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OPINION, U.S. COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT  
(JUNE 11, 2026)

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NOTE: This disposition is nonprecedential.

UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

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JOE PENA,

*Claimant-Appellant,*

v.

DOUGLAS A. COLLINS,  
SECRETARY OF VETERANS AFFAIRS,

*Respondent-Appellee.*

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No. 2026-1361

Appeal from the United States Court of Appeals  
for Veterans Claims in No. 24-2579,  
Judge Margaret C. Bartley.

Before: REYNA, CHEN, and STOLL, Circuit Judges.

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PER CURIAM.

Joe Pena appeals from a decision of the United States Court of Appeals for Veterans Claims (1) affirming a decision of the Board of Veterans' Appeals, which denied entitlement to a higher initial disability evaluation, and (2) rejecting Mr. Pena's other arguments,

including his request to have the Veterans Court strike the Secretary of Veterans Affairs' response brief and enter judgment in his favor. Because Mr. Pena's challenges are outside the scope of our jurisdiction, we dismiss.

### **BACKGROUND**

The procedural history of the disability benefits claim at issue is lengthy and involves multiple previous appeals to the Board and the Veterans Court. Relevant to this appeal, Mr. Pena appealed an April 2, 2024 Board decision denying a higher disability rating to the Veterans Court. On the day the Secretary's response brief was due, the Secretary moved for a 45-day extension of time based on current deadlines and workload considerations. That same day, the Clerk of the Court granted the Secretary's motion. However, Mr. Pena timely opposed the Secretary's motion three days later, and the Clerk subsequently revoked the government's extension of time and forwarded the motion and opposition to the Veterans Court for consideration. The Veterans Court granted the extension for good cause shown, extending the Secretary's deadline to November 4, 2024. Without the Chief Judge of the Veterans Court certifying an interlocutory order for appeal under 38 U.S.C. § 7292(b)(1), Mr. Pena appealed the Veterans Court's order granting the extension of time. We dismissed the appeal for lack of jurisdiction. *Pena v. Collins*, No. 2025-1092, 2025 WL 635448, at \*1 (Fed. Cir. Feb. 27, 2025).

After the case returned to the Veterans Court, the court discovered that the Secretary had failed to file his response. Because the Veterans Court did not stay the case pending Mr. Pena's appeal to this court, the

Veterans Court deemed the Secretary's response overdue and ordered the Secretary to file his brief within ten days. Mr. Pena sent the Veterans Court correspondence asserting that the Secretary's response was filed late and requesting that the Veterans Court enter judgment in Mr. Pena's favor. However, the Veterans Court determined that Mr. Pena's correspondence did not comply with the Veterans Court's Rules of Practice and Procedure and did not clearly move the Veterans Court to reconsider, vacate, or modify the order for the Secretary to file his response within ten days. The Secretary complied with the order, and the Veterans Court subsequently affirmed the Board's decision on November 20, 2025. *Pena v. Collins*, No. 24-2579, 2025 WL 3471313, at \*3–4 (Vet. App. Nov. 20, 2025).

Mr. Pena appeals.

### DISCUSSION

The scope of our review in an appeal from a Veterans Court decision is limited. *Wanless v. Shinseki*, 618 F.3d 1333, 1336 (Fed. Cir. 2010). We “have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof . . . and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision.” 38 U.S.C. § 7292(c). However, absent a constitutional issue, we lack jurisdiction to “review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.” *Id.* § 7292(d)(2).

We lack jurisdiction over Mr. Pena's appeal because he fails to challenge any particular aspect of the Veterans Court's decision based on the validity or

interpretation of any statute or regulation. Instead, Mr. Pena asserts that the Veterans Court acted contrary to its own Rules of Practice and Procedure and 38 U.S.C. § 7261 in allowing the Secretary an additional ten days to file his response rather than immediately entering judgment in Mr. Pena's favor. Appellant's Inf. Br. 1–2. In addition, Mr. Pena appears to reargue his underlying claim that there is clear and unmistakable error in earlier rating decisions but fails to point to any legal errors with respect to the relevant decision by the Veterans Court. Appellant's Inf. Br. 3. Mr. Pena's arguments, ultimately, relate to the Veterans Court's discretion in enforcing procedure and "disagreements with how the facts were weighed or how the law was applied to the facts in this particular case, which we do not have jurisdiction to review." *Guillory v. Shinseki*, 669 F.3d 1314, 1320 (Fed. Cir. 2012) (citing 38 U.S.C. § 7292(d)(2)); see *Checo v. Shinseki*, 748 F.3d 1373, 1377 (Fed. Cir. 2014) (recognizing "the Veterans Court[s] broad discretion to prescribe, interpret, and apply its own rules"). As Mr. Pena fails to allege any issues of statutory or regulatory interpretation, we lack jurisdiction over his appeal.

Although Mr. Pena also appears to argue that the Veterans Court decided a constitutional issue, Appellant's Inf. Br. 2, "he has simply put a 'due process' label on his contention" such that "his claim is constitutional in name only." *Helper v. West*, 174 F.3d 1332, 1335 (Fed. Cir. 1999). Therefore, Mr. Pena's unsupported allegations are insufficient to raise a non-frivolous constitutional issue, and we lack jurisdiction. *Id.* ("[The] characterization of [a] question as constitutional in nature does not confer upon [this court] jurisdiction that we otherwise lack.").

App.5a

**CONCLUSION**

We have considered Mr. Pena's remaining arguments and find them unpersuasive. Accordingly, we dismiss Mr. Pena's appeal for lack of jurisdiction.

**DISMISSED**

Costs

No costs.

App.6a

**JUDGMENT, U.S. COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT  
(JUNE 11, 2026)**

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UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

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JOE PENA,

*Claimant-Appellant,*

v.

DOUGLAS A. COLLINS,  
SECRETARY OF VETERANS AFFAIRS,

*Respondent-Appellee.*

---

No. 2026-1361

Appeal from the United States Court of Appeals  
for Veterans Claims in No. 24-2579,  
Judge Margaret C. Bartley.

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**JUDGMENT**

THIS CAUSE having been considered, it is  
ORDERED AND ADJUDGED:  
DISMISSED

App.7a

FOR THE COURT

/s/ Jarrett B. Perlow  
Clerk of Court

Date: June 11, 2026

**MEMORANDUM DECISION, U.S. COURT OF  
APPEALS FOR VETERANS CLAIMS  
(NOVEMBER 20, 2025)**

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Designated for electronic publication only

UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS

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JOE PENA,

*Appellant,*

v.

DOUGLAS A. COLLINS,  
SECRETARY OF VETERANS AFFAIRS,

*Appellee.*

---

No. 24-2579

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

Before: BARTLEY, Judge.

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**MEMORANDUM DECISION**

**BARTLEY, Judge:**

Self-represented appellant Joe Pena, adult son of veteran Rodolpho V. Pena, appeals an April 2, 2024, Board of Veterans' Appeals (Board) decision that denied entitlement to an initial disability evaluation higher

than 50% for bilateral hearing loss. Record (R.) at 3-10. For the reasons that follow, the Court will affirm the April 2024 Board decision.

## **I. Facts**

Veteran Rodolpho Pena served in the U.S. Marine Corps from January 1954 to January 1957. R. at 3205.

In January 2010, the veteran sought service connection for bilateral hearing loss. R. at 3019. In November 2010, a VA regional office (RO) granted service connection and assigned an initial 50% evaluation effective January 29, 2010. R. at 2947-52. In January 2011, the veteran timely filed a Notice of Disagreement (NOD) challenging the evaluation and effective date assigned. R. at 2924-33. At the time, the veteran asserted that the RO committed clear and unmistakable error (CUE) in assigning the 50% evaluation effective January 29, 2010. *Id.*

In September 2012, the veteran died. R. at 2818. Sometime thereafter Jovita Pena, the veteran's surviving spouse, was substituted as the claimant. *See* R. at 2127.

In February 2016, the RO issued a Statement of the Case (SOC), continuing the denial of a higher evaluation and an earlier effective date. R. at 2169-201. The SOC noted the veteran's CUE allegation but found that "[b]road brushed allegations of CUE are not considered specific enough to . . . establish CUE occurred." R. at 2198. In March 2016, Ms. Pena, through Mr. Joe Pena, the veteran's son, perfected an appeal to the Board. R. at 2149 (VA Form 9), 2150-62.

In November 2017, the Board denied entitlement to a higher evaluation and an earlier effective date for

hearing loss. R. at 2047-72. Regarding the veteran's CUE assertions, the Board stated that because it was reviewing a direct appeal of the November 2010 RO decision, that decision was not final and, thus, "there can be no valid claim of CUE." R. at 2049.

