IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

CHARLES J. LOVE, JR.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Vet. App. No. 21-1323
	)	
DENIS MCDONOUGH,	)	
Secretary of Veterans Affairs,	)	
	)	
Respondent.	)	

RESPONDENT'S RESPONSE TO THE COURT'S
NOVEMBER 22, 2021, ORDER

Respondent, Denis McDonough, Secretary of Veterans Affairs, hereby responds to the Court's November 22, 2021, Order directing supplemental memoranda of law addressing the following questions:

1. Whether the Secretary's action to implement the rating discontinuance on December 1, 2019, was "a decision by the Secretary under a law that affects the provision of benefits" within the meaning of section 511(a) that petitioner may appeal;

2. Regardless of whether the Secretary's action to implement a discontinuance is a decision that petitioner may appeal, is the matter of the proper implementation date of the discontinuance a question that falls under a law that affects the provision of benefits such that the petitioner is entitled to a decision by VA on that matter, *see, e.g., Rosinski v. Shulkin*, 29 Vet.App. 183 (2018) (per curiam order); *Chisholm v. McDonald*, 28 Vet.App. 240 (2016) (per curiam order), (i.e., as an alternative to question one above, may petitioner request that the Secretary render a decision on the timing of the implementation); and

3. What impact, if any, would finding either of these scenarios [to be] a section 511(a) question have on this Court's authority to issue a writ in aid of its jurisdiction under 28 U.S.C. § 1651(a)?

1. The Action to Implement a Discontinuance is not a Decision within the Meaning of 38 U.S.C. § 511(a).

The action to implement the rating discontinuance on December 1, 2019, was not a decision within the meaning of 38 U.S.C. § 511(a). In this regard, the action implementing a decision does not involve the interpretation of a law that affects the provision of VA benefits. Rather, such action only represents the actual effect of a decision on Petitioner's benefits. As this Court held, "[s]ection 511(a) bases the Secretary's jurisdiction not upon an ***actual*** effect upon a ***particular*** claimant's benefits but upon whether the law to be interpreted is one that '***affects*** the provision of [VA] benefits'." *In re Fee Agreement of Cox*, 10 Vet.App. 361, 373 (1997), *vacated sub nom. Cox v. West*, 149 F.3d 1360 (Fed. Cir. 1998) (quoting 38 U.S.C. § 511(a) and adding emphasis). Here, as discussed below, while the discontinuance itself does involve a law that affects the provision of benefits, the action to implement that decision does not. Rather, the action to implement the reduction is a ministerial act that is statutorily mandated and necessarily follows where, as here, a claimant has not timely submitted additional evidence to show that their compensation payments should be continued at their present level. *See* 38 U.S.C. § 5112(b)(6) (providing that the effective date of a reduction of discontinuance of compensation "shall be the last day of the month following sixty days from the date of notice to the payee . . . of the reduction of discontinuance"); 38 C.F.R. §. 3.105(e) (providing that if additional evidence is not received in the 60 days following a proposed reduction or discontinuance, "final rating action will be

taken and the award will be reduced or discontinued effective the last day of the month in which a 60-day period from the date of notice to the beneficiary of the final rating action expires").

2. The Proper Implementation Date of a Discontinuance is a Matter that Could be Subject to a Decision pursuant to 38 U.S.C. § 511(a).

At the outset, in this case, the term "implementation date" is synonymous with "effective date." As discussed at oral argument, rating decisions are binding on the agency when they are issued, pursuant to 38 C.F.R. § 3.104. Oral Argument at 40.34-41.00; *see* 38 C.F.R. § 3.104(a) ("A decision of a VA rating agency is binding on all VA field offices as to conclusions based on the evidence on file at the time VA issues written notification in accordance with 38 U.S.C. [§] 5104."). To suggest that a rating decision should not be implemented on the same day that it is effective in a rating discontinuance or reduction case renders the due process procedures set forth by Congress in 38 U.S.C. § 5112(b)(6) superfluous, and the Court should avoid such an outcome. Oral Argument at 41.33-42.20; *see also Duncan v. Walker,* 533 U.S. 167, 174 (2001) (*citing Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879) ("a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant")). Given that, in this case, "implementation date" is synonymous with "effective date," the Secretary concedes that the propriety of such a date is a question that falls under a law that affects the provision of benefits, specifically 38 U.S.C. § 5112, such that, had he specifically pursued an appeal of the effective

date, Petitioner would be entitled to a decision on that matter. However, as will be discussed in more detail below, Petitioner has not pursued an appeal of the effective date of the discontinuance and VA has not issued a decision on that matter.

