IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

RUBEN VILLANUEVA, JR.,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 21-3663
	)	
DENIS MCDONOUGH,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

APPELLEE'S OPPOSITION TO
APPELLANT'S SEPTEMBER 20, 2022, MOTION FOR LEAVE

Pursuant to U.S. Vet. App. R. 27(B), the Secretary submits this response in opposition to Appellant's September 20, 2022, Opposed Motion for Leave to File a Reply to Appellee's Response.

On September 12, 2022, the Court ordered the Secretary to "inform the Court about the status of the veteran's motion for revision based on CUE, including whether the RO has adjudicated and decided that motion and whether the veteran has asked VA to do so." September 12, 2022, Court Order (Court Order) at 1.

In his September 14, 2022, response, the Secretary stated that as of the date of his filing, "a review of the Veterans Benefit Management System (VBMS) indicates that the RO has not adjudicated the pending CUE motion, nor is there any indication that Appellant has asked VA to do so subsequent to the March 1,

2021, Board decision here on appeal." September 14, 2022, Secretary's Response (Secretary's Response) at 1.

In response to the Secretary's submission, Appellant on September 20, 2022, filed an Opposed Motion for Leave to File a Reply to Appellee's Response and a concurrently filed Reply to the Secretary's Response. September 20, 2022, Appellant's Opposed Motion for Leave (Appellant's Motion for Leave) at 1; *see generally* September 20, 2022, Appellant's Reply (Appellant's Reply). In his Reply, Appellant averred that "the Secretary may have misconstrued the Court's Order" and thus sought to supplement the Secretary's Response with additional arguments and evidence which purportedly "indicate that the RO did adjudicate the motion for revision based on CUE prior to the March 1, 2021, Board decision." Appellant's Reply at 2. Similarly, in his Motion for Leave, Appellant stated that "in light of the Secretary's answer, submission of a reply, with additional clarifying information from [VBMS], will be of assistance to the Court in addressing this matter." Appellant's Motion for Leave at 1.

The Court should deny Appellant's Motion for Leave because the Secretary's Response is accurate and no additional information is needed to clarify the status of the CUE motion. Moreover, Appellant's attempt to use the Court's Order as a means of submitting supplemental arguments and extra-record evidence is unreasonable and impermissible. Finally, the supplemental arguments and evidence in Appellant's Reply do not demonstrate that the RO adjudicated the CUE motion in its February 7, 2020, decision.

1. The Court Should Deny Appellant's Motion for Leave Because the Secretary's Response Accurately Reported the Status of the CUE Motion and Reflects a Reasonable, Good-Faith Effort to Respond to the Court's Inquiry.

The Secretary respectfully submits that he did not "misconstrue" the Court's Order. *Contra* Appellant's Reply at 2. In its September 12, 2022, Order, the Court requested additional information from the Secretary "about the status of the veteran's motion for revision based on CUE, including whether the RO has adjudicated and decided that motion and whether the veteran has asked VA to do so." Court Order at 1. The Secretary construed this Order as the Court requesting a simple status update: has anything changed regarding the status of the CUE motion since the parties' filings that the Court should be made aware of?

This reasonable interpretation of the Order is supported by the context of the Court's request itself. Notably, the Court made its request in the context of withdrawing the May 16, 2022, Memorandum Decision, thus signaling its intention to issue a new decision in the appeal. *Id*. Hence, the Court made its status update request in order to "assist [the Court] in [its] resolution of this matter." Court Order at 1. Such a request is entirely reasonable in this context. For example, had the RO subsequently adjudicated the CUE motion, at Appellant's subsequent request or otherwise, the issue on appeal would likely be rendered moot. *See Mokal v. Derwinski*, 1 Vet.App. 12, 13 (1990) (noting that prohibition against advisory opinions is based on the "case or controversy" doctrine to which this Court adheres); *Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992) (holding that once a live

case or controversy becomes moot, the Court lacks jurisdiction). Moreover, any such subsequent action by Appellant or the RO as to the CUE motion would necessarily alter the parties' positions and interpretations of the record as articulated in their original briefs. Thus, any such subsequent development would certainly assist the Court in its resolution of this matter.

Read in this context, the Secretary accurately reported that a review of VBMS "indicates that the RO has not adjudicated the pending CUE motion, nor is there any indication that Appellant has asked VA to do so subsequent to the March 1, 2021, Board decision here on appeal." Secretary's Response at 1. This response accurately captures the fact that nothing has changed. The status of the CUE motion has not changed subsequent to the Board decision on appeal. The parties' interpretation of the record—to include whether the RO adjudicated, actually or implicitly, the CUE motion in its February 2021 decision—has not changed. Consequently, the central issue on appeal has not changed. The Secretary thus informed the Court of this absence of any new developments by accurately reporting that the RO has not adjudicated the pending CUE motion, nor has Appellant made any effort to request that VA adjudicate or decide his CUE motion, following the Board's decision. *Id*.

Therefore, the "additional clarifying information" proffered by Appellant is not necessary to supplement the Secretary's accurate reporting to this Court. Appellant's Motion at 1. Accordingly, the Court should deny Appellant's Motion for Leave at 1. Additionally, as explained below, the evidence and supplemental

arguments presented in Appellant's Reply neither undermine the accuracy of the Secretary's Response nor are relevant to any reasonable interpretation of the Court's Order.

2. The Court Should Deny Appellant's Motion for Leave Because His Reinterpretation of the Court's Order is Unreasonable, and His Attempt Present Supplemental Arguments and Extra-Record Evidence is Impermissible.

