IN THE UNITED STATES COURT OF APPEALS FOR VETERANS' CLAIMS

AARON N. ADAMS, Appellant, v. DENIS MCDONOUGH, Secretary of Veterans Affairs, Appellee.	)))))))))))	Vet. App. No. 21-3239

APPELLANT'S MOTION FOR ORAL ARGUMENT

Pursuant to U.S. Vet. App. Rule 34, Appellant, Aaron N. Adams, moves this Court for oral argument in the present matter.

A Motion for Oral Argument will generally be granted if the Court believes it will materially assist in the disposition of the appeal. *See Roberts v. Peake*, 22 Vet. App. 187, 188 (2008) ("because the Court believes that oral argument will materially assist the disposition of this appeal," the Court granted Appellant's Motion for Oral Argument); *see also O'Brien v. Wilkie*, 30 Vet. App. 21, 29 (2018) (Judge Greenberg, dissent) ("I initially dissent from the majority's denial of the motion for oral argument. A worthy veteran has been wronged and has asked to be heard. Here, tenuous notions of judicial economy should not stifle legitimate pleas of the very people we were created for and meant to serve"). Aaron N. Adams is the adult son of U.S. Army veteran Johnny R. Adams. His eligibility for dependents educational assistance (DEA) derives from his father's finding of total disability. 38 U.S.C. § 3512. Under § 3512(a)(3), DEA may be elected from

the date of total disability finding through the date of notification of the finding of total disability.

Aaron N. Adams argued that his March 2019 notification for DEA was defective notice of his eligibility dates as the notice failed to contain the correct date range for eligible DEA election. [R. at 48-49]. This argument was based on defective notice of the finding of total disability in the January 2019 Rating Decision for Johnny R. Adams. [R. at 2190-2211]. Because § 3512(a)(3) ties the eligibility dates for DEA to the date of notification of the decision finding total disability, and that notice was defective, so too was the notice to Aaron N. Adams since he would be entitled to an eligibility date through "cured" notice. Appellant's Brief at 7 & Reply Brief at 4.

The Secretary has responded that "any deficiency as to the January 29, 2019, notification letter is a matter that could have been raised by the Veteran in his case, but not by Appellant in this one." Appellee's Brief at 14. The Secretary also maintains that this case is distinguishable from *Romero v. Tran,* 33 Vet. App. 252 (2021), because the notice requirements under 38 U.S.C. § 3512 and 38 C.F.R. § 21.3041 did not require notice of the Rating Decision to the veteran's representative, unlike the notice requirements for a Statement of the Case, as in *Romero*. Appellee's Brief at 14.

Oral argument is warranted as a decision in this case would constitute the only recent binding precedent on a particular point of law. The Secretary's interpretation of 38 U.S.C. § 3512 and 38 C.F.R. § 21.3041 is inconsistent with the VA's other provisions. "Courts should read a regulation in a way so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not

destroy another unless the provision is the result of obvious mistake or error." *Foster v. McDonough*, 34 Vet. App. 338, 346 (2021) (internal quotation marks omitted). 38 U.S.C. § 5104 and 38 C.F.R. § 3.103(b)(1) both address RDs and require notice to the representative to be adequate. Thus, oral argument is warranted for the Court to elaborate on whether 38 U.S.C. § 3512 and 38 C.F.R. § 21.3041 are read in isolation or in tandem with 38 U.S.C. § 5104 and 38 C.F.R. § 3.103(b)(1). Further, oral argument would benefit the Court in ascertaining whether the Veteran's defective notice can be raised by a DEA applicant when that notice directly affects the DEA applicant's benefits.

Aaron N. Adams also argued that he should be able to amend and relate his election back to his initial submission, similar to what the appellant in *Demery v. Wilkie*, 30 Vet. App. 430, 443-444 (2019), was able to do with this Court's 120-day appeal deadline. Appellant's Brief at 18 and Reply Brief at 5-6. The Secretary responded that "here Congress explicitly" provided the 60-day deadline, whereas in *Demery* "the Court's rules came into play more than the statute." Appellee's Brief at 17-18. Yet, Congress spoke directly to the 120-day deadline to appeal to the Court in 38 U.S.C. § 7266: "a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days." Thus, Mr. Adams contends that the critical question is whether the 60-day election requirement is "'an important procedural rule,' [that] is not jurisdictional" or "jurisdictional restraints. *Demery*, 30 Vet. App. at 443-44. Thus, this case would clarify an existing rule of law as well as establish the only recent binding precedent on whether the 60-day election period for DEA is jurisdictional or whether an applicant can amend the election. If amendments are allowed, then the matter must be remanded for the Board to make the

factual determination of whether it is appropriate based on the facts of this case, a matter not reached by the Board.

Appellee was contacted, via e-mail, and takes no position on this motion but reserves the right to respond.

WHEREFORE, Appellant, Aaron N. Adams, respectfully requests, to aid the Court in a resolution of the present appeal, that this Court grant this Motion for Oral Argument.

Respectfully Submitted,

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