

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-3367

DANIEL D. BARRY

APPELLANT,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before ALLEN, FALVEY and JAQUITH, *Judges*.

ORDER

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

Appellant Daniel D. Barry appeals a March 16, 2020, Board of Veterans' Appeals decision that denied entitlement to special monthly compensation (SMC) at the rate payable under 38 U.S.C. § 1114(n). On August, 23, 2021, this case was submitted to a panel for a decision. Oral argument is scheduled for October 25, 2021, at 1:00 PM.

Each of the substantive issues being considered in this matter raises the potential that the Court should employ principles of issue exhaustion to avoid addressing the arguments on the merits. In other words, for each issue we must first consider whether the issues appellant raises in his briefs were properly raised before the Agency, either explicitly or reasonably raised by the record, or whether the Board adversely decided the issues being challenged.

In particular, appellant's primary argument concerns the meaning of 38 C.F.R. §3.350(f)(3). The Secretary questions the Court's ability to address that argument because it was not properly raised before the Board. The Secretary raises similar concerns with respect to the two alternative arguments appellant presents. Recently, in *Carr v. Saul*, 141 S.Ct. 1352 (2021), the Supreme Court addressed issue exhaustion in the context of non-adversarial administrative proceedings.

To assist the Court in the resolution of this appeal, counsel for each party should be prepared to discuss, in addition to the other issues briefed, the impact, if any, of *Carr v. Saul*. In addition, the parties should also be prepared to discuss whether the principles of issue exhaustion apply for each issue raised here, and how those principals interact with the requirement that the Board consider all relevant laws and regulations and its duty to maximize benefits.

Upon consideration of the foregoing, it is

ORDERED that counsel be prepared to discuss the above issues at oral argument.

DATED: October 12, 2021

PER CURIAM.

Copies to:

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VA General Counsel (027)