

RICARDO D. STAFFORD,)
Appellant,)
)
v.) Vet. App. No. 18-4520
)
ROBERT L. WILKIE,)
Secretary of Veterans Affairs,)
Appellee.)

Pursuant to U.S. Vet. App. Rule 27(b), Appellee submits this response in opposition to Appellant's February 24, 2020, Motion for an Order to Produce Material Relied on at Oral Argument, because Appellant is attempting to seek the process of discovery, which is not applicable to a proceeding in this appellate Court.

On February 19, 2020, the Court held oral argument in this matter. At the oral argument, Judge Pietsch asked a general question about whether the undersigned was aware of any times where the Board of Veterans' Appeals (Board or BVA) awarded a total disability rating based on individual unemployability (TDIU) on an extraschedular basis in the first instance. Oral Argument at 25:30-25:49, *Stafford v. Wilkie*, U.S. Vet.App No. 18-4520. The question did not relate to what occurred in Appellant's case and only related to what had occurred in other cases where the Board awarded TDIU on an extraschedular basis in the first instance. See *id.* In response, the undersigned provided an answer and subsequently filed a February 24, 2020, Notice of Clarification that indicated that, regarding what occurred in previous cases, the Secretary's legal position in this case was communicated by the Deputy Chief Counsel to Board personnel

subsequent to the issuance of the Board decision in this case and following the appeal of the Board decision, in the course of the litigation in this case. See Oral Argument at 26:02-26:21 and Notice of Clarification to the Court, *Stafford v. Wilkie*, U.S. Vet.App. No. 18-4520.

Appellant's February 24, 2020, motion seeks an order from this Court to require Appellee to produce the details of the communications provided by the Deputy Chief Counsel to Board personnel. Appellant is essentially seeking to compel discovery. Because this Court is an appellate court, the process of discovery, as that principle is perceived by the nation's trial courts, is not applicable. This Court is precluded by statute from considering any material that was not contained in the "record of proceedings before the Secretary and the Board." 38 U.S.C. § 7252(b); *Rogozinski v. Derwinski*, 1 Vet.App. 19 (1990) (review in the Court shall be on the record of proceedings before the Secretary and the Board).

To the extent that Appellant contends that Appellee "relied on" this information during oral argument, Appellant's argument is misguided. The information was provided merely to answer the Court's question, not to support Appellee's argument. The appeal in this case is limited to the Board decision in Appellant's case and, pursuant to precedent and regulation, decisions by the Board in other cases are not precedential. See 38 C.F.R. § 20.1303 (2018); *Lynch v. Gober*, 11 Vet.App. 22, 27 (1997) ("It is well established that BVA decisions are of no precedential value before the BVA or this Court.").

Appellant's three arguments why the information must be provided are unfounded. First, the information sought was not part of the "proceedings before the Secretary and the Board." See 38 U.S.C. § 7252(b) ("Review in the Court shall be on the record of proceedings before the Secretary and the Board."). Second, to the extent that the communication represents "the Secretary's interpretation of

a pertinent regulation and case law,” App. Mot. at 3, this interpretation is already evident from Appellee’s briefing and oral argument in this case and no further disclosure is required pursuant to this Court’s rules. See U.S. Vet. App. Rule 30(b) (requiring a party to promptly file notice when pertinent and significant authority comes to the attention of a party following briefing or oral argument). Third, the details of the communications provided by the Deputy Chief Counsel to Board personnel regarding previous Board decisions does not constitute “developments that could deprive the Court of jurisdiction or otherwise affect its decision.” See *Solze v. Shinseki*, 26 Vet.App. 299, 301 (2013) (“the parties are under a duty to notify the Court of developments that could deprive the Court of jurisdiction or otherwise affect its decision”).

Finally, the substance of the communication has already been revealed to this Court and opposing counsel. Appellant has provided no cogent argument why disclosure of any details of the communications provided by the Deputy Chief Counsel to Board personnel regarding previous cases would assist this Court in determining whether, in Appellant’s case, jurisdiction exists to review the Board’s decision to remand in this case and, if so, whether the Board properly declined to decide the extraschedular TDIU claim in the first instance.

WHEREFORE, Appellee respectfully requests that the Court deny Appellant’s Motion for an Order to Produce Material Relied on at Oral Argument.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ James B. Cowden
JAMES B. COWDEN
Deputy Chief Counsel

/s/ Mark J. Hamel
MARK J. HAMEL
Appellate Attorney
Office of General Counsel (027K)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6135

Attorneys for Appellee,
Secretary of Veterans Affairs