Ms. Pena appealed the November 2017 Board decision to this Court. In a December 2018 memorandum decision, the Court, agreeing with the Secretary's concession of error, concluded that the Board failed to "fully discuss all potential allegations of CUE regarding the assignment of an effective date for benefits based on service-connected bilateral hearing loss," particularly whether the veteran's CUE assertions implicated January 1985 and November 2001 RO decisions<sup>1</sup> denying service connection for hearing loss. R. at 763. The Court also concluded that the Board failed to provide adequate reasons or bases for denying a higher evaluation than 50% because the Board failed to (a) adequately explain whether the veteran's vertigo and otalgia symptoms were part of the service-connected hearing loss disability and (b) consider a February 2002 VA audiologic examination.<sup>2</sup> R. at 763-64. The Court also remanded the issue of entitlement to an earlier effective date. R. at 765.

In July 2019, the Board remanded the appeal for the RO to adjudicate whether there was CUE in the January 1985 or November 2001 RO decisions. R. at 627-30. The Board also remanded the increased-evalu-

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<sup>1</sup> Neither RO decision is contained in the record of proceedings before the Court.

<sup>2</sup> The 2002 VA examination is not contained in the record of proceedings before the Court.

ation and earlier-effective-date claims as inextricably intertwined. *Id.*

In April 2020, Ms. Pena died. *See* R. at 543 (VA Form 27-0820a. Report of First Notice of Death). Sometime thereafter Mr. Pena was substituted as the claimant. *See* R. at 331-39 (April 2021 Supplemental SOC addressed to Mr. Pena).

In July 2021, the Board denied entitlement to an earlier effective date for bilateral hearing loss, including finding no CUE in the January 1985 and November 2001 RO decisions denying service connection for hearing loss. R. at 286-305. The Board also denied a higher evaluation for hearing loss. *Id.* Specific to the veteran's vertigo and otalgia, the Board found that neither symptom manifested in functional impairment to warrant separate evaluations. R. at 301-02. And the Board found the results of the 2002 VA examination did not warrant a higher evaluation because they predated the appeal period by 8 years and did not call into question the accuracy and validity of the 2010 VA examination results on which the 50% evaluation was awarded. R. at 303-04.

Mr. Pena appealed the July 2021 Board decision to this Court. In a March 2023 memorandum decision, the Court affirmed the Board's denial of an earlier effective date for hearing loss and specifically "conclude[d] that the Board's determination that there was no CUE in either [the January 1985 or November 2001] rating decision was not arbitrary, capricious, or an abuse of discretion." R. at 271. However, the Court concluded that the Board failed to provide adequate reasons or bases for denying an evaluation higher than 50% because it found the Board rendered an unsubstantiated medical opinion regarding the import

of the 2002 hearing test results. R. at 271-72. Mr. Pena did not appeal the March 2023 Court decision to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit).

In August 2023, the Board remanded the increased-evaluation claim to obtain a medical opinion addressing the import of the 2002 hearing test results, R. at 169-72, which was obtained later in August 2023, R. at 161-63.

In the April 2024 decision on appeal, the Board, relying on the August 2023 VA opinion, denied an initial evaluation higher than 50%. R. at 3-10. This appeal followed.

## **II. Jurisdiction and Standard of Review**

Mr. Pena's appeal is timely, and the Court has jurisdiction to review the April 2024 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).

Board determinations regarding the appropriate degree of disability are findings of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *see Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997). "A factual finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

The Board is statutorily required to support its material determinations of fact and law with adequate

reasons or bases. 38 U.S.C. § 7104(d)(1); *Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015) (en banc); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence it finds 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).

### III. Analysis

As best as the Court can discern, *see De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992) (noting that the Court liberally construes pro se pleadings), Mr. Pena argues that the April 2024 Board decision did not substantially comply with the remand directives contained in the Court's December 2018 memorandum decision. Appellant's Informal Brief (Br). at ii, 1-2; Reply Br. at 4. His briefs principally appear to assert that the Board erred in April 2024 because it did not address whether there was CUE in the January 1985 and November 2001 RO decisions, noting that the CUE allegations were inextricably intertwined with the claim seeking a higher evaluation for hearing loss. Appellant's Informal Br. at iii, 4-8. The Secretary asserts that the Board substantially complied with the December 2018 and March 2023 Court remands. Secretary's Br. at 9-16. The Court agrees with the Secretary.

In its December 2018 decision, the Court directed the Board to address the veteran's allegations of CUE in January 1985 and November 2001 RO decisions. R. at 763. The Court also directed the Board to address the veteran's vertigo and otalgia symptoms and the

February 2002 VA examination results. R. at 763-64. After the Board remanded the issues to the RO in July 2019, R. at 627-30, it readjudicated them in July 2021, R. at 286-305. In that decision, the Board found that neither the January 1985 nor the November 2001 RO decision contained CUE, R. at 290-98, and that the veteran's vertigo and otalgia did not warrant separate evaluations because neither symptom resulted in functional impairment, R. at 301-02.

Mr. Pena appealed the July 2021 decision to this Court, which led to the March 2023 memorandum decision. R. at 265-72. Regarding CUE, the Court affirmed the Board's finding of no CUE in the January 1985 or the November 2001 RO decisions. R. at 271 (concluding that Mr. Pena "has failed to persuade the Court that the Board erred when it denied an effective date earlier than January 29, 2010, for service connection for bilateral hearing loss, to include whether there was CUE in the January 1985 and November 2001 rating decisions"). Because the Court affirmed the July 2021 Board decision with respect to CUE and because Mr. Pena did not appeal the March 2023 decision to the Federal Circuit, the CUE issues became final. Although the Board had previously found the CUE issues inextricably intertwined with the increased-evaluation claim, the Board in its April 2024 decision had no reason to revisit the CUE issues that were already finally resolved by the Court in March 2023. Thus, Mr. Pena fails to demonstrate error in the Board not addressing CUE in its April 2024 decision.

Regarding vertigo and otalgia, nothing about the March 2023 Court decision put the Board on notice that it needed to readdress these symptoms. And Mr. Pena has not pointed to anything in the record that

re-raised the separate evaluation issue after the March 2023 Court decision that required the Board to revisit that issue. Thus, Mr. Pena fails to demonstrate error in the Board not addressing separate evaluations for the veteran's vertigo or otalgia.

Regarding the February 2002 VA examination results, the Court's March 2023 decision found that the Board rejected those results based on an unsubstantiated medical opinion. R. at 271-72. In August 2023, the Board remanded the claim to obtain a VA medical opinion addressing the 2002 hearing test results. R. at 169-72. In the April 2024 decision on appeal, the Board, relying on the August 2023 VA medical opinion, found no evidence warranting an evaluation higher than 50%. R. at 9.

Mr. Pena makes no clear mention, let alone argument, regarding the Board's consideration of the 2002 VA examination results or the August 2023 VA medical opinion. Nevertheless, regarding his arguments about substantial compliance, following the December 2018 Court remand directing the Board to consider the 2002 VA examination results, the Board addressed them. R. at 303-04. And following the March 2023 Court remand ordering the Board to rely on independent medical evidence when addressing the 2002 VA examination results, the Board obtained, and relied upon, a VA medical opinion discussing those results. R. at 5-6; *see* R. at 163. Thus, Mr. Pena fails to show how the Board did not comply with the Court's previous remands.

The Court is cognizant that Mr. Pena is self-represented, but he still bears the burden of demonstrating error. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant bears

the burden of demonstrating error on appeal), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). The Court discerns no error in the Board's analysis, which is consistent with governing law, plausible in light of the record, and sufficiently detailed to inform Mr. Pena why a higher evaluation for hearing loss was not warranted. Thus, the Court will affirm the Board decision.

In various correspondence, Mr. Pena asserts that the Secretary's brief was filed late and, as a result, the Court should enter judgment in his favor. None of these correspondences have been filed with the Court because they do not comply with the Court's Rules of Practice and Procedure. Nevertheless, the Court notes that, although we previously found that the Secretary was late in filing his brief, in light of the Federal Circuit's dismissal of Mr. Pena's interlocutory appeal of the Court's grant of the Secretary's motion for an extension of time to file his brief, we provided 10 days for the Secretary to correct his error and file a brief. *Pena v. Collins*, Vet. App. No. 24-2579, Order (July 15, 2025). Although the Court received correspondence from Mr. Pena on July 16, 2025, that correspondence did not clearly move for the Court to reconsider, vacate, or modify the July 15, 2025, order. *Cf.* U.S. Vet. App. R. 26(c). On July 25, 2025, the Secretary complied with the Court order by filing his brief. Thus, the Court considers the Secretary's brief timely filed.

