

THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

LEWIS BROWN,
Appellant,

v.

DENIS R. MCDONOUGH,
Secretary of Veterans Affairs,
Appellee.

VET. APP. NO. 21-3218

SUPPLEMENTAL MEMORANDUM OF LAW

Pursuant to this Court's November 2, 2023, order, Mr. Brown submits the following memorandum of law. The Court asked the parties to address whether, after the Secretary's grant of a TDIU rating from May 1977, there remains any case or controversy in this appeal. The short answer is absolutely. As will be discussed more below, Mr. Brown is not done. Congress has promised that claimant, particularly veterans like Mr. Brown, have certain rights. These rights include, as directly pertinent to the issue in the appeal, notice of the Secretary's 38 U.S.C. § 511 decision. But these rights also include the right to payment of compensation benefits for all disability resulting from a service incurred injury.

The Court also asked the parties to "identify the precise harm experienced by appellant." Again, as we will develop more below, the harm Mr. Brown suffered is the lack fo 38 U.S.C. § 5104 compliant notice of the Secretary's August 2019 § 511(a) decision made by the Board. Mr. Brown still has not obtained this notice, and without

that notice is unable to adequately pursue his compensation claims. The Secretary's failure to provide this notice is sufficient damages to establish the presence of a case or controversy. However, assuming he needs to show some pecuniary harm, Mr. Brown has continued to pursue his 1977 claim, and is now seeking special monthly compensation benefits (SMC) for his lumbar spine disability. Should any SMC rating be assigned, he will be entitled to additional compensation benefits.

Nominal damages satisfy the case or controversy requirement. Mr. Brown still has not received 38 U.S.C. § 5104 compliant notice of the Board's 2019 decision. That notice is critical to understanding his benefits, and to enabling him to continuously pursue his 1977 claim to its maximum. We won't delve too deeply into why, but refer the Court to the oral argument and the July 2023 supplemental memorandum of law. However, and more importantly, Mr. Brown still seeks additional compensation benefits from his 1977 claim. These benefits, if awarded, will entitle Mr. Brown to a higher monthly compensation payment, thereby representing a case or controversy.

This Court adopts the rule from Article III, Section 2 of the U.S. Constitution that its jurisdiction only extends to a "case or controversy." *Mokal v. Derwinski*, 1 Vet.App. 12, 15 (1990). A live case or controversy must be present at the outset of an appeal and persist throughout its pendency. See *Cardona v. Shinseki*, 26 Vet.App. 472, 474 (2014). As a jurisdictional requirement, the Court has an independent duty to ensure

that a case or controversy still exists. *Demery v. Wilkie*, 30 Vet.App. 430, 434 (2019) (per curiam order).

If an appellant receives the benefit or relief sought before the Court reaches a decision, the case becomes moot, and the appeal must be dismissed. See *id.* A case is moot when "it is impossible for [the Court] to grant 'any effectual relief whatever' to [the appellant] in the event that he [or she] prevails." *Philbrook v. Wilkie*, 32 Vet.App. 342, 345 (2020), *rev'd on other grounds sub nom. Philbrook v. McDonough*, 15 F.4th 1117 (Fed. Cir. 2021)(quoting *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019)).

However, "as long as the parties have a concrete interest, however, small, in the outcome of the litigation, the case is not moot." *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Emps.*, 466 U.S. 435, 442 (1984). And that interest need not be great, for the Supreme Court has long held that even nominal damages satisfy the case or controversy requirement. In *Uzuegbunam* the Supreme Court considered a suit alleging violation of the First Amendment's right to free speech and a demand for nominal damages. *Uzuegbunam v. Preczewski*, 141 S.Ct. 792 (2021). The Court observed, "[w]hen a right is violated, that violation 'imports damage in the nature of it' and 'the party injured is entitled to a verdict for nominal damages.'" *Id.* at 800; citation omitted.

"Nominal damages are not a consolation prize for the plaintiff who pleads, but fails to prove, compensatory damages. They are instead the damages awarded by default

until the plaintiff establishes entitlement to some other form of damages, such as compensatory or statutory damages." *Id.* After discussing the common law and other precedent, the Court held "[b]ecause nominal damages were available at common law in analogous circumstances, we conclude that a request for nominal damages satisfies the redressability element of standing where a plaintiff's claim is based on a completed violation of a legal right." *Id.*, at 801-802.

