IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

DOUGLAS L. HAILEY,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 22-3061
	)	
DENIS MCDONOUGH,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

APPELLEE'S RESPONSE TO THE COURT ORDER OF FEBRUARY 14, 2024

On February 8, 2024, the Board of Veterans' Appeals (Board) issued a decision on the matter underlying Appellant's, Douglas L. Hailey's, April 6, 2022, motion to advance his case on the Board's docket.[1] On February 14, 2024, the Court ordered the parties to file a supplemental submission "addressing whether the issuance of the Board's February 8, 2024, decision moots the pending appeal." The Secretary of Veterans Affairs, Denis McDonough, files this Response in accordance with such directive. In short, yes; the Board's February 8, 2024, decision moots the attempted appeal of the Board's advancement on the docket (AOD) determination.

"The inquiry about mootness is straightforward." *Kernz v. McDonough*, 36 Vet.App. 372, 381 (2023) (en banc). This Court "has an independent duty to

[1] The Board denied entitlement to disability ratings in excess of 30% for Appellant's right and left knee disabilities and remanded Appellant's claim for entitlement to a higher level of special monthly compensation (SMC).

ensure that a case or controversy still exists," and "[i]f an appellant receives the benefit or relief sought before the Court reaches a decision, the case becomes moot and the appeal must be dismissed." *Philbrook v. Wilkie*, 32 Vet.App. 342, 345 (2020) (citation omitted); *see Monk v. Wilkie*, 32 Vet.App. 87, 97 (2019) (en banc order), *aff'd in part, dismissed in part sub nom. Monk v. Tran*, 843 F. App'x 275 (Fed. Cir. 2021); *Mokal v. Derwinski*, 1 Vet.App. 12, 15 (1990).

I. Appellant Has Conceded that Issuance of a Board Decision Would Moot His Appeal

The benefit or relief Appellant seeks from the Court is key to the mootness inquiry. *Kernz*, 36 Vet.App at 381-83. By Appellant's own concession, receiving a Board decision on the increased rating and SMC claims underlying the ruling on the administrative motion he attempts to appeal provides him with the relief he seeks. The Court should find, therefore, that his attempted appeal of the AOD determination is moot now that the Board has issued such a decision.

In Appellant's Motion for Single Judge Reconsideration, or in the Alternative Referral for a Panel Decision, he contended that "[t]he denial of such a motion [for advancement on the Board's docket] adversely affects the provision of benefits by the Secretary to [Appellant] by delaying the consideration of his appeal by the Board." Aug. 16, 2022, Motion at 6. And most important here, Appellant asserted that "when the Board eventually decides his appeal, this question of the Board's denial of his motion for advancement will have evaded judicial review because that issue *is moot*." *Id.* (emphasis added).

Thus, by Appellant's own concession, the Board decision on the merits of his claims has mooted this attempted appeal. And the relief Appellant seeks from the Court is clear from that concession—he came to the Court seeking an order requiring the Board to issue an expedient decision on his underlying claims. However, he received that decision on February 8, 2024, before the Court could issue such an order. Appellant's current contention that the February 8, 2024, Board decision on the merits of his increased rating claims *does not* moot his appeal is both incorrect under this Court's case law, as discussed next, and a full reversal of the position he took earlier in the course of this very litigation. *Compare* Aug. 16, 2022, Motion at 6, *with* Feb. 12, 2024, Appellant's *Solze* Notice at 3. In short, the Court needs to look no further than Appellant's pleadings to determine that what Appellant came to the Court seeking was an order for the Board to render a decision on the merits of the issues underlying the advancement motion, and Appellant has received that relief. There remains no case or controversy for the Court to decide.

Additionally, the relief Appellant sought is evident in his May 31, 2022, Response to Appellee's Motion to Dismiss, where he asserted that "the decision by the Board denying the motion to advance on the docket is in fact 'adverse' and affects the provision of benefits since the Veteran was prejudiced by remaining in the same 'docket order.'" May 31, 2022, Appellant's Response at 2. Further, Appellant averred that "[e]ither the case should be advanced on the docket[,] or it should not be advanced. The Board determined in [Appellant's] case that it should

not be advanced." *Id.* Nowhere in Appellant's May 2022 response did he contend that the benefit or relief he sought went beyond receiving the most expedient decision possible from the Board on his underlying claims of increased compensation for his bilateral knee disability and SMC.

Based on Appellant's own pleadings before this Court, upon issuance of the Board's February 8, 2024, decision, he obtained the relief he sought. Thus, because he received this relief and conceded there would remain no case or controversy upon such receipt, his attempted appeal of the Board's determination not to advance his appeal is now moot.

II. *Kernz* Directs that the Board's February 8, 2024, Decision Moots this Attempted Appeal

Beyond Appellant's own recognition and concession of mootness, precedent directs that this attempted appeal is now moot. The en banc Court's recent decision in *Kernz*, 36 Vet.App. 372, binds this panel's mootness inquiry and leads to the same conclusion that the Court reached there—the attempted appeal is moot. That inquiry is as follows: "'[i]f an appellant receives the benefit or relief sought before the Court reaches a decision, the case becomes moot[,] and the appeal must be dismissed.'" *Kernz*, 36 Vet.App. at 381 (quoting *Philbrook*, 32 Vet.App. at 345). Following the "straightforward" inquiry for analyzing whether a case or controversy exists, it is clear that Board's February 8, 2024, decision mooted this appeal. The Board's action on February 8, 2024, afforded Appellant

all the relief the Court could order in this appeal. *See Philbrook*, 32 Vet.App. at 345.

