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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-3606

BILAL J. SABIR, PETITIONER,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before FALVEY, Judge.

ORDER

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

I. BACKGROUND

On July 5, 2018, pro se veteran Bilal J. Sabir filed a petition for extraordinary relief in the nature of a writ of mandamus. Mr. Sabir asks the Court to compel VA to adjudicate his claims consistent with the terms of an August 2016 joint motion for partial remand (JMPR).¹ On August 2, 2016, under docket number 15-2486, the Court granted a JMPR in which the parties moved the Court to vacate a November 28, 2014, Board of Veterans' Appeals decision to the extent that it (1) denied entitlement to service connection for a gastrointestinal (GI) disorder, claimed as gastroesophageal reflux disorder, on a secondary basis; (2) denied entitlement to an increased disability rating in excess of 40% for service-connected hepatitis C; (3) denied entitlement to a separate rating for service-connected right-foot disorder pursuant to the osteomyelitis rating criteria; (4) denied entitlement to a disability rating in excess of 20% for service-connected lumbosacral strain; and (5) denied entitlement to extraschedular referral pursuant to 38 C.F.R. § 3.321(b)(1), and to remand those issues for readjudication. In the August 2016 JMPR, the parties also agreed that the Board should review submissions filed by the veteran within one year of a February 22, 2008, VA regional office (RO) decision that awarded a 100% disability rating for service-connected post-traumatic stress disorder (PTSD) and special monthly compensation (SMC) pursuant to 38 U.S.C. § 1114(s)(1), to determine whether a Notice of Disagreement (NOD) was timely filed regarding the April 25, 2005, effective date of those awards. Mr. Sabir asserts that VA has delayed finalizing the claims contained in the JMPR and issues raised on remand for nearly two years, despite his repeated requests.²

¹ Petition (Pet.) at 1-2.

² *Id.*

On July 25, 2018, the Court ordered the Secretary to respond to Mr. Sabir's petition. In his August 24, 2018, response, the Secretary references a declaration from Scott Hilliard, an acting assistant veteran service center manager for the Appeals Resource Center (ARC).³ Mr. Hilliard states that an April 13, 2017, Board decision remanded the claims for a GI disorder, hepatitis C, a separate rating for a right-foot disorder, and lumbosacral strain, and deferred the extraschedular referral pursuant to § 3.321(b)(1).⁴ The Board ordered the RO to request information from the veteran regarding treatment records; obtain any such records; and, after those records were associated with the claims folder, schedule examinations for his GI, hepatitis C, right-foot, and lumbosacral strain conditions.⁵ In addition, the Board found that, after reviewing the submissions filed by Mr. Sabir within one-year of the February 2008 RO decision, he did not express disagreement with the effective date of the 100% PTSD rating or entitlement to SMC under section 1114(s)(1), and thus had not timely filed an NOD and, accordingly, the issues were not before the Board.⁶

On April 28, 2017, VA requested the necessary medical records information from Mr. Sabir and, in a response received on May 25, 2017, the veteran stated that he did not have any new information or documentation to submit.⁷ On June 1, 2017, VA ordered the examinations required by the April 2017 Board remand.⁸ On June 26, 2017, the right foot examination was performed and on July 5, 2017, the GI, hepatitis C/liver condition, and low back examinations were completed.⁹ An RO rating decision dated November 29, 2017, granted an increased rating for lumbosacral strain (from 20% to 40%) effective July 5, 2017 (the date of the VA examination), and SMC based on housebound status from February 12, 2000; for unspecified reasons, notification regarding that decision was not mailed until June 6, 2018.¹⁰ On January 23, 2018, the RO issued a Supplemental Statement of the Case (SSOC) continuing to deny service connection for a GI disorder, a rating in excess of 40% for hepatitis C, a separate rating for a right foot disorder, and extraschedular referral pursuant to § 3.321(b)(1), and denying a rating in excess of 40% for lumbosacral strain.¹¹ On February 8, 2018, the veteran submitted additional medical evidence and statements in support of his claims.¹² Mr. Hilliard explains that, because VA did not properly identify Mr. Sabir's January 30, 2018, waiver of his right to have the appeal remanded to the agency of original jurisdiction and request that the Board consider any new evidence, the ARC errantly

³ Secretary's Response (Resp.) at 3.

⁴ *Id.*, Attachment at A2.

⁵ *Id.*

⁶ *Id.* at A14-16.

⁷ *Id.* at A3.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at A3, A31-32.

