

**IN THE UNITED STATES COURT OF  
APPEALS FOR VETERANS' CLAIMS**

CARMEN ENCARNACION	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 21-1411
	)	
DENIS MCDONOUGH	)	
Secretary of Veterans' Affairs,	)	
	)	
Appellee.	)	

***SOLZE* NOTICE**

This Court has directed that, in all cases before it, the parties are under a duty to notify the Court of developments that could deprive it of jurisdiction or “otherwise affect its decision.” *Solze v. Shinseki*, 26 Vet. App. 299, 301 (2013). This duty is continuing and encompasses “any development which *may conceivably affect*” the Court’s decision in a case. *Id.* at 302 (emphasis in original). When any such development occurs, it is “irrelevant” whether a party believes it would affect the Court’s decision because “that [is] not a question within the parties’ power to decide.” *Id.*

Appellant is hereby informing the Court of an additional issue that pertains to the Court’s jurisdiction. Appellant’s counsel states that she was notified of this issue via email from Secretary’s counsel on October 12, 2022.

On October 12, 2022, Secretary’s counsel sent an email, notifying Appellant’s counsel that the Secretary had reached out to the Board after reviewing the Court’s September 29, 2022 order, outlining the questions the Court expected counsel to address during the October 27, 2022 oral argument. Secretary’s counsel informed Appellant’s

counsel that the Board would construe the July 2018 Notice of Disagreement (NOD) as a Motion for Reconsideration, thereby vitiating the finality of the 2018 Board decision that denied entitlement to ratings higher than 10 percent for right knee limitation of flexion. (R. 176-177). This rating was the rating that Appellant cited on her July 12, 2018 NOD (R. 109-110), submitted in response to the Regional Office's June 14, 2018 implementation of the Board's 2018 decision (R. 116-18). The VA rejected the July 2018 NOD as improper with respect to the right knee rating in a September 18, 2018 Deferred Rating Decision. (R. 101).

Though VA rejected the July 2018 NOD as improper, VA still issued a Statement of the Case on this issue on September 20, 2018. (R. 74). On May 30, 2019 the Board adjudicated the right knee percentage on the merits. (R. 31-35). Appellant then appealed the Board's 2019 decision to this Court, which resulted in a Joint Motion for Partial Remand (JMPR). (R. 28). The JMPR determined that "the Board erred by addressing the merits of the increased rating claim before determining whether the RO properly found that it could not accept Appellant's July 2018 NOD." (R. 24). The case returned to the Board and was denied on June 15, 2020. (R. 3). The June 15, 2020 Board decision is the Board decision currently on appeal.

The Board's decision to docket a Motion for Reconsideration with respect to the Board's May 16, 2018 decision potentially moots the issues that the Court wished to address in its September 29, 2022 Order. *See Mokal v. Derwinski*, 1 Vet.App. 12, 15 (1990) ("[I]t is sufficient to observe that we are granted power judicial in nature and being statutorily characterized as a 'Court' we are free, in the absence of a congressional directive

to the contrary, to adopt as a matter of policy the jurisdictional restrictions of the Article III case or controversy rubric.”).

Appellant still asserts that the jurisdictional issues she raised in her October 3, 2022 *Solze* Notice remain present and in dispute in the present case.

Dated: October 13, 2022

Respectfully Submitted,

CARMEN ENCARNACION

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