### IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

| Ruben Villanueva, Jr.,        | ) |                    |
|-------------------------------|---|--------------------|
| Appellant,                    | ) |                    |
|                               | ) |                    |
| V.                            | ) | Docket No. 21–3663 |
|                               | ) |                    |
| Denis McDonough,              | ) |                    |
| Secretary Of Veterans Affairs | ) |                    |
| Appellee                      | ) |                    |

## APPELLANT'S REPLY TO APPELLEE'S RESPONSE TO THE COURT'S SEPTEMBER 12, 2022, ORDER

Now comes the Appellant, through counsel, and subject to the Court's approval, who submits this reply to the Secretary's Response to the Court's September 12, 2022, Order.

## THE SECRETARY'S RESPONSE TO THE STATUS OF APPELLANT'S MOTION FOR REVISION BASED ON CUE

In its September 12, 2022, Order the Court instructed the Secretary to provide relevant information regarding the status of Appellant's motion for revision based on Clear and Unmistakable Error (CUE). In their response, the Secretary indicated that they reviewed the Veterans Benefit Management System (VBMS) to determine that the VA Regional Office (RO) had not adjudicated the pending CUE motion. The Secretary also noted that Appellant had not requested the VA to adjudicate the CUE motion

"subsequent to the March 1, 2021, Board decision here on appeal." Appellee's response to Court's September 12, 2022, Order.

# VBMS Entries for Appellant's Motion for Revision Based on CUE Prior to March 1, 2022

It is believed that counsel for the Secretary may have misconstrued the Court's Order regarding the information being requested. Namely, it appears that the Secretary limited their response only to those entries appearing in VBMS after the March 1, 2021, Board decision on appeal. It is counsel's reading of the September 12, 2022, Order that the Court did not limit the request only to information appearing after the Board's March 1, 2021, decision.

In light of this differing view, screen captures of the Appellant's VBMS file are provided to the Court that would indicate that the RO did adjudicate the motion for revision based on CUE prior to the March 1, 2021, Board decision. The first two screen captures show an End Product (EP)¹ 040-Supplemental Claim Rating, with a date of claim of October 14, 2019, Status of CLD [closed], and Suspense Date of February 7, 2020. Attach. A at 1.² In the "Contention" field for the claim the sole matter listed is "Tinnitus"

<sup>&</sup>lt;sup>1</sup> The Secretary maintains a public facing website that details the usage of End Product codes in VBMS.

 $https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000011474/Appendix-B.-End-Product-Codes-and-Work-Rate-Standards-for-Quantitative-Measurements$ 

<sup>&</sup>lt;sup>2</sup> Counsel apologizes to the Court for the quality of the screen captures as the VBMS system does not allow for high quality screen captures to be exported or printed.

(tinnitus) (earlier effective date due to CUE)." *Id.* The "CaseFlow Disposition" field lists the status as "Denied". *Id.* The corresponding Claim Notes detail that "Claim status changed from RATING\_DECISION\_COMPLETE to CLOSED" on February 7, 2020. *Id.* at 3. The only decision notice in VBMS. Dated February 10, 2020, the business day following closure of the EP-040 Supplemental Claim Rating, is the decision denying entitlement to an earlier effective date for service connection of tinnitus, which served as the basis for the Appellant's appeal to the Board and subsequent appeal to this Court.

Counsel for the Appellant has been informed of a separate VBMS entry in conjunction with the EP-040 Supplemental Claim Rating entry. *Id.* at 5. This entry was created under EP 960-Administrative Error. Attach. B at 1. The sole contention for the claim is listed as "Revision for Tinnitus effective date due to CUE." *Id.* The corresponding VBMS notes show that this EP was created on November 4, 2019, and assigned to the Appeal lane. *Id.* at 2. On January 31, 2020, it was "Assigned to team 'Appeals - DROC IPC' and team member 'Toni Johnson'" and closed at that time. *Id.* It is noteworthy that the EP-040 Supplemental Claim Rating notes show that the EP-040 was also created on January 31, 2020, by Toni Johnson. Attach. A at 4. Thus, it would appear that the EP-960 was created to resolve incorrectly assigning the CUE motion to the Appeals Team, and the subsequently created EP-040 properly processed the CUE motion at the RO level.

