

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

JOHN A. COOPER,
Appellant,

v.

DENIS McDONOUGH,
Secretary of Veterans Affairs,
Appellee.

)
)
)
)
)
)
)
)
)
)

Vet. App. No. 23-5963

APPELLANT’S OPPOSED MOTION OUT OF TIME FOR
RECONSIDERATION OF THE COURT’S DECEMBER 22, 2023 ORDER
GRANTING IN PART APPELLANT’S MOTION TO SUBMIT A RESPONSE IN
EXCESS OF THE PAGE LIMIT

The Appellant, John A. Cooper (“Mr. Cooper”), respectfully moves this Court pursuant to U.S. Vet. App. Rules 2, 26, 27, and 35 for reconsideration of the part of this Court’s single-judge December 22, 2023 Order denying leave for Mr. Cooper’s response to the Secretary’s motion to dismiss to exceed twenty pages.

On November 30, 2023 the Secretary filed an opposed motion to dismiss the present appeal for lack of subject matter jurisdiction. On December 6, 2023 Mr. Cooper filed an opposed motion for leave to file a response to the motion to dismiss in excess of the ten page limit provided for by this Court’s rules. U.S. Vet. App. Rule 27(d)(2). In the December 6, 2023 motion Mr. Cooper argued he needed thirty pages (the length afforded initial briefs before this Court absent permission to exceed the thirty page limit under U.S. Vet. App. Rule 32(e)) to fully and adequately cover the depth and breadth of his argument as to why the Secretary’s motion to dismiss should be denied.

On December 22, 2023 this Court granted in part Mr. Cooper's opposed motion to exceed the page limit, permitting Mr. Cooper to file a response of no more than twenty pages.

In denying in part Mr. Cooper's motion to exceed the page limit, Mr. Cooper respectfully submits the single-judge panel at the time overlooked two issues with respect to Mr. Cooper's motion to exceed the page limit. First, limiting Mr. Cooper's response to twenty pages risks infringing Mr. Cooper's Fair Process and Due Process rights, limiting his ability to fully respond to the Secretary's Motion to Dismiss. Second, limiting Mr. Cooper's response risks depriving the Court of Mr. Cooper's full, thirty page position, denying the Court the benefit of Mr. Cooper's complete analysis in a case in which the Court has since noted warrants panel review and a potential precedential decision. Mr. Cooper will take each of these issues in turn.

First, providing Mr. Cooper "a full and fair opportunity to respond" to the Secretary's Motion to Dismiss would safeguard his Fair Process and Due Process rights and comport with "fundamental fairness." *Dr. Robert L. Meinders, D.C., Ltd. v. UnitedHealthcare, Inc.*, 800 F.3d 853, 858 (7th Cir. 2015) ("When strict adherence to local rules . . . threatens to deprive a litigant of the opportunity to respond, the local rules must give way to considerations of due process and fundamental fairness."); *see Smith v. Wilkie*, 32 Vet. App. 332, 337–38 (2020). No Rule requires the Secretary to move to dismiss an appeal. To the contrary, the parties always may address the Court's jurisdiction in their briefs. *But see* U.S. Vet. App. R. 28(g) (prohibiting the Secretary from filing a motion to dismiss "in lieu of a brief"). For an initial brief, the Court permits an appellant up to thirty pages. *See* U.S. Vet. App. R. 32(e). This is where Mr. Cooper intended and hoped to address the Court's jurisdiction. Instead, beyond Mr. Cooper's control, the

Secretary has employed a pre-briefing motions strategy that has limited Mr. Cooper's opportunity to address jurisdiction to, even with the part of this Court's order permitting leave to exceed Rule 27(d)(2)'s typical limit, two-thirds of the space that Rule 32(e) provides.

