IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

TERRY L. HAMILTON, Appellant,	)	
v.	)	Vet. App. No. 22-3726
DENIS MCDONOUGH, Secretary of Veterans Affairs, Appellee.	)	

APPELLEE'S MOTION FOR RECONSIDERATION

Appellee respectfully moves this Court to reconsider its May 23, 2024, decision to the extent that it found that the Board of Veterans' Appeals (Board) failed to ensure that the duty to assist was satisfied when it failed to associate Appellant's administrative tort claim file with his VA claims file. *See Hamilton v. McDonough*, __Vet.App.__, No. 22-3726, slip op. at 2 (May 23, 2024). As grounds for this relief, Appellee submits that the Court overlooked points of fact and law. *See* U.S. Vet. App. R. 35(e).

Rehearing is warranted for two reasons. First, this Court's decision conflicts with *Hickman v. Taylor*, 329 U.S. 495 (1947) because it created a general rule requiring disclosure of attorney fact work product without an individualized showing of a substantial need for the protected materials. Second, the Court's decision improperly engaged in factfinding in the first instance in determining that the contents of Appellant's administrative tort claim file are relevant to Appellant's section 1151 claim.

A. The new rule for attorney fact work product is contrary to caselaw from the United States Supreme Court.

In adopting a general rule requiring the disclosure of attorney fact work product, this Court overlooked the fact of law – otherwise stated in this Court's opinion - that "non-disclosability must be assessed on an individualized basis according to the nature of the document or information in question." See *Hamilton*, slip op. at 12.

The *Hickman* decision held that attorney work product protections are so important that exceptions would only be made when a party meets their burden to establish adequate reasons to justify production:

> But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. That burden, we believe, is necessarily implicit in the rules as now constituted.

Hickman, 329 U.S. at 512. The Court found that the then-existing federal rule of civil procedure provided the trial judge the requisite discretion to determine whether discovery should be allowed. *Id.* In *Hickman*, just like in the instant case, "[n]o attempt was made to establish any reason why [the protected party] should be forced to produce the written statements." *Id.* This fact was fatal to the sought after disclosure in *Hickman* and should be in the instant case as well.

The current federal rule of civil procedure also puts the burden on the proponent seeking disclosure to make an individualized showing that "it has

substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3)(A)(ii). In the context of a veteran pursuing a section 1151 claim after a tort claim, a veteran would have an opportunity to obtain the substantial equivalent by other means because VA is required to develop section 1151 claims. *See Bailey v. O'Rourke*, 30 Vet.App. 54, 59 (2018) ("The Secretary has a duty to assist claimants in developing their claims."). This would abrogate any need to create a generalized rule in the section 1151 context for access to the administrative tort claim file and create a harmony with the individualized requirement from *Hickman*. For example, in the instant case, Appellant was provided with a more appropriate opinion tailored to the facts raised in his 1151 claim and using the appropriate standard for a section 1151 claim. This more appropriate medical opinion demonstrates that Appellant would not have a substantial need for the disclosure of any medical advisory opinion that may have been obtained for the purposes of his tort claim.

In imposing a general rule that requires the disclosure of attorney fact work product, this Court failed to follow the rule announced in *Hickman*. Instead of requiring the proponent of the disclosure to meet the burden of making an individualized showing of substantial need for the materials, this Court's decision overlooks VA's existing obligations under the duty to assist and creates an automatic rule that completely eliminates the burden for the proponent of the

disclosure to make an individualized showing of substantial need. *See Hamilton*, slip op. at 13.

This Court established a general rule despite otherwise announcing in the same decision that "assessment on an individualized basis" is required. *See Hamilton*, slip op. at 13. Furthermore, the Court overlooked the fact that a veteran can "obtain their substantial equivalent by other means" Because VA has a duty to assist claimants in developing their claims. *See Bailey,* 30 Vet.App. at 59. As to Appellant's section 1151 claim in the instant case, a VA medical opinion was obtained in May 2016 that was specific to the facts of Appellant's claim and the standard applicable to section 1151 claims. [R. at 360-61]. Thus, to the extent that a medical advisory opinion might have been obtained for Appellant's tort claim, Appellant had not just the ability to obtain its "substantial equivalent," but something even better: a more appropriate opinion tailored to Appellant's facts and the appropriate standards of a section 1151 claim. Thus, given the development of section 1151 claims by VA, there is no substantial need for veterans to receive attorney fact work product as a general matter because VA is otherwise required to provide "their substantial equivalent by other means." *See* Fed. R. Civ. P. 26(b)(3)(A)(ii). Because the Court overlooked the Supreme Court's requirement for an individualized analysis in these situations when it created a generalized rule requiring disclosure, the Court should reconsider its decision.

