

APPENDIX A 8a

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

**WILFREDO E. UGAY, ACTING AS THE PERSONAL
REPRESENTATIVE OF THE ESTATE OF JAIME D.
UGAY,**
Claimant-Appellant

v.

**DAVID J. SHULKIN, SECRETARY OF VETERANS
AFFAIRS,**
Respondent-Appellee

2016-2625

Appeal from the United States Court of Appeals for
Veterans Claims in No. 15-3790, Judge Margaret C.
Bartley.

Decided: October 6, 2017

WILFREDO E. UGAY, Surigao City, Surigao Del Norte,
Philippines, pro se.

ANAND RAVI SAMBHWANI, Commercial Litigation
Branch, Civil Division, United States Department of
Justice, Washington, DC, for respondent-appellee. Also
represented by CHAD A. READLER, ROBERT E. KIRSCHMAN,

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death was service connected. The VA Regional Office ("RO") granted \$300 in burial benefits, and Jaime Ugay disagreed with the decision. In a separate appeal, the RO denied service connection for the cause of death, which the Veterans Court affirmed in August 2010.

In November 2008, Jaime Ugay filed a formal claim for accrued benefits, seeking reimbursement for expenses related to the veteran's last sickness and burial. The RO denied the claim. Jaime Ugay appealed, and in November 2011, the Board denied the claim of entitlement to accrued benefits, finding there were no claims pending at the time of the veteran's death and the claim for accrued benefits was received by VA more than one year after the veteran's death. Jaime Ugay appealed to the Veterans Court, which dismissed his appeal for failure to file an opening brief.

In December 2014, Jaime Ugay filed a motion to reverse or revise, on the basis of CUE, the Board's November 2011 decision. In June 2015, the Board determined that the Board's November 2011 denial of entitlement to accrued benefits was not clearly and unmistakably erroneous. The Board determined that nothing in Jaime Ugay's statements submitted during the one-year period following the veteran's death, including the application for burial benefits, indicated he was seeking or believed he was entitled to accrued benefits, and it noted that the formal claim made through VA Form 21-601 was received by the RO in November 2008, more than one year after the veteran's death. It stated the VA's letter providing the form to claim burial benefits satisfied the VA's obligation under 38 C.F.R. § 3.150(b), and it declined to address arguments related to the merits of the underlying accrued benefits claim.

Jaime Ugay appealed, and in May 2016, the Veterans Court affirmed. The Veterans Court responded to Jaime Ugay's argument that the VA failed to send him a formal

application for accrued benefits pursuant to 38 C.F.R. § 3.150(b) and this failure excuses him from the obligation to file an accrued benefits claim within one year of the veteran's death. It quoted *Westberry v. Principi*, 255 F.3d 1377, 1382 (Fed. Cir. 2001), to explain "it is the 'apparent' entitlement to benefits, and not merely 'potential' or 'possible' entitlement that triggers the VA's obligation to send an application." It noted that the first and second sentences of § 3.150(b) state only that an application will be sent to a "dependent," but Jaime Ugay did not assert, and it did not discern a basis to conclude, that he meets any definition of "dependent."

The Veterans Court also responded to Jaime Ugay's argument that the October 2005 application for burial benefits constituted a timely informal claim for accrued benefits. It determined that because Jaime Ugay was not the veteran's surviving spouse or child, his application for burial benefits could not constitute an informal claim for dependency and indemnity compensation, and the VA was not required to consider his claim for burial benefits as a claim for accrued benefits under 38 C.F.R. § 3.152. The Veterans Court concluded that the Board's decision was supported by adequate reasons or bases and was not arbitrary, capricious, an abuse of its discretion, or otherwise not in accordance with the law.

Jaime Ugay appealed to this court, but the appeal was dismissed for failure to file a conforming, informal opening brief. On January 3, 2017, Wilfredo Ugay ("Mr. Ugay"), Jaime's son, informed this court that his father passed away and moved to substitute himself as appellant. By order filed March 22, 2017, this court recalled the case's mandate, reinstated the appeal, and authorized the substitution of the Estate of Jaime D. Ugay as appellant in the appeal.

