

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JESUS G. ATILANO,  
Appellant,

No. 17-1428

v.

DENIS MCDONOUGH,  
Secretary of Veterans Affairs,  
Appellee.

NOTICE OF CASE DEVELOPMENTS

In *Solze v. Shinseki*, 26 Vet.App. 299 (2013), the Court held that parties are under a duty to notify the Court of developments that could deprive the Court of jurisdiction or otherwise affect its decision. *Id* at 302. Although *Solze* was decided in the context of a Petition for Extraordinarily Relief pursuant to Rule 21 of the Court's Rules, the Court considers its holding to apply equally to appeals from final decisions of the Board of Veterans' Appeals ("Board"). In *Solze*, the Court wrote, in pertinent part:

**In all cases before this Court**, the parties are under a duty to notify the Court of developments that could deprive the Court of jurisdiction or otherwise affect its decision.

*Solze*, 26 Vet.App. at 301. (**Bold** emphasis added).

The rationale for the Court's holding was that notice is important to ensure that the Court does not issue advisory opinions that conflict with its adopted case or controversy requirement. *Solze*, 26 Vet.App. at 302. Here, the Court wrote, in pertinent part:

This duty is vital to ensure that the Court does not issue a decision absent a live case or controversy. *Aronson v. Brown*, 7 Vet.App. 153, 155 (1994) (adopting the case-or-controversy requirements imposed by Article III of the U.S. Constitution); *Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992) (per curiam) ("When there is no case or controversy, or when a once live case or controversy becomes moot, the Court lacks jurisdiction.") "As the parties might be aware, deciding live disputes keeps us busy enough and we feel no need to moonlight by rendering

advisory opinions.” *Publicis Commc’n v. True N. Commc’ns, Inc.*, 206 F.3d 725, 727 (7<sup>th</sup> Cir.2000).

*Solze*, 26 Vet.App. at 302.

*Solze* is contrary to the limits imposed on the Court’s statutory jurisdiction. The Court possesses exclusive jurisdiction to review final decisions of the Board, however, review in the Court “shall be on the record of proceedings before the Secretary, and the Board.” 38 U.S.C. § 7252(a),(b) (2022); *Khyn v. Shinseki*, 716 F.3d 572, 576-77 (Fed.Cir. 2013) (The Veterans Court’s reliance on extra-record evidence exceeded its limited jurisdiction to review the Board’s decision based upon the record before the Board). Appellant asserts that the Court does not possess jurisdiction to review any document that post-dates the Board’s decision on appeal in this mater, which is April 18, 2017.

Pursuant to this Court’s decision in *Solze*, appellant submits the following notice to the Court of developments which could potentially affect the Court’s jurisdiction or otherwise impact the Court’s decision in this appeal.

In compliance with the Court’s order, on June 26, 2023, the Board of Veterans’ Appeals permitted Mr. Atilano’s expert witness to testify on his behalf without requiring either his presence or participation. After hearing the sworn testimony of Dr. T.R.M., the Board issued a decision on October 31, 2023.

In that decision, the Board held that Mr. Atilano was (1) entitled to a disability rating of 70 percent, but no higher, for an acquired psychiatric disability prior to December 17, 2010, and (2) entitled to a total disability rating based on individual unemployability (“TDIU”) prior to March 16, 2009. The decision represents a full grant of benefits sought on appeal since Mr. Atilano’s initial claim of July 1995.

As the issue before the Court is entitlement to attorney fees and expenses under the Equal Access to Justice Act (“EAJA”), despite the full grant of benefits by the Board in its recent decision, the matter before the Court is still a live case or controversy.

Mr. Atilano opposes dismissal on any grounds and asserts that the work performed by appellant’s counsel before both the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit is not the same work which has been performed before the Board of Veterans’ Appeals or the U.S. Department of Veterans Affairs. *Ravin v. Wilkie*, 31 Vet.App. 104, 115 (2019) (“same work” in section 506(c) refers solely to work performed at the Court).

Respectfully submitted,

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