While the Secretary maintains that the Court could afford *no* relief in this matter due to the lack of subject matter jurisdiction, assuming for the sake of argument that the Court *could* review the Board's May 10, 2022, letter, any dispute about *when* the Board should render a decision was resolved when the Board, in fact, rendered a decision. And as noted above, Appellant, by conceding review of his motion for advancement would be moot upon a decision on the merits, recognized this Court's jurisdiction was premised upon an actual case or controversy, and agreed there would not be one upon issuance of a merits decision. Aug. 16, 2022, Motion at 6.

Regardless of Appellant's concession, though, finding the appeal here moot is consistent with *Kernz*. There, the Court held that "even if all this were not so—that is, that the appeal was moot when the Board accepted appellant's NOD as timely—*the appeal must be moot given that the Board has actually acted on the issues underlying the administrative matter appellant wanted the Court to consider*." *Kernz*, 36 Vet.App. at 383 (emphasis added). Here, the same is true. The Board acted on the issues underlying the administrative matter Appellant wanted the Court to consider when the Board issued a February 8, 2024, decision denying entitlement to increased compensation. In essence, the administrative matter that Appellant seeks to appeal was subsumed by the Board's decision on the merits of the underlying appeal. *See id.* ("[T]the appeal must be moot given

that the Board has actually acted on the issues underlying the administrative matter appellant wanted the Court to consider."). Thus, if the Court was to now rule on the administrative matter underlying the merits, when there exists no case or controversy, where a final decision on the merits was issued, any decision of the Court would amount to an advisory opinion. *See Kernz*, 36 Vet.App. at 381 (citing *Kaw Nation v. Norton*, 405 F.3d 1317, 1323 (Fed. Cir. 2005)) (internal quotations omitted); *see also Gardner-Dickson v. Wilkie*, 33 Vet.App. 50, 56 (2020) ("[W]e have 'long held that [we] cannot hear interlocutory appeals or otherwise conduct appellate review of *Board decisions that are not final, such as remands.*'") (quoting *Young* v. Shinseki, 25 Vet.App. 201, 208 (2012) (en banc order) (Lance, J., dissenting)).

To further illustrate why there is no live controversy, or why the Court could afford no relief to Appellant, consider an analogy. Appellant asking the Court to find a live controversy is akin to a passenger asking a pilot to go back in time and allow him to board the plane in an earlier boarding group *after* the flight has arrived at its destination. Once the passenger has boarded and the plane takes off, even if the passenger still disputes when he should have boarded, it cannot be said that a live controversy still exists. He has arrived at his destination. Any controversy is no longer live because the pilot cannot go back and order the gate agent to have the passenger board the plane earlier than the passenger did. Similarly, while Appellant may have preferred a decision earlier than when he received it, the Court cannot go back and order the Board to issue a decision more expediently than it

did. Appellant has received a decision, much like the passenger in the analogy has arrived at his destination. That means that the Court cannot afford the relief Appellant presently seeks to the extent he seeks review of the Board's advancement determination.

To the extent Appellant focuses on *future* harm that may result from the Board's letter denying advancement on the docket, or if Appellant asserts that advancement on the docket in a *future* appeal before the Board is a live controversy, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985) (internal quotations omitted)). Here, there is no certainty that Appellant's claim for increased compensation related to his bilateral knee disability or special monthly compensation will ever return to the Board.

With regard to his knees, Appellant could elect to *not* appeal the Board's February 8, 2024, decision to the Court. Or he may appeal the Board's decision and the Court could affirm the decision. Or he may file a supplemental claim for increased compensation and the agency of original jurisdiction (AOJ) could award the full amount of compensation that Appellant seeks. With regard to the SMC claim, upon remand, the AOJ could award the full amount of compensation Appellant seeks. Or the AOJ could award a different amount of compensation and

Appellant could choose to not appeal. In short, Appellant cannot demonstrate that future events will occur as anticipated, or at all.

The airline illustration is helpful for this point as well. Although an aggrieved passenger could ask the airline for an earlier boarding group on a *future* flight, if the airline complied with such a request, it could not be said that such relief is what the passenger originally requested. Put in mootness terms, the airline would be affording something different than the *original benefit or relief sought*. The same is true here. Even if the Court found that it can review the Board's advancement determination, and that the determination was wrong, any relief provided would be different than the *original benefit or relief sought*. The relief would, necessarily, be a future relief. However, that is precisely the type of relief that the Court is prohibited from providing. *See Kernz*, 36 Vet.App. at 383; *see also Texas*, 523 U.S. at 300, 118 S.Ct. 1257.

This is consistent with the manner and function of AOD motions—they can be filed at any time and as many times as circumstances necessitate. 38 U.S.C. §§ 7107(a), (b); 38 C.F.R. §§ 20.800, 20.902; *see also Board of Veterans' Appeals, Customer Service*, *available at* https://www.bva.va.gov/CustomerService.asp (last accessed March 6, 2024) (noting that motions for advancement require claim-specific evidence of hardship). Thus, if Appellant's underlying claims do return to the Board in the future, Appellant may file for advancement at that time.

III. Conclusion

The relief Appellant seeks is a Board decision on his increased rating and SMC claims, which he has now received. The Court needs to look no further than the concession Appellant made in his August 2022 Motion to determine that the Board's February 8, 2024, decision on the merits of his claims moots the present appeal. Still, this Court's recent decision in *Kernz* shows that because the Board here has actually acted on the issues underlying the administrative matter that Appellant wanted the Court to consider, the attempted appeal of the motion for advancement is now moot.

WHEREFORE, the Secretary responds to the Court's February 14, 2024, Order.

Respectfully submitted,

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MARY ANN FLYNN
Chief Counsel

Date: March 6, 2024

/s/ Megan C. Kral
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