

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 23-5120

EUGENE A. DYKES,

APPELLANT,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before GREENBERG, ALLEN, and LAURER, *Judges*.

ORDER

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

This appeal calls on us to address the scope of the Court's jurisdiction. The specific issue before us today is resolution of appellant's November 17, 2023, Motion for an Expedited Proceeding ("Motion to Expedite") and establishing how we will address this appeal given the information we have recently received that appellant is seriously ill. We begin by laying out the relevant factual background. Then, we turn to appellant's Motion to Expedite, which we will grant in part as we will explain. Next, we will direct that the Court's Central Legal Staff (CLS) conduct a staff conference under Rule 33(a) of the Court's Rules of Practice and Procedure before oral argument to address the possible resolution of this matter given the health concerns appellant is facing. And finally, if the parties cannot resolve the case in a Rule 33 Staff Conference, we will explain the specific issues the parties should be prepared to address at the expedited oral argument we will order to be held.

I. BACKGROUND

On August 28, 2023, appellant, through counsel, filed a Notice of Appeal (NOA) listing August 4, 2023, as the date of the Board of Veterans' Appeals (Board) decision he wished to appeal. On September 26, 2023, the Secretary moved to dismiss this appeal for lack of jurisdiction. The Secretary argued that appellant had not received a final Board decision dated August 4, 2023. Instead, on August 4, 2023, the Board sent a letter to appellant concerning a perceived defect in his attempt to file an administrative appeal. Appellant opposed the motion to dismiss.

From the parties' submissions, we understand the factual background of this appeal to be as follows. On June 29, 2023, a VA regional office mailed appellant a June 24, 2023, rating decision that determined that service connection was "confirmed and continued" for (1) an anxiety

disorder; (2) chronic obstructive pulmonary disease; (3) hypertension; and (4) a heart condition.¹ Thereafter, appellant retained his current counsel and, on July 17, 2023, notified VA of the appointment.²

On August 3, 2023, through counsel, appellant submitted a VA Form 10182, Notice of Disagreement (NOD), seeking Board review of the June 2023 rating decision in which he stated the following:

- That he wished to appeal "the rating decision dated June 24, 2023, which denied the concession of actual exposure to herbicides and 'direct' service-connection for his claimed herbicide-related medical conditions arising from his active duty service in Panama;"³ and
- As to the specific issues appealed, appellant stated, among other things: "All conditions claimed as related to/arising from exposure to CFR-listed herbicides improperly decided."⁴

In response to the NOD, on August 4, 2023, the Board sent a letter to appellant stating, among other things, that:

- "Your request did not identify which issues you want to appeal. In order for us to process your Board Appeal, you need to submit another VA Form 10182 that lists the issues you want a Veterans Law Judge to review."⁵
- "Your request did not identify the date of the VA decision you want to appeal. In order for us to process your Board Appeal request, you must submit another VA Form 10182 that lists the date(s) of the decision(s) with the specific issue(s) you are appealing."⁶
- "The Board cannot proceed with the review your appeal until we receive your new Board Appeal (VA Form 10182). If you do not submit a new form, the previous VA Form 10182 you submitted will not be considered a valid appeal for which clarification was requested and the Board will not review your appeal as to those issues."⁷

¹ See Secretary's Motion to Dismiss ("Sec'y Mot. To Dismiss"), Exhibit (Ex.) 1.

² *Id.*, Ex. 2.

³ *Id.*, Ex. 3.

⁴ *Id.*

⁵ *Id.*, Ex. 4.

⁶ *Id.*

⁷ *Id.*

The August 4, 2023, letter came from the "Inbound Operations Branch, Office of the Clerk [of the Board]."⁸ It did not reference or enclose appellate rights, but it did provide that appellant could submit a revised Form 10182 "within 60 days of the date of this letter or 1 year from the date on your decision letter."⁹

There was an exchange of some additional communications between appellant's counsel and the Board over the 2 weeks following the August 4, 2023, Board letter.¹⁰ The Board and appellant could not resolve their disagreement concerning the VA Form 10182 appellant submitted. On August 28, 2023, appellant filed the NOA at issue in this appeal. The motions judge to whom the Secretary's motion to dismiss had been assigned referred this matter to a panel for resolution. The Clerk of the Court was still scheduling oral argument when, as we will discuss next, appellant's counsel informed the Court of a health issue concerning appellant.