#### **IV. Conclusion**

Upon consideration of the foregoing, the April 2, 2024, Board decision is AFFIRMED.

App.17a

DATED: November 20, 2025

Copies to:

Joe Pena  
VA General Counsel (027)

**ORDER DENYING PETITION FOR PANEL  
REHEARING, U.S. COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT  
(JULY 2, 2026)**

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NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

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JOE PENA,

*Claimant-Appellant,*

v.

DOUGLAS A. COLLINS,  
SECRETARY OF VETERANS AFFAIRS,

*Respondent-Appellee.*

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No. 2026-1361

Appeal from the United States Court of Appeals  
for Veterans Claims in No. 24-2579,  
Judge Margaret C. Bartley.

Before: REYNA, CHEN, and STOLL, Circuit Judges.

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PER CURIAM.

**ORDER**

On June 15, 2026, Joe Pena filed a petition for panel rehearing [ECF No. 21].

App.19a

Upon consideration thereof,

IT Is ORDERED THAT:

The petition for panel rehearing is denied.

FOR THE COURT

/s/ Jarrett B. Perlow

Clerk of Court

Date: July 2, 2026

**RESPONDENT-APPELLEE'S INFORMAL  
BRIEF AND SUPPLEMENTAL APPENDIX  
(MARCH 12, 2026)**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

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JOE PENA,

*Claimant-Appellant,*

v.

DOUGLAS A. COLLINS,  
SECRETARY OF VETERANS AFFAIRS,

*Respondent-Appellee.*

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No. 2026-1361

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**RESPONDENT-APPELLEE'S INFORMAL  
BRIEF AND SUPPLEMENTAL APPENDIX**

Pursuant to Federal Circuit Rule 28(g) respondent-appellee, Douglas A. Collins, the Secretary of Veterans Affairs, respectfully submits this informal brief and supplemental appendix in response to the informal brief filed by pro se claimant-appellant, Joe Pena.

**STATEMENT OF THE CASE**

**I. Factual Background and Prior Proceedings**

Mr. Rodolpho Pena, claimant-appellant Joe Pena's father, served in the United States Marine Corps

from January 1954 to January 1957. Sappx1. In January 2010, Rodolpho Pena sought service connection for bilateral hearing loss, which was granted in a November 2010 regional office (RO) decision with an initial rating of 50% and an effective date of January 29, 2010, the date of his claim. SAppx1. Within the one-year time to appeal to the Board of Veterans' Appeals (board), Rodolpho Pena submitted a notice of disagreement in which he asserted clear and unmistakable error (CUE) in assigning the 50% rating and January 29, 2010 effective date. *Id.* Rodolpho Pena died in September 2012 and his surviving spouse Jovita Pena substituted into the claim. *Id.*

Following a February 2016 Statement of the Case in which the RO continued the denial of the higher rating and earlier effective date, the RO noted that the CUE allegations were too broad to be considered. SAppx2. The appeal was perfected and in November 2017, the board denied entitlement to a higher evaluation or earlier effective date. In its decision, among other things, the board observed that because the appeal of the November 2010 regional office decision was timely, there could be no valid claim of CUE in that decision. *Id.* Ms. Pena appealed to the Veterans Court.

In December 2018, the Veterans Court, in part following the suggestion of the Secretary, remanded the CUE holding to the board, noting that although Rudolpho Pena had timely appealed the 2010 RO decision, his CUE allegations may have been directed at earlier claim denials from January 1985 and November 2001, as opposed to the 2010 decision on appeal and so could support an earlier effective date. SAppx71. The court further found that a reasons and

bases remand was required vis-a-vis the 50% rating, as the board failed to adequately explain whether the veteran's vertigo and otalgia symptoms were part of the hearing loss disability and whether a February 2002 VA audiologic examination was considered. SAppx71-72.

In July 2019, the board remanded the CUE claims to the RO for a determination of whether CUE existed in the January 1985 and November 2001 RO decisions. SAppx61-64. As part of the remand order, the board noted that as the disability rating claim "could be affected by the results of the remand for the CUE motions, the issues are inextricably intertwined." SAppx63. In April 2020, Ms. Pena died and her son Joe Pena was substituted in as the claimant. SAppx31. Our references going forward to Mr. Pena refer to Joe Pena.

Following development by the RO resulting in continued denial of the claimed benefits, in July 2021, the board denied entitlement to a higher rating and/or an earlier effective date for Rodolpho Pena's hearing loss. SAppx39-58. The board found no CUE in the January 1985 and November 2001 RO decisions. SAppx2; SAppx49-50. The board further found that the vertigo and otalgia symptoms did not manifest in functional impairment such that either would support a separate evaluation. SAppx55. And the board found that the 2002 VA examination predated the appeal period by eight years and did not call into question the accuracy and validity of the 2010 examination relied upon by the RO. SAppx56-57.

Mr. Pena appealed the July 2021 board decision to the Veterans Court. In a March 27, 2023 decision, the Veterans Court affirmed the board's holding vis-

a-vis the CUE claims finding that the “[b]oard’s determination that there was no CUE in either rating decision was not arbitrary, capricious, or an abuse of discretion,” and that there was “no clear error in the [b]oard’s finding that there was no other basis for an earlier effective date for the grant of service connection for bilateral hearing loss.” SAppx37. However, the court remanded the increased rating claim premised on the 2002 medical examination for a reasons and bases error, finding that the board’s holding concerning that 2002 examination constituted an unsubstantiated medical opinion vis-a-vis the 2010 medical opinion, *i.e.*, the board failed to explain how it possessed the medical knowledge to determine that Rodolpho Pena’s hearing loss improved, as a comparison of the 2010 and 2002 examinations suggested. SAppx38.

No motion to reconsider the March 27, 2023 decision was filed, and judgment issued on April 18, 2023. SAppx30. Mr. Pena did not appeal the Veterans Court decision, including the portion affirming the denial of an earlier effective date, to this Court, and accordingly the mandate was issued June 21, 2023, effective June 20, 2023. SAppx29.

For the part of the case remanded to the board, the board first remanded to the RO to obtain a medical opinion regarding the apparent improvement in hearing from 2002 to 2010. SAppx20. Following receipt of a 2023 VA medical opinion designed to address the concerns of the Veterans Court, the RO continued the claim denial and in an April 2024 decision, the board also denied a higher rating. SAppx18; SAppx20-25. The board examined the newly obtained medical opinion designed to address the two audiological reports of 2002 and 2010 and, based upon that opinion, concluded

that there was no basis to discount the 2010 audiologic report obtained at the time Mr. Pena filed his claim. SAppx21. Mr. Pena appealed that decision to the Veterans Court.

In the decision on appeal to this Court, issued in November 2025, with reconsideration denied in December 2025, the Veterans Court affirmed the board's April 2024 finding that the 50% initial rating for hearing loss was proper. SAppx1-5. In so doing, the court first disposed of Mr. Pena's argument that the 2024 board decision failed to comply with the Veterans Court's remand instructions by not addressing the CUE issues. The Veterans Court revisited the procedural history of the case, noting that in its March 2023 decision, the Veterans Court had affirmed the board's July 2021 holding, following the earlier remand, of no CUE and no appeal of that decision was taken to this Court. As such, the CUE issues became final, and although earlier in the claims stream the board had remanded other issues with the CUE issues noting they were inextricably intertwined, the board committed no error in not addressing the CUE issues following the Veterans Court's March 2023 decision. SAppx5.

The Veterans Court also rejected Mr. Pena's challenges regarding the board decision as they pertained to the vertigo and otalgia symptoms, noting that nothing about the 2023 remand to the board suggested a need to reconsider the earlier board finding that these symptoms failed to provide a basis for a higher rating. *Id.* And as for the 2002 VA examination issue which was addressed on remand, the Veterans Court noted that Mr. Pena's appeal fails to grapple with the board's review of the 2023 medical opinion or the analysis related to it, concluding that the board committed

no error in addressing the one issue that had actually been remanded. SAppx5-6. Nevertheless, given Mr. Pena's pro se status, the Veterans Court examined the board's analysis of the record, to include the 2023 VA opinion, and found no error.

