

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

WILLIS E. BRELAND,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 18-5980
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

SECRETARY’S RESPONSE TO APPELLANT’S NOTICE TO THE COURT

Pursuant to the Court’s April 28th Order from the bench during oral argument, the Secretary of Veterans Affairs (VA), Robert L. Wilkie, hereby responds to Appellant’s Notice earlier that day, pursuant to *Solze v. Shinseki*, 26 Vet.App. 299 (2013). In *Solze*, this Court held that “the parties are under a duty to notify the Court of developments that could deprive the Court of jurisdiction or otherwise affect its decision.” *Id.* at 301.

This appeal arises from a June 27, 2018, Board decision that denied initial compensable ratings for Appellant’s service-connected squamous cell carcinoma (SCC) of the tongue from August 1, 2007, to January 16, 2008, and from September 1, 2008, to the present. The Board also granted an earlier effective date of August 1, 2007, for the service-connected residuals of SCC: diffuse interstitial fibrosis, cervical strain, dysphagia, and hypothyroidism.

In footnote 3 on pages 10-11 of the Secretary’s brief dated August 19, 2019, the Secretary stated that the regional office (RO) implemented the effective date

assigned by the Board for the residuals in a rating decision on August 13, 2018. That statement is incorrect because the August 2018 rating decision addressed the issues of service connection for corneal scar, right eye and residuals of shingles (herpes zoster), and it did not implement the Board's June 27, 2018, decision. The Secretary sincerely regrets this error but notes that the August 2018 rating decision code sheet accurately reflects the Secretary's recitation of the disability ratings assigned as well as the combined disability ratings.

As acknowledged by Appellant (Appellant's Notice at 3), this demonstrates that he is receiving compensation for residuals of SCC, and the Secretary's error in stating that the August 2018 rating decision implemented the June 27, 2018, Board decision does not alter the Secretary's point that assigning a 100% rating under 38 C.F.R. § 4.114, Diagnostic Code 7343 for Appellant's service-connected SCC from December 26, 2006, to September 5, 2017, as he seeks, would (1) drastically overcompensate him for more than 9 years in which he did not have active SCC and was not receiving or convalescing from treatment for his service-connected SCC, and (2) constitute impermissible pyramiding pursuant to 38 C.F.R. § 4.14.

In his notice, Appellant has also submitted a copy of a March 9, 2020, rating decision that granted a 60% evaluation diffuse interstitial fibrosis (claimed as lung scarring) effective August 1, 2007. Appellant's Notice at 3; Exhibit B. Appellant asserts "that these new proceedings before the Secretary clarify that only one of the four effective dates for the ratings assigned his residuals have in fact been

implemented by the Secretary and that the lack of implementation does affect the decision in this matter.” Appellant’s Notice at 3. However, Appellant provides no explanation for how the implementation affects the decision in this matter. Notwithstanding any delay in implementing the Board decision dated June 27, 2018,¹ the Board’s grant of the earlier effective date for the residuals remains valid. Therefore, any delay does not undermine the Secretary’s position that assigning a 100% rating under 38 C.F.R. § 4.114, Diagnostic Code 7343 for Appellant’s service-connected SCC from December 26, 2006, to September 5, 2017, would result in both overcompensation and impermissible pyramiding.

WHEREFORE, the Secretary responds to Appellant’s Notice of April 28, 2020.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Principal Deputy General Counsel

MARY ANN FLYNN
Chief Counsel

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

/s/ Alex L. Kutrolli
ALEX L. KUTROLLI
Appellate Attorney
Office of the General Counsel (0271)
U.S. Department of Veterans Affairs

¹ On April 30, 2020, the Secretary contacted the Montgomery and Atlanta ROs and called attention to the June 27, 2018, Board decision.

810 Vermont Avenue, N.W.
Washington, DC 20420
(202) 632-6863

Counsel for Appellee,
Secretary of Veterans Affairs