

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 14-2719

CARL E. KILGORE, PETITIONER,

v.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before MOORMAN, *Judge*.

ORDER

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

On August 15, 2014, petitioner Carl E. Kilgore, through counsel, filed a petition for extraordinary relief in the nature of a writ of mandamus seeking an order from the Court compelling the Nashville, Tennessee, VA regional office (RO) to issue a decision review officer decision or a Statement of the Case (SOC) in response to a Notice of Disagreement (NOD) filed on May 1, 2012, regarding staged rating and effective dates for a coronary artery disease. The petitioner also requested that VA comply with the Board's October 26, 2012, remand order regarding an appropriate effective date for the total disability rating based on individual unemployability (TDIU) previously granted by the Board of Veterans' Appeals (Board) based upon his service-connected disabilities.

On September 16, 2014, in response to a Court order, the Secretary addressed the status of the petitioner's claim. He acknowledges that the RO received the petitioner's NOD in May 2012 and explains that the RO just recently, on September 2, 2014, issued an SOC. In explaining the RO's delay in issuing the SOC, the Secretary represents that "the processing of this matter was delayed by the adjudication involving the October 2012 Board remand." Sept. 16, 2014, Secretary's Response at 6 (referencing an attached declaration from Philip R. Bramlage, "Assistant Veterans Service Center Manager" at the RO).

The October 2012 Board remand order instructed VA to obtain a VA examination and opinion with regard to the petitioner's lower back disorder and to refer the petitioner's TDIU claim to the Director, Compensation and Pension Service (Director). The Secretary maintains that the RO provided the petitioner with an examination in January 2013 in accordance with the Board's directives, but the petitioner's claims file "was inadvertently sent to the Board" instead of the

Veteran's Benefits Administration's Central Office. *Id.* at 3. The petitioner's claim for entitlement to TDIU was sent to the Director on September 2, 2014. *Id.*

This Court has authority to issue extraordinary writs in aid of its jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). However, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976); *see also Lamb v. Principi*, 284 F.3d 1378, 1384 (Fed. Cir. 2002) ("[E]xtraordinary writs cannot be used as substitutes for appeals, even though hardship may result from delay and perhaps unnecessary trial." (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953))). Before the Court may issue a writ, three conditions must be satisfied: (1) The petitioner must demonstrate that he lacks adequate alternative means to obtain the desired relief, thus ensuring that the writ is not used as a substitute for the appeals process; (2) the petitioner must demonstrate a clear and indisputable right to the writ; and (3) the Court must be convinced, given the circumstances, that the issuance of the writ is warranted. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004).

This Court has adopted the case-or-controversy jurisdiction requirements imposed by Article III of the U.S. Constitution. *Aronson v. Brown*, 7 Vet.App. 153, 155 (1994). When the relief sought by a petition has been accomplished, the appropriate course of action is for the Court to dismiss the matter as moot. *See Chandler v. Brown*, 10 Vet.App. 175, 177 (1997); *Thomas v. Brown*, 9 Vet.App. 269, 270 (1996); *see also Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992) ("When there is no case or controversy, or when a once live case or controversy becomes moot, the Court lacks jurisdiction."); *Mokal v. Derwinski*, 1 Vet.App. 12, 15 (1990) (dismissing a portion of a petition seeking mandamus relief because the controversy surrounding the petition was moot).

In this case, the petitioner has obtained the relief sought, i.e., that the RO issue an SOC and the TDIU claim be referred to the Director. The Secretary represents that, on September 2, 2014, the RO issued to Mr. Kilgore an SOC and the same day referred the TDIU Claim to the Director. Accordingly, the petition is now moot, and the Court will dismiss the petition. *See Chandler and Thomas*, both *supra*. Because VA has responded to Mr. Kilgore's NOD and complied with the Board's October 2012 remand order, the Court concludes that adequate means are available to the petitioner to obtain the desired relief. The Court notes that if VA fails to continue processing the petitioner's claims, he is free to submit another petition to the Court.

The Court reminds VA that it must process the petitioner's claims in a timely manner. The Court observes that the RO waited approximately 848 days after receiving the petitioner's NOD to issue an SOC, and the RO representative, Mr. Bramlage, does not assert that any activity occurred on the petitioner's claim after a medical examination report was returned on January 31, 2013. Further, the RO did not take any action until after the petitioner filed the instant petition with this Court. The Court appreciates that the Secretary manages a system with many cases, but the Court also presumes that the Secretary has in place adequate procedures to ensure that response to an NOD and compliance with Board remand orders occurs in a more timely fashion.


Having said that, the Court cannot refrain from observing that Mr. Bramlage attests in his affidavit that "the average days pending (nationwide) from time of a NOD to SOC mailing was 624 days." Sept. 16, 2014, Secretary's Response, Exhibit 1 (Declaration) at 2. That VA might consider 624 days to be an acceptable period in which to provide a veteran with an explanation for a decision already rendered is almost incomprehensible.

On consideration of the foregoing, it is

ORDERED that the petitioner's request for extraordinary relief is DISMISSED.

DATED: September 26, 2014

BY THE COURT:


WILLIAM A. MOORMAN
Judge

Copies to:

Robert V. Chisholm, Esq.

VA General Counsel (027)