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.	)	

MR. BRELAND'S REPLY TO THE SECRETARY'S RESPONSE TO HIS *SOLZE* NOTICE TO THIS COURT

Pursuant to the Court's April 28th Order from the bench during oral argument, Mr. Breland submits the following reply to the Secretary's response to his notice in accordance with this Court's rule established in *Solze v. Shinseki*, 26 Vet.App. 299 (2013). The Secretary does not dispute that Mr. Breland's *Solze* notice clarified the proceedings before VA following the Board decision on appeal. The Secretary's response claims that Mr. Breland has provided no explanation for how the implementation by the Secretary affects the decision in this matter.

Mr. Breland understands the rule established in *Solze* by this Court as a duty to notify and not as an opportunity to explain or make further argument. *See Solze*, 26 Vet.App. 301-303. This Court in *Solze* stated:

> In all cases before this Court, the parties are under a duty to notify the Court of **developments that could deprive the Court of jurisdiction or otherwise affect its decision**.

Solze, 26 Vet.App. 301. (emphasis added). This Court in *Solze* stated further "This duty is vital to ensure that the Court does not issue a decision absent a live case or controversy." *Solze*, 26 Vet.App. 302.

The Secretary stated in Footnote 3 on pages 10-11 of the Secretary's brief dated August 19, 2019, that the regional office (RO) had implemented the effective date assigned by the Board for the residuals in a rating decision on August 13, 2018. The Secretary has acknowledged in his response this statement was incorrect. Mr. Breland believed that he was obligated to clarify that in fact RO had not implemented the effective date assigned by the Board. It was Mr. Breland's belief that if the record was not clarified the implementation of the Board's effective date assignments could be understood by this Court to deprive it of jurisdiction or otherwise affect its decision based upon VA's having made a retroactive assignment of staged ratings.

Mr. Breland's interpretation of the note to Diagnostic Code 7343 is that the plain language does not require a staged rating but rather requires the only rating available, a 100 percent rating, to continue until a mandatory examination confirms that treatment is no longer required and then and only then is the service connected disability rated in its residuals. As argued by Mr. Breland, such a mandated process is

not one which is retrospective or permits staged ratings. The plain language of the note requires VA to assign a 100 percent rating until there is a mandatory examination and **any change** in rating whether by the mandatory examination or any subsequent examination requires notice under 38 C.F.R. § 3.105(e).

WHEREFORE, Mr. Breland submits his reply to the Secretary's response to his *Solze* notice.

Respectfully Submitted,

/s/Kenneth M. Carpenter
Kenneth M. Carpenter
Counsel for Willis Breland
Electronically filed May 1, 2020.