IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

AMANDA JANE WOLFE,	)	
	)	
Petitioner,	)	
	)	
v.	)	Vet. App. No. 18-6091
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Respondent.	)	

RESPONDENT'S MOTION FOR ISSUANCE OF JUDGMENT OR, IN THE ALTERNATIVE, FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL

Pursuant to U.S. Vet. App. Rule 27 and 38 U.S.C. § 7292, Respondent, Robert L. Wilkie, Secretary of Veterans Affairs, respectfully requests that the U.S. Court of Appeals for Veterans Claims (Court) enter judgment immediately on its September 9, 2019 decision in this matter, as it represents a final decision on the Petitioners' claims for which the Secretary intends to pursue an appeal pursuant to 38 U.S.C. § 7292(a). In the alternative, if the Court finds that its September 9, 2019 order is not final and appealable pursuant to Section 7292(a), the Secretary requests that the Court certify an interlocutory appeal pursuant to 38 U.S.C. § 7292(b). The Secretary submits that two questions of law adjudicated in the Court's September 9, 2019 decision merit certification: (1) whether Petitioner Wolfe demonstrated entitlement to extraordinary relief in the form of a writ of mandamus; and (2) whether 38 C.F.R. § 17.1005(a)(5) is invalid because it is inconsistent with its authorizing statutory provision, 38 U.S.C. § 1725(c)(4)(D).

A. The Court Should Issue Judgment Immediately to Permit the Secretary to Pursue His Right of Appeal.

Any party may appeal a "decision" of this Court to the United States Court of Appeals for the Federal Circuit (Federal Circuit). 38 U.S.C. § 7292(a). That party may obtain the Federal Circuit's review of the decision

> with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation. . .or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision.

Id. Although Section 7292(a) "does not explicitly impose a final judgment requirement," the Federal Circuit "[has] nonetheless 'generally declined to review non-final orders of the Veterans Court' on prudential grounds." *Joyce v. Nicholson*, 443 F.3d 845, 849 (Fed. Cir. 2006) (quoting *Williams v. Principi*, 275 F.3d 1361, 1363 (Fed. Cir. 2002)).

The Court issued a decision in this matter on September 9, 2019. Summarized, the Court certified a class of claimants who were denied reimbursement of emergency medical expenses under 38 U.S.C. § 1725 because the amounts at issue were comprised of deductibles or coinsurance. The Court also invalidated 38 C.F.R. § 17.1005(a)(5) and ordered the Secretary to re-adjudicate class members' reimbursement claims. Finally, the Court ordered the Secretary to propose a second corrective action plan to correct the notices he previously sent to putative members of Petitioner Boerschinger's proposed class, as those notices, contrary to the Court's decision, stated that coinsurance and deductibles may not be reimbursed. The time for seeking reconsideration of the

Court's decision by the panel or by the full Court has expired. U.S. Vet. App. R. 35(d). Ordinarily, the expiration of this period triggers the entry of judgment, *id.* 36(b)(2)(A), but the Court has not yet entered judgment on its decision.

In light of the Federal Circuit's prudential reading of a final-judgment requirement into Section 7292(a), *Williams*, 275 F.3d at 1363, without a final judgment issued by this Court, the Secretary's ability to pursue an appeal of the September 9, 2019 decision is impeded. The Court should issue its judgment immediately because it has finally disposed of the claims in this matter and it may not withhold the entry of judgment to oversee performance of the relief granted.

The Federal Circuit explained in *Elkins v. Gober*, 229 F.3d 1369, 1373 (Fed. Cir. 2000), that a judgment in district-court litigation ordinarily is appropriate when all claims for relief have been resolved and nothing remains but for the court to execute the judgment. However, in appeals from proceedings in this Court, the Federal Court takes a different approach. *See id.* For instance, when this Court disposes of certain claims but remands others to the agency, the Federal Circuit queries whether the claims that were finally adjudicated are "distinct" from the remanded claims and therefore separately appealable. *Id.* at 1375.

Applied here, *Elkins* counsels in favor of entering judgment on the Court's September 9, 2019 decision. First, the Court finally adjudicated the claim of Petitioner Boerschinger and his putative class, dismissing it as moot. Second, the Court finally adjudicated the claim of Petitioner Wolfe as well, granting her request for class certification and awarding her all the relief she sought.

The only issue lingering as a result of the Court's decision is the scope of the second corrective action plan the Court directed the Secretary to undertake. Notably, this task is separate from Petitioner Wolfe's claim—that is, she did not ask for such an order. Instead, the Court directed the Secretary to propose this second corrective action plan in order to remedy statements he made to previously putative members of the Boerschinger class which are inconsistent with the Court's findings. The Court recognized in fashioning relief that the second corrective action plan is distinct from the claim of the Wolfe class, writing that it would order the Secretary to supply all of the relief Wolfe sought "plus other relief that gets at the 'corrective letters.'" Because the only matter left for resolution is one that is tangential to and distinct from the claim for relief asserted by the Wolfe class, the Court should issue judgment, as there is nothing left for the Court to do with respect to the class' claim but execute the judgment in their favor. *Elkins*, 229 F.3d at 1373.

