

In the
UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

KENNETH M. CARPENTER,)
)
 Appellant,)
)
 v.)
)
 DENIS MCDONOUGH,)
 in his capacity as)
 Secretary of Veterans Affairs,)
)
 Appellee.)

Vet. App. No. 19-1136

NOTICE OF SUPPLEMENTAL AUTHORITY

“When pertinent and significant authority comes to the attention of a party after the party’s brief has been filed,” U.S. Vet. App. Rule 30(b) requires that the “party shall promptly file notice with the Clerk and serve all other parties.” The notice must “set forth the citation(s) to the authority” and “refer to the page of the brief ... to which each citation pertains, and shall state without argument the reasons for the supplemental citation(s).” *Id.*

The Appellant, Kenneth Carpenter (“Mr. Carpenter”), understands Rule 30(b) not to ask parties to presume to decide what is pertinent and significant but, instead, to provide notice of any authority that the Court might conceivably conclude to be pertinent and significant. *Cf. Solze v. Shinseki*, 26 Vet. App. 299, 302 (2013) (per curiam order) (“[I]t is irrelevant that neither party believed that the Board’s decision would impact the Court’s ruling ... , as that was not a question within the parties’ power to decide.”); *id.* (“[C]ounsel have a *continuing duty* to inform the Court of any development which *may conceivably affect* an outcome.” (quoting *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring)) (emphases *Solze*’s)).

Additionally, as mentioned, Rule 30(b) requires notice “after the party’s brief has been filed.” Mr. Carpenter has come to understand “the party’s brief” to be a broad term that encompasses, alike, Rule 28 briefs and Rule 35 motions.

In this appeal, a three-judge panel of this Court issued a decision on February 24, 2021, affirming the decision of the Board of Veterans’ Appeals. Mr. Carpenter filed a Motion for Panel Reconsideration Or Full Court Review (the “Motion for Reconsideration”) on May 3, 2021. A part of his argument in that motion touches upon the *Chenery* doctrine in the context of prejudicial error. *See* Mot. for Recon., at 5–6.

On May 18, 2021, this Court issued a precedential decision in *Davis (Stanley) v. McDonough*, Vet. App. No. 18-4371, __ Vet. App. ___, 2021 WL _____. The appellant argued nonfinality under 38 C.F.R. § 3.156(b) and 38 C.F.R. § 3.156(c). *See Davis*, slip op. at 1–2, 4–5. With respect to § 3.156(b), the Court “accept[ed] for the sake of argument that Mr. Davis is right and the Board is wrong.” *Id.* at 7. The Court then turned to addressing whether the rule of prejudicial error would require setting aside the Board’s decision. *Id.* at 8. The Court framed its analysis as follows:

Board error does not automatically require setting aside a Board decision. When adjudicating appeals, this Court must “take due account of the rule of prejudicial error.” 38 U.S.C. § 7261(b)(2). This means, where it is not obvious that an error was harmful, the appellant bears the burden of showing that it was. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009). Prejudice, which disrupts the essential fairness of the adjudication, “can be shown by demonstrating that the error (1) prevented the claimant from effectively participating in the adjudicative process, or (2) affected or could have affected the outcome of the determination.” *Simmons v. Wilkie*, 30 Vet.App. 267, 279 (2018), *aff’d*, 964 F.3d 1381 (Fed. Cir. 2020). In assessing prejudice, the Court’s inquiry is “not limit[ed] . . . to the facts as found by the Board” but must be based on a review “of the record of the proceedings before the Secretary and the Board.” *Newhouse v. Nicholson*, 497 F.3d 1298, 1301-02 (Fed. Cir. 2007) (noting that prejudicial-error review does “not violate the *Chenery* doctrine”).

Id. at 8. The Court then applied that framework. *See id.* at 8–10.

Given that the Motion for Reconsideration touches upon the *Chenery* doctrine in the context of prejudicial error, Mr. Carpenter has concluded that providing this Rule 30(b) notice would be appropriate.

Rule 30(b) expressly forbids Mr. Carpenter from presenting argument in this notice. He reserves all rights to seek to do so elsewhere.

May 19, 2021

Respectfully submitted,

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