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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 14-1749

CARL L. GULLEY, PETITIONER,

v.

SLOAN D. GIBSON,
ACTING SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before LANCE, *Judge*.

ORDER

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

On June 5, 2014, the pro se petitioner filed a petition for extraordinary relief in the nature of a writ of mandamus. In it, he asserts that the Secretary has failed to decide his claim for entitlement to service connection for an acquired psychiatric disorder, to include paranoid schizophrenia, since the Court granted a joint motion for remand (JMR) on June 17, 2011. Petition at 1. In the JMR, the parties agreed that remand was necessary for VA to properly fulfill its duty to assist, as VA failed to obtain relevant treatment records from the Little Rock VA Medical Center (VAMC) and the Winnebago Mental Health Institute. The petitioner argues that "[t]he Board seem[s] to have indefinitely delayed the proceeding of [his] case, on the strength of being backlogged, with no specific time frame set for deciding [his] claim." *Id.* at 1.

On June 30, 2014, the Court ordered the Secretary to respond with information about the status of the petitioner's claim. In his response, the Secretary notes that the Board remanded the petitioner's claim to the Little Rock, Arkansas, VA regional office (RO) for additional development in January 2012. Secretary's July 11, 2014, Response (Resp.) at 2-3. The Secretary states that the Board specifically "directed the RO to obtain records from the Little Rock VAMC, the Winnebago Mental Health Institute, and the Social Security Administration (SSA)" and "to schedule [the p]etitioner for a VA psychiatric examination." *Id.* at 3. The Secretary indicates that "[i]n March 2012, the RO received medical records from SSA and the Winnebago Mental Health Institute." *Id.* However, he explains that the RO submitted three requests for medical records to the Little Rock VAMC before it ultimately "received the documents in July 2013 and January 2014." *Id.* at 3-4. The Secretary also noted that "[a]n examination has been scheduled for July 17, 2014." *Id.* at 4.

Additionally, the Secretary indicates that, in October 2011 and February 2012, the petitioner was provided with an explanation as to the then-current status of his claims. *Id.* at 2-4. He also notes that "[i]n January 2012 and May 2012, the Chairman of the Board responded to inquiries from Senator Mark Pryor regarding the status of [the p]etitioner's claim." *Id.* at 3.

This Court has the authority to issue extraordinary writs in aid of its jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). *See Cox v. West*, 149 F.3d 1360, 1363-64 (Fed. Cir. 1998). However, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976). Accordingly, three conditions must be met before the Court may issue a writ: (1) The petitioner must demonstrate that he lacks adequate alternative means to obtain the desired relief, thus ensuring that the writ is not used as a substitute for the appeals process; (2) the petitioner must demonstrate a clear and indisputable right to the writ; and (3) the Court must be convinced, given the circumstances, that the issuance of the writ is warranted. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004).

When delay is alleged as the basis for a petition, this Court has held that a clear and indisputable right to the writ does not exist unless the petitioner demonstrates that the alleged delay is so extraordinary, given the demands on and resources of the Secretary, that it is equivalent to an arbitrary refusal by the Secretary to act. *Costanza v. West*, 12 Vet.App. 133, 134 (1999) (per curiam order). As the petitioner correctly notes, he is entitled to expeditious treatment as to matters that were remanded by this Court. 38 U.S.C. § 7112 (requiring Secretary to provide for "expeditious treatment" of claims remanded by the Court). Nonetheless, although the Court understands the petitioner's frustration, "[t]he delay involved . . . must be unreasonable before a court will inject itself into an administrative agency's adjudicative process," and "the mere passage of time in reviewing a matter" does not necessarily constitute unreasonable delay. *Bullock v. Brown*, 7 Vet.App. 69, 69 (1994) (per curiam order); *see also Nash v. West*, 11 Vet.App. 91, 93 (1998) (en banc).

Under the circumstances, the Court is not convinced that issuance of a writ is warranted. *See Cheney, supra*. Though not without some delay, the RO has secured the records requested in the Board's January 2012 remand. Additionally, the petitioner was scheduled to undergo a VA compensation and pension examination on July 17, 2014, and the Secretary represents that the RO "has indicated that it anticipates that the claim will be re-adjudicated by July 31, 2014." Secretary's July 11, 2014, Resp. at 6. The Court holds that the Secretary has not engaged in an arbitrary refusal to act.

Accordingly, the Court finds that, for now, the petitioner has failed to establish that the issuance of a writ is needed to avoid the kind of injury (delay) for which extraordinary relief is designed, nor has he shown a clear and indisputable right to the writ or alleged that his administrative remedies have been exhausted. However, if, in the future, the petitioner believes that the Secretary refuses to timely adjudicate his claim, the petitioner remains free to file another petition for extraordinary relief with the Court.

Upon consideration of the foregoing, it is
ORDERED that the petition is DENIED.

DATED: July 29, 2014

BY THE COURT:

A handwritten signature in blue ink that reads "Alan G. Lance". The signature is written in a cursive style with a large initial 'A'.

ALAN G. LANCE, SR.
Judge

Copies to:

Carl L. Gulley

VA General Counsel (027)