Given these VBMS entries, it would appear that the RO properly coded, processed, and adjudicated the Appellant's CUE motion on February 7, 2021.<sup>3</sup>

Wherefore, Appellant respectfully asks that the Court finds that this information is relevant and necessary so as to fully inform the Court in response to their September 12, 2022, Order.

Respectfully submitted,

/s/Paul Jennings

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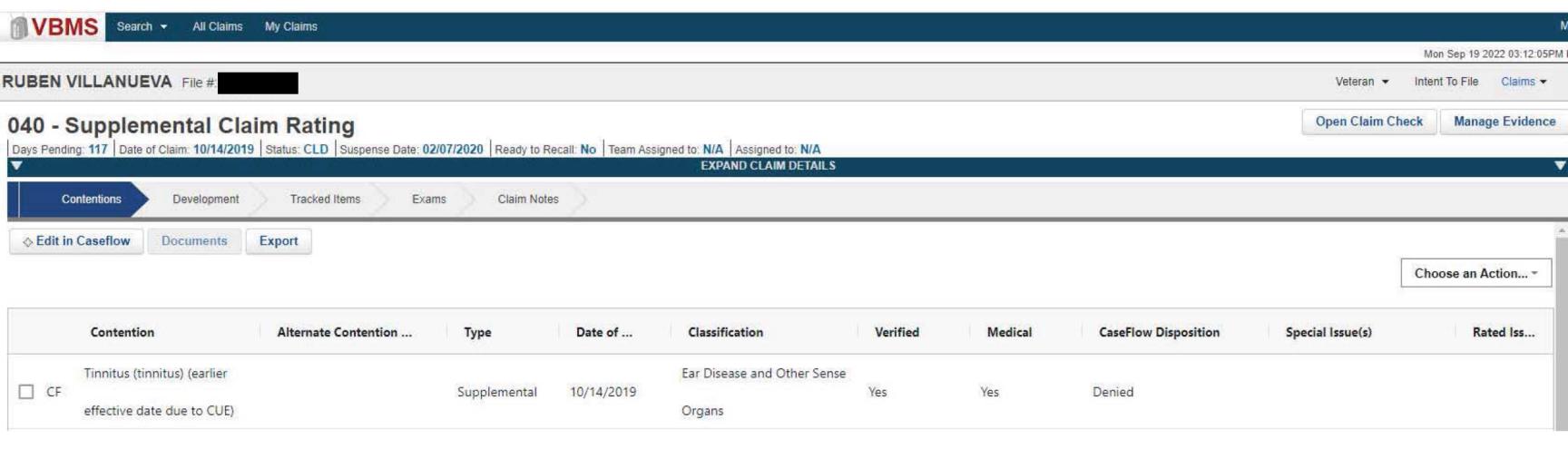
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Lacey, WA 98516