Finally, the Veterans Court rejected Mr. Pena's attempt to have the court strike the Secretary's brief and enter judgment in his favor. SAppx6. As context, on September 20, 2024, the Secretary moved the Veterans Court on the day his brief was due for an extension of time to file his brief. SAppx15-16. The clerk granted the motion. SAppx9. Mr. Pena filed an opposition on September 23, 2024. SAppx11-13. Accordingly, the clerk revoked the earlier grant the next day and forwarded the motion and opposition to the court for consideration. SAppx9. The court granted the extension on September 27, 2024 for good cause shown. *Id.* Mr. Pena immediately (and without permission given its interlocutory nature) appealed that decision to this Court in *Pena v. Collins*, No. 25-1091. Following this Court's dismissal of that appeal (to include a later denial of reconsideration, with mandate issuing on April 21, 2025), on July 15, 2025, the Veterans Court ordered the Secretary to file his brief in 10 days, noting that the Secretary had failed to file his brief and that the No. 25-1091 appeal before this Court did not toll the time for the Secretary to file his brief before the Veterans Court. SAppx7. It is this series of events that relates to Mr. Pena's arguments concerning the filing of the Secretary's brief.

In addressing the brief filing issue below, the Veterans Court noted that Mr. Pena had not complied with the court's rules in raising his challenge, and instead submitted a series of correspondence. SAppx6.

Second, the court observed that upon becoming aware that the Secretary missed his filing date (presumably related to the intervening appeal to this Court), the court granted the Secretary 10 days to correct the error, which the Secretary did and that further, subsequent correspondence from Mr. Pena regarding this extension was received by the court, but that Mr. Pena did not clearly move the court to reconsider, vacate or modify its order. *Id.*

This appeal followed.

### JURISDICTIONAL STATEMENT

This Court does not possess jurisdiction over this appeal because Mr. Pena does not challenge any interpretation by the Veterans Court of a statute or regulation, nor does he raise any genuine constitutional issues. 38 U.S.C. § 7292(d).

“This [C]ourt’s jurisdiction to review decisions by the Veterans Court is limited.” *Wanless v. Shinseki*, 618 F.3d 1333, 1336 (Fed. Cir. 2010). Pursuant to 38 U.S.C. § 7292(a), this Court may review a Veterans Court decision “with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation . . . or any interpretation thereof . . . that was relied on by the Court in making the decision.” It may not, however, “review the Veterans Court’s factual findings or its application of law to facts absent a constitutional issue.” *Singleton v. Shinseki*, 659 F.3d 1332, 1334 (Fed. Cir. 2011) (citing 38 U.S.C. § 7292).

In reviewing a Veterans Court decision, this Court must decide “all relevant questions of law, including interpreting constitutional and statutory provisions,” and set aside any interpretation thereof

“other than a determination as to a factual matter” relied upon by the Veterans Court that it finds to be: “(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law.” 38 U.S.C. § 7292(d)(1). In this case, the Veterans Court simply applied the law to the facts.

Finally, although the Court has jurisdiction to interpret constitutional provisions “to the extent presented and necessary to a decision,” 38 U.S.C. § 7292(c), and may consider genuine constitutional issues, see *In re Bailey*, 182 F.3d 860 (Fed. Cir. 1999), the “characterization of [a] question as constitutional in nature does not confer upon [this Court] jurisdiction that [it] otherwise lack[s].” *Helper v. West*, 174 F.3d 1332, 1335 (Fed. Cir. 1999). As discussed below, because there are no genuine constitutional issues raised in Mr. Pena’s informal brief, the Court does not have jurisdiction.

### QUESTIONS AND ANSWERS

1. **Has the appellant ever had another case in this Court? If yes, state the name and number of each case.**

Yes. *Pena v. Collins*, No. 25-1091 (Fed. Cir. 2025).

2. **Did the Court of Appeals for Veterans Claims decision involve the validity or interpretation of a statute or regulation? If yes, what are your arguments concerning those issues?**

No. Mr. Pena's informal brief primarily focuses upon the Veterans Court's order granting the Secretary 10 days to file his brief after failing to meet the calendared time to file. See questions 2-5. In his response to question 6, Mr. Pena appears to continue to take issue with the extension of time issue, referencing "[Proof of Misconduct] Secretary Appellee Brief," but discusses the merits issues in such a manner as to suggest those are also being presented to this Court. We will address both aspects of his challenge, first the extension and then the merits.

#### **A. Veterans Court's Order to Submit a Brief**

A challenge to a Veterans Court procedural order granting the Secretary additional time to file his brief attacks the Veterans Court's broad discretion to enforce its own rules. *Carbino v. West*, 168 F.3d 32, 35 (Fed. Cir. 1999) ("Congress has provided the Court of Veterans Appeals the express authority to promulgate its rules, practice and procedure, see 38 U.S.C. § 7264(a), and it is appropriate for the Court of Veterans Appeals to have discretionary authority to apply its rules as other courts of appeals."); *Bastien v. Shinseki*, 599 F.3d 1301, 1307 (Fed. Cir. 2010) (same).

Here, after the Secretary timely submitted a request for an extension of time due to workload considerations, which the Veterans Court granted over Mr. Pena's objection, Mr. Pena appealed the procedural order to this Court, which subsequently dismissed the appeal. *Pena v. Collins*, No. 25-1091. Following issuance of the mandate in No. 25-1091, the Veterans Court observed that the Secretary's brief was overdue and ordered the Secretary to submit his brief within ten days, SAppx7, which the Secretary did. Mr.

Pena attempted to challenge the court's order in a series of correspondences and in his reply brief below. The court was not persuaded by Mr. Pena's challenge. SAppx6.

The challenge to the Veterans Court's order allowing the Secretary to submit a brief within 10 days at best implicates the broad jurisdiction vested with that court to apply its own rules, which this Court should not disturb. Clearly, Mr. Pena's improper appeal of the Veterans Court's earlier order granting the timely submitted request for additional time cannot be ignored in examining the Veterans Court's later order requiring the submission of a brief. More significantly, the Veterans Court should want to hear from the Secretary before disposing of an appeal of a denied claim. Thus, the order granting 10 days to submit the brief falls well within the Veterans Court's discretion.

Moreover, it is Mr. Pena's burden to convince the Veterans Court (and this Court) that the board erred in denying his claim. SAppx6 (citing *Hilkert v. West*, 12 Vet. App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000)). As the Supreme Court has stated, "the burden of showing that an error is harmful normally falls upon the party attacking the agency's determination." *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) ("[T]he party that 'seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted.'") (quoting *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943)). Thus, his suggested relief — reversing the Veterans Court and ordering a grant of benefits — must be denied. The Veterans Court must examine the facts and the law to determine whether the board correctly denied relief. Here, one of the two claims challenged

by Mr. Pena, the earlier effective date claim premised on two CUE allegations regarding the January 1985 and November 2001 RO decisions, had been resolved in the Veterans Court's March 2023 decision, which affirmed a 2021 board decision finding no CUE. The November 2025 decision on appeal to this Court, whereby the Veterans Court pointed out that the effective date claim was no longer susceptible to review, is clearly supported by the record irrespective of what is contained in the Secretary's brief. In other words, setting that brief aside does not cure Mr. Pena's failure to timely appeal the early effective date claim premised on the CUE contentions finally resolved in the Veterans Court's March 2023 decision, so his arguments about the Secretary's brief as it relates to that claim fail to demonstrate harm.

Regarding the higher rating claim, for the issue that was properly raised and argued on appeal in the November 2025 decision below — the effect of the 2002 VA examination on the rating, if any — the Veterans Court examined the board's decision, to include its reliance on the 2023 medical opinion, and concluded that the board had complied with the prior remand and further that the board's analysis was "consistent with governing law, plausible in light of the record, and sufficiently detailed to inform Mr. Pena. . . ." SAppx5-6. Nothing about that conclusion is dependent upon anything in the Secretary's brief. Indeed, in reaching this conclusion, the Veterans Court pointed out that Mr. Pena failed to actually challenge the board in this regard, SAppx5, but continued with its analysis of the merits of the board's holding given Mr. Pena's pro se status. Once again, even assuming the Veterans Court abused its discre-

tion in allowing the Secretary to file a brief, which it did not, Mr. Pena fails to provide this Court with any basis to reverse the holding below.

