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

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| RAYMOND S. ZIRKELBACH, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | Vet. App. No. 20-1558 |
| | ) | |
| DENIS MCDONOUGH, | ) | |
| Secretary of Veterans Affairs, | ) | |
| | ) | |
| Appellee. | ) | |

## NOTICE OF CLARIFICATION OF POSITION

In its February 11, 2021 Order, the Court asked the parties to address the following question: "If the RO in 2013 treated the rating reduction as a grant of service connection and did not notify the appellant of the reduction, … did the decision become final?" Feb. 11, 2021 Order at 1. Both parties agreed that the 2013 decision was final. Appellant's Supplemental Memorandum of Law at 1-4, 14; Secretary's Response to Court's Order at 2-4. And both parties agreed that if the Court determined that the 2013 decision was not final, the Court would likely find that it lacked jurisdiction to consider Appellant's CUE motion. Appellant's Memorandum at 3; Secretary's Response at 4.

In preparing for oral argument, and upon further, in-depth reflection on this question, counsel for Appellant seeks to clarify her position on the finality of the 2013 decision. An alternative argument can be made that the 2013 decision may <u>not</u> be final. In 2013, VA was required to notify claimants of, inter alia, "the decision made" and "the reason(s) for the decision." 38 C.F.R. § 3.103(a) (2013). If the 2013 decision did not

adequately inform Mr. Zirkelbach that his protected disability rating had been reduced, that decision may not be final. *Ingram v. Nicholson*, 21 Vet.App. 232, 240-41 (2007) ("[A] decision may be rendered nonfinal when 'the time for appealing either an RO or a Board decision did not run where the [Secretary] failed to provide the veteran with information or material critical to the appellate process.'").

Further, when the Board evaluates a claim based on an assertion of clear and unmistakable error (CUE), it is required to first determine that the decision subject to the CUE challenge is final. 38 U.S.C. § 5109A(d); 38 C.F.R. § 3.105(a)(1); *Richardson v. Nicholson*, 20 Vet.App. 64, 71 (2006) (discussing "the indispensable prerequisite for revision on the basis of CUE – a final RO or Board decision"); *Link v. West*, 12 Vet.App. 39, 45 (1998) (holding that, absent a final decision, "a claim of CUE does not exist, as a matter of law"). Here, the Board discussed the relevant law pertaining to CUE and determined that the 2013 decision did not contain CUE, but never actually determined that the 2013 decision was final and, thus, subject to a CUE challenge. R. 5-11.

Nevertheless, even if the 2013 decision is not final, Appellant's position is that this Court would have jurisdiction to review the Board's implicit determination that the 2013 decision was final and its explicit determination that the 2013 rating reduction was not CUE. Counsel for Appellant thus clarifies her position to acknowledge that even if the Court determines that the 2013 decision is not final, it has jurisdiction to review the Board's decision. *See* 38 U.S.C. § 7252(a) (giving the Court "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals"); *see also* 38 U.S.C. § 7104(d) (requiring Board to address "all material issues of fact and law presented on the record"); and 38 C.F.R. § 20.904(a)

(requiring Board to remand for "correction of a procedural defect."). Counsel intends to use her oral argument time to address the Board's determination that the 2013 rating reduction was not CUE, in line with the arguments raised in the principal brief, reply brief, and supplemental memorandum of law.

Respectfully submitted,

Date: May 25, 2021

*/s/ Amy B. Kretkowski*

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