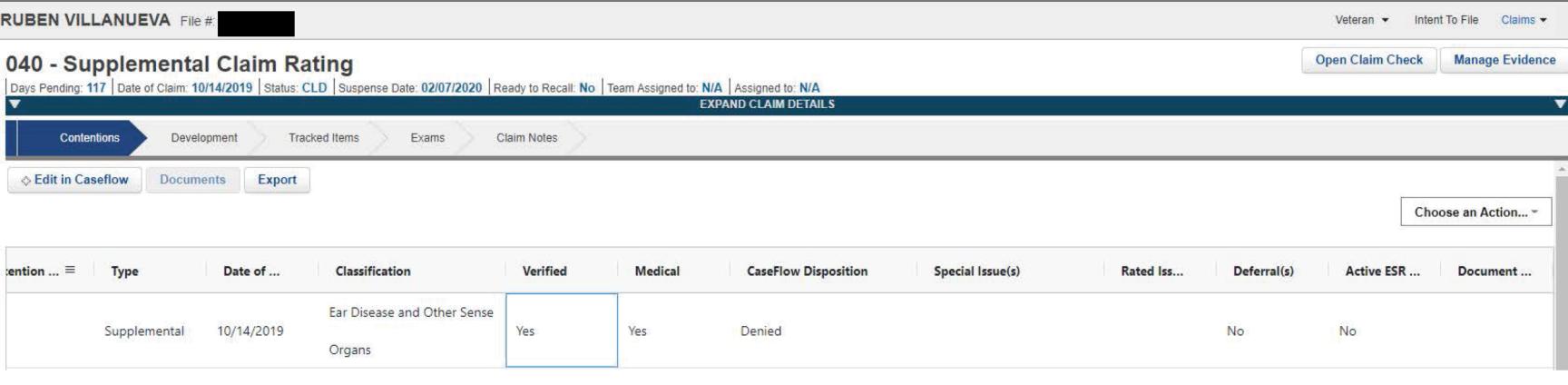
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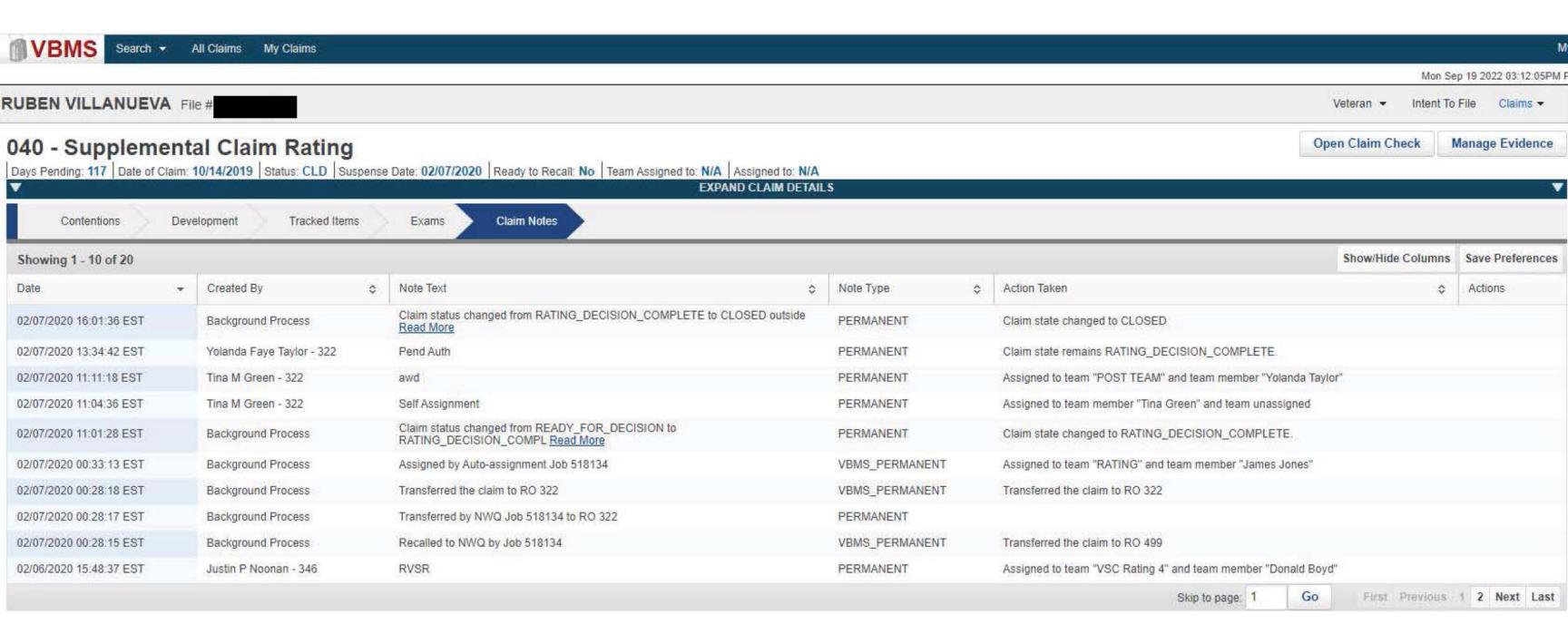
Paul@milvetlaw.com

