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 TO STAY THE PRECEDENTIAL EFFECT OF *WOLFE V. WILKIE*, __ VET.APP. __, NO. 18-6091 (SEPT. 9, 2019), PENDING APPEAL TO THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Pursuant to U.S. Vet. App. Rule 5, Respondent, Robert L. Wilkie, Secretary of Veterans Affairs, respectfully requests that the U.S. Court of Appeals for Veterans Claims (Court) grant a stay of the precedential effect of *Wolfe v. Wilkie*, __ Vet.App. __, No. 18-6091 (Sept. 9, 2019), while the Secretary pursues his appeal with the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). In its recent decision, the Court granted, for Petitioner Wolfe and a class of benefits claimants she represents, a petition for a writ of mandamus invalidating 38 C.F.R. § 17.1005(a)(5), which provides that VA may not reimburse copayments, deductibles, coinsurance, or similar payments that veterans owe under their third-party health-plan contracts for emergency medical treatment provided at non-VA facilities for non-service-connected conditions.

The Court outlined the test for staying the precedential effect of one of its

decisions in *Ribaudo v. Nicholson*, 20 Vet.App. 552 (2007). Four factors are relevant to this determination: (1) the likelihood of success on appeal; (2) whether the moving party will suffer irreparable harm in the absence of a stay; (3) the impact of the stay on the non-moving party; and (4) the public interest. *Id.* at 560; *see also Ramsey v. Nicholson*, 20 Vet.App. 16, 39 (2006). In *Ribaudo*, the Court held that it has jurisdiction to consider a motion to stay the precedential effect of one of its decisions "even in a case where a Notice of Appeal has been filed seeking review in the Federal Circuit." *Ribaudo*, 20 Vet.App. at 560.

A. Likelihood of Success on the Merits of the Appeal

To demonstrate a likelihood of success on appeal, the Secretary must show that the circumstances "present fair ground for litigation and thus produce a good reason for maintaining the status quo pending further deliberate review." *Ribaudo v. Nicholson*, 21 Vet.App. 137, 142 (2007) (*Ribaudo II*). Likelihood is not the same as certainty, however. As the Court observed in *Ribaudo II*, "[t]he determination of likelihood of success does not depend on a showing of a mathematical probability of success, but rather on whether there is 'substantial equity, and [a] need for judicial protection,' such that 'an order maintaining the status quo is appropriate.'" *Id.* at 141 (quoting *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)). Thus, the Court queries whether its decision is "rooted in well-established law" or, by contrast, operated in "an area with little precedent." *Id.* Similarly, where the Court has rendered several rulings to reach its ultimate conclusion, it recognizes that "the likelihood that the final conclusion will

be modified or reversed on appeal necessarily increases." *Id.*

Applied here, these considerations establish a strong likelihood that the Secretary will succeed on appeal to the Federal Circuit. First, and most importantly, the Court's deployment of a writ of mandamus under the All Writs Act (AWA), 28 U.S.C. § 1651(a), to afford Petitioner Wolfe the relief she seeks is not merely a foray into uncharted territory—it is flatly inconsistent with well-settled interpretations of the AWA. The Court recited the rule that a writ cannot be used as a substitute for an appeal, *Cheney v. U.S. Dist. Court,* 542 U.S. 367, 380–81 (2004), but failed to apply it. Relying on what it viewed as the "unique circumstances" of this case, the Court found that Petitioner Wolfe should not be forced to proceed through the administrative appeals process, which it deemed a "useless act."

As Judge Falvey noted in his dissent, disputing the validity of a regulation does not make Petitioner Wolfe unique. Thousands of claimants are denied relief under VA regulations they think invalid. Yet, they may present their claims of invalidity only after receiving the agency's final decision. If the Court's decision stands, no rational veteran would ever await VA's adjudication of her claim if she could frame her argument as a legal challenge to a regulation or rule. The Board cannot gainsay applicable law or agency rules, so each such veteran will ostensibly suffer the same harm as Petitioner Wolfe. If the Supreme Court meant anything at all when it said that the inconvenience of appeals is no reason to grant a writ, it meant for that lesson to apply here. *Roche v. Evaporated Milk Ass'n*, 319

U.S. 21, 30–31 (1943) (although delay is inherent in obtaining appellate review, such inconvenience does not itself authorize a court to grant extraordinary relief). A flood of writ petitions displacing appeals is the only alternative.

