IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

CAROLYN CLARK,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 21-1124
	)	
DENIS MCDONOUGH,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

SECRETARY'S OPPOSITION TO APPELLANT'S MOTION FOR INITIAL PANEL REVIEW

The requirements for initial panel review are not met. *See* U.S. Vet.App. R. 27(c)(1); Appellant's November 29, 2021, motion for initial review by panel. (App. Mot.). The Court should deny Appellant's motion for panel decision because Appellant fails to provide sufficient justification in support of his motion. *See* U.S. Vet.App. R. 27(c)(1) (the motion must state why the resolution of an issue would 1) establish a new rule of law; 2) modify or clarify an existing rule of law; 3) apply established law to a novel factual situation; 4) constitute the only recent, binding precedent on a particular point of law; 5) involve a legal issue of continuing public interest; or 6) resolve a case in which the outcome is reasonably debatable); *see also Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990) (setting forth the criteria for panel consideration by this Court).

Appellant argues in App. Mot. as to why she believes this case presents an issue of continuing public interest, may clarify an existing rule of law and apply it to a novel factual situation, or establish a new or modify an existing rule of law. *See* App. Mot. at 1-7. However none of these arguments do anything but disagree with binding case law, including from the U.S. Court of Appeals for the Federal Circuit, that clearly states this Court does not have jurisdiction over Board remands, because Board remands do not constitute a "decision" for the purpose of 38 U.S.C. § 7252. *See Maggitt v. West*, 202 F.3d 1370, 1376 (Fed. Cir. 2000); *Kirkpatrick v. Nicholson*, 417 F.3d 1361, 1364 (Fed. Cir. 2005); *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order); *see also Bethea v. Derwinski*, 2 Vet.App. 252, 254 (1992)). Binding caselaw is clear that remands are not final decisions of the Board over which the Court has jurisdiction, and to the extent that there is a question of whether any exception to this rule exists, that matter is currently pending before a panel of the court in in *Stiles v. McDonough*, 20-3523.

Indeed, it is difficult to discern the specific reasons Appellant believes this case warrants initial panel review, apart from perhaps the fact that Appellant's counsel is not a part of the litigation in *Stiles*. *See generally* App. Mot at 1-7.

Insofar as Appellant states there are "issues of continuing public interest," she only vaguely notes that "jurisdictional questions arise frequently" App. Mot at 2, and also raises the issue of "what 38 C.F.R. § 20.3(i) means[.]" App. Mot. at 6. But again, current case law is clear that there is no final decision to appeal. *See e.g. Maggitt*, 202 F.3d at 1376; *Kirkpatrick*, 417 F.3d at 1364. Unless and until

something changes, those decisions have a preclusive effect on the Court's jurisdiction over this appeal. Regardless of Appellant's opinion on the matter, the Court may not accept jurisdiction even where (as is not the case here) both parties concede it, but it must affirmatively satisfy itself that it has authority to act. *See Hayre v. Principi*, 15 Vet.App. 48, 50 (2001) (holding that the Court "cannot accept jurisdiction simply because the parties conceded it"; rather, the Court "must affirmatively satisfy itself that it has authority to act"), *aff'd*, 78 F. App'x 120 (Fed. Cir. 2003); *see also Jarrell v. Nicholson*, 20 Vet.App. 326, 331 (2006). And if the Court lacks jurisdiction over a Board remand, which it currently does, this appeal is indeed a "poor vehicle" (App. Mot. at 6) for Appellant's arguments.

But the specifics of Appellant's arguments here are difficult to pin down, apart from her repeated insistence that it is somehow important that she shares counsel with the appellants in several appeals. *See* App. Mot. at 2, 4, 5. Appellant argues she does not believe *Stiles* is a good vehicle for "presenting the jurisdictional issues [she] describes as being important," App. Mot. at 6, but this statement represents a stunning incongruity with another appeal where Appellant does, indeed, share counsel: *Beaudoin v. McDonough*, 21-2078. *Cf. also* App. Mot. at 2 (Identifying *Beaudoin* as one of "[m]any" who have similar appeals before this Court and share counsel). Fascinatingly, Appellant's counsel, in *Beaudoin*, moved to join this case with that one, specifically "for the limited purpose of deciding their jurisdictional questions together[.]" *See Beaudoin*, 20-2078, Appellant's Motion to Join Jurisdictional Questions for Decision at 6. The Court

has since stayed *Beaudoin* pending *Stiles*. *See Beaudoin,* 20-2078, Order dated Sept. 22, 2021. And *Beaudoin* is not an outlier here. Appellant also points to *Harris v. McDonough*, 21-0906; *Smith v. McDonough*, 21-1244; and *Duigou v. McDonough*, 21-4060[1]. App. Mot. at 2. The Court has also stayed *Harris* and *Duigou* pending *Stiles*, even though those appellants (which "share counsel" with Appellant) opposed the Secretary's stay motions. *See Harris*, 21-0906 (Order dated Oct. 28, 2021); *Duigou*, 21-4060 (Order dated Sept. 24, 2021). While the Secretary has not yet moved to stay *Smith* pending *Stiles*, the Court has only marked the appellant's opposition to the Secretary's motion to dismiss that case as "Received" on the docket.

Appellant here is attempting to have it both ways. First she attempted to join this case with *Beaudoin* for the Court to consider "their jurisdictional questions" together; now, however, once *Beaudoin* was stayed pending *Stiles*, she argues that this case is importantly distinguishable and must be initially reviewed by a panel. *See* App. Mot. at 5-6. The Court should simply not condone this complete reversal of argument Instead, the Court should stay this case pending *Stiles*, proceed to decide *Stiles*, and, if necessary, move on to consider this case once the impact of that decision is known.

As the law currently stands, there is not a large continuing public interest because jurisdiction is a question in every case, and binding case law currently

[1] Appellant mis-numbered *Duigou* "12-4060" and the Secretary has corrected this to avoid confusion.

answers that question in that the Court does not have jurisdiction over Board remands, which are not final decisions for the purpose of section 7252.

Assuming that the Court follows the relevant case law, there is no need to clarify an existing rule of law. Remands are not decisions, and this appeal stems from a Board remand. The answer to the question is clear. Similarly, a panel of this Court deciding this case now will not apply established law to a novel factual situation. Remands are common and Appellant concedes as much. Appellant notes that 25% (approximately 1,014), 27% (approximately 853), and 29% (approximately 3,852) of the Board's dispositions of appeals under the Appeals Management Act in Fiscal Year 2021 were remands (percentages based on whether the appeals were in the Hearing lane, the Evidence Submission lane, or the Direct Review lane, respectively) . *See* App. Mot. at 3 citing Appellant's Exhibit.

Finally, because of the binding preclusive effect of current Federal Circuit precedent, *see Bethea*, 2 Vet.App. at 254, a panel decision of this Court cannot establish a new or modify an existing rule of law in this case. Appellant is attempting to appeal a remand, and this she cannot do.

WHEREFORE, the Secretary respectfully requests that the Court deny Appellant's motion for panel decision in this appeal.

Respectfully submitted,

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