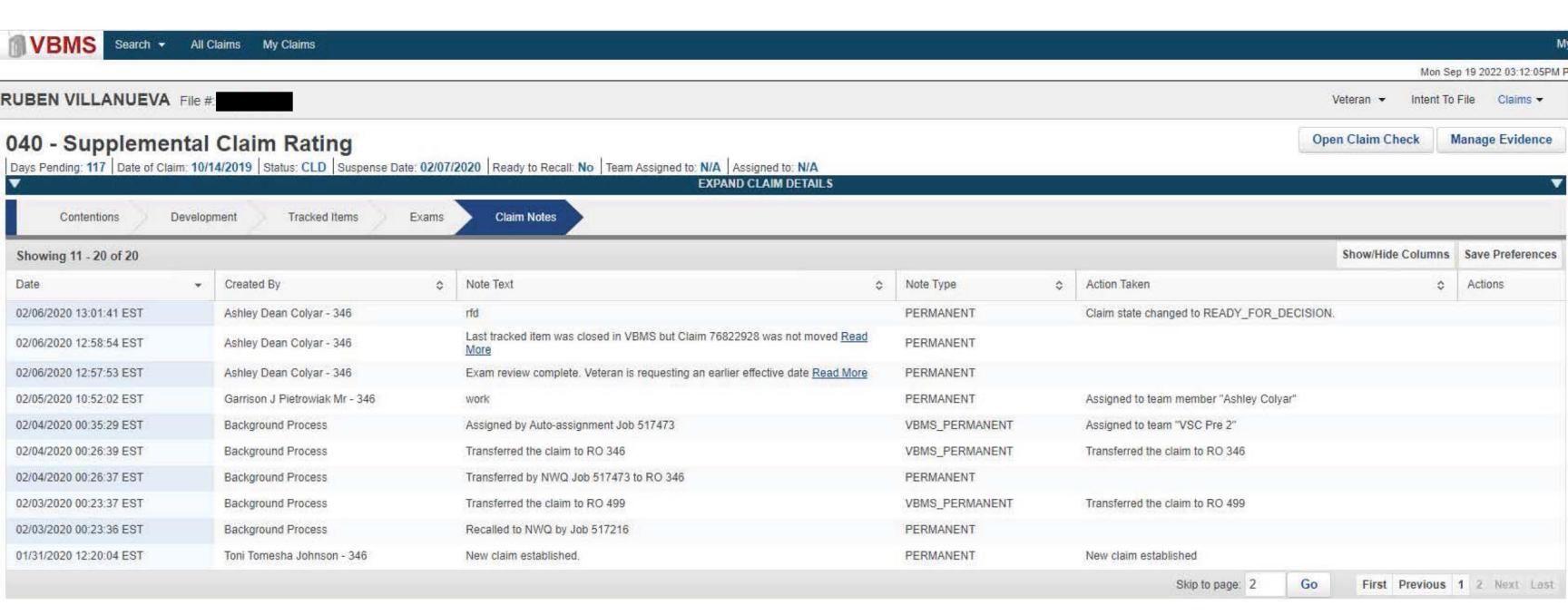
<sup>&</sup>lt;sup>3</sup> The Court, in their Order, only requested "the status of the veteran's motion for revision based on CUE, including whether it has been adjudicated and decided by the RO" and did not invite arguments or other pleadings from either party. Accordingly, the attached screen captures are only provided to ensure the Court is fully informed and Appellant raises no argument at this time in relation to these VBMS entries.