II. APPELLANT'S MOTION TO EXPEDITE

On November 17, 2023, appellant's counsel informed the Clerk of the Court of a health issue related to appellant. On that same date, pursuant to the Court's direction conveyed through the Clerk of Court, appellant filed his Motion to Expedite.¹¹ Appellant's counsel reported that he had learned on November 15, 2023, from appellant's daughter that appellant "was gravely ill and had been told by his treating physician that there was 'nothing more he could do' and was now 'trying to add a few more months.'"¹² Appellant requested that the Court (1) expedite proceedings in this appeal under Rule 47 of the Court's Rules of Practice and Procedure and (2) either forego oral argument and direct the Secretary to reply to appellant's opposition to the motion to dismiss or schedule a virtual oral argument in early December 2023.¹³

We will grant appellant's Motion to Expedite in part. First, based on counsel's representations, including his commitment to submit appropriate medical documentation supporting a motion to expedite,¹⁴ we will grant the Motion to Expedite to the extent it seeks to treat this appeal as expediated under the Court's Rules.¹⁵ Second, we will direct that the Clerk of

⁸ *Id.*

⁹ *Id.* (bolded emphasis omitted).

¹⁰ *Id.* Exs. 5-7.

¹¹ Appellant's Motion to Expedite contains more than one request for relief, which is generally not permitted. *See* U.S. VET. APP. R. 27(e). Given the circumstances, including the Court's direction that appellant file a motion explaining the actions he wished the Court to take given appellant's health issues, we suspend that Rule. *See* U.S. VET. APP. R. 2.

¹² Motion at 1.

¹³ *Id.* at 2. Appellant's counsel also stated that "[g]iven the nature of his motion," he had not contacted the Secretary's counsel about the Motion to Expedite as he is required to have done under normal circumstances. *See* U.S. VET. APP. R. 27(a)(5). We are not sure why, even given the circumstances, that appellant's counsel could not have attempted to communicate with the Secretary's counsel. Nevertheless, we will suspend the Rules again with respect to this issue. *See* U.S. VET. APP. R. 2.

¹⁴ Motion at 1.

¹⁵ *See* U.S. VET. APP. R. 47.

the Court schedule a virtual oral argument in early December in order to assist us in resolving the motion to dismiss.

III. CLS STAFF CONFERENCE

We will also direct that the CLS schedule a staff conference to take place before the oral argument in this matter.¹⁶ To be clear, we express no views about (1) whether the Board's August 4, 2023, letter seeking clarification of appellant's VA Form 10182 is a "decision" over which we have jurisdiction or (2) assuming we have jurisdiction, whether the Board's determination that the VA Form 10182 did not provide the information necessary to process the appeal was correct.

Despite our not taking a position on anything related to the merits, it seems that this case calls out for a negotiated resolution. We acknowledge that both parties have strongly held views about what needs to be included on a VA Form 10182. And, in an appropriate case, the Court may need to weigh in that question. But maybe, even if we have jurisdiction, this is not the case. We know that appellant is seriously ill. And it seems that it would be possible for the parties to agree what needs to be on *this appellant's* VA Form 10182 in order to allow the administrative appeal to move forward. True, such an agreement would leave the broader issues unresolved. But appellant's case could proceed far more quickly than would ever be possible based on resolving the current appeal. After all, this case is about Mr. Dykes, not simply an abstract principle. If the parties could reach such an agreement, either the Secretary could direct the Board to process the August 2, 2023, submission as a valid NOD or appellant could submit a revised VA Form 10182. And appellant could then dismiss this appeal. As we noted above, he has until June 29, 2024, to do perfect an appeal to the Board.¹⁷ We can't compel the parties to reach an agreement under these circumstances, but we can compel them to try.

We trust that counsel for the parties will approach a potential resolution in good faith. So, we will direct CLS to schedule and hold a Rule 33 Staff Conference before the date on which oral argument is scheduled.

