

**DOUGLAS L. HAILEY,** )  
*Appellant,* )  
) )  
v. )  
) )  
**DENIS McDONOUGH,** )  
**Secretary of Veterans Affairs,** )  
*Respondent.* )

**DENIS McDONOUGH,** )  
**Secretary of Veterans Affairs,** )  
*Respondent.* )

On July 29, 2022, this Court issued an order granting the Secretary's motion to dismiss this appeal for lack of jurisdiction based on a single judge concluding that the May 10, 2022, letter by the Deputy Vice Chairman of the Board of Veterans Appeals

(Board) denying veteran Douglas L. Hailey’s motion to advance his appeal on the Board’s docket was not a final adverse Board decision that granted or denied a VA benefit. On August 16, 2022, Mr. Hailey filed a timely motion for single judge reconsideration or, in the alternative, a panel decision. On January 12, 2023, this Court granted Mr. Hailey’s motion for a panel decision and withdrew the single judge decision. On May 16, 2023, the panel heard oral argument.

The case or controversy presented by Mr. Hailey’s appeal requires that this panel determine several questions of law including whether the Board’s decision to deny advancement of the docket is a decision of the Secretary under 38 U.S.C. § 511(a). In order to decide whether the Board’s decision to deny advancement on the docket is a decision of the Secretary under § 511(a), this Court must interpret the provisions of § 7107(b)(1) and § 20.800(c)(3).

This issue presented by Mr. Hailey’s appeal is an issue of first impression and if this appeal is dismissed, the question of whether the Board’s decision to deny advancement on the docket is a decision of the Secretary under § 511(a) will remain unanswered.

This Court is “an Article I tribunal,” created under the Veterans’ Judicial Review Act of 1988 (“VJRA”), Pub. L. No. 100–687, 102 Stat. 4105 (2000) (codified as amended at 38 U.S.C. §§ 7251–98), “to review Board decisions adverse to veterans.” *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 432 (2011). Under the

VJRA, this Court has “exclusive jurisdiction to review decisions of the Board,” with “power to affirm, modify,” remand, “or reverse a decision of the Board[.]” 38 U.S.C. § 7252(a). Whether or not the Board’s decision to deny advancement on the docket is a decision of the Secretary under § 511(a) and it is a decision of the Board within this Court’s exclusive jurisdiction to review. The question presented by this appeal is of interest to every claimant who appeals a decision of the Secretary to the Board for review.

“Jurisdiction” refers to “a court’s adjudicatory authority.” *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004). Jurisdictional questions “should generally be addressed by the Court whenever they arise.” *Matthews v. Nicholson*, 19 Vet.App. at 202, 204 (2005) (citing *Barnett v. Brown*, 83 F.3d 1380, 1383 (Fed. Cir. 1996) (holding that “it was well-established judicial doctrine that any statutory tribunal must ensure that it has jurisdiction over each case before adjudicating the merits [and] that a potential jurisdictional defect . . . must be adjudicated”)). This appeal has raised an important question of law concerning whether this Court has jurisdiction to review a decision of the Board denying a motion authorized by statute to advance an appeal on the Board’s docket. Since, the February 8, 2024 Board decision on the merits of Mr. Hailey’s appeal does not resolve the question of law pending before this panel, its issuance does not and can not moot this appeal.

This Court has adopted the jurisdictional restrictions of the case-or-controversy rubric under Article III of the Constitution of the United States. *See Aronson v. Brown*, 7 Vet.App. 153, 155 (1994); *Mokal v. Derwinski*, 1 Vet.App. 12, 13 (1990). When the relief sought has been accomplished, the appropriate course of action is for the Court to dismiss the matter as moot. *See Thomas v. Brown*, 9 Vet.App. 269, 270 (1996) (*per curiam* order); *Aronson*, 7 Vet.App. at 155–56 (dismissing as moot motion for recusal because underlying issue in dispute had become moot); *Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992) (*per curiam* order) (“[w]hen there is no case or controversy, or when a once live case or controversy becomes moot, the Court lacks jurisdiction”). The issuance of the Board’s February 8, 2024, decision did not grant the relief sought by Mr. Hailey’s motion to have his appeal advanced on the docket. Likewise, the issuance of the Board’s February 8, 2024, decision did not resolve the underlying issue presented by Mr. Hailey’s appeal which is whether a denial by the Board of a motion to advance an appeal on its docket is a decision of the Secretary under 38 U.S.C. § 511(a).