Appellant states that the Court's Order "did not limit the request only to information appearing after the Board's March 1, 2021, decision." Appellant's Reply at 2. Rather than construing the Court's Order as requesting an update as to any new information pertaining to the CUE motion subsequent to the Board's decision, Appellant interprets the Court's Order as an invitation to offer new evidence or arguments regarding the status of the CUE motion prior to the Board's decision. The Court should reject Appellant's Motion for Leave and his attempt to supplement his prior arguments for two reasons.

First, Appellant's interpretation of the Court's Order is unreasonable. The Court is already well informed as to the parties' positions regarding whether the RO adjudicated the CUE motion in its February 2020 decision. Indeed, the parties have made their positions clear through full briefing, a motion for panel/reconsideration, and a response thereto. *See* Appellant's Brief; Appellee's Brief; Appellant's Reply Brief; Appellant's Motion for Reconsideration, or In the Alternative, Panel Decision; Appellee's Response to the Court's July 20, 2022, Order. Moreover, the parties' respective positions have not changed throughout

the course of these proceedings. It is therefore not reasonable to interpret the Court's order as requesting anything other than information regarding new developments subsequent to the Board's decision and the parties' briefing on that decision. The Court should therefore reject Appellant's attempt to reinterpret its Order as an opportunity for him to provide additional arguments and evidence.

The VBMS entries Appellant has attached to his Reply are not included in the Record Before the Agency (RBA) or the Record of Proceeding (ROP), nor did Appellant dispute the absence of these VBMS entries from the RBA or ROP. Consequently, these VBMS entries are extra-record evidence, which the Court is generally precluded by statute from considering. 38 U.S.C. § 7252(b); *see Kyhn v. Shinseki*, 716 F.3d 572 (Fed. Cir. 2013). The Court may, of course, "take judicial notice of facts of universal notoriety that are not subject to reasonable dispute," *Monzingo v. Shinseki*, 26 Vet.App. 97, 103 (2012), yet Appellant neither requests that the Court take judicial notice of these VBMS entries nor argues that the facts contained therein are of universal notoriety or not subject to reasonable dispute. *See generally*, Appellant's Reply.

Nevertheless, Appellant argues that these VBMS entries support his primary position: the RO adjudicated the CUE motion in its February 2020 rating decision. As noted above, this assertion goes to the very heart of the issue on appeal. *See supra*. To the extent Appellant now offers supplemental arguments concerning evidence that both existed prior to the Board's decision and was accessible to Appellant's counsel to reinforce his central position in this appeal,

Appellant fails to provide at least some explanation as to how the Court may consider this extra-record evidence and why he declined to raise this argument at any point in these proceedings prior to the filing of his Reply. As such, the Court should decline to entertain Appellant's untimely attempt to supplement his pleadings with arguments and extra-record evidence.

Second, Appellant's attempt to offer additional arguments at this stage in the proceedings is impermissible. *See Grivois v. Brown*, 6 Vet.App. 136, 138 (1994) (explaining that the Court has discretion to deem abandoned issues not argued on appeal); *cf. Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999) ("improper or late presentation of an issue or argument . . . ordinarily should not be considered"), *aff'g sub nom. Carbino v. Gober*, 10 Vet.App. 507, 511 (1997) (declining to review argument first raised in appellant's reply brief); *Fugere v. Derwinski*, 1 Vet.App. 103, 105 (1990) ("Advancing different arguments at successive stages of the appellate process does not serve the interests of the parties or the Court. Such a practice hinders the decision-making process and raises the undesirable specter of piecemeal litigation."); *Tubianosa v. Derwinski*, 3 Vet.App. 181, 184 (1992) (holding that a party "should have developed and presented all of his arguments in his initial pleading"). While he posits that he "raises no argument at this time in relation to these VBMS entries," Appellant's Reply at 4, his proffering of this extra-record evidence and interpretation of such as demonstrating that the RO "adjudicated the [ ] CUE motion on February 7,

2021 [sic],"[1] is facially a supplemental argument raised for the first time in his Reply. Reply at 4. Indeed, nowhere in any prior pleading has Appellant so much as alluded to any VBMS entries. *See generally* Appellant's Brief; Appellant's Reply Brief; Appellant's Motion for Reconsideration, or In the Alternative, Panel Decision. Appellant's counsel has access to VBMS and each of the entries he now relies upon existed prior to the Board's decision. *See generally* Appellant's Reply Attachments A, B. Despite such access and the existence of such records, Appellant declined to raise this specific argument to the Board, let alone in any prior pleading to this Court. Presumably, the choice to not previously raise any arguments regarding VBMS entries was strategic, although the Secretary acknowledges that such is merely a presumption given that Appellant offers no explanation as to why he has not previously raised this argument. *See generally* Appellant's Motion for Leave; Appellant's Reply. Accordingly, the Court should deny Appellant's Motion for leave.

In the event this Court grants his Motion for Leave, because Appellant raises supplemental arguments and offers extra-record evidence in his Reply and the Secretary disputes Appellant's characterization of this extra-record evidence, the Secretary respectfully requests an opportunity to provide the Court with a substantive response to Appellant's Reply.

[1] The Secretary understands Appellant's reference to RO having "adjudicated the Appellant's CUE motion on February 7, 2021," to be the result of a typographical error in which he intended to refer to the RO's February 7, 2020, rating decision. Appellant's Reply at 4; *see* [R. at 231-35] (February 7, 2020, Rating Decision).

WHEREFORE, the Secretary respectfully responds to Appellant's September 20, 2022, Opposed Motion for Leave.

Respectfully submitted,

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Date: September 23, 2022

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