The Court emphasized that this holding is directed only at redressability, and "[i]t remains for the plaintiff to establish the other elements of standing." *Id.*, at 802. Those elements are "(1) an injury in fact (2) that is fairly traceable to the challenged conduct, but he must also seek (3) a remedy that is likely to redress that injury." *Id.*, at 797. Mr. Brown meets all of these.

First, he has an injury in fact. As he established, he is entitled to 38 U.S.C. § 5104 notice of the Secretary's 2019 Board decision. See July 2023 Suppl. Memo. of Law. Congress guaranteed this notice, and to date he has not provided it. Thus, he was injured by the Secretary's failure to provide him notice. This injury is directly traceable to the Secretary, as he is the only one who can provide this notice. Lastly, the remedy, § 5104 compliant notice, is redressable as it is a "nominal damage."

Uzuegbunam points out to precedent that establishes a "declaration of trespass" as one such nominal damage because one "could 'vindicate his right by action' and protect against those future threats." See *Uzuegbunam*, at 798; see also *Simmons v. Wilkie*, 30 Vet.App. 267, 279 (2019). (Holding harm "can be shown by demonstrating

that the error (I) prevented the claimant from effectively participating in the adjudicative process"). A declaration of trespass is similar to what Mr. Brown seeks from this Court. Whereas there is no obvious pecuniary injury to someone trespassing, the future consequence of that trespass can lead to significant harm. See *Uzuegbunam*, at 798. (Noting "a trespass to land or water rights might raise a prospective threat to a property right by creating the foundation for a future claim of adverse possession or prescriptive easement").

Similarly, there is no obviously pecuniary injury to defective notice, but it can and does lead to significant harm where a binding § 5104(b)(4) favorable finding is overturned without showing clear and convincing evidence. See 38 U.S.C. § 5104A. Mr. Brown seeks an order from this Court that he is entitled to § 5104 compliant notice of the Secretary's 2019 Board decision. This notice is critical to, and will enable him to appropriately respond to the Secretary's decision. He has yet to receive that notice. We must keep in mind that the changes made by the AMA "w[ere] intended to 'help veterans better understand VA's decisions on their claims' and 'to help better inform the veteran's decision regarding whether to appeal VA's rating decision.'" See *Greer v. McDonough*, 30 Vet.App. 220, 224 (2023); quoting H.R. Rep. No. 115-135, at 3 (2017).

The nominal damages sought here are both statutorily required, and necessary to further Congress' intent in creating the AMA system. Furthermore, Mr. Brown has still not received § 5104 compliant notice of any § 5111 decision from the Secretary. Since the August 2019 Board decision, the only notice Mr. Brown has received is the October

2023 Board decision, which does not provide § 5104 notice. Therefore, the Board's 2023 decision cannot, as a matter of law, provide the notice Mr. Brown seeks. And even if the AOJ provides § 5104 compliant notice when it implements the Board's decision, it still will not touch on the issues adjudicated in the 2019 Board decision.

Furthermore, even assuming there are no nominal damages available here for § 5104 notice, or this Court finds that more is needed than asking for nominal damages, Mr. Brown has submitted a supplemental claim in response to the 2023 Board decision seeking special monthly compensation. See *Solze* notice. He filed that claim to obtain additional compensation for his severely disabled conditions, and if successful, will entitle him to additional money. Compare 38 U.S.C. § 1114(j) (payment for a total rating) with § 1114(l) (payment for aid and attendance).

To be clear, without § 5104 notice, Mr. Brown is unable to effectively respond and obtain his rightful benefits. Congress has said that this notice is critical to making the AMA work. See *Greer*, at 224. As argued at oral argument, this notice was defective, and it was that notice that he sought to correct with his higher level review request. See Oral argument transcript, at 16'00"-16'45"; see also, *id.*, at 12'00"-13'05" (explaining how Mr. Brown was harmed by the inadequate notice). Therefore, should the Court find that Mr. Brown must show some money benefit is still in dispute, he submits that the potential for additional compensation payments due to the need of aid and attendance (or any other SMC rating) more than satisfies such a requirement.

Respectfully submitted this the 11th day of January, 2024.

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