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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-1280

CONLEY F. MONK, JR., PETITIONER,

V.

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

Before HAGEL, *Judge*.

ORDER

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

On April 6, 2015, Conley F. Monk filed through counsel a petition for extraordinary relief in the nature of a writ of mandamus. Mr. Monk asserted that his claim for benefits for post-traumatic stress disorder was denied in August 2012 and that he had received no response to his July 2013 Notice of Disagreement. He contended that the Secretary's failure to respond in the intervening 20 months amounts to "a constructive denial of benefits." Petition (Pet.) at 2.

Mr. Monk alleged the following facts pertinent to his claim for benefits before VA:

- He served in the U.S. Marine Corps between 1968 and September 1970. He received an other than honorable discharge in lieu of a court-martial for various offenses.
- He filed a claim for VA disability benefits for post-traumatic stress disorder in February 2012.
- That claim was denied by a VA regional office in August 2012 because the character of Mr. Monk's discharge precluded his entitlement to benefits. Mr. Monk and his representative did not receive notice of the decision until "spring 2013." Pet. at 7.
- Mr. Monk filed a Notice of Disagreement with that decision in July 2013 and requested a hearing before a decision review officer.

- In December 2012, before he received notice of VA's August 2012 decision, Mr. Monk submitted additional evidence.
- In February 2013, again before Mr. Monk received notice of VA's August 2012 decision, VA advised Mr. Monk that he could submit "supplemental information about his discharge and military records" within 60 days and could also request a personal hearing. Pet. at 6.
- In March 2013, Mr. Monk requested a personal hearing.
- In February 2014, Mr. Monk testified at a hearing before a decision review officer and presented additional evidence.
- In November 2014, a U.S. District Court remanded his application for correction of records to the Board for Correction of Naval Records "for reconsideration in light of Secretary of Defense Hagel's September 2014 instruction that record correction boards give 'liberal consideration' to post-service [post-traumatic stress disorder] diagnoses, especially for Vietnam veterans who had received" an other than honorable discharge. Pet. at 7.
- In February 2015, Mr. Monk contacted the regional office and his congressional representative to inquire as to the status of his claim.
- In March 2015, VA notified Mr. Monk's congressional representative that it could not process Mr. Monk's appeal "because some of his records are with the Board for Correction of Naval Records" and that VA could not proceed without the records. *Id.*

Mr. Monk argued that the pendency of his application to correct his records to reflect a character of discharge that would not preclude entitlement to benefits "in no way justifies" VA's delay in acting on his July 2013 Notice of Disagreement with the August 2012 denial of disability benefits. Pet. at 8. He asserted that "[t]he Secretary has neither offered a reason why he cannot obtain a copy of the allegedly relevant records, nor offered a reason why a decision cannot be made on the existing administrative record." *Id.*

On May 27, 2015, the Court ordered the Secretary to respond to Mr. Monk's petition, and on June 26, 2015, the Secretary did so. The Secretary urges the Court to deny Mr. Monk's petition, asserting that VA has now received Mr. Monk's service medical records back from the Board for Correction of Naval Records and can proceed to adjudicate Mr. Monk's claims. Specifically, the Secretary states that, following the February 2014 personal hearing, the regional office requested Mr. Monk's service medical records and personnel file from the National Personnel Records Center:

The National Personnel Records Center responded that the records had been checked out to "MC HQ" (U.S. Marine Corps Headquarters) in July 2012 for the apparent purpose of review by the Board for Correction of Naval Records.

A follow-up request for [Mr. Monk's] personnel file was made on April 1, 2014. The [National Personnel Records Center] responded that the records were still unavailable. The [National Personnel Records Center] later indicated that the [service medical records] were still unavailable as of June 2014, because the case at the [Board for Correction of Naval Records] was still pending. On November 24, 2014, a deferred decision was made for another follow-up for [service medical records] and the personnel file. The unusually lengthy unavailability of the file appears to have been the result of litigation involving [Mr. Monk] and the [Board for Correction of Naval Records] at the District Court.

On March 9, 2015, electronic mail was sent to the Records Management Center asking once again for the [service medical records] and personnel file in a third attempt to obtain the records. On April 2, 2015, the [Records Management Center] responded that they were still at the [Board for Correction of Naval Records].

On May 8, 2015, the [Board for Correction of Naval Records] upgraded [Mr. Monk's] discharge to a general discharge under honorable conditions. VA received [Mr. Monk's service medical records] and personnel file on June 10, 2015. By letter, dated that same day, VA promptly informed [Mr. Monk] that VA had made a favorable administrative decision regarding the nature of his discharge, determining that his service was honorable for VA purposes. This finding changed the fundamental nature of VA's adjudication of [Mr. Monk's] claims since his discharge status was now considered to be honorable.

Secretary's Response at 3-4. The Secretary states that development of Mr. Monk's claims has recommenced and that, in light of the change in character of discharge, his claims must now be adjudicated on the merits, as opposed to the regional office simply issuing a Statement of the Case on the issue of the character of discharge.

This Court has the authority to issue extraordinary writs in aid of its jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). *See Cox v. West*, 149 F.3d 1360, 1363-64 (Fed. Cir. 1998). However, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 402 (1976) (citations omitted). Accordingly, three conditions must be met before a court may issue a writ: (1) The petitioner must lack adequate alternative means to attain 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. *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004).

It is clear from the Secretary's response and attached exhibits that, despite Mr. Monk's assertions to the contrary, VA has continuously attempted to continue the adjudication of his claims but was thwarted by the Board for Correction of Naval Records's need for his service medical records to adjudicate a claim initiated by Mr. Monk himself. To the extent, then, that Mr. Monk's petition is based on the Secretary's alleged delay, he has not demonstrated that the alleged 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. *See Costanza v. West*, 12 Vet.App. 133, 134 (1999) (per curiam order).

Moreover, given the favorable outcome of the Board of Correction of Naval Records proceeding, it is clear that VA intends to provide Mr. Monk more than simply the relief sought by his petition—that is, a Statement of the Case on the issue of the character of discharge—and will develop and adjudicate his claims on their merits. Mr. Monk may not now use the writ procedure to bypass the usual appellate procedures, of which he is free to avail himself should the adjudication on the merits prove unfavorable to him. *See Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953).

In all, the Court concludes that Mr. Monk has not demonstrated an indisputable right to a writ under these circumstances. *See Cheney*, 542 U.S. at 380-81.

Upon consideration of the foregoing, it is

ORDERED that Mr. Monk's petition is DENIED.

DATED: July 8, 2015

BY THE COURT:



/s/ Lawrence B. Hagel
LAWRENCE B. HAGEL
Judge

Copies to:

Michael J. Wishnie, Esq.

VA General Counsel (027)