Finally, the Veterans Court correctly addressed the only remaining issue in the claim stream — the question of whether Rodolpho Pena’s vertigo and otalgia symptoms could have led to a higher rating. This issue was part of the original Veterans Court remand in 2018, SAppx71-72, was addressed by the board in its 2021 decision, SAppx54-55, and was not reached by the Veterans Court in its 2023 remand, SAppx38 (“Because the Court is remanding the appellant’s entitlement to a higher rating for his service-connected hearing loss, it will not address his remaining arguments on this matter.”). Accordingly, the Veterans Court was correct in 2025 in finding that Mr. Pena’s argument regarding compliance with the 2023 Veterans Court remand order was without merit as “nothing about the March 2023 Court decision put the [b]oard on notice that it needed to readdress these [vertigo and otalgia] symptoms. And Mr. Pena has not pointed to anything in the record that re-raised the separate evaluation issue after the March 2023 Court decision that required the [b]oard to revisit that issue. Thus, Mr. Pena fails to demonstrate error. . . .” SAppx5. And because Mr. Pena failed in demonstrating error (and harm), nothing about the Veterans Court’s order granting the Secretary time to file his brief affects the outcome here.

### **B. Veterans Court’s Review of the Merits**

The Veterans Court properly affirmed the board on the only issue that survived the prior remands and Veterans Court decisions — the question of the

significance of the 2002 VA examination report as it pertains to the increased rating claim. SAppx5. Further, the Veterans Court correctly concluded in 2025 that the board in 2024 was not required to re-address the vertigo/otalgia issue as nothing about the 2023 Veterans Court order imposed such a requirement. SAppx5. Finally, the court correctly determined that the earlier effective date claim that was affirmed by the Veterans Court in 2023 but not appealed to this Court (SAppx29) was no longer before the Veterans Court, *i.e.*, the two CUE challenges upon which the earlier effective date claim was based, along with any other basis for an earlier effective date.

## **1. Increased Rating Claim**

### **a. 2002 Medical Examination Issue**

Regarding the 2002 medical examination issue, as an initial matter, any challenge before this Court to the Veterans Court's conclusion that the board's decision was sufficiently supported by record evidence is beyond this Court's jurisdiction to review. 38 U.S.C. § 7292(d); *Singleton*, 659 F.3d at 1334. To the extent this Court examines the Veterans Court's holding on this issue, the board properly obtained, considered and weighed the 2023 medical opinion.

The March 2023 Veterans Court remand was limited to ordering the board to obtain a medical opinion to explain whether the hearing levels reflected in the 2010 audiological exam could be rectified with the 2002 audiological exam which suggested worse hearing. The regional office obtained the opinion, continued the denial of an increased rating, and forwarded the claim to the board. The board described

the expert findings, which were that (1) there were no significant threshold shifts between the 2002 and 2010 exams (there was a slight improvement in threshold at 2000 Hz), and (2) Mr. Rodolpho Pena had a significant history of middle ear disorder and middle ear surgery, such that fluctuations in hearing acuity could be expected. SAppx11; SAppx20-21. Finally, because there were no post-2010 audiological exams prior to Rodolpho Pena's death in 2012, the medical professional could not opine on whether the 2010 audiological exam reflected a true improvement or a temporary condition without speculating. SAppx21. The board accepted these opinions and concluded that there was no basis to alter the 50% rating granted in 2010. *Id.*

As reflected in the Veterans Court's November 2025 decision, Mr. Pena failed to actually challenge these findings, but the court nevertheless reviewed the board's conclusions, predicated as they were on the ordered medical opinion, and found that the board's conclusions were consistent with law, plausible in light of the record and sufficiently detailed to inform Mr. Pena why a higher rating was not appropriate. SAppx5. As such, the board's 2024 decision complies with the 2023 Veterans Court remand and accurately reflects the evidence of record, to include the expert medical evidence and directly responds to the 2023 Veterans Court's remand order to obtain medical support for the board's prior reliance on the 2010 medical examination. To the extent this Court does not dismiss the challenge to these findings pursuant to section 7292(d) for challenging the weighing of evidence or the application of law to fact, this Court should affirm (as noted, Mr. Pena also failed to present this argument to the Veterans Court but was pro se at the time).

### **b. Vertigo and Otalgia Symptoms**

The remaining issue undergirding the increased rating claim is premised on Rodolpho Pena's vertigo and otalgia (ear pain) symptoms. The 2021 board decision, relying on the evidentiary record, including the 2010 medical examination, addressed this issue in detail, explaining that Rodolpho Pena was never diagnosed with Meniere's syndrome, so "a separate compensable rating for th[at] disorder is not warranted" and that "the symptoms of dizziness and vertigo were not severe enough to warrant a separate compensable rating." SAppx55. Further, the board concluded that the record demonstrated that no diagnosis of otalgia existed at the time of the 2010 claim for hearing loss and no complaint of otalgia was made during the time period preceding the 2010 claim, including as part of the 2010 medical examination. *Id.*

Mr. Pena's argument below and before this Court focuses on whether the 2024 board erred in not revisiting this issue, in other words, whether the board complied with Veterans Court's 2023 remand. The Veterans Court in 2025 correctly held that the board in 2024 did comply with the 2023 Veterans Court remand order, which did not instruct the board to revisit that issue. That finding cannot be reviewed by this Court as a Veterans Court finding that the board complied with an earlier remand order involves an application of law to fact. *Dyment v. Principi*, 287 F.3d 1377, 1381 (Fed. Cir. 2002). But even if this Court did review that question, the Veterans Court's 2025 finding is correct as the Veterans Court's 2023 decision expressly reserved review of the vertigo and otalgia issue until after the remand designed to address the 2002 medical examination question. SAppx38

(“Because the Court is remanding the appellant’s entitlement to a higher rating for his service-connected hearing loss, it will not address his remaining arguments on this matter.”).

Moreover, any challenge to the underlying board holding in 2021 that record evidence, including medical evidence (see SAppx55), demonstrated that symptoms of vertigo and otalgia could not support an increase rating also fall outside this Court’s jurisdiction as questions of fact or the application of law to fact. 38 U.S.C. § 7292(d); *Singleton*, 659 F.3d at 1334. To the extent the Court reviews the evidence, the board’s analysis is thorough and well supported. SAppx55. Thus, any remaining challenge to the vertigo and otalgia issue should be dismissed

## **2. Earlier Effective Date Claim**

Finally, Mr. Pena’s (apparent) challenge to the Veterans Court’s treatment of the earlier effective date claim premised primarily on the two CUE contentions should be dismissed or in the alternative affirmed. Assuming that the Court finds these issues to have been presented in the informal brief, the Veterans Court correctly found that the CUE contentions were finally resolved in the March 2023 Veterans Court decision and not appealed to this Court, and as such, Mr. Pena failed to establish that the 2024 board decision failed to comply with the March 2023 Veterans Court remand. SAppx5. But even if this Court reviewed the March 2023 decision affirming the lack of CUE or any other basis to award an earlier effective date, any challenge to those findings falls outside this Court’s jurisdiction. 38 U.S.C. § 7292(d).

In its March 2023 decision, the Veterans Court clearly affirmed the board's denial of the earlier effective date claim premised on the two CUE contentions (and any other basis as well). SAppx37. At that point, the earlier effective date claim was final for purposes of appeal to this Court. *Elkins v. Gober*, 229 F.3d 1369, 1374-75 (Fed. Cir. 2000); *Grantham v. Brown*, 114 F.3d 1156, 1158-59 (Fed. Cir. 1997); *Tyrues v. Shinseki*, 732 F.3d 1351, 1356 (Fed. Cir. 2013) (addressing board remands and requirement to appeal finally decided issues to Veterans Court). The Veterans Court issued a judgment for that portion of the decision, SAppx30, and Mr. Pena did not appeal the finally decided effective date claim to this Court, and mandate followed. SAppx29.

Instead, Mr. Pena allowed the remand of the higher rating claim to proceed at the board and then, when back on appeal to the Veterans Court after the 2024 board addressed the only issue before it-the 2002 medical examination's effect on the higher rating claim-argued that the 2024 board failed to address the earlier effective date claim pursuant to the 2018 Veterans Court remand, ignoring the intervening 2023 Veterans Court decision affirming the 2021 board decision. SAppx5. In 2025, the Veterans Court properly determined that the earlier effective date claim was finally resolved in its March 27, 2023 decision and, accordingly, there could be no error in the board not addressing the CUE challenges in its 2024 decision. SAppx5. This Court should affirm.

To the extent Mr. Pena is seeking review of the 2021 board decision addressing the CUE challenges on the merits, and it is not clear that he is and, as noted, he was not doing so below, he is too late. The board's

2021 decision addressing the earlier effective date claim was timely appealed to the Veterans Court and was affirmed, *i.e.*, finally resolved in 2023. SAppx29-30; SAppx37. No appeal of that claim was taken and any attempt to revive that issue now should be dismissed. 38 U.S.C. § 7292(a). Thus, the Court should either dismiss Mr. Pena's challenge to the 2023 Veterans Court's affirmance of the 2021 board holding on the CUE challenges or affirm the 2025 Veterans Court holding that the 2024 board committed no error in not revisiting these finally resolved issues.

