

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-1053

DARRELL SAULSBERRY,

PETITIONER,

v.

ROBERT L WILKIE,
SECRETARY OF VETERANS AFFAIRS,

RESPONDENT.

Before FALVEY, *Judge*.

ORDER

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

On February 12, 2020, veteran Darrell Saulsberry filed through counsel a petition for extraordinary relief in the nature of a writ of mandamus.

In his petition, he notes that on June 9, 2017, a VA regional office (RO) granted noncompensable ratings for degenerative joint disease (