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Mr. Ugay, acting as the personal representative of the Estate of Jaime D. Ugay, appeals from the Veterans Court's decision.

DISCUSSION

Our jurisdiction to review decisions by the Veterans Court is limited by statute. Unless an appeal raises a constitutional issue, we lack jurisdiction to review "a challenge to a factual determination" or "a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2).

Mr. Ugay does not challenge the validity of any statute or regulation or the interpretation thereof. See 38 U.S.C. § 7292(d)(1). The Veterans Court's review of the Board's July 2015 determination as to whether there was CUE in the Board's November 2011 decision involves only the application of law to fact.

Mr. Ugay's arguments on appeal challenge the Board's factual determinations and the Veterans Court's application of law to the facts of his case. He argues the Veterans Court failed to assess the scope of his claim in view of the entire evidence of record. But the Veterans Court's evaluation and weighing of evidence are factual determinations which we lack jurisdiction to review. Mr. Ugay asserts that the Veterans Court legally erred in interpreting a number of statutory and regulatory provisions, such as 38 C.F.R. § 3.150(b), but the Veterans Court did not interpret or expand upon the meaning of any statutes, regulations, or other legal principles. See *Githens v. Shinseki*, 676 F.3d 1368, 1372 (Fed. Cir. 2012). Mr. Ugay asserts that his appeal raises a constitutional issue, but because he fails to identify or elaborate upon any constitutional issue and merely challenges the merits of the Veterans Court's decision, his characterization of any issue as constitutional does not control. See *Flores v. Nicholson*, 476 F.3d 1379, 1382 (Fed. Cir. 2007).

CONCLUSION

Because we lack jurisdiction over Mr. Ugay's appeal,
we *dismiss*.

DISMISSED

COSTS

No costs.

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NOTE: This order is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

**WILFREDO E. UGAY, ACTING AS THE PERSONAL
REPRESENTATIVE OF THE ESTATE OF JAIME D.
UGAY,**
Claimant-Appellant

v.

**DAVID J. SHULKIN, SECRETARY OF VETERANS
AFFAIRS,**
Respondent-Appellee

2016-2625

Appeal from the United States Court of Appeals for
Veterans Claims in No. 15-3790, Judge Margaret C.
Bartley.

**ON PETITION FOR PANEL REHEARING AND
REHEARING EN BANC**

Before PROST, *Chief Judge*, NEWMAN, MAYER¹, LOURIE,
DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO,
CHEN, and STOLL, *Circuit Judges**.

PER CURIAM.

ORDER

Appellant Wilfredo E. Ugay filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on December 5, 2017.

FOR THE COURT

November 28, 2017
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

¹ Circuit Judge Mayer participated only in the decision on the petition for panel rehearing.

* Circuit Judge Hughes did not participate.

APPENDIX C 8c

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-3790

JAIME D. UGAY, APPELLANT,

v.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE

Before BARTLEY, Judge.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

BARTLEY, Judge: Jaime D. Ugay, who is self-represented, appeals a July 30, 2015, Board of Veterans' Appeals (Board) decision denying, on the basis of clear and unmistakable error (CUE), revision or reversal of a November 2011 Board decision denying accrued benefits. Amended Record (R.) at 3-10. This appeal is timely and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons set forth below, the Court will affirm the July 2015 Board decision.