But even if this Court were to consider a challenge to the 2021 board's finding on CUE, any challenge would fall outside the Court's jurisdiction as a challenge to the weighing of evidence and/or the application of law to fact. 38 U.S.C. § 7292(d). As the 2021 board decision provides, SAppx49-50, and as the 2023 Veterans Court affirmed, SAppx37, the board carefully reviewed the record and determined that service connection was denied in 1985 and 2001 based on an absence of nexus evidence. As the board found, at the time of the earlier RO decisions, "there was no medical evidence of record indicating a nexus between his current hearing loss and his time in service" and that "medical records did not support a finding that the Veteran's hearing loss was due to service." SAppx49. Rather, the board noted that "following the January 1985 and November 2001 denials, the Veteran was ultimately granted service connection as a result of a July 2010 VA examination," addressing nexus. *Id.* Given the evidentiary nature of the board's conclusion, this Court must dismiss any challenge to the board and Veterans Court's conclusions regarding the earlier effective date claim. 38 U.S.C. § 7291(d). To the

extent the Court were to review the board and Veterans Court's evidentiary conclusions, it should affirm.

**3. Did the Court of Appeals for Veterans Claims decide constitutional issues? If yes, what are your arguments concerning those issues?**

No. The Veterans Court did not decide any constitutional issues. Mr. Pena indirectly suggests a possible constitutional issue related to allegations directed at various judges on the Veterans Court, including Chief Judge Allen who does not appear to have had any role in the disposition of appeal No. 24-2597, the decision on appeal to this Court, although he was involved in the denial of an earlier petition for a writ of mandamus. *Pena v. McDonough*, No. 23-6599 (Vet. Ct.), SAppx28. Mr. Pena did not appeal the denial of the mandamus petition to this Court.

As for the contentions that arguably relate to this appeal, they are not developed, but appear to challenge the July 15, 2025 order granting the Secretary 10 days to submit his brief. We have already demonstrated above that the Veterans Court's decision to allow the Secretary to file a brief was a proper exercise of the court's discretion and could not have prejudiced Mr. Pena in any way. Moreover, Mr. Pena's challenge to that order, despite not conforming to the Veterans Court's rules, was considered by that court. Thus Mr. Pena received any process he was due regarding this issue and any remaining challenge to the decision below fails to raise a genuine constitutional issue. *Helper v. West*, 174 F.3d 1332, 1335 (Fed. Cir. 1999) ("[T]he characterization of [a] question as constitutional in nature does not confer upon [this Court] jurisdiction that we otherwise lack.").

**4. Did the Court of Appeals for Veterans Claims fail to decide any other issue correctly? If yes, how?**

No. The Veterans Court did not fail to decide any other issue correctly.

**5. Are there other arguments you wish to make? If yes, what are the arguments?**

Yes. Mr. Joe Pena is the adult son of Mr. Rodolpho Pena, thus his substitution into his father's claim can only be allowed to the extent he paid for any expenses related to his father's last sickness and burial. 38 U.S.C. § 5121(a)(6); *Smith v. Collins*, 133 F.4th 1059, 1061-62 (Fed. Cir. 2025). The board observed in its 2024 decision, SAppx19, that there is no record of a claim for expenses related to last sickness and burial. In preparing this responsive brief, we examined portions of Rodolpho Pena's claims file and discovered documents that would call into question the board's observation as to whether Joe Pena paid for his father's funeral services and burial — he may have.

Accordingly, we submit that the Court need not address Mr. Pena's ability to satisfy 38 U.S.C. § 5121(a)(6) at this time. Indeed, setting aside the board's observation, we note that the record indicates that the regional office substituted Joe Pena into his father's claim even after raising the claim issue. So, if the Court were to consider the board's observation in this regard to be a finding, and an erroneous finding at that, *but see Toomer v. McDonald*, 783 F.3d 1229, 1236 (Fed. Cir. 2015) (“[T]his court lacks jurisdiction to reexamine [factual] findings.”), any remand to the

regional office to further address this issue would not necessarily be favorable to Mr. Pena.

In any event, our responses to questions 2 and 3 above demonstrate that regardless of whether Mr. Pena filed a claim for expenses related to last sickness and burial, he has not presented a legal argument that is both within this Court's jurisdiction and persuasively demonstrates that the Veterans Court erred, such that further development of this issue by the regional office would result in a different, more favorable outcome for Mr. Pena.

**6. What action do you want this court to take in this case?**

We respectfully request that the Court dismiss this appeal or, in the alternative, affirm the Veterans Court's decision.

Respectfully submitted,

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March 12, 2026

App.42a

**BRIEF OF THE APPELLEE,  
SECRETARY OF VETERANS AFFAIRS  
(JULY 25, 2025)**

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IN THE UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS

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JOE PENA,

*Appellant,*

v.

DOUGLAS A. COLLINS,  
SECRETARY OF VETERANS AFFAIRS,

*Appellee.*

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Vet. App. No. 24-2579

On Appeal from the Board of Veterans' Appeals

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**BRIEF OF THE APPELLEE,  
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**[TOC, TOA, Excluded]**

**I. Issue Presented**

Whether the Court should affirm the April 2, 2024, Board of Veterans' Appeals (the "Board") decision denying entitlement to an initial rating higher than 50 percent for bilateral hearing loss.

**II. Statement of the Case**

**A. Jurisdictional Statement**

The Court has exclusive jurisdiction to review final decisions of the Board. 38 U.S.C. § 7252(a).

**B. Nature of the Case**

Appellant appeals the April 2, 2024, Board decision, which denied entitlement to an initial rating higher than 50 percent for bilateral hearing loss. [Record Before the Agency (R.) at 3 (1-12)].

**C. Statement of Relevant Facts**

The Veteran, Rodolpho V. Pena, served on active duty from January 1954 to January 1957. [R. at 3205]. Appellant is the adult son of the deceased Veteran, who died in September 2012, and the prior appellant, Jovita Pena, who died in April 2020. *See* [R. at 543; 2818].

In January 2010, the Veteran submitted a claim for service connection for bilateral hearing loss, tinnitus,

a perforated right ear drum, and loss of sight in his right eye. [R. at 3019]. In November 2010, the Agency of Original Jurisdiction (AOJ) issued a rating decision that, among other things, granted service connection for bilateral hearing loss with a 50% rating and an effective date of January 29, 2010, the date the Department of Veterans Affairs (VA) received his claim. [R. at 2943-52]. The Veteran filed a timely Notice of Disagreement (NOD) in January 2011, [R. at 2924-33], and died on September 22, 2012. [R. at 2818]. In September 2016, the Veteran's widow was substituted as claimant. [R. at 2127].

In February 2016, the AOJ issued a Statement of the Case (SOC) denying, among other things, an initial rating in excess of 50% for bilateral hearing loss and an effective date prior to January 29, 2010, for the grant of service connection for bilateral hearing loss. [R. at 2169-201]. The prior appellant filed a timely substantive appeal in March 2016. [R. at 2149-62].

In November 2017, the Board issued a decision that, among other things, denied entitlement to an initial rating in excess of 50% for bilateral hearing loss, entitlement to an effective date earlier than January 29, 2010, for the grant of service connection for bilateral hearing loss, and reopening the claim for service connection for a tympanic membrane. [R. at 2047-72].

The previous appellant appealed that decision to this Court. In a December 2018 memorandum decision, this Court affirmed the part of the November 2017 Board decision that declined to reopen a claim for service connection for tympanic membrane perforation. [R. at 759-65]. Additionally, this Court vacated the part of the November 2017 Board decision that denied

entitlement to (1) an initial disability rating in excess of 50% for bilateral hearing loss and (2) an effective date prior to January 29, 2010, for the grant of service connection for bilateral hearing loss, to include on the basis of clear and unmistakable error (CUE), and remanded the claims back to the Board for further proceedings consistent with the Court's decision. *Id.* Regarding an earlier effective date, this Court agreed with the Secretary that remand was warranted for the Board to address all potential allegations of CUE regarding the assignment of an effective date for benefits based on service-connected bilateral hearing loss, specifically citing a March 2010 statement arguing CUE in the January 1985 rating decision and the March 2011 VA Form 9, which hinted at CUE in the November 2001 rating decision. *Id.* at 763. Regarding a higher initial rating, this Court found that remand was warranted for the Board to address the potentially favorable February 2002 audiological evaluation results. *Id.* at 764. This Court further found that remand was warranted for the Board to address vertigo and otalgia as part of the Veteran's service-connected bilateral hearing loss. *Id.* at 763-64.

