2007); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012). Here, VA's interpretation of 38 C.F.R § 3.299 (1949) was fair because the Department sent the Veteran a notice of its interpretation, specifically that he would need to contact his respective RO in writing if he intended to reinstate his benefits. [R. 718] (March 1948 letter stating "[i]f your status at present is that of a civilian, and if you desire to file a new claim for disability compensation, you are requested to complete and return to this office the enclosed [form]"). The Veteran did not respond to either of this letter. Additionally, requiring veterans to notify VA if they intend reinstatement of their benefits, especially after previously informing them that such notification was required, does not put an unfair burden on veterans. Consequently, VA's interpretation of 38 C.F.R § 3.299 (1949) reflects a fair and considered judgment.

VA's interpretation of 38 C.F.R § 3.299 (1949) satisfies all the criteria in order to receive *Auer* deference as opined by the Supreme Court in *Kisor*. 519 U.S. 452 (1997); 204 L. Ed. 2d 841 (2019). Therefore, this Court should afford deference

to VA's reasonable interpretation of 38 C.F.R § 3.299 (1949) that would have required the Veteran to file a claim to reinstate benefits.

CONCLUSION

WHEREFORE, in light of the foregoing reasons, the Court should vacate the March 22, 2017, Board decision in so much as it denied, rather than dismissed, Appellant's appeal for an effective date earlier than September 28, 2009, for the award of a 70% rating for PTSD and depressive disorder and affirm the portion of the decision denying an earlier effective date than September 28, 2009, for the grant of entitlement to TDIU.

Respectfully submitted,

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