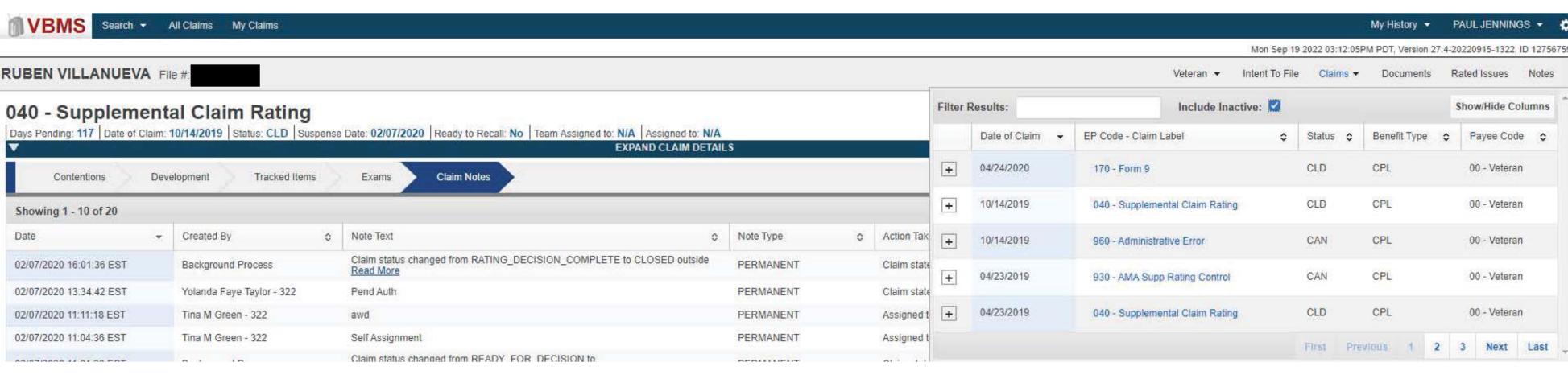


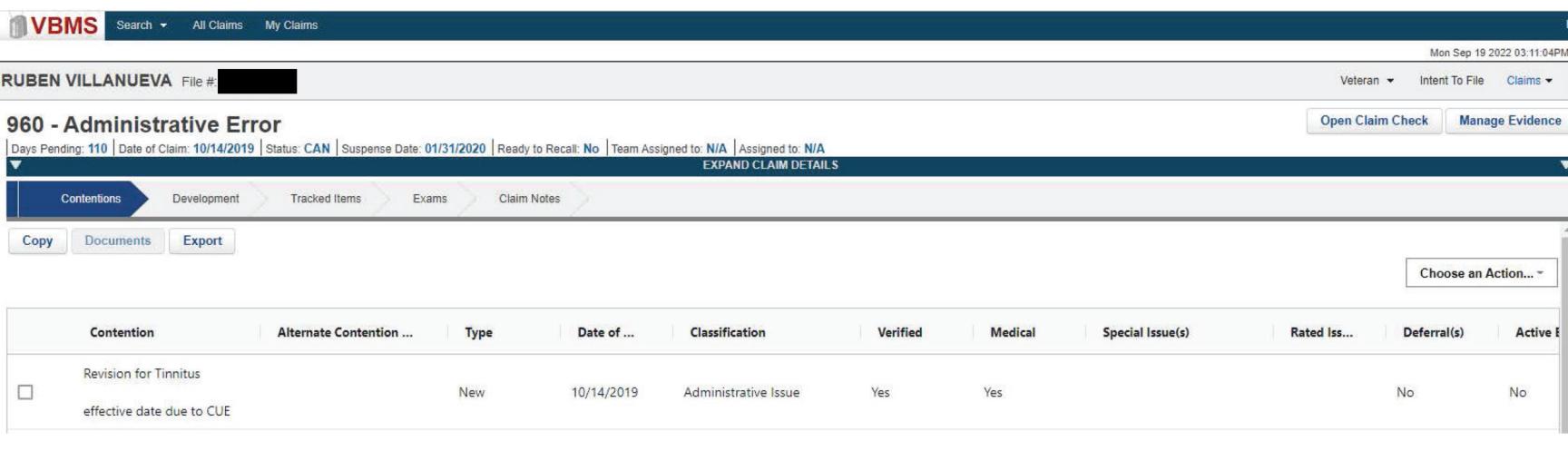
Attachment A -1











Attachment B -1