B. The Court overlooked points of fact.

The Court's decision relied on the following five incorrect statements of fact:

1. Appellant "later filed claims under section 1151 and asked VA to associate any documents involved with his administrative FTCA claim (which we'll call the 'FTCA claim file') with his VA benefits claim file (which we'll call the 'VA claims file')." *Hamilton*, slip op. at 1.

Appellant did not ask VA to associate documents from his administrative tort claim file with his section 1151 claim file. At the September 7, 2021, Board hearing, Appellant stated that he would submit evidence of the tort claim settlement within ninety days of the hearing. [R. at 27]. No request was made for VA to associate documents. The briefs submitted by the parties do not assert that Appellant asked VA to associate any documents involved with his administrative tort claim file with his section 1151 claim file. *See* Appellant's Initial and Reply Brief; Appellee's Brief. Appellant argued for the first time on appeal that the administrative tort file was constructively before the Board. *See* Appellant's Initial Brief. However, this Court framed the issue as whether the "case must be remanded to the Board so that it can ensure that Mr. Hamilton's FTCA claim file is associated with his VA claims file." *Hamilton*, slip op. at 14.

2. "The Secretary counters that the entirety of the FTCA claim file was shielded from disclosure to the veteran . . ." *Hamilton*, slip op. at 1-2.

The Secretary maintained that portions of the administrative tort claim file were not shielded from disclosure as attorney work product. Although Appellee's brief addressed the administrative tort claim generally because the actual contents were not known at the time, at oral argument counsel for Appellee clarified that

portions of the tort claim file were not shielded from disclosure. Counsel for Appellee told the Court: "the settlement document is not attorney work product" (Oral Argument at 49:55); "they could get non-attorney work product that's included in the tort claim file" (Oral Argument at 50:25); "there are documents in there that are not attorney work product . . . there is the tort claim, standard form 95 with any attachments that are submitted, correspondence – correspondence between VA and the claimant, there is paperwork to authorize payment, there are employment verification documents . . . the settlement offer . . ." (Oral Argument at 54:10). Judge Allen acknowledged this information at oral argument, responding: "I think you are conceding that everything in the file is not attorney work product." (Oral Argument at 56:41). Thus, the Court's decision is premised upon a misunderstanding of the Secretary's position.

3. "Nor is there any dispute that the contents of the FTCA claim file are relevant to the veteran's section 1151 claim." *Hamilton*, slip op. at 7.

At oral argument, counsel for Appellee disputed whether all the contents of the administrative tort claim file are relevant to Appellant's section 1151 claim. Counsel for Appellee argued that "the important thing is context. What we are doing in the tort claims context is developing a case to see whether there should be a settlement, or we should proceed to trial. This is not the same thing as a compensation claim where we are looking to see whether a standard has been met or we get a medical opinion that has to address all the evidence. . ." (Oral

Argument at 44:29) and "it may be related but it doesn't really pertain to the 1151 claim." (Oral Argument at 58:00).

To be clear, Appellee continues to dispute the assertion that all the contents of the torts claim file are relevant to Appellant's section 1151 claim. Appellee agrees that the contents of an administrative tort claim could be relevant to a section 1151 claim, but that depends on individualized facts, such as the similarity between the theory pursued in the tort claim and the theory pursued in the section 1151 claim. However, there is no factual basis for the Court to conclude that the contents of Appellant's administrative tort file are relevant to his section 1151 claim because the Court is completely unaware of what is contained in the administrative tort claim file.

4. "VA has not exercised its rulemaking authority in a way that indicates its intention to prevent disclosure of factual information in an FTCA claim file." *Hamilton*, slip op. at 13.

This statement overlooks or misunderstands the fundamental reasons Agencies exercise their rulemaking authority. For non-attorney work product, where the material is not otherwise protected, it would be inappropriate for VA to attempt to prevent disclosure of factual information in an administrative tort claim file. VA complies with Freedom of Information Act requests and Privacy Act requests for "factual information" in an administrative tort claim file.

