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May 23, 2023

Mr. Gregory O. Block
Clerk of the Court
U.S. Court of Appeals for Veterans Claims
625 Indiana Ave., N. W. - Suite 900
Washington, D.C. 20004-2950

RE: Hailey, Douglas L.
Vet. App. No. 22-3061
Citation to Supplemental Authority by the Appellant

Dear Clerk:

Pursuant to U.S. Vet.App. R. 30(b), Mr. Hailey brings to the Court's attention supplemental authority that is relevant to the above-referenced case now pending before the Court. The supplemental authority is as follows:

Encarnacion v. McDonough, __ Vet. App. __ (2023), slip opinion Vet.App No. 21-1411, issued May 18, 2023.

This authority pertains to a precedential decision of a panel of this Court issued on May 18, 2023, two days following the oral argument in this matter regarding the Secretary's motion to dismiss Mr. Hailey's appeal of a decision of the Board denying his motion for advancement on the docket.

This Court's decision in *Encarnacion* was the result of the Secretary's successful motion for reconsideration by the panel of its decision of January 30, 2023. The panel

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granted the Secretary's motion for reconsideration in at least one aspect concerning the rescinding of the Board's vacatur of its May 2018 decision and left in place the remainder of its decision of January 30, 2023.

Mr. Hailey submits the following as supplemental authority which is relevant to the question of what constitutes a "decision" of the Secretary affecting the provision of benefits under 38 U.S.C. § 511.

This Court in *Encarnacion* interpreted what constitutes a "decision" of the Secretary affecting the provision of benefits under 38 U.S.C. § 511. In *Encarnacion*, this Court determined that an AOJ does not issue a "decision" of the Secretary affecting the provision of benefits under 38 U.S.C. § 511 when it implements a Board decision without independently resolving any issue. *Encarnacion*, Slip op., p. 1. It follows from this interpretation of § 511 that, when as here, a decision of the Board resolves independently an issue, *i.e.* whether to advance on the docket a pending appeal, such a "decision" is a "decision" of the Secretary affecting the provision of benefits under 38 U.S.C. § 511.

This Court in *Encarnacion* reasoned that when an action of the Secretary is "ministerial" rather than adjudicative in nature, it is not possible to appeal a pure implementation of a grant of benefits; there is technically no "decision" to appeal. *Id.* In so doing, this Court in its interpretation of what constitutes a "decision" of the Secretary affecting the provision of benefits under § 511 in *Encarnacion* has addressed the question discussed in this matter at oral argument concerning how to distinguish the holding of the Federal Circuit in *Mayer v. Brown*, 37 F.3d 618, 619 (Fed. Cir. 1994) that an action by the Chairperson or her deputies is not a decision of the Board. *Id.* at 620.

In addition, the panel in *Encarnacion* observed:

"It is well settled that the Court has jurisdiction to determine whether the Board had jurisdiction to take the action it takes in a decision." *Young v. Shinseki*, 25 Vet.App. 201, 203 (2012)

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(*en banc*). To that end, “the Court exercises *de novo* review over Board determinations that are critical to its jurisdiction.” *Evans v. Shinseki*, 25 Vet.App. 7, 10 (2011). The Court must decide whether an implementing action of the sort at issue here can be appealed and thus whether the Board erred in finding it lacked jurisdiction.

Encarnacion, Slip op., p. 4. In this matter, this Court must decide whether a decision made to deny a motion for advancement on the docket is adjudicative in nature or is comparable to a motion for reconsideration and is a ministerial decision.

The panel in *Encarnacion* further observed:

Two provisions, 38 U.S.C. §§ 511 and 7104(a), govern the jurisdictional question. Section 511 sets out the bounds of the subject matter within the Secretary’s jurisdiction; section 7104(a), in turn, establishes that the Board’s jurisdiction is derivative of the Secretary’s.

.....

Under section 511(a), “[t]he Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans.” A “decision” is a “judicial or agency determination after consideration of the facts and the law.” BLACK’S LAW DICTIONARY 511 (11th ed. 2019). Clearly, an action that does nothing more than implement a grant of benefits already determined by another agency department falls outside the definition of “decision” because it lacks the requisite assessment of legal or factual issues. Such action is

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ministerial rather than adjudicative in nature; it merely effectuates an earlier judgment and leaves no room during implementation for choice or discretion. *See Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1323–24 (Fed. Cir. 2002); *see also Love v. McDonough*, 35 Vet.App. 336, 346 (2022) (noting the parties' agreement that issuing payment at a post-discontinuance disability rate is not a "decision" under section 511(a) but a ministerial act simply giving effect to an earlier discontinuance decision).

Encarnacion, Slip op., pp. 4-5. As applies to this matter, a decision which denies a motion for advancement on the docket assesses factual issues. Whereas, a decision which denies a motion for reconsideration by the Chairman of his or her Deputy falls outside the definition of "decision" because it lacks the requisite assessment of legal or factual issues. It is only when a motion for reconsideration is granted is there an assessment of legal or factual issues. A Board decision denying a motion for advancement is a "final and conclusive" determination of the Secretary as to the discrete issue of whether an appeal will be advanced on the Board's docket. As a result, it is a § 511(a) decision of the Board acting on behalf of the Secretary just as the Board does in making one review of the decision of the Secretary under 38 U.S.C. § 7104(b).

Further in *Encarnacion* the panel concluded:

Taken together, these statutory provisions show that the pure implementation of a Board adjudication cannot be regarded as a decision "affect[ing] the provision of benefits" under section 511(a) and so cannot be appealed to the Board, which has already rendered the Secretary's final determination on the matter.

Encarnacion, Slip op., p. 5. The opposite is the case in this matter.

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In footnote 2 the panel in *Encarnacion* explained:

We have used the word “pure” to describe an implementation in which the AOJ need not make any further determinations for an award of benefits to take effect. Of course, there are frequently instances where implementation does require the AOJ to make additional determinations. The most obvious example is when a Board decision simply grants service connection and, to implement that award, the AOJ must for the first time determine the proper disability rating and effective date. In those circumstances, the AOJ does issue a “decision” that is appealable. *Grantham v. Brown*, 114 F.3d 1156, 1158 (Fed. Cir. 1997). This opinion does not pertain to what might be called “mixed” implementation decisions, which ministerially implement a grant of service connection but adjudicate the “previously undecided,” “down-stream” rating and effective date issues. *Id.*

Id. This matter does not involve the pure implementation of a Board adjudication, it involves the reviewability of the disposition of by the Board of a motion for advancement on the docket. A “decision” that is appealable.

Mr. Hailey submits the above supplemental authority following oral argument in this matter.

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Respectfully submitted by:

/s/ Kenneth M. Carpenter

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