In this matter, it is undisputed that on April 6, 2022, Mr. Hailey after waiting more than a year and a half for his appeal to be decided by the Board filed his motion for advancement on the docket, due to serious illness. On May 10, 2022, the Board denied his motion and Mr. Hailey appealed that decision of the Secretary to this Court. This Court now knows from the Secretary’s January 17, 2024 *Solze* notice that

Mr. Hailey's appeal was distributed to a Veterans Law Judge (VLJ) for a decision. Further, based on Mr. Hailey's February 12, 2024 *Solze* notice that on February 8, 2024 a decision was made by the Board on his appeal. Mr. Hailey calculates that it took the Board 23 days to provide him a decision on his appeal. Mr. Hailey's submits that this means that had the Board granted, rather than denied his motion for advancement on the docket on May 10, 2022, then by the first week of June 2022 Mr. Hailey would have had a final decision from the Board. Based upon the outcome of the decision made by the Board, Mr. Hailey asserts that he was unlawfully denied and unreasonably delayed a decision for 18 months, the time from his Motion to Advance and his decision from the Board.

There remains a live case or controversy for this panel to address on the question of whether the denial of a Motion for Advancement is a final decision of the Board subject to appeal to this Court. The case or controversy which continues is two fold. First, is the question of law presented by the matter currently pending before this panel is whether this Court has subject matter jurisdiction to review a decision of the Board to deny a motion to advance an appeal on its docket. Second, is the merits determination on the Motion for Advancement made by the Board that Mr. Hailey was not sufficiently sick to require the advancement of his appeal on the Board's docket. Even though the Board has now rendered a final decision on Mr. Hailey's appeal to the Board that disposition does not render moot whether this

Court has subject matter jurisdiction to review a decision of the Board to deny a motion to advance an appeal on its docket. Further, the Board's decision does not render moot, his appeal of the Board's decision to deny advancement on the docket.

There is no dispute that this Court is an Article I Court, of this Court has adopted the case-or-controversy requirements of Article III courts. *See Mokal v. Derwinski*, 1 Vet.App. 12 (1990). Under Article III, constitutional standing is present when (1) there is an injury in fact (defined as “an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical”); (2) the alleged injury is causally related to the conduct of the defendant; and (3) it is likely that the injury will be “redressed by a favorable decision.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992) (citations omitted). Mr. Hailey has the requisite constitutional standing to have brought this appeal and the only way that his appeal does not continue to a decision on the merits is if this Court grants the Secretary's motion to dismiss on the basis that this Court lacks subject matter jurisdiction. Mr. Hailey has a right to appeal an adverse jurisdictional decision by this Court.

The Board's February 8, 2024 decision has no impact or affect on the question of law regarding whether this Court has subject matter jurisdiction to review a decision of the Board to deny advancement on the docket. Equally, the Board's February 8, 2024 decision has no impact or affect on the question presented by Mr.

Hailey's appeal which is whether his service connected disabilities resulted in a serious illness which would require the advancement of his appeal on the Board's docket. Put another way, the Board's denial of Mr. Hailey's appeal is neither relevant nor dispositive of either the question of the Secretary's motion to dismiss. Likewise, the Board's February 8, 2024 decision on Mr. Hailey's appeal of the Secretary's decision to deny him benefits does not resolve the merits of Mr. Hailey's pending appeal should this Court conclude that it has subject matter jurisdiction.

Additionally, Mr. Hailey's appeal is an AMA appeal and as such the Board's February 8, 2024 decision included a denial of two claims and a remand of another. The Board's remand was based on VA's failure to consider a higher level of SMC constituting a pre-decisional duty to assist error. Mr. Hailey's June 2020 VA Form 10182 expressly argued that SMC should have been considered by VA's April 2020 rating decision. As a result, of this remand, Mr. Hailey loses his docket number under the Board's AMA procedures. This means that in the event that VA does not award him SMC benefits, then he will be required to file another appeal to the Board with a new docket number. Given that his health has not improved and his service connected disabilities cause a serious illness, he will be filing a motion to advance his new appeal on the docket. Thus, this panel can be assured that he will filing this appeal, again.

## CONCLUSION

Wherefore, Mr. Hailey respectfully submits the above supplemental brief in support that this appeal is not moot.

Respectfully Submitted,

/s/ Kenneth M. Carpenter

Counsel for Appellant

Douglas L. Hailey

Electronically filed on

March 6, 2024