In July 2019, the Board remanded the issues of (1) whether CUE occurred in a January 1985 rating decision that denied service connection for bilateral hearing loss; (2) whether CUE occurred in a November 2001 rating decision that denied service connection for bilateral hearing loss; (3) entitlement to an earlier effective date, prior to January 29, 2010, for the grant of service connection for bilateral hearing loss; and (4) entitlement to an initial disability rating in excess of 50% for service-connected bilateral hearing loss. [R. at 627-30]. Explaining that applicable law required the

AOJ to adjudicate in the first instance CUE motions attacking a prior rating decision and that the AOJ, to date, had not adjudicated the March 2010 and March 2011 CUE motions in the first instance, the Board remanded the CUE motions to the AOJ for such initial adjudication. *Id.* at 628-30 (citing *Jarrell v. Nicholson*, 20 Vet.App. 326, 333 (2006)). The Board remanded the issues of the initial disability rating and earlier effective date as inextricably intertwined with the CUE motions. *Id.* at 629-30.

In April 2021, the RO issued a Supplemental Statement of the Case that continued the denial of entitlement to (1) an initial disability rating in excess of 50% for bilateral hearing loss and (2) an effective date prior to January 29, 2010, for the grant of service connection for bilateral hearing loss. [R. at 331-39]. The RO also issued a Decision Review Officer Decision that denied entitlement to accrued benefits for (1) an earlier effective date prior to January 29, 2010, for service connection for hearing loss, (2) an earlier effective date prior to January 29, 2010, for service connection for tinnitus, (3) service connection of hearing loss prior to January 29, 2010, and (4) the evaluation of hearing loss since January 29, 2010. [R. 341-44].

In April 2021, Appellant submitted a VA form 9. [R. at 318-21]. Further, in July 2021, the Board issued a decision denying entitlement to (1) an effective date earlier than January 29, 2010, for the grant of service connection for bilateral hearing loss, to include on the basis of CUE in January 1985 and November 2001 rating decisions, and (2) an initial rating in excess of 50% for bilateral hearing loss. [R. at 284-307].

Appellant appealed that decision to this Court and in a March 2023 memorandum decision, this

Court affirmed the part of the July 2021 Board decision that denied entitlement to an effective date earlier than January 29, 2010, for service connection for bilateral hearing loss, to include whether there was CUE in the January 1985 and November 2001 rating decisions. [R. at 265-72]. However, this Court vacated the part of the July 2021 Board decision that denied entitlement to a higher rating for his service connected hearing loss and remanded this claim back to the Board for further proceedings consistent with the Court's decision. *Id.* Regarding a higher initial rating, this Court found that remand was warranted for the Board "to provide an adequate statement of reasons of bases for its treatment of the medical evidence" when addressing the February 2002 audiological exam. *Id.* at 271-72. Further, because this Court remanded Appellant's claim for entitlement to a higher initial rating for service connected hearing loss, this Court declined to address any remaining arguments on the matter. *Id.*

In August 2023, the Board remanded Appellant's claim for entitlement to a higher initial rating for service-connected hearing loss. [R. at 167-72]. In its remand order, the Board requested a VA medical opinion addressing (1) any "significant differences found within the Veteran's February 2002 and July 2010 VA audiological examinations"; (2) whether "the July 2010 audiological testing results represent a true improvement in the Veteran's bilateral hearing loss when compared to his February 2002 audiological testing results"; and (3) whether the July 2010 audiological testing results are a reliable representation of the Veteran's hearing acuity between January 29, 2010 through September 22, 2012. *Id.* at 171-72.

In August 2023, a VA audiologist issued a medical opinion in which she found:

Given there were no significant threshold shifts between 2/28/2002 and 7/20/2010, it is likely that hearing on 7/20/2010 would be a reliable representation of hearing acuity in 2012. However, without an audiogram in 2012, there is no possibility of being certain, and any comments on hearing acuity in 2012 would be mere speculation.

[R. at 163 (161-64)].

On April 2, 2024, the Board issued the decision currently on appeal which denied entitlement to an initial rating higher than 50 percent for bilateral hearing loss. [R. at 3]. Based on the August 2023 VA audiological opinion, the Board determined that “there is no evidence to assign a rating higher than 50 percent for bilateral hearing loss.” *Id.* at 6. This appeal followed.

### **III. Summary of Argument**

Appellant contends that the Board decision fails to substantially comply with this Court’s December 2018 decision. However, the issues that this Court’s December 2018 decision ordered to be addressed have been addressed. There is no error.

### **IV. Argument**

#### **A. Standards of Review**

While a Board decision is required to include “a written statement of the Board’s findings and conclusions, and the reasons or bases for these findings and conclusions, on all material issues of fact and law

presented on the record,” 38 U.S.C. § 7105(d)(1), this obligation does not exist in the abstract and must be viewed in the context of the Board’s findings and conclusions. It is thus not sufficient to simply say that the Board failed to discuss ‘favorable evidence’ — the Board is presumed to have considered the totality of the evidence, *Gonzalez v. West*, 218 F.3d 1378, 1380-81 (Fed. Cir. 2000), and, if the record contains a plausible basis for the Board’s findings and conclusions, just because certain evidence can in hindsight be construed or even persuasively interpreted to potentially support a different finding or conclusion does not mean that the evidence had to be considered favorable or that the Board’s findings should not be affirmed. If a plausible basis of the Board decision can be ascertained, its statement of reasons or bases is adequate. *See Johnson v. Shinseki*, 26 Vet.App. 237, 247 (2013) (“A Board statement should generally be read as a whole, and if that statement permits an understanding and facilitates judicial review of the material issues of fact and law presented on the record, then it is adequate.”) (citation omitted). *See also Mayfield v. Nicholson*, 19 Vet.App. 103, 129 (2005) (observing that where judicial review is not hindered by deficiency of reasons or bases, a remand for reasons or bases error would be of no benefit to the appellant and would therefore serve no useful purpose).

**B. The Board Substantially Complied with  
this Court's December 2018 Remand  
Order**

**I. The Board did not Err by Declining  
to Address Appellant's Claim for an  
Earlier Effective Date and Associated  
Theories of CUE**

As a threshold matter, Appellant has submitted an informal brief and the Secretary has attempted to discern, to the extent possible, Appellant's arguments on appeal. [App. Inf. Br. at 1-20]; *see De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992) (When reviewing the Board's decision, the Court liberally construes arguments made by pro se appellants). However, like other parties, pro se appellants "bear the burden of persuasion on appeals to this Court." *Berger v. Brown*, 10 Vet.App. 166, 169 (1997); *see also Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant bears the burden of demonstrating error on appeal), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

Appellant contends that the Board failed to substantially comply with this Court's December 2018 remand order. His argument is unavailing as the Board substantially complied with the Court's 2018 decision and provided an adequate statement of reasons or bases for its findings.

An order by the Board or the Court remanding an appeal for further action and adjudication confers upon a claimant the right to compliance with that order. *Stegall v. West*, 11 Vet.App. 268, 271 (1998). The Secretary has a duty to ensure compliance with the terms of a remand order. *Id.* Substantial compli-

ance, not strict compliance, is required. *Dyment v. West*, 13 Vet.App. 141, 146-47 (1999). Substantial compliance with the terms of a remand is shown when the Secretary's actions "resolve the issue that required the remand order." *D'Aries v. Peake*, 22 Vet.App. 97, 105 (2008).

In its 2018 Memorandum Decision, this Court vacated that part of the November 2017 Board decision that denied entitlement to (1) an initial disability rating in excess of 50% for bilateral hearing loss and (2) an effective date prior to January 29, 2010, for the grant of service connection for bilateral hearing loss, to include on the basis of CUE, and remanded the claims back to the Board for further proceedings consistent with the Court's decision. [R. at 759-65]. Concerning Appellant's earlier effective date claim, this Court found that remand was warranted for the Board to adequately discuss all theories of CUE. *Id.* at 763; *see also* [R. at 270].