I. FACTS

Mr. Ugay is the son-in-law of deceased veteran Felimon A. Elacion (hereinafter "the veteran"), who served with the Philippine Commonwealth Army from September 1941 to May 1942 and with the Recognized Guerrillas and Combination Service from February 1943 to April 1946. R. at 3, 1640. In November 1955, a VA regional office (RO) granted the veteran service connection for psychosis and assigned a 100% evaluation, effective July 6, 1955. R. at 1576-79. The veteran died on March 1, 2005, at 89 years of age, with the immediate cause of death listed as multi-organ failure and the contributing cause of death listed as "old age." R. at 1344-45. At the time of the

veteran's death, Mr. Ugay was his legal guardian. R. at 13, 1357. In October 2005, Mr. Ugay submitted an informal claim for burial benefits. R. at 1342-43. The following month VA sent Mr. Ugay a VA Form 21-530, "Application for Burial Benefits," and provided VA's web site address "for general information about benefits and eligibility." R. at 1341.

Mr. Ugay submitted the formal application for burial benefits in December 2005. R. at 1336-38. Mr. Ugay checked "yes" in box 11, where it was asked, "are you claiming that the cause of death was due to service?" R. at 1337. The RO granted \$300 in burial benefits in March 2006. R. at 1329-35. Mr. Ugay disagreed with this decision, asserting that the veteran's death was service connected. R. at 1324. In June 2006, the RO denied service connection for the cause of the veteran's death. R. at 1317-21. Mr. Ugay appealed, submitting information that showed, inter alia, that Mr. Ugay was born in 1939, that he was married to the veteran's daughter and only child, and that the veteran's daughter had also passed away. R. at 1155-65. Ultimately, in an August 2010 decision, this Court affirmed the Board's October 2008 denial of service connection for the cause of the veteran's death. *See Ugay v. Shinseki*, No. 08-4295, 2010 WL 3350787 (Vet. App. Aug. 26, 2010) (mem. dec.), *appeal dismissed*, 434 F. App'x 900 (Fed. Cir. 2011); R. at 427-37.

Meanwhile, in November 2008, Mr. Ugay filed a formal claim for accrued benefits, seeking reimbursement for expenses related to the veteran's last sickness and burial. R. at 306-10. In December 2008, the RO denied the claim, finding that the veteran was not owed any money at the time of his death. R. at 216-17. Mr. Ugay timely disagreed. R. at 193-98. In a March 2010 Statement of the Case, the RO continued its denial on the bases that the claim for accrued benefits was not received within one year of the veteran's death and that, in any event, no monetary benefit was due and unpaid at the time of the veteran's death and that no claim was pending at the time of the veteran's death. R. at 175-87. Mr. Ugay appealed to the Board, disputing these findings. R. at 167-73.

In a November 2011 decision, the Board denied the claim for accrued benefits, finding that there were no claims pending at the time of the veteran's death and that the claim for accrued benefits was received by VA more than one year after the veteran's death. R. at 147-53. Mr. Ugay appealed the November 2011 Board decision, but this Court dismissed his appeal for failure to file an opening brief. *See* R. at 19.

In December 2014, Mr. Ugay filed a motion to reverse or revise the November 2011 Board decision on the basis of CUE.¹ R. at 42-50. He argued that the Board erred in finding that no claim was pending at the time of the veteran's March 2005 death because a family member had in October 2002 made an informal claim on the veteran's behalf for special monthly compensation, alleging that he needed help with his daily needs and activities. R. at 43. With respect to the Board finding that an accrued benefits claim was not filed within one year of the veteran's death, Mr. Ugay argued that, when he informed VA in October 2005 of the veteran's death, VA was obligated but failed to send him a formal application for accrued benefits. R. at 46 (citing 38 C.F.R. § 3.150(b)).

In the July 2015 decision on appeal, the Board declined to reverse or revise the November 2011 Board decision, finding no CUE therein. The Board concluded that a claim for accrued benefits was not submitted to VA until October 2008, more than one year after the veteran's death in March 2005. R. at 7. The Board rejected Mr. Ugay's argument that his timely claim for burial benefits constituted an informal claim for accrued benefits, citing *Shields v. Brown*, 8 Vet.App. 346, 349 (1995), for the proposition that "a claim for burial benefits cannot act as an informal claim for other benefits such as dependency and indemnity compensation where the other benefit was not identified." R. at 7-9. The Board declined to address the veteran's argument as to whether there were pending claims at the time of the veteran's death, finding that his failure to file an accrued benefits claim within one year of the veteran's death was dispositive. R. at 10. This appeal followed.