Additionally, to the extent the Court determines that "implementation date" and "effective date" do not have the same meaning in this case but instead determines that the decision to implement a rating discontinuance on the same day it is effective is more akin to a policy decision by the Agency, such a policy would be derived from 38 U.S.C. § 5112, which governs effective dates of reductions and discontinuances. Like in *Rosinski v. Shulkin*, where the Court determined that an M21-1 provision was promulgated from statutory authority such that the provision at issue involved a law that affects the provision of benefits, a decision to implement a rating discontinuance on the day it was effective would involve a law that affects the provision of benefits within the meaning of 38 U.S.C. § 511(a). 29 Vet.App. 183, 189 (2018). Therefore, the Secretary clarifies the undersigned counsel's comments made at argument and submits that the matter of the proper implementation date of a rating discontinuance is an issue that could be the subject of an agency decision that could then be appealed to the Board and to this Court.

Given the above, and as would be the case in any rating discontinuance, Petitioner could have contested the proposed effective date for the discontinuance of his 100% rating for prostate cancer and resulting discontinuance of Special

Monthly Compensation when he received the February 13, 2019, letter informing him of the proposed discontinuance or the October 1, 2019, rating decision finalizing the discontinuance. However, Petitioner never contested the effective date of the discontinuance before the agency, he only contested the propriety of the discontinuance itself on procedural grounds. As such, the matter of the proper implementation or effective date has not been the subject of a decision within the meaning of 38 U.S.C. § 511(a).

3. Finding Either the Action Implementing the Discontinuance to be a Decision or Finding the Propriety of the Implementation Date to be a Matter Warranting a Decision has no Impact on the Court's Authority in this Case to Issue a Writ Granting Petitioner's Requested Relief.

As noted above, Petitioner did not contest the propriety of the effective date of the rating discontinuance before the agency and, as a result, VA did not issue a decision on this matter. As the Secretary discussed during oral argument, Petitioner has initiated no action before the agency regarding the question of the appropriate implementation date for the rating discontinuance. Oral Argument at 35.37-36.35. Given that Petitioner has not initiated any action before the agency, issuance of a writ in this matter would not be in aid of this Court's jurisdiction. *See In re Tennant*, 360 U.S. App. D.C. 171, 359 F.3d 523, 529 (D.C. Cir. 2004) ("It is one thing to say that we have such authority when, in the formulation used by the Supreme Court, a case is 'within [our] appellate jurisdiction although no appeal has been perfected.' [citation omitted]. It is quite another to claim such power solely on

the basis that events might lead to a filing before an agency or lower court, which might lead to an appeal to this court.").

While in *Chisholm v. McDonald*, the Court found it had jurisdiction to order VA to issue a decision, which could then be appealed, the facts of this case differ in one key aspect from *Chisholm*. 28 Vet.App. 240 (2016). The Petitioner in *Chisholm* had specifically requested that VA issue a decision on the matter of whether support staff could be granted access to veteran files, but VA "refused to do so." *Id*. at 243. Therefore, because the Petitioner in that case had initiated action at the agency by requesting a decision, the Court had the authority to issue that writ in aid of its jurisdiction.

Petitioner here has chosen to bypass the agency and the administrative appeals process entirely, initiating action before the Court by virtue of this writ. Essentially, Petitioner is asking this Court to exercise original jurisdiction over the Regional Office decision that implemented his rating discontinuance. "The [All Writs Act] does not authorize [the Court] to act in these circumstances. Mandamus in support of prospective jurisdiction, 'like any exercise of appellate jurisdiction, [i]s limited to review of proceedings in a cause already instituted.'" *Wolfe v. Wilkie*, 32 Vet.App. 1, 44 (2019) (Falvey, J., dissenting) (*citing In re Tennant*, 359 F.3d at 530); *see also Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 379 (2004) ("[M]andamus may not issue so long as alternative avenues of relief remain available."); *Lamb v. Principi*, 284 F.3d 1378, 1384 (Fed. Cir. 2002) (holding that

writs "'cannot be used as substitutes for appeals'" (quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953))).

Therefore, regardless of whether the action implementing the discontinuance constitutes a decision or whether a decision on the proper implementation date can be issued, this Court is without authority to issue a writ in this case because Petitioner has initiated no action related to the implementation date before the agency.

WHEREFORE, Respondent, Denis McDonough, Secretary of Veterans Affairs, responds to the Court's November 22, 2021, Order.

Respectfully submitted,

RICHARD A. SAUBER
General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Selket N. Cottle
SELKET N. COTTLE
Deputy Chief Counsel

/s/ Amanda M. Haddock
AMANDA M. HADDOCK
Senior Appellate Attorney
Office of General Counsel (027I)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-5114

Counsel for Respondent
Secretary of Veterans Affairs