Similarly, the Court ignored the principle that writs exist only to protect, not supplant, the Court's exercise of its prospective jurisdiction. *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 603 (1966) (holding that the AWA supports court action "in aid of the appellate jurisdiction which might otherwise be defeated"). By granting a writ of mandamus, rather than aiding its appellate jurisdiction the Court essentially exercised original jurisdiction over reimbursement decisions. The AWA is not, and never has been, construed to allow a court to reach the merits of a case simply because those merits may one day come within its jurisdiction. Yet that is precisely what the Court did here. In so doing, the Court misapplied *Erspamer v. Derwinski*, 1 Vet.App. 3, 7 (1990), which held that writs are needful when VA action will prevent or frustrate the pursuit of an appeal. The *Erspamer* Court took pains to emphasize that a writ should be used to clear the way for completion of the administrative process, not for an early merits review of the veteran's claim. *Id.* at 9 (observing that the petitioner "[did] not seek to compel a specific type or character of a decision; she [asked] only that, after ten years, a decision be made"). This Court did not heed this crucial limitation on the reach of the AWA.

Second, the Court's decision on the merits of Petitioner Wolfe's claim abandoned the deference it was required to show the Secretary's regulation under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837,

843 (1983). The Court's task was not to determine whether Wolfe's quantitative interpretation of Section 1725(c)(4)(D) is preferable to the Secretary's qualitative interpretation. Rather, its only duty was to determine whether the Secretary's view was reasonable. *Id.*

In deeming the Secretary's qualitative view "absurd," the Court adopted a myopic focus on the phrase "cost share." The Secretary used that term only as shorthand for the qualitative comparison Congress intended to draw between copayments, deductibles, and coinsurance, all of which are considered related in the health insurance industry and major Federal programs like Medicare. The Court did not attempt to explain why the Secretary's joining in this view was unreasonable. *Id.*

What's more, calling the Secretary's position absurd only holds true if, as the Court did here, one ignores the realities of the health insurance industry. Neither Petitioner nor the Court identified a single type of payment owed under a health-plan contract that is similar to a copayment in a quantitative sense but is not, in fact, a copayment. Nothing of the sort exists in the real world. By invoking the quantitative standard of comparison and then failing to recognize, much less fill, this crucial gap, the Court rendered Congress' instruction to exclude "any. . .similar payment" superfluous. *Walters v. Metro. Educ. Enters.*, 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect.").

Finally, the Court's contention that the Secretary wrote a regulation to

swallow whole the ruling in *Staab v. McDonald*, 28 Vet.App. 50 (2016), fails to recognize that Congress, not the Secretary, mandated that reimbursement is not available for "any copayment or similar payment that the veteran owes the third party or for which the veteran is responsible under a health-plan contract." 38 U.S.C. § 1725(c)(4)(D). The Secretary enjoyed no discretion to disregard this command. His only task was to interpret it. The Court may disagree with his qualitative interpretation, but VA was not compelled to pick the Court's interpretation, only a reasonable one. *Chevron*, 467 U.S. at 844.

In dismissing the Secretary's interpretation of Section 1725(c)(4)(D), the Court relied heavily, but erroneously, on dictum from *Staab* that it said fashioned a "regime" regarding this statute. Addressing the validity of a different VA reimbursement regulation, the *Staab* Court said, "it is clear from the plain language of the statute that Congress intended VA to reimburse a veteran for that portion of expenses not covered by a health-plan contract." *Staab*, 28 Vet.App. at 54. Proceeding from the assumption that *Staab* forever defined Congress' intent as to all aspects of the reimbursement system, the *Wolfe* Court determined that VA must reimburse deductibles and coinsurance because they are "expenses not covered by a health-plan contract."

But court rulings do not define the world, nor do they create regimes; they merely interpret the provisions of law before them. *See McDaniel v. Sanchez*, 452 U.S. 130, 141 (1981) (explaining that dictum is language that is "unnecessary to the decision" and therefore "not controlling" in future cases). In *Staab*, those

provisions were 38 U.S.C. § 1725(b)(3)(B) and its implementing regulation, 38 C.F.R. § 17.1002(f). What was not before the Court in *Staab* was Section 17.1005(a)(5)'s predecessor or its authorizing statutory provision, Section 1725(c)(4)(D). Indeed, the *Staab* Court relied upon Section 1725(c)(4)(D) to support its reading of the statutory provision before it, noting that if the mere existence of third-party insurance was enough to defeat reimbursement, Congress would not have also written that copayments and similar payments veterans owe under those health-plan contracts cannot be reimbursed. *Id.* (citing 38 U.S.C. § 1725(c)(4)(D)). Because the *Staab* Court did not, and could not, hold that any and all costs left over after partial payment by a third party must be reimbursed, this Court's decision in *Wolfe* flows from a faulty premise.