¹¹ *Id.* at A43-47. Although the January 2018 SSOC does not reference the date of the November 2017 RO decision, it stated that the veteran was "recently awarded a rating decision" as to lumbosacral strain and that the increase to 40% was based on examination findings from July 2017, and then the SSOC denied a rating in excess of 40%.

¹² *Id.*

waited for additional review rather than recertifying the appeal back to the Board.¹³ Mr. Hilliard avers, however, that the appeal has now been recertified to the Board.¹⁴

Thus, the Secretary argues that the Court should deny Mr. Sabir's petition because VA is acting diligently to complete the actions required by the August 2016 JMPR and the April 2017 Board decision and there has been no unreasonable delay.¹⁵

Finally, in an August 27, 2018, order, the Court construed Mr. Sabir's July 31, 2018, correspondence as a motion to stay proceedings. In the correspondence, the veteran stated: "Should VA in their response to the Court [o]rder not grant the benefits sought, I am requesting the Court allow me time to hire counsel . . . to file on my behalf with the Court an amended petition for a writ." The Court stayed proceedings until September 26, 2018, for the veteran to make possible arrangements for representation and notify the Court before it made a decision on his petition and the Secretary's response. As of October 18, 2018, the Court has neither received notification from the veteran that he obtained counsel nor has a notice of appearance from an attorney been filed in his case. Therefore, the Court will now make a determination as to the petition.

II. ANALYSIS: *TRAC* FACTORS

This Court has authority to issue extraordinary writs in aid of its jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a).¹⁶ This authority includes writs of mandamus to "compel action of the Secretary unlawfully withheld or unreasonably delayed."¹⁷ Yet, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations."¹⁸ Three conditions must be met before the Court may issue a writ: (1) The petitioner must demonstrate the lack of 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 issuance of the writ is warranted.¹⁹

When delay is alleged as the basis for a petition,²⁰ "[t]he overarching inquiry in analyzing a claim of unreasonable delay is 'whether the agency's delay is so egregious as to warrant mandamus,'"²¹ and there is no "hard and fast rule with respect to the point in time at which delay

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Secretary's Resp. at 1-6.

¹⁶ See *Cox v. West*, 149 F.3d 1360, 1363-64 (Fed. Cir. 1998).

¹⁷ 38 U.S.C. § 7261(a)(2); see *Martin v. O'Rourke*, 891 F.3d 1338, 1343 (Fed. Cir. 2018).

¹⁸ *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976).

¹⁹ See *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004).

²⁰ See *Martin*, 891 F.3d at 1348 (quoting *Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654, 660 (D.C. Cir. 2010) ("a claim that a plaintiff has been denied due process because of delayed agency action is essentially no different than an unreasonable delay claim")).

²¹ *Id.* at 1344 (quoting *Telecomms. Research & Action Ctr. v. FCC (TRAC)*, 750 F.2d 70, 79 (D.C. Cir. 1984)).

becomes unreasonable."²² Rather, the Federal Circuit has held that the *TRAC* standard is the appropriate framework to use when evaluating mandamus petitions based on alleged unreasonable delay.²³ In *TRAC*, the U.S. Court of Appeals for the D.C. Circuit identified six factors relevant to that inquiry: (1) The time an agency takes to make decisions must be governed by a "rule of reason"; (2) where Congress in the enabling statute has provided a timetable or other indication of the speed with which it expects the agency to proceed, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the nature and extent of the interests prejudiced by delay; and (6) it is not necessary to "find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."²⁴

Regarding the first factor, a "rule of reason," the Court concludes that VA's actions have not been unreasonable because the delay Mr. Sabir has experienced is in part due to compliance with legal duties, including VA's duty to assist in obtaining medical records and examinations.²⁵ The Court recognizes that there was delay, including in both issuing the SSOC and certifying Mr. Sabir's appeal to the Board. But, because VA acted to comply with the August 2016 JMPR and April 2017 Board remand instructions, this is not a situation of "complete inaction by the VA," which the Federal Circuit identified as important in assessing the "rule of reason."²⁶ Thus, although VA has been sluggish in processing the veteran's claim and, to an extent, discordant from the accuracy one would expect from an agency devoted to veterans, the first factor weighs against the issuance of a writ.²⁷

The second factor, congressional timetables, also weighs against Mr. Sabir because Congress has not provided a schedule for agency adjudication. In fact, rather than establishing timelines, Congress created a system with multiple steps for adjudication, including assisting claimants in developing their cases.²⁸ Congress's choice to design a system with such features also further supports a finding under *TRAC* factor one that VA's actions here fit within the rule of reason.²⁹

The third and fifth *TRAC* factors both focus on the veteran's interest, and these two factors often overlap.³⁰ Specifically, the third factor considers delays less tolerable when "human health

²² *Id.* at 1346.