In the event the Court disagrees and finds that a further order or orders are necessary to fully and finally dispose of this matter, the Secretary seeks clarification from the Court on this issue. As noted, the Court should normally have issued judgment on its September 9, 2019 order after the expiration of the time to seek reconsideration or full-Court review. By withholding judgment, the Court is depriving the Secretary of his right of appeal by forcing him to comply with the relief the Court awarded before he can seek appellate review of the Court's decisions leading to that relief. This invites a massive expenditure of resources by the Secretary to implement relief he believes to be unlawful, and it will engender only

further confusion in claimants, who may have to receive yet more corrective notice—and possibly suffer from detrimental reliance on representations of forthcoming reimbursement—if the Secretary succeeds on appeal to the Federal Circuit.

B. In the Alternative, the Court Should Certify An Interlocutory Appeal of the Court's Decision As To Two Questions of Law: the Propriety of a Writ as a Vehicle for Relief and the Validity of 38 C.F.R. § 17.1005(a)(5).

Should the Court deny the Secretary's request for the immediate entry of judgment on its September 9, 2019 decision, the Secretary requests in the alternative that the Court certify an interlocutory appeal to the Federal Circuit of two questions of law: (1) whether Petitioner Wolfe demonstrated entitlement to extraordinary relief in the form of a writ of mandamus, and (2) whether 38 C.F.R. § 17.1005(a)(5) is invalid because it is inconsistent with its authorizing statutory provision, 38 U.S.C. § 1725(c)(4)(D).

Under 38 U.S.C. § 7292(b),

> When a judge or panel of the Court of Appeals for Veterans Claims, in making an order not otherwise appealable under [Section 7292(a)], determines that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that there is in fact a disagreement between the appellant and the Secretary with respect to that question of law and that the ultimate termination of the case may be materially advanced by the immediate consideration of that question, the judge or panel shall notify the chief judge of that determination. Upon receiving such a notification, the chief judge shall certify that such a question is presented, and any party to the case may then petition the Court of Appeals for the Federal Circuit to decide the question.

38 U.S.C. § 7292(b)(1). The Court has defined three elements that must be shown

to support a certification request. First, "the nondispositive order must be based on a legal determination appropriate for Federal Circuit review." *Bonhomme v. Nicholson*, 22 Vet.App. 317, 318 (2007). Second, "there must be 'a substantial ground for difference of opinion. . .with respect to that question of law.'" *Id.* (quoting 38 U.S.C. § 7292(b)). Third, "'the ultimate termination of the case may be materially advanced by the immediate consideration of that question." *Id.* (quoting 38 U.S.C. § 7292(b)). The proponent of certification bears the burden to establish each of these elements. *Bowey v. West*, 11 Vet.App. 188, 189 (1998).[1]

All three elements are easily satisfied in this case. First, as noted above, the Federal Circuit may review the Court's interpretations of law but not the application of law to fact. 38 U.S.C. § 7292(a); *Conway v. Principi*, 353 F.3d 1369, 1372 (Fed. Cir. 2004). In its September 9, 2019 decision, the Court rendered two wholly legal rulings that the Federal Circuit may review: (1) whether Petitioner Wolfe's request for an extraordinary writ is the appropriate vehicle through which to issue the relief she seeks, and (2) whether the Secretary's regulation implementing Section 1725(c)(4)(D), Section 17.1005(a)(5), is a valid exercise of his rulemaking authority. Resolution of these issues did not turn on the application of law to fact; rather, the Court found as a matter of law that Section 17.1005(a)(5) is invalid as

[1]Although the statute contemplates that the panel making the decision containing a certifiable question must *sua sponte* alert the Chief Judge of its existence, in past cases the Court has entertained motions requesting that the panel consider certifying specific questions. *See Bonhomme*, 22 Vet.App. at 318; *Bowey*, 11 Vet.App. at 189. The Secretary pursues that same request in this case.

inconsistent with its authorizing statutory provision and, concurrently, that Petitioner Wolfe had a clear and indisputable right to have that regulation invalidated through a writ. Further, the Court determined as a matter of law that pursuing an administrative appeal was inadequate as an alternative means of obtaining relief because the Board cannot invalidate VA regulations, making such efforts "useless." Finally, the Court held that issuance of the writ was warranted under the circumstances because it concluded that "enormous bureaucratic waste" would result from VA action that was inconsistent with its view of the validity of Section 17.1005(a)(5). Because Petitioner Wolfe's right to an extraordinary writ is based on a legal holding, not any facts unique to her, and is deeply intertwined with the validity of the regulation at issue, the Federal Circuit has the power to review the Court's determinations on these questions.