As for attorney work product, there is no reason for VA to exercise rulemaking authority to protect attorney work product. Attorney work product is already protected from disclosure by longstanding established law from the United

States Supreme Court with disclosure only permitted in limited circumstances based on an individualized determination. *See Hickman*, 328 U.S. at 511-12. Additionally, both the Privacy and Freedom of Information Acts exempt attorney work product from disclosure. *See* 5 U.S.C. §§ 552(b)(5); 552a(d)(5). Thus, there is no gap that required VA to exercise its rulemaking authority regarding attorney work product, and the fact that VA did not do so does not indicate any intent to disclose attorney work product. It is otherwise well-protected. Furthermore, there is no authority in regulations, statutes, or caselaw to suggest that VA's duty to assist would require providing attorney work product, which has been protected from disclosure for over seventy-five years as a principal that is fundamental to the effective practice of law. *See Hickman*, 329 U.S. at 511.

5. "no one—not the Court, not the Board, not Mr. Hamilton, and not counsel for the Secretary—is quite sure of what is contained in the veteran's FTCA claim file." *Hamilton*, slip op. at 14.

In the response to the Court's order of September 19, 2023, Appellee notified the Court that counsel for Appellee discovered that an electronic version of Appellant's complete tort claim file still exists and will be preserved for the purposes of this appeal. (Appellee's Response filed September 25, 2023). Since that time, counsel for the Secretary has had knowledge of all the contents of Appellant's administrative tort claim file. At oral argument Judge Allen asked if there is a medical advisory opinion in Appellant's administrative tort claim file and counsel for Appellee responded that he did not want to reveal that fact because he did not want to be accused of waiving the attorney work product protections. (Oral

Argument at 47:11). Not responding to the Court's questions directly, to avoid waving the protections afforded attorney work product, is not the same as not knowing what is contained in the administrative tort claim file.

C. The Court engaged in improper factfinding.

The overlooked points of fact led to improper factfinding. The Court remanded the case "to the Board so that it can ensure that Mr. Hamilton's FTCA claim file is associated with his VA claims file." *Hamilton*, slip op. at 14. However, this was based on the mistaken conclusion that the contents of the administrative tort claim file are relevant to the section 1151 claim and that association of the administrative tort claim file was sought. *See Hamilton*, slip op. at 7 ("Nor is there any dispute that the contents of the FTCA claim file are relevant to the veteran's section 1151 claim."). By announcing that there is no dispute as to relevancy, this Court engaged in factfinding by resolving a disputed fact, where the initial factfinding was not conducted by the Board because the same issue was not raised before the Board. Additionally, by announcing a new general rule applicable to all veterans – that fact work product contained in the administrative tort claim file generally should not be shielded from disclosure – the Court essentially determined that tort claim files are always relevant to section 1151 claims, which is another factual matter in dispute. Despite the Court's indication to the contrary, Appellee has actual knowledge of the contents of the administrative tort claim file and, therefore, is well-positioned to dispute the relevancy of the contents.

To be clear, the relevancy of Appellant's tort claim file to Appellant's section 1151 claim is a disputed question of fact that this Court is unable to address in the first instance. *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) ("The Court of Appeals for Veterans Claims, as part of its clear error review, must review the Board's weighing of the evidence; it may not weigh any evidence itself."). To the extent it did so, it overlooked the limitations placed on its authority. *See id.*

Appellee asks this Court to recognize (1) that Appellant did not request that his administrative tort claim file be associated with his section 1151 claim; (2) that the Secretary agreed that some documents in the administrative tort claim file are disclosable; (3) that it is disputed whether the documents in the administrative tort claim file are relevant; (4) that VA's rulemaking does not indicate that VA waived any protection afforded to attorney fact work product; and (5) that counsel for Appellee is aware of what is contained in the administrative claim file. Appellee further asks this Court to (1) reconsider the appropriateness of a general rule requiring the disclosure of attorney fact work product and (2) reconsider whether remand is required to associate the administrative tort claim file with the section 1151 claim file.

WHEREFORE, the Court should reconsider its May 23, 2024, decision to the extent that it found that the Board failed to ensure that the duty to assist was satisfied when it failed to associate Appellant's administrative tort claim file with his VA claims file.

Respectfully submitted,

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