IV. ORAL ARGUMENT: BE PREPARED TO DISCUSS

As discussed, we will direct the Clerk of the Court to schedule a virtual oral argument in this matter in early December. Of course, the parties should be prepared to discuss any issues implicated by the Secretary's motion to dismiss. To assist the parties in their preparation, they should ensure that they are prepared to address the following matters at oral argument:¹⁸

- The August 4, 2023, letter requiring appellant to submit a revised VA Form 10182 came from the "Inbound Operations Branch" in the "Office of the Clerk of the

¹⁶ See U.S. VET. APP. R. 30(a).

¹⁷ See Sec'y Mot. To Dismiss, Ex. 4.

¹⁸ While we have not divided the topics between the parties, we recognize that certain of the topics we have identified are more applicable to one party or the other. A party should be prepared to address every topic to the extent that party has the information to do so.

[Board]."¹⁹ What is the process the Inbound Operations Branch uses to determine whether a Form 10182 contains the information necessary to process an appeal? Is the decision made by a Veterans Law Judge (VLJ)? If not, what type of Board employee decides?

- Is there a way a claimant who is told by the Inbound Operations Branch that a VA Form 10182 they submitted lacks the necessary information can seek correction of an error in that determination? Specifically, if a VLJ does not make the initial determination, is there a way a claimant can obtain VLJ review of the decision? How is a claimant made aware of any such review options?
- If a claimant does not have, or is not told of, a right to seek some review of a determination that a VA Form 10182 does not provide the information necessary to process an appeal, has the claimant been denied rights under the Fair Process Doctrine and/or the Due Process Clause?
- The August 4, 2023, letter stated that if appellant did "not submit a new form, the previous VA Form 10182 you submitted will not be considered a valid appeal of any issue for which clarification was requested, and the Board will not review your appeal as to those issues."²⁰ Why doesn't the determination that the Board will not consider appellant's administrative appeal constitute a "decision" of the Board because it effectively denied a benefit appellant sought by refusing to adjudicate an appeal concerning claims the Agency had denied?²¹
- How, if at all, does 38 C.F.R. § 20.202(f) affect whether the August 4, 2023, letter is a "decision" for purposes of the Court's jurisdiction?
- What is the import, if any, of the VA's failure to reference or enclose appellate rights along with its August 4, 2023, letter?
- What is the import, if any, of the fact that appellant has until June 29, 2024, to submit a revised VA Form 10182, which could then allow the Board to process his appeal?²² In other words, does the appellant's ability to engage in self-help affect whether the August 4, 2023, letter is a "decision" for purposes of the Court's jurisdiction?

¹⁹ Sec'y Mot. To Dismiss, Ex. 4.

²⁰ *Id.*

²¹ *See, e.g., Tyrues v. Shinseki*, 732 F.3d 1351, 1355 (Fed. Cir. 2013) (a Board "decision" is an action that grants or denies the benefit sought); *Kilpatrick v. Nicholson*, 417 F.3d 1361, 1364 (Fed. Cir. 2005) (same); *Maggitt v. West*, 202 F.3d 1370, 1367 (Fed. Cir. 2000) (same); *Clark v. McDonough*, 35 Vet.App. 317, 322 (2022) (same); *see also* 38 U.S.C. §§ 7252(a), 7266(a).

²² Sec'y Mot. To Dismiss, Ex. 4.

V. CONCLUSION

Upon consideration of the foregoing, it is

ORDERED that appellant's Motion for an Expedited Proceeding is granted-in-part. In particular, this appeal is to be treated as expedited under Rule 47 of the Court's Rules of Practice and Procedure. In addition, the Clerk of the Court will schedule a virtual oral argument in early December as the business of the Court permits. It is further

ORDERED that the Court's Central Legal Staff schedule a staff conference under Rule 33 of the Court's Rules of Practice and Procedure to be conducted before oral argument in order to address the matters set forth above. And it is further

ORDERED that the parties be prepared to discuss the issues set forth above at the oral argument in this matter.

DATED: November 21, 2023

PER CURIAM.

Copies to:

Douglas J. Rosinski, Esq.

VA General Counsel (027)