However, in its March 2023 Memorandum Decision, this Court affirmed the part of the July 2021 Board decision that denied entitlement to an effective date earlier than January 29, 2010, for service connection for bilateral hearing loss, to include whether there was CUE in the January 1985 and November 2001 rating decisions. [R. at 265-72]. Thus, the Board's declination to address Appellant's claim for an earlier effective date and associated theories of CUE was proper as this Court affirmed the Board's July 2021 denial of Appellant's effective date claim in its March 2023 Memorandum Decision. *Id.* In *Means v. Brown*, this Court found, "under the law of the case' doctrine, an earlier determination by an appellate court is binding upon any administrative tribunal subject to the deci-

sion of that court.” 9 Vet.App. 482, 483 (1996); *see also Milano v. McDonough*, 35 Vet.App. 490, 491 (2022) (noting that “once a court decides an issue, the same issue may not be relitigated in subsequent proceedings in the same case.”). Applied to the present case, because this Court affirmed the Board’s July 2021 denial of entitlement to an effective date earlier than January 29, 2010, for service connection for bilateral hearing loss, to include whether there was CUE in the January 1985 and November 2001 rating decisions, the Board was bound by this determination. Therefore, this Court should find that the Board did not err by declining to address Appellant’s claim for an earlier effective date and associated theories of CUE.

## **II. The Board Adequately Addressed Appellant’s Claim for an Initial Higher Rating for Bilateral Hearing Loss**

Turning to Appellant’s claim for an initial higher rating for bilateral hearing loss, this Court’s 2018 remand order instructed the Board to address the potentially favorable February 2002 audiological evaluation results. [R. at 763-64]. Similarly, this Court’s 2023 remand order instructed the Board to “to provide an adequate statement of reasons of bases for its treatment of the medical evidence” when addressing the February 2002 audiological examination. [R. at 271-72]. It is clear that the Board decision on appeal substantially complies with both this Court’s 2018 and 2023 remand orders. In order to avoid relying on an unsubstantiated medical opinion, the Board remanded Appellant’s claim to the AOJ in August 2023 to obtain a VA audiological opinion addressing the February 2002 VA audiological examination in

relation to the 2010 VA audiological examination. [R. at 171-72]. In the decision on appeal, the Board heavily relied on the August 2023 VA audiological opinion in determining that Appellant is not entitled to an initial rating higher than 50% for bilateral hearing loss. [R. at 3-10]; *see also* [R. at 161-64].

In its analysis, the Board found the August 2023 VA audiological opinion to be probative and that the VA audiologist applied valid medical principles and provided thorough rationale to support her conclusions. [R. at 6]. In doing so, the Board cited the VA audiologist's findings that (1) because there were no significant threshold shifts between February 28, 2002, and July 20, 2010, it is likely that the Veteran's hearing on July 20, 2010 would be a reliable representation of hearing acuity in 2012; (2) without an audiogram, there is no possibility of estimating hearing acuity in 2012, and any comments on hearing acuity in 2012 would be mere speculation; and (3) without an audiogram available for review after 2010, it would be mere speculation to say if the slight improvement in the Veteran's hearing between 2002 and 2010 represents true improvement or if it was temporary condition. *Id.* at 5-6. As a result of this, the Board plausibly concluded that "there is no evidence to assign a rating higher than 50 percent for bilateral hearing loss." *Id.* at 6. Therefore, because (1) this Court's 2018 and 2023 remand orders collectively instructed the Board to address the February 2002 VA audiological examination and "provide an adequate statement of reasons or bases for its treatment of the medical evidence" and (2) a statement of reasons or bases is adequate if a plausible basis for the Board's decision can be ascertained; this Court should find that the Board

adequately addressed the audiological medical evidence and substantially complied with both this Court's 2018 and 2023 remand orders as a result. [R. at 271-72; 763-64]; *see Johnson*, 26 Vet.App. at 247.

Additionally, this Court's 2018 remand order instructed the Board to address the Veteran's vertigo and otalgia as symptoms of hearing loss. [R. at 763-64]. In its July 2021 decision, the Board considered the Veteran's symptomatology for the period on appeal and plausibly found that the Veteran did not experience functional impairment as a product of either his vertigo or otalgia. [R. at 301-02]. Relating to the Veteran's vertigo, the Board noted that although the Veteran reported severe vertigo upon sneezing during an October 2001 VA examination, that examination was conducted many years prior to the period on appeal and a contemporaneous VA examination from July 2010 revealed that the Veteran's "ambulating, dressing, feeding, bathing, driving, toileting, and grooming were not affected." *Id.* at 302. On this basis, the Board plausibly found that the Veteran did not experience any "functional impairment of earning capacity related to his reported dizzy spells or any reported impairment on his activities of daily living as a result of his dizzy spells." *Id.* Similarly, concerning the Veteran's otalgia, the Board found that the Veteran did not (1) report otalgia during the July 2010 VA examination or in additional treatment records pertaining to the period on appeal; (2) have a diagnosis of otalgia during the period on appeal; and (3) experience functional impairment attributable to otalgia. *Id.*

The decision on appeal did not directly address the Veteran's vertigo and otalgia, which was addressed in the Board's previous July 2021 decision. [R. at 3-10,

302-03]. Appellee recognizes that *Mathews v. McDonald*, 28 Vet.App. 309, 315 (2016) held that the Board is not permitted to sub silentio incorporate its reasons or bases from a prior remand order into a later decision. However, the decision in *Mathews* is distinguishable because, unlike the instant case, the prior Board findings in *Mathews* were in non-final remand orders that were insulated from judicial review. *See ids*, at 316. However, even if the Board erred in the instant case by not addressing vertigo and otalgia again, Appellant was not prejudiced. *See Mathews*, 28 Vet.App. at 316 (“Like all reasons or bases errors, however, this one is subject to review for prejudice.”); *Simmons v. Wilkie*, 30 Vet.App. 267, 279 (2018) (explaining that prejudice “is established by demonstrating a disruption of the essential fairness of the adjudication, which can be shown by demonstrating that the error (1) prevented the claimant from effectively participating in the adjudicator process, or (2) affected or could have affected the outcome of the determination.”). As previously noted, neither the Veteran’s vertigo or otalgia resulted in functional impairment during the period of appeal. *See* [R. at 301-02]. Further, in his brief, Appellant does not allege that the July 2021 Board decision was erroneous in its finding that Veteran’s vertigo and otalgia did not result in functional impairment or was prejudiced by it. *See* [App. Br. at 1-20]. Because (1) the evidence demonstrates that the Veteran did not experience functional impairment from vertigo or otalgia during the period on appeal and (2) Appellant does not allege that the Board’s July 2021 findings on this matter resulted in prejudice nor provide any reason as to how the Board could plausibly reach a different conclusion upon remand; this Court should find that, even if there was any error, Appel-

lant was not prejudiced by the Board's declination to address the Veteran's vertigo and otalgia in the decision on appeal. *See Lamb v. Peake*, 22 Vet.App. 227, 235 (2008) (holding that there is no prejudicial error when a remand for a decision on the merits would serve no useful purpose); *Valiao v. Principi*, 17 Vet.App. 229, 232 (2003) (ruling that error is nonprejudicial "where the facts averred by a claimant cannot conceivably result in any disposition of the appeal other than affirmance of the Board decision.").

In light of the foregoing, this Court should affirm the Board's April 2, 2024, decision on the basis that it substantially complies with this Court's 2018 remand order and Appellant has failed to satisfy his burden of demonstrating prejudice concerning any potential reasons or bases errors.

Appellant has abandoned any other potential arguments, and the Court should decline to raise or address any additional arguments on Appellant's behalf. *See Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999) ("[C]ourts have consistently concluded that the failure of an appellant to include an issue or argument in the opening brief will be deemed a waiver of the issue or argument.") (citing *Becton Dick. & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990)); *Mason v. Shinseki*, 25 Vet.App. 83, 95 (2011), *aff'd*, 496 Fed. App'x 86 (Fed. Cir. 2013) ("[T]he Court will not invent an argument for a represented party who had ample opportunity and resources to make that same argument, but, for whatever reason—be it strategy, oversight, or something in between—did not do so.").

Moreover, the Secretary does not concede any material issue that the Court may deem Appellant adequately raised, argued and properly preserved, but

which the Secretary may not have addressed through inadvertence, and reserves the right to address same if the Court deems it necessary or advisable for its decision. The Secretary also requests that the Court take due account of the rule of prejudicial error wherever applicable in this case. *See* 38 U.S.C. § 7261(b)(2).

## V. Conclusion

Upon review of all the evidence, as well as considering the arguments advanced by Appellant, the Court should find that he has not demonstrated that the Board committed any prejudicial error warranting remand. Thus, the Court should affirm the Board's April 2, 2024, decision.

Respectfully submitted,

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