That's not fair. For the reasons Mr. Cooper explained to the Court in his December 6, 2023 Motion to Exceed the Page Limit, ten pages would simply not cut it. His request of the same thirty pages that he would receive in an initial brief was to make sure he could provide the Court the full depth and breadth of argument that would aid the Court as to why the Secretary's motion should be denied. Certainly, he has been able to provide a fuller explanation in twenty pages than he would have been able to in ten.

Even so, Mr. Cooper has more to say to aid the Court and to be heard on all material aspects of the key jurisdictional issue than fit within twenty pages. This includes a fuller explication of the pertinent law, *see* Resp. to Mot. to Dismiss, *Fotopoulos v. McDonough*, Vet. App. No. 23-3844 (filed Feb. 9, 2024), and also a fuller presentation of this case's procedural facts that Mr. Cooper respectfully submits would aid the Court. Those facts, he proffers, include more on how Mr. Cooper is one of our country's thousands of veterans who served in Thailand during the Vietnam Era, later manifested a disability for which VA presumes service connection when the veteran's military service exposed the veteran to herbicide agents, and VA denied service connection before learning through official service department records that the U.S. military used herbicide agents in Thailand during the Vietnam Era. They further include how VA for a time encouraged and helped such veterans to seek reconsideration of those denials, including by linking through VA's website to official service department records establishing the presence of herbicide agents where and when they served; how VA since has

reversed course, including by removing that access to those records; and how VA has been thwarting Mr. Cooper through actions such as the undesired Board remand order now on appeal, in seeking not only the full benefit to which the law entitles Mr. Cooper individually but also, if VA refuses, to represent a class of similarly situated veterans to whom VA owes (and long has owed) 38 C.F.R. § 3.156(c) reconsideration.

The twenty-page constraint that the Court imposed upon Mr. Cooper prevented him from being able to address, at the depth they warrant, such matters or why they further counsel that Congress intends for this Court to review remand orders that the Board issues in appeals to it under the Veterans Appeals Improvement and Modernization Act of 2017 (“VAIMA”), Pub. L. 115-55. To protect his Fair Process and Due Process rights, he thus moves the Court to reconsider the part of its December 22, 2023 Order denying merely an opportunity commensurate with Rule 28 briefing for Mr. Cooper to present his argument.

Second, it is not just to protect Mr. Cooper’s Fair Process and Due Process that he moves for reconsideration of the Court’s December 22, 2023 Order, but, he would humbly submit, granting Mr. Cooper’s motion for reconsideration would benefit the Court itself. The Court, in its decision-making, will benefit from a full, complete presentation of Mr. Cooper’s argument as to why the VAIMA has transformed the nature of Board of Veterans’ Appeals (“Board”) remand orders. *See e.g., Kowalski v. Boliker*, 893 F.3d 987, 996 (7th Cir. 2018) (requiring an opportunity to respond to provide not just “the litigant ... his day in court” but also to afford “the judge the benefit of the litigant’s analysis”); *see also Befitel v. Global Horizons, Inc.*, 461 F. Supp. 2d 1218, 1220 (D. Haw. 2006) (granting leave to file reply where “the reply will help clarify the issues for the Court”). Indeed, Mr. Cooper submits now that this Court

has ordered Mr. Cooper's appeal be reviewed by a panel for a possible precedential decision, the Court having an opportunity to review all the points Mr. Cooper had hoped to make in his response becomes even more important.

Accordingly, Mr. Cooper respectfully requests reconsideration of the Court's December 22, 2023 Order denying in part Mr. Cooper's motion to exceed the page limit by providing a response to the Secretary's Motion to Dismiss not to exceed thirty pages. The Secretary, by and through counsel, has indicated to Mr. Cooper, by and through counsel, the Secretary opposes this motion for reconsideration out of time and reserves the right to respond.

April 11, 2024

Respectfully submitted,

/s/ Kent A. Eiler

Kent A. Eiler
John D. Niles
Carpenter Chartered
P.O. Box 2099
Topeka, KS 66601
785-357-5251
kent@carpenterchartered.com
john@carpenterchartered.com

Counsel for Appellant