

THE UNITED STATES COURT OF APPEALS FOR

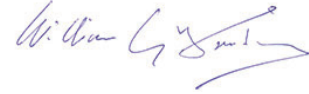
TIMOTHY DAVIS,
Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,
Appellee.

MOTION GRANTED

For the Panel



July 8, 2021
William Greenberg
Judge

VET. APP. NO. 19-7214

**APPELLANT'S UNOPPOSED MOTION FOR LEAVE TO
FILE NOTICE OF SUPPLEMENTAL AUTHORITIES UNDER RULE 30(b)**

Pursuant to U.S. Vet. App. Rules 27 and 30(b), Appellant, by and through his undersigned counsel moves this Court for leave to file a Notice of Supplemental Authorities pursuant to Rule 30(b) within 7 days of the scheduled oral argument in this case.

For good cause, the Appellant asserts the following. Counsel for Appellant only recently became aware of the decision issued only eight days ago in *Taylor v. McDonough*, No. 2019-2211, 2021 WL 2672307 (Fed. Cir. June 30, 2021). In addition, Counsel only became aware of the importance of *Kisor* while preparing for oral argument.

The undersigned has contacted Secretary's counsel and he is unopposed to this motion.

WHEREFORE, The Appellant respectfully requests that the court grant this motion for leave to file a Notice of Supplemental Authorities pursuant to Rule 30(b) within 7 days of the scheduled oral argument in this case.

Respectfully submitted,

/s/ Kenneth H. Dojaquez
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July 8, 2021

Mr. Gregory O. Block
Clerk of the Court
U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW
Washington D.C. 20004

In Re: *Davis v. McDonough*
Docket: 19-7214

Dear Mr. Block,

Pursuant to U.S. Vet. App. R. 30(b), the Appellant hereby advises the Court of pertinent and significant authority of which the undersigned became aware after the Appellant filed his briefs in this appeal, and before oral argument is to be held on July 9, 2021. The additional authority consists of three precedential cases issued by the Federal Circuit.

First, in *Kisor v. McDonough*, 995 F.3d 1316, 1325 (Fed. Cir. 2021), a panel of the Federal Circuit held that when interpreting a regulation "the [pro-veteran] canon does not apply unless 'interpretive doubt' is present." However, the full Court could not come to a consensus as to this issue. See *Kisor v. McDonough*, 995 F.3d 1347 (Fed. Cir. 2021). However, in *Taylor v. McDonough*, No. 2019-2211, 2021 WL 2672307 (Fed. Cir. June 30, 2021), a different panel of the Federal Circuit held the pro-veteran canon applies at step one when interpreting a statute.

Mr. Davis argued the pro-veteran canon is a necessary canon of interpretation when the Court interprets a statute in Title 38. *Taylor* confirms this argument, while *Kisor* explains the canon works differently when interpreting a regulation. Therefore, these cases are pertinent to this appeal.

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Additionally, the Federal Circuit held in *Taylor*, "the claim filing requirement of 38 U.S.C. § 5110(a)(1) is not jurisdictional and therefore may be subject to equitable considerations, such as waiver, forfeiture, and estoppel." See *Taylor*, at 7. Mr. Davis argued 38 U.S.C. § 5108 does not require an application to trigger reopening of a prior claim. Brief for the Appellant, at 5-16. He also argued that even if the statute does have such a requirement, the Secretary did not create such a form until 2010. Therefore, this statute is unenforceable; and "the law cannot require a claimant to perform an action that is impossible to perform." Brief for the Appellant, at 14.

Taylor confirms that the Secretary can waive application of, or be estopped from applying this statute; therefore, it is pertinent to this appeal.

Very Respectfully,

/s/ Kenneth H. Dojaquez
Kenneth H. Dojaquez, Esq.
Attorney for Appellant