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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-1255

ISHMEAL W. JEMMOTT, PETITIONER,

v.

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

Before PIETSCH, *Judge*.

ORDER

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

On February 12, 2020, the pro se petitioner, Ishmeal W. Jemmott, Jr., filed a petition in the nature of a writ of mandamus, asking this Court to compel VA to issue a decision on his claim for sleep apnea. He stated that his claim for sleep apnea has been "going on" since June 1996, *see* Petition at 1, and that the Court had granted the parties' joint motion for a partial remand (JMPR) in May 2017, *see Jemmott v. Shulkin*, U.S. Vet. App. No. 16-2712 (May 31, 2017, Order Granting Joint Motion for Partial Remand). Since the remand, he asserted, VA has not expeditiously processed his claim.

On March 9, 2020, the Court ordered the Secretary to respond to Mr. Jemmott's assertions. The Secretary responded and attached a declaration from Michael Edsall, assistant director of operations for the VA Appeals Management Office. *See* Secretary's Response (Resp.) Attachment (Attach.) A. In his declaration, Mr. Edsall acknowledged that the Court had remanded the appeal to the Board in May 2017, and that the Board then remanded Mr. Jemmott's claim on March 19, 2019, for the *scheduling of medical examinations*. *See* Resp. Attach. B at 2-5. Mr. Edsall, however, fails to explain why the Board took almost 2 years *to schedule* (not complete) these examinations.

Attachments to the Secretary's response show that Mr. Jemmott underwent an examination on July 27, 2019, and on September 19, 2019. *See* Secretary's Resp. Attach. C at 4. In November 2015, Mr. Jemmott's appeal returned to the Board; in December 2019, the Board remanded his appeal again, finding that an addendum medical opinion was needed to address arguments from the JMPR and the prior Board remand. *See* Secretary's Resp. Attach. A at 3; *see also* Secretary's Resp. Attach. D at 1-4. VA obtained an addendum medical opinion on December 12, 2019. *See* Secretary's Resp. Attach. E at 3.

Subsequently, Mr. Edsall stated that VA issued a Supplemental Statement of the Case on February 24, 2020, that continued to deny Mr. Jemmott's claim for sleep apnea. Mr. Edsall explained that on March 25, 2020, if VA receives no additional evidence, the appeal will be returned to the Board. *See* Resp. Attach. A at 2.

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). This includes issuing writs of mandamus to "compel action of the Secretary unlawfully withheld or unreasonably delayed." 38 U.S.C. § 7261 (a)(2); *see Martin v. O'Rourke*, 891 F.3d 1338, 1342-43 (Fed. Cir. 2018). 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).

Three conditions must be met before the Court may issue a writ: (1) The petitioner must demonstrate a 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 the writ is warranted. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004).

Mr. Jemmott's request for the Court to compel VA action is based on a claim of unreasonable delay. The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has stated that "the overarching inquiry in analyzing a claim of unreasonable delay is 'whether the agency's delay is so egregious as to warrant mandamus.'" *Martin v. O'Rourke*, 891 F.3d 1338, 1344 (Fed. Cir. 2018) (quoting *Telecomms. Research & Action Ctr. v. FCC (TRAC)*, 750 F.2d 70, 79 (D.C. Cir. 1984)). In *Martin*, the Federal Circuit held that this Court should evaluate mandamus petitions based on unreasonable delay by considering the six *TRAC* factors. *Id.* at 1345. In *TRAC*, the U.S. Court of Appeals for the D.C. Circuit fashioned a standard for determining whether unreasonable agency delay warrants mandamus by considering

(1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, 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 court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."

750 F.2d at 80 (citations omitted).

In analyzing the first two *TRAC* factors, that is, whether the time VA takes to make decisions is governed by a rule of reason and whether Congress has provided a timeline, the Court notes that, although Mr. Jemmott's claims are entitled to expedited treatment on remand, here the Board was required to conduct additional development in obtaining medical examinations. *See Martin*, 891 F.3d at 1346 (noting that the "rule of reason" analysis may include 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"). However, the Court is troubled that in his response to the Court's March 9 order, the Secretary offered no explanation for VA's almost 2-year delay in scheduling examinations, and for further delay when the examinations did not comply with the Court's JMPR, requiring an additional medical opinion. But though there has been considerable delay in obtaining the medical information required by the JMPR, the Court does not find that the "delay is so egregious as to warrant mandamus." *Martin*, 891 F.3d at 1344. Although several of the *TRAC* factors weigh in favor of issuing a writ, notably the third *TRAC* factor, deeming delays less reasonable when human health and welfare are at stake, under a "rule of reason" analysis the Court cannot say that any delay on VA's part is so egregious it warrants mandamus. *See Martin*, 891 F.3d at 1344.

Specifically, the third and fifth *TRAC* factors focus on the interest of the veteran and weigh in favor of a writ because health and human welfare are at stake. But the fourth factor, the effect of granting a writ on competing agency priorities, weighs against a writ. To require "VA to focus such limited resources on addressing delays in certain appeals will inure to the benefit of some veterans, [yet] such efforts may work a detriment to other veterans who are also relying on the VA for various types of assistance." *Martin*, 891 F.3d at 1347. Granting a writ in this case would merely shift resources away from adjudicating claims from other veterans. Finally, under the sixth *TRAC* factor, agency impropriety is not a necessary component of an unreasonable delay finding. The absence of such impropriety, however, militates against intervention through issuance of a writ.

In sum, having weighed the *TRAC* factors in the circumstances of this case, the Court concludes that Mr. Jemmott has not demonstrated that VA's delay in developing and readjudicating his claim is unreasonable. Consequently, the extraordinary remedy of mandamus is not appropriate. *See Cheney*, 542 U.S. at 380-81 (holding that mandamus may not issue unless the Court is convinced in the given circumstances that it is warranted). Now that Mr. Jemmott has pointed out the delay to the Secretary, the Court trusts that VA will address his claim in a timely manner, ensuring that any decision is correct as well as prompt, and that further petitions for extraordinary relief on his behalf will not be necessary. If Mr. Jemmott elects not to provide additional evidence to VA on or after March 25, 2020, and does not receive a timely decision from the Board, he may file another writ of mandamus.

Upon consideration of the foregoing, it is

ORDERED that the petition for extraordinary relief in the nature of a writ of mandamus is DENIED.

DATED: April 17, 2020

BY THE COURT:



CORAL W. PIETSCH
Judge

Copies to:

Ishmeal W. Jemmott

VA General Counsel (027)