In reaching the ultimate conclusion that the Secretary endeavored to avoid its *Staab* decision, the Court left by the wayside longstanding limitations on the reach of its authority under the AWA and principles of deference to the expertise of administrative agencies. The Secretary respectfully asserts that, for the reasons stated above, the legal issues in this case "present fair ground for litigation and thus produce a good reason for maintaining the status quo pending further deliberate review." *Ribaudo II*, 21 Vet.App. at 142.

B. Irreparable Harm

The Secretary will suffer irreparable harm in the absence of a stay. *Id.* Ranging well beyond Petitioner Wolfe's requested class definition, which was limited to claimants whose reimbursement claims were denied on or after January

8, 2018, the Court certified a class without any temporal limitation whatsoever.[1] For this reason, implementation of the Court's order would require the Secretary to review *every* reimbursement claim *ever adjudicated* by the agency since the enactment of the Emergency Care Fairness Act in 2010—numbering in the millions—to determine if reimbursement was ever denied "for medical expenses deemed deductibles or coinsurance, in whole or in part." Doing so would involve intractable administrative difficulties, given the age of many of the claims and the lack of surviving documentation as to the costs incurred, payments by third parties, and the veteran's remaining liability. In the absence of a stay, the Secretary will be required to undertake a truly herculean administrative and adjudicative task that even Petitioner Wolfe did not ask for. Such an undertaking would "unnecessarily strain[] the limited resources" of VA by requiring vast expenditures of time and funds to change reimbursement adjudication procedures, and lead to reimbursement payments that VA would likely never recoup even if successful on appeal. *Id.*

C. Impact on Nonmoving Party

The impact on the nonmoving party is "judged by the group that is defined by the law being interpreted," and in this case would constitute claimants whose

[1]Indeed, although the Court invalidated Section 17.1005(a)(5), which was not adopted until January 2018, it separately ordered the Secretary to re-adjudicate reimbursement claims involving coinsurance or deductibles, which the Secretary takes to mean that the order contemplates decisions pre-dating the adoption of the regulation in its current form.

reimbursement claims were denied for the reason that the amount at issue was comprised of a deductible or coinsurance obligation that the claimant owed as part of a third-party health-plan contract. *Id.* at 143. The impact to these individuals would be a temporary delay in receiving reimbursement for coinsurance or deductibles they shouldered should the Secretary lose on appeal. Further, without a conclusive determination as to the nature of the relief, if any, to be afforded to these individuals, VA compliance with the Court's orders will lead to more misunderstanding for claimants seeking reimbursement or healthcare providers seeking payment. If one corrective action plan must be replaced by another with each stage of review, the affected claimants and providers will only languish in confusion.

D. The Public Interest

The public interest supports the grant of a stay. As the Court held in *Ribaudo II*, the "primary effect of not granting a stay is incursion of the risk that processing claims while the lead case is on appeal will result in a waste of resources that further burdens the veterans benefits system." *Id.* at 143–44. If the Court denies a stay, and the Federal Circuit ultimately decides the matter in the Secretary's favor, the Secretary would be required to "readjudicate hundreds, if not thousands, of claims," which would put a "significant burden" on the veterans' benefits adjudication system. *Id.* at 144. Thus, while members of the class may have an interest in immediate enforcement of the Court's order, "millions of veterans and dependants who must contend with the delays caused by the limited resources

available to the Secretary" have the opposite interest. *Id.* at 144–45.

Considering these competing interests and the likelihood that the Secretary will succeed on appeal, the Secretary submits that the totality of the circumstances favor a stay. *Id.* at 145. A stay will preserve the agency's resources in advance of a final ruling on the issues presented, will avoid costly and duplicative proceedings, ensure uniformity in adjudications, and preserve VA's rights in this matter. *Id.* ("[I]n a world of limited resources and uncertainty in the appeals process, the Court must accept its role in balancing competing interests where it is not always possible to process some veterans' claims without prejudicing the interests of other veterans.").

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 for a stay of the precedential effect of *Wolfe v. Wilkie*, __ Vet.App. __, No. 18-6091 (Sept. 9, 2019), pending his appeal of that decision to the U.S. Court of Appeals for the Federal Circuit.

Respectfully submitted,

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