

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

MONTE E. GASKINS, SR.,)	
Appellant,)	
)	
v.)	Vet. App. No. 19-8364
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
Appellee.)	

APPELLEE’S MOTION TO DISMISS

Pursuant to U.S. Vet. App. R. 27(a), the Secretary notifies the Court that the November 21, 2019, Board of Veterans’ Appeals (Board or BVA) decision does not contain any appealable issues. Therefore, the Secretary moves to dismiss this appeal on jurisdictional grounds.

BACKGROUND

On November 21, 2019, the Board dismissed service-connection claims for a right and left knee disability. The Board noted that these claims were still pending before the agency of original jurisdiction (AOJ), referred the claims to the AOJ for appropriate action, and dismissed the certified appeal for these claims as there was no timely appeal of record. On December 3, 2019, Appellant filed a notice of appeal (NOA) with this Court, indicating his intent to appeal a Board decision that dismissed his service-connection claims for a left and right knee disability, and he referenced a Board docket number of “14-22-671.” A copy of the Board’s November 21, 2019, decision, which reflects a docket number “14-22 671,” was transmitted to the Court on January 13, 2020.

BASIS FOR DISMISSAL

The Court should dismiss this appeal as there are no appealable issues in the decision in question. The jurisdiction of this Court derives exclusively from statutory grants of authority provided by Congress, and the Court may not extend its jurisdiction beyond that authorized by law. *See Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 818 (1988); *Machado v. Derwinski*, 928 F.2d 389,

391 (Fed. Cir. 1991); *Dudley v. Derwinski*, 2 Vet.App. 602, 603 (1992) (en banc order). Pursuant to 38 U.S.C. § 7266(a), for a claimant to obtain review of a Board decision by this Court, the decision must be final, and the person adversely affected by that decision must file an NOA within 120 days after the date the BVA decision was mailed. The burden of establishing jurisdiction rests with Appellant. *Hampton v. Nicholson*, 20 Vet.App. 459, 460 (2006). As this Court has emphasized, “an ‘aggrieved party’ has standing to challenge administrative action only if the party has suffered ‘injury in fact’ to an interest ‘arguably within the zone of interests’ protected by the underlying statute.” *Gifford v. Brown*, 6 Vet.App. 269, 271 (1994) (quoting *Panhandle Producers & Royalty Owners Ass’n v. Economic Regulatory Admin.*, 847 F.2d 1168, 1173 (5th Cir. 1988)).

There is no current BVA decision issued or pending at the Board for Appellant on the merits of service connection for his bilateral knee disability. The merits of Appellant’s service-connection claims are currently before the AOJ for development and appropriate action as noted by the Board in its November 21, 2019, decision. The November 21, 2019, BVA decision simply referred his service-connection claims to the AOJ and dismissed the certified appeal because no timely perfected appeal was of record.¹ Here, the appellate process for Appellant’s claims continues before the agency. The BVA has not issued a final decision on the underlying claims for benefits, and Appellant has not exhausted his administrative remedies. See *In re Quigley*, 1 Vet. App. 1 (1990). Thus, it appears

¹ The Secretary acknowledges that, in the headers of the Board’s November 21, 2019, decision, it appears that the Board remanded Appellant’s service-connection claims to the AOJ. However, a reading of the Board’s decision as a whole shows that these claims were not properly before the Board and that referral was appropriate. Even if the Court were to find that the Board remanded rather than referred these claims to the AOJ, the merits of Appellant’s claims are not subject to a final decision by the Board and these matters remain pending before the agency. *Kirkpatrick v. Nicholson*, 417 F.3d 1361 (Fed. Cir. 2005); *Zevalkink v. Brown*, 6 Vet.App. 483, 488 (1994)

that Appellant's appeal to the Board and NOA submitted to the Court are both premature. Since there is no final BVA decision for the Court to review, this case should be dismissed. See *Breeden v. Principi*, 17 Vet.App. 475 (2004).

Appellant is proceeding *pro se* in this matter.

WHEREFORE, the Secretary moves the Court to dismiss this appeal for lack of jurisdiction.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Richard A. Daley
RICHARD A. DALEY
Deputy Chief Counsel

/s/ Amy M. Roth-Pixton
AMY M. ROTH-PIXTON
Appellate Attorney
Office of General Counsel (027E)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, DC 20420
202-632-6985

CERTIFICATE OF SERVICE

I certify under possible penalty of perjury under the laws of the United States of America, that on this February 18, 2020, a copy of the foregoing was mailed, postage prepaid, to:

Monte E. Gaskins, Sr.
207 Algrave Way
Columbia, SC 29229

/s/ Amy M. Roth-Pixton
AMY M. ROTH-PIXTON
Appellate Attorney