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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 14-0269

GENE S. GROVES,

PETITIONER,

v.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS,

RESPONDENT.

Before KASOLD, *Chief Judge*, and MOORMAN and LANCE, *Judges*.

ORDER

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

On November 25, 2014, the Court issued an order granting in part pro se veteran Gene S. Groves's petition for extraordinary relief to the extent it found the Secretary in civil contempt and directed the Secretary to pay, as a sanction, the reasonable expenses of Mr. Groves associated with the litigation of the matter. The Court held that, "under the unique and particularized circumstances of this case, the Secretary's failure to provide a minimum amount of scrutiny to any one of multiple letters from Mr. Groves following the Court's March 2012 remand order showed gross negligence and lack of reasonable diligence in handling the Court's March 2012 remand order." *Groves v. McDonald*, __ Vet.App. __, __, No. 14-269, 2014 WL 6675434, at *1 (Nov. 25, 2014) (per curiam order). "Here, VA did not merely fail to timely process a remand. It not only failed to identify a Court-ordered remand regarding the propriety of a reduction in rating, but it further failed to question what had happened after its inaction was called to its attention." *Id.*, 2014 WL 6675434, at *7. The Secretary's disregard of Mr. Groves's letters resulted in his case remaining derailed from the "remand" track for agency compliance with the remand order. *Id.*, 2014 WL 6675434, at *5 n.2. As discussed fully in its order, the Court's imposition of sanctions included a monetary fine to compensate Mr. Groves for his reasonable and necessary costs associated with litigating this matter and the specific amount was to be determined following the submission of an application that identified those expenses. *Id.*, 2014 WL 6675434, at *9-10.

On December 9, 2014, in response to the Court's order, Mr. Groves filed a motion for an award of expenses in the amount of \$1,325.00. The Secretary filed a response stating that he does not contest the reasonableness of the requested expenses.

The Court considers Mr. Groves's asserted expenses for postage, photocopying, and transportation to be reasonable and necessary and will grant his motion for an award of the expenses. *See Harvey v. Shinseki*, 24 Vet.App. 284, 291-92 (2011) (applying jurisprudence under Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), in determining compensation for payment as a sanction against the Secretary); *cf. March v. Brown*, 7 Vet.App. 163, 168-70 (1994) (allowing recovery of reasonable and necessary expenses under the EAJA to pro se litigant for photocopying, postage, and transportation, all incurred in litigating appeal). Accordingly, the Court will order the Secretary to pay to Mr. Groves \$1,325.00 in expenses.

The Court notes that the 21-day period for filing a motion under Rule 35 of this Court's Rules of Practice and Procedure as to this Court's November 25, 2014, order holding the Secretary in civil contempt and awarding sanctions has expired. U.S. VET. APP. R. 35(d) ("Any motion under this Rule shall be filed not later than 21 days . . . after the date of the dispositive action for which reconsideration, panel review, or full Court review is sought."). The Court further notes that the Secretary does not contest the reasonableness of the expenses sought by Mr. Groves in his December 9 submission. Accordingly, the Court will enter judgment. U.S. VET. APP. R. 36.

On consideration of the foregoing, it is

ORDERED that the petitioner's motion for an award of expenses is granted, and that, as a sanction, the Secretary shall pay \$1,325.00 to the petitioner in expenses. It is further

ORDERED that, in light of the time for filing Rule 35 motions having expired as to the Court's November 25, 2014, order and the petitioner's December 9, motion for an award having been uncontested, the Clerk enter judgment as of the date of this order.

DATED: January 9, 2015

PER CURIAM.

KASOLD, *Chief Judge*, dissenting: I disagree with the Court's order because I do not agree that the mere negligent act of misfiling a remand order, *see Groves v. McDonald*, __ Vet.App. __, __, No. 14-269, 2014 WL 6675434, at *6 (Nov. 25, 2014) (acknowledging that the "Board's initial mis-entry of the Court's March 2012 remand order as an affirmance is arguably understandable"), can form a proper basis for finding the Secretary in civil contempt under 38 U.S.C. § 7265(a)(3). *See id.* at *11-12 (Kasold, C.J., dissenting).¹ As noted in my dissent to the underlying order, *id.*, the

¹ Additionally, I note that although the Court purported to "grant in part" the petitioner's request for extraordinary relief, as it restates in today's order, *ante* at 1, the petition was, in fact, dismissed as moot because the Secretary had taken corrective action. *See Groves*, __ Vet.App. at __, 2014 WL 6675434, at *1; *see also Thomas v. Brown*, 9 Vet.App. 269, 270-71 (1996) (per curiam order) (when the relief sought by a petition has been afforded, the petition is moot). Notwithstanding the fact that the petitioner sought both a writ of mandamus and sanctions, a grant of

majority finds gross negligence in the Secretary's failure to take action in response to letters submitted by the petitioner, but there is simply no evidence that the Secretary's failure to take action in response to the petitioner's letters in this case reflects "disobedience or resistance to [the Court's] lawful writ, process, order, rule, decree, or command," as required to sanction the Secretary under section 7265(a)(3).²

The Court has time and again recognized that the failure of the Secretary to take action on a remanded case for two years and more has not been the basis for granting extraordinary relief in the nature of a writ of mandamus because this alone does not demonstrate an arbitrary refusal to process a remand, "given the demands on and resources of the Secretary." *See Stratford v. Peake*, 22 Vet.App. 313, 314 (2008) (mandamus relief warranted if the "delay is so extraordinary, given the demands on and resources of the Secretary, that it is equivalent to an arbitrary refusal by the Secretary to act," rather than merely being the product of a burdened system); *see also Chandler v. Brown*, 10 Vet.App. 175, 177-78 (1997) (noting that a delay of two and one-half years in the RO's adjudication of a claim even after remand was not unreasonable under the circumstances); *Erspamer v. Derwinski*, 1 Vet.App. 3, 10 (1990) (noting that a reasonable time to act on a remanded claim may encompass "months, occasionally a year or two, but not several years or a decade" (quoting *Cnty. Nutrition Inst. v. Young*, 773 F.2d 1356, 1361 (D.C. Cir. 1985))).

This case is no different. As in the overwhelming number of petitions filed with the Court, the petitioner in this case wrote the Secretary numerous times trying to have his remanded case adjudicated. When the petition in this case was filed with the Court, the Secretary responded *sua sponte* by recognizing that he misfiled the Court's remand order and by taking corrective action. Because the petition was mooted, it was dismissed. *See supra* note 1.

Moreover, the delay in processing the Court's remand order in this case at that time was less than two years, which generally is insufficient to warrant mandamus, given the demands on and resources of the Secretary. *See Stratford, supra*; *see also Chandler* and *Erspamer*, both *supra*.

In sum, I have grave concerns that, despite the majority's attempt to convince readers that this case is "unique [with] particularized circumstances," *ante* at 1, it will not be seen that way by other petitioners – as I do not see it that way – and will result in motions for sanctions routinely being

only the former would constitute "extraordinary relief" as contemplated by U.S. VET. APP. R. 21 (Extraordinary Relief).

² I also note an inattentiveness exhibited by the parties in their responses to the Court's November 25, 2014, order. The Court imposed sanctions pursuant to its authority under 38 U.S.C. § 7265 (Contempt Authority), not 28 U.S.C. § 2412 (Equal Access to Justice Act), yet the parties both address the jurisdictional requirements of the Equal Access to Justice Act (EAJA) in their responses to the Court's order. While the Court's EAJA jurisprudence may guide its discussion of the reasonableness of fees awarded pursuant to a sanction order, *e.g.*, *Harvey v. Shinseki*, 24 Vet.App. 284 (2011) (per curiam order) (sanctioning the Secretary pursuant to section 7265 and, in the absence of a significantly cogent reason to do otherwise, applying the monetary limits provided under the EAJA in determining reasonableness of rates for attorney compensation), the EAJA's jurisdictional requirements do not govern the Court's determination whether to approve the amount of expenses a party seeks to recover pursuant to a sanction order. The parties should be more attentive in their responses to the Court's orders.

made with the filing of petitions for extraordinary relief, and potentially being granted even where the Secretary's delay is less than two years in length and the product of an understandable mistake.

Accordingly, because I do not believe a finding of civil contempt on the part of the Secretary is permissible in this case under 38 U.S.C. § 7265(a)(3), I respectfully dissent from the Court's order.

Copies to:

Gene S. Groves

VA General Counsel (027)