

**Margaret Bartley**
Chief Judge

June 9, 2023

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

MICHELE M. BOLDS,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 22-2484
)	
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

**APPELLEE’S AMENDED UNOPPOSED MOTION FOR LEAVE TO FILE
AN AMENDED RECORD OF PROCEEDINGS OUT OF TIME**

Pursuant to U.S. Vet. App. R. 26(b), Appellee, Denis McDonough, Secretary of Veterans Affairs, respectfully requests leave of the Court to file an Amended Record of Proceedings (ROP) in this case, out of time.

This motion is being filed in compliance with U.S. Vet. App. R. 28.1(a)(1)(C), which calls for “any other documents before the Secretary and the Board that are relevant to the issues before the Board that are on appeal to the Court or relevant to issues otherwise raised in the appeal” to be included in the ROP. In this regard, the Secretary noted in his brief that Appellant had filed a supplemental claim pertaining to the same issues on appeal in the Board decision currently before the Court in November 2021, that the RO issued a rating decision in January 2022 denying Appellant’s claims, and that Appellant, through her attorney, had requested a Higher-

Level Review (HLR) of the January 2022 rating decision. See Secretary's Brief (S.B.) at 5-6 (1-30).

During his preparation for the upcoming oral argument in this case, however, the Secretary's counsel recognized that there are additional records in the Record Before the Agency (RBA) that were before the Secretary and the Board at the time of the April 2022 decision on appeal that clarify the procedural history around Appellant's November 2021 supplemental claim, which is relevant to the issues of due process and prejudice as disputed by the parties in their briefs. See Appellant's Opening Brief (AOB) at 13-17 (1-23); S.B. at 24-28 (1-30). Particularly, pages 273-275 of the RBA contain a February 2022 letter from the Regional Office (RO) to Appellant explaining that her HLR request was premature because it had not yet made a decision on her claim. To this end, pages 784-788 and 811-816 of the RBA contain relevant complaints by Appellant, submitted to the RO both prior to and on the date of the January 2022 rating decision, regarding the January 2022 VA examinations. Subsequent pages of the RBA at 258-65, 283-90, and 327-33 contain relevant examination requests from the RO that illuminate reason for the RO's February 2022 letter. These records also bring important context to the impact of Appellant's November 2021

supplemental claim on this appeal and to the parties' dispute regarding due process and prejudice.

Mainly, because these records show why the March 2022 rating decision was effectively the Agency of Original Jurisdiction's decision on Appellant's November 2021 supplemental claim, the record before the RO, as it pertains to Appellant's November 2021 supplemental claim, included those documents submitted by Appellant in January and February 2022 as it remained open until that March 2022 decision. See 38 C.F.R. § 3.2501(b) (noting that the evidentiary record for a supplemental claim "includes all evidence received by VA before VA issues notice of a decision on the supplemental claim"). As such, and because Appellant has timely appealed the RO's March 2022 rating decision to the Board (see S.B. at 6), the evidence submitted by Appellant to the Board in January and February 2022 will also be before the Board when it adjudicates that appeal. Given that these additional documents provide important context to the procedural history of Appellant's November 2021 supplemental claim and to issues in this appeal pertaining to due process and prejudice, the Secretary respectfully requests leave to amend the ROP and add these records.

Counsel for the Appellee apologizes to the Court, and to Appellant, for any inconvenience caused by the Secretary's unintentional omission of

these records from the original ROP and for the need to file an Amended Record of Proceedings out of time.

Counsel for Appellant has been contacted regarding this motion and has indicated that he is unopposed to the motion¹.

WHEREFORE, Appellee Denis McDonough, Secretary of Veterans Affairs, respectfully requests that the Court grant his Motion for Leave to File an Amended Record of Proceedings out of time, in the above-captioned matter.

Respectfully submitted,

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MARY ANN FLYNN
Chief Counsel

/s/ Sarah W. Fusina
SARAH W. FUSINA
Deputy Chief Counsel

¹ Since the Secretary's original motion submitted to the Court on June 7, 2023, the Secretary's counsel has received correspondence from Appellant's counsel indicating that he is unopposed to the motion, which has prompted this amended motion by the Secretary.

/s/ Jonathan G. Scruggs

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