²³ *Id.* at 1344.

²⁴ 750 F.2d at 80.

²⁵ See *Martin*, 891 F.3d at 1345-46 (explaining that the first *TRAC* factor's "rule of reason" analysis may entail consideration of "whether the delays are due in part to the VA's statutory duty to assist a claimant in developing his or her case"); *Bullock v. Brown*, 7 Vet.App. 69, 69 (1994).

²⁶ *Martin*, 891 F.3d at 1345-46.

²⁷ *Id.* at 1345 (Federal Circuit commenting that some circuit courts of appeal consider the first *TRAC* factor the most important).

²⁸ See *id.* at 1346.

²⁹ See *id.* at 1345-46.

³⁰ *Id.* at 1346.

and welfare are at stake."³¹ Similarly, the fifth factor considers the nature and extent of the interests prejudiced by delay. Because "[v]eterans' disability claims always involve human health and welfare,"³² and Mr. Sabir's interests are significant, these factors weigh in his favor.

The fourth factor, however, weighs against issuing a writ. This factor deals with the impact that granting a writ would have on other agency activities. "In other words, the VA may consider . . . that the VA has fixed resources, and that the Agency is in a better position than the courts to evaluate how to use those limited resources."³³ Because the delay here, at least in part, appears to be the unavoidable result of "practical realities of the burdened veterans' benefits system,"³⁴ this factor weighs against the issuance of a writ. Mr. Sabir has not demonstrated that VA should shift its limited resources from the claims of other veterans, also awaiting adjudication, to his petition. Further, VA has broad discretion in choosing how best to carry out its responsibilities and, as stated, has utilized its limited resources, albeit slowly, to request medical records, obtain examinations, and issue determinations as to Mr. Sabir's claims as required by the August 2016 JMPR and April 2017 Board remand.

After considering all the *TRAC* factors, the Court concludes that Mr. Sabir fails to demonstrate entitlement to a writ of mandamus. The delay the veteran has experienced appears to be the result of compliance with legal duties, such as VA's duty to assist in obtaining medical examinations, and the practical realities of the burdened veterans benefits system.³⁵ Thus, issuance of a writ is not justified. Accordingly, the Court will deny this portion of the petition. But, the Court trusts that VA will address Mr. Sabir's claims in a timelier manner, taking care that any decision is correct as well as prompt, and that no further petition for extraordinary relief will be necessary. This includes timely responding to future correspondence from the veteran.

Finally, to the extent that Mr. Sabir's petition alleges that VA did not comply with the portion of the August 2016 JMPR instructing the Board to review submissions filed by the veteran within one year of the February 2008 RO decision and determine whether an NOD was timely filed, the April 2017 Board decision reviewed and explained why the submissions filed by Mr. Sabir within one-year of the February 2008 RO decision did not express disagreement with the effective date of the 100% PTSD rating or the entitlement to SMC under section 1114(s)(1) and that he had thus not timely filed an NOD as to that decision. Thus, any such requested relief as to this matter was obtained and the Court will accordingly dismiss this portion of the petition as moot.³⁶

³¹ *Id.* (quoting *TRAC*, 750 F.2d at 80).

³² *Id.* at 1347.

³³ *Id.*

³⁴ *Id.*

³⁵ See 38 U.S.C. § 5103A(d); 38 C.F.R. § 3.159(c)(4) (2018); see also *Martin*, 891 F.3d at 1345-47.

³⁶ See *Thomas v. Brown*, 9 Vet.App. 269, 270-71 (1996) (per curiam order); see also *Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992) (per curiam) ("When there is no case or controversy, or when a once live case or controversy becomes moot, the Court lacks jurisdiction."); *Mokal v. Derwinski*, 1 Vet.App. 12, 13-15 (1990) (this Court adheres to the case-or-controversy jurisdictional requirements imposed by Article III of the U.S. Constitution).

III. CONCLUSION

Upon consideration of the foregoing, it is

ORDERED that Mr. Sabir's petition for extraordinary relief in the nature of a writ of mandamus is DENIED in part and DISMISSED in part.

DATED: October 18, 2018

BY THE COURT:

A handwritten signature in blue ink, appearing to read "J. Falvey, Jr.", with a stylized flourish at the end.

JOSEPH L. FALVEY, JR.
Judge

Copies to:

Bilal J. Sabir

VA General Counsel (027)