II. ANALYSIS

Because Mr. Ugay is self-represented, the Court is obliged to construe his informal briefs liberally. See *De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992). Mr. Ugay makes two main arguments. First, he contends that VA's failure to send him a formal application for accrued benefits upon being informed of the veteran's March 2005 death excused him from the obligation to file an accrued benefits claim within one year of the veteran's death. Appellant's Informal Brief (Br.) at 7-15. Second, he argues that his October 2005 formal application for burial benefits constituted a timely informal claim for accrued benefits. See *id.*; Reply Br. at 1-11. The Secretary disputes these

¹ Mr. Ugay simultaneously filed a motion for Board Chairman reconsideration of the November 2011 decision, which was denied in March 2015. R. at 37-38.

allegations and urges the Court to affirm the Board decision. Secretary's Br. at 7-15.

When a prior final RO or Board decision contains CUE, that decision may be reversed or revised. 38 U.S.C. §§ 5109A, 7111; *see DiCarlo v. Nicholson*, 20 Vet.App. 52, 54-58 (2006); 38 C.F.R. §§ 3.105, 20.1400-.1411 (2015). CUE is established when the following conditions have been met: (1) Either the correct facts as they were known at the time were not before the adjudicator, the adjudicator made an erroneous factual finding, or the statutory or regulatory provisions extant at the time were incorrectly applied; (2) the alleged error is "undebatable," not merely a "disagreement as to how the facts were weighed or evaluated"; and (3) the error "manifestly changed the outcome" of the prior decision. *Russell v. Principi*, 3 Vet.App. 310, 313-14, 319 (1992) (en banc); *see King v. Shinseki*, 26 Vet.App. 433, 439 (2014); *Damrel v. Brown*, 6 Vet.App. 242, 245 (1994); *see also Bustos v. West*, 179 F.3d 1378, 1380-81 (Fed. Cir. 1999). "CUE is a very specific and rare kind of error" with a "stringent definition." *Fugo v. Brown*, 6 Vet.App. 40, 43-44 (1993) (internal quotation marks omitted). "The words 'clear and unmistakable error' are self-defining. They are errors that are undebatable, so that it can be said that reasonable minds could only conclude that the original decision was fatally flawed at the time it was made." *Russell*, 3 Vet.App. at 313-14.

The Court is not directly determining whether there was error in the November 2011 Board decision but rather is reviewing the Board determination in July 2015 as to whether there was CUE in the November 2011 Board decision. *See King*, 26 Vet.App. at 437. The Court's review of a Board decision finding no CUE in a prior, final Board decision is limited to determining whether the Board's finding was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 38 U.S.C. § 7261(a)(3)(A), and whether it was supported by an adequate statement of reasons or bases on all material issues of fact and law, 38 U.S.C. § 7104(d)(1). *See Cacciola v. Gibson*, 27 Vet.App. 45, 59 (2014); *King*, 26 Vet.App. at 439. To be adequate, the Board's reasons or bases must enable the claimant to understand the precise basis for the Board's decision and facilitate informed review by this Court. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence that it finds to be persuasive or unpersuasive, and provide reasons for its rejection of material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

At the time of the November 2011 Board decision, the law provided that certain persons could file a claim for accrued benefits for any monthly VA benefit that was "due and unpaid" at the time of a beneficiary's death. 38 U.S.C. § 5121(a) (2006); 38 C.F.R. § 3.1000(a) (2011). In the case of the death of a veteran, these persons included those who "bore the expense of last sickness and burial." 38 U.S.C. § 5121(a)(6) (2006). A claim for accrued benefits must have been filed within one year after the date of death. 38 U.S.C. § 5121(c) (2006); 38 C.F.R. § 3.1000(c) (2011); *see also* *Sheets v. Nicholson*, 20 Vet.App. 463, 465 (2006) ("To be eligible for [accrued] benefits, a qualified survivor must file an accrued-benefits claim within one year of the date of the veteran's death."). This claim could have been formal or informal. *See Quiamco v. Brown*, 6 Vet.App. 304, 307-08 (1994); 38 C.F.R. § 3.155(a) (2011).

It is uncontested that Mr. Ugay did not submit a formal claim for accrued benefits until November 2008, nearly three years after the veteran's March 2006 death. R. at 7, 306-10. The Board in the decision on appeal determined that "VA's obligation under 38 C.F.R. § 3.150(b) was satisfied via the November 2005 letter that supplied the [a]ppellant with the appropriate form to claim burial benefits and which informed him of where to learn about general benefits and eligibility." R. at 10. The Board further found that "nothing in the statements submitted by the [a]ppellant during the one-year period following the [v]eteran's death indicate[d] he was seeking or believed he was entitled to accrued benefits." R. at 9.

Mr. Ugay continues to argue that, pursuant to § 3.150(b), VA was required to send him an application for accrued benefits upon being notified in October 2005 that the veteran had died. VA's failure to do so, Mr. Ugay maintains, excused him from the mandate to file an accrued benefits claim within one year of the veteran's death. *See* Appellant's Informal Br. at 10-12.

In November 2011, § 3.150(b) provided as follows:

Upon receipt of notice of death of a veteran, the appropriate application form will be forwarded for execution by or on behalf of any dependent who has apparent entitlement to pension, compensation, or dependency and indemnity compensation. If it is not indicated that any person would be entitled to such benefits, but there is payable an accrued benefit not paid during the veteran's lifetime, the appropriate application form will be forwarded to the preferred dependent. Notice of the time limit will be included in letters forwarding applications for benefits.

38 C.F.R. § 3.150(b) (2011). "[I]t is the 'apparent' entitlement to benefits, and not merely 'potential'

or 'possible' entitlement that triggers the VA's obligation to send an application"; "[e]ntitlement is only 'apparent' when it is discernible from the file that the claimant meets the basic eligibility requirements." *Westberry v. Principi*, 255 F.3d 1377, 1382 (Fed. Cir. 2001). In *Westberry*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) also noted that the first line of § 3.150(b) required VA to send an application only to a "dependant," which in that case, dealing with death pension benefits, meant a surviving spouse or child.² *Id.* at 1383.

Mr. Ugay contends that, even assuming that the "apparent entitlement" requirement applies to his situation, it was apparent from the claims file in March 2005 that he met the basic eligibility requirements for accrued benefits based on his having borne the expense of the last sickness and burial. Appellant's Informal Br. at 11. But both the first and second sentences of § 3.150(b) state only that an application will be sent to a "dependent." Mr. Ugay, the son-in-law and adult guardian of the veteran, and surviving spouse of the veteran's only child, has not asserted—and the Court discerns no basis to conclude—that he meets any definition of "dependent" used in VA or common parlance. *Cf.* 38 U.S.C. § 5121(a)(2) (2006) (stating that, upon the death of a veteran, accrued benefits may be paid "to the living person first listed below": the veteran's spouse, the veteran's children (as defined in 38 U.S.C. § 101(4)), or the veteran's dependant parents). Nor has the Court found any legal authority interpreting the meaning of "preferred dependent" in § 3.150(b) that would bring Mr. Ugay into its ambit. Moreover, inasmuch as VA's obligations under § 3.150(b) appear to be part of its duty to assist, the Federal Circuit has held that a violation of the duty to assist cannot form the basis of an allegation of CUE. *Cook v. Principi*, 318 F.3d 1334, 1344 (Fed. Cir. 2002) (en banc).

Expanding his § 3.150(b) argument,³ Mr. Ugay points out that he submitted, and VA received, in December 2005 an application for burial benefits, in which he indicated "yes" when

² For all relevant purposes, VA defines child—with additional restrictions not relevant here—as an unmarried person who (1) is under the age of 18, (2) became permanently incapable of self-support before turning 18, or (3) is pursuing a qualified educational program between the ages of 18 and 23. *See* 38 U.S.C. § 101(4) (2006); *Nolan v. Nicholson*, 20 Vet.App. 340, 348 (2006). There is no contention that Mr. Ugay qualifies as a child for VA purposes.

³ The Secretary asserts that Mr. Ugay's second argument is a new theory of CUE that was not raised in his motion before the Board, and, consequently, the Court should not consider it. Secretary's Br. at 12. For the sake of argument, the Court will assume that Mr. Ugay's second argument is merely a development of the arguments, liberally construed, that he presented in his December 2014 CUE motion. *See Acciola v. Peake*, 22 Vet.App. 320, 326-27 (2008).

asked whether he was claiming that the cause of death was due to service. Appellant's Informal Br. at 5. Mr. Ugay contends that this constituted an informal claim for dependency and indemnity (DIC) compensation and that this, in turn, is deemed to include a claim for accrued benefits, to which VA should have responded by sending him a formal application. *Id.* at 7, 10-11.

In *Mitscher v. West*, 13 Vet.App. 123, 127 (1999), this Court stated that an application for burial benefits that indicates that the applicant is claiming that the veteran's death was related to service could constitute an informal claim for DIC benefits. The Court in *Mitscher* distinguished *Shields*, cited by the Board here, on the basis that the applicant in that case "had not checked the box" indicating a claim that the veteran's death was service connected. *Id.* While it is true that, pursuant to 38 C.F.R. § 3.152, a claim for DIC "will also be considered to be a claim for . . . accrued benefits," 38 C.F.R. § 3.152(b)(1) (2011), that regulation explicitly limits its reach to "[a] claim by a surviving spouse or child for [DIC]," most likely because a surviving spouse or qualified surviving children are the only individuals, other than dependent parents, who are entitled to DIC benefits. *Id.* Because Mr. Ugay was not the veteran's surviving spouse or child, VA was not required under the plain language of the regulation to consider Mr. Ugay's December 2005 application for burial benefits a claim for accrued benefits, nor has Mr. Ugay cited any legal authority that would support extending § 3.152(b)(1) to his application.

The Court has reviewed all Mr. Ugay's filings in this case and fully considered the remaining arguments made therein but finds them unavailing.⁴ In sum, the Court concludes that the July 2015 Board decision on appeal was supported by adequate reasons or bases and was not arbitrary, capricious, an abuse of its discretion, or otherwise not in accordance with the law when it determined that the November 2011 Board decision properly denied the claim for accrued benefits, based on the finding that VA did not violate applicable law upon learning of the veteran's March 2005 death. *See Cacciola*, 27 Vet.App. at 59; *King*, 26 Vet.App. at 439.

⁴ In particular, the Court notes Mr. Ugay's statement in his May 5, 2016, late-filed response to the record of proceedings that he wished to argue entitlement to special monthly compensation based on housebound status. The record shows that this claim was filed in February 1961 and denied the following month. *See R.* at 1418-21; *see also* Act of July 14, 1960, Pub. L. 86-663, 74 Stat. 528 (originally codified at 38 U.S.C. § 314(s), currently codified at 38 U.S.C. § 1114(s)). The RO's March 1961 denial was not appealed to the Board and is, therefore, final. Because this issue was not raised before the Board and was not part of the Board decision on appeal, the Court has no jurisdiction to consider it. *See Jarrell v. Nicholson*, 20 Vet.App. 326, 331 (2006) (en banc) (holding that the Court may exercise its jurisdiction only over claims and theories that are the subject of a final decision by the Board).

III. CONCLUSION

Upon consideration of the foregoing, the July 30, 2015 Board decision is AFFIRMED.

DATED: May 17, 2016

Copies to:

Jaime D. Ugay

VA General Counsel (027)

**Additional material
from this filing is
available in the
Clerk's Office.**