

January 17, 2022

For the Panel

**Joseph L. Toth**
Judge**IN THE UNITED STATES COURT OF
APPEALS FOR VETERANS' CLAIMS**

CARMEN L. ENCARNACION

Appellant,

v.

DENIS MCDONOUGH

Secretary of Veterans' Affairs,

Appellee.

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Vet. App. No. 21-1411

OPPOSED MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Pursuant to U.S. Court of Appeals Rule 27, Appellant, CARMEN L. ENCARNACION, respectfully moves this Court for permission to supplement Appellant's briefing.

As good cause for this motion, counsel for Appellant states that this Court submitted the above-captioned case for panel consideration on July 15, 2022. On September 27, 2022, Appellant's counsel filed a Joint Motion for Clarification of Issues for Oral Argument. The Court granted this motion in a September 29, 2022 Order, stating that the Court wanted the parties to address two questions during oral argument. *Encarnacion v. McDonough*, Dkt. No. 21-1411, September 29, 2022 Order. First, the Court wanted the parties to address "[w]hether a claimant can file a Notice of Disagreement (NOD) as to a regional office's implementation of the Board's grant of an increased-rating claim where the RO issued no additional factual or legal findings[.]" *Id.* Second, the Court stated, "[r]egardless of how the first question is answered, if a claimant files an NOD as to the RO's implementation within 120 days of the Board's decision, does VA have a duty to sympathetically construe

that NOD as a motion for reconsideration?” *Id.* The Court’s September 29, 2022 questions have not been briefed by the parties. As such, Appellant avers that briefing on these questions could assist the Court.

Moreover, the Board has taken overt actions below that have directly impacted the Court’s consideration of the questions raised in the September 29, 2022 Order. On October 13, 2022, Secretary’s counsel informed this Court that the Board had decided to construe Appellant’s July 18, 2018 Notice of Disagreement (“NOD”) as a Motion for Reconsideration and would be issuing a ruling on the motion. *Encarnacion v. McDonough*, Dkt. No. 21-1411, October 13, 2022 Appellee’s *Solze* Notice. The Board’s eleventh-hour actions may directly impact this Court’s jurisdiction and, at the very least, have frustrated Appellant’s ability to respond to the Court’s second question from its September 29, 2022 Order. Thus, VA’s actions during the pendency of this appeal have raised jurisdictional issues that Appellant has not had an opportunity to brief because the agency action occurred after Appellant filed his principal brief. For this reason, Appellant requests the opportunity to respond by briefing the jurisdictional issues raised by the Board’s action and the Court’s second question.

For the reasons set forth in this motion, Appellant respectfully requests leave to file a supplemental brief to address the Court’s September 29, 2022 questions and/or the jurisdictional issues raised by the Board’s recent actions related to this case.

Counsel for Appellant has sought the Secretary’s consent to this motion, and the Secretary is opposed and indicated he will respond in writing.

Dated: November 8, 2022

Respectfully Submitted,

CARMEN L. ENCARNACION

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