As to the second element required for certification, the Secretary submits that there is no dispute that a substantial ground for difference of opinion exists with respect to the two questions he identified for certification. *Bonhomme*, 22 Vet.App. at 318. As the extensive briefing in this matter reveals, the parties certainly maintain a dispute in fact regarding the propriety of an extraordinary writ as a vehicle for the merits-based relief Petitioner Wolfe sought and the validity of Section 17.1005(a)(5) under the deferential standards enunciated in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

What's more, as Judge Falvey explained in his well-reasoned dissent, substantial authority and logic support the opposite result on each of the questions

for which the Secretary seeks certification.[2] On the propriety of the writ, Judge Falvey observed that Petitioner Wolfe's claim is for relief on the merits, not to clear the way for her administrative appeal to reach the Court in due course. For that reason, "her requested relief would thwart, not aid, [the Court's] appellate jurisdiction." Indeed, Wolfe sought not to protect the Court's prospective appellate jurisdiction but "to rule in the first instance" on the validity of the challenged regulation. Judge Falvey rightly noted that Wolfe's justifications for a writ—that the administrative appeals process takes too long and will not supply her with relief—are reasons long rejected as bases for a writ. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 29 (1943). Further, said Judge Falvey, her request for review of a legal question regarding the validity of a VA regulation is not a basis for a writ, as it does not make her situation extraordinary in any sense. *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976).

Regarding the validity of Section 17.1005(a)(5) itself, Judge Falvey found the Secretary's qualitative interpretation of the word "similar" in Section 1725(c)(4)(D) to be a "good argument" in favor of a "permissible construction" of the statute. In supporting this view, Judge Falvey noted that the Secretary argued

[2]The Court observed in *Bowey* that a dissent by one member of a panel does not constitute notification to the Chief Judge of a certifiable question. *Bowey*, 11 Vet.App. at 189. That is not the purpose for which the Secretary relies on Judge Falvey's dissent. Rather, the Secretary relies on the dissent as a summation of his prior arguments on the questions for which he seeks certification. The thorough dissent also demonstrates that there is strong legal support for the Secretary's position which gives rise to substantial ground for difference of opinion on these questions.

that Wolfe's quantitative reading of Section 1725(c)(4)(D) "would read the term 'similar payment' from the statute" because there are no payments that a veteran could owe under a health-plan contract that are similar in amount to copayments but are not called copayments. Furthermore, although Judge Falvey did not conclusively determine that the Secretary's interpretation of the statute was the right one, he aptly noted that the relevant standard for issuance of a writ is that the petitioner's right to relief must be "clear and indisputable." *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380–81 (2004). In the face of the Secretary's "good argument" in favor of his interpretation, Judge Falvey recognized that "the invalidity of § 17.1005(a)(5) is not a foregone conclusion," eliminating the availability of a writ as a method to invalidate it.

The Secretary submits that, in light of the arguments he presented on these questions in his pleadings and Judge Falvey's dissent, the Court should find that substantial ground for difference of opinion exists as to the two questions for which he seeks certification. This is not mere vehement disagreement with the Court's rulings or a plea that the Court's rulings are in an area without precedent. *See Bonhomme*, 22 Vet.App. at 319–20. To the contrary, the Secretary's arguments and Judge Falvey's dissent demonstrate that the Court's challenged rulings are inconsistent with black-letter law on the propriety of writs and the deference due agency interpretations of the statutes they are tasked with administering. *See id.*

Finally, as to the third element for a certifiable question, the ultimate termination of this case may be materially advanced by the immediate

consideration of the legal questions the Secretary has identified. As he has explained, the Court's rulings on the validity of Section 17.1005(a)(5) and its concomitant finding that Petitioner Wolfe is entitled to invalidation of that regulation through a writ are the foundation of its grant of relief. The Secretary respectfully disagrees with the Court's determinations on these questions, without which the Court would have been forced to deny relief, as Judge Falvey explained in his dissent. Consequently, certification of these questions for review by the Federal Circuit would materially advance the ultimate termination of the matter "by obviating the need for any further effort by the Court or the parties" to carry out the Court's ordered relief should the Federal Circuit reverse all, or even part, of the Court's determinations on these two questions. *Id.* at 318.

Petitioner is opposed to this motion and will file a written response.

WHEREFORE, Respondent, Robert L. Wilkie, Secretary of Veterans Affairs, respectfully moves the Court to issue judgment immediately on its September 9, 2019 order or, in the alternative, to certify an interlocutory appeal of that order with respect to two controlling questions of law decided therein—namely, (1) whether Petitioner Wolfe demonstrated entitlement to extraordinary relief in the form of a writ of mandamus, and (2) whether 38 C.F.R. § 17.1005(a)(5) is invalid because it is inconsistent with its authorizing statutory provision, 38 U.S.C. § 1725(c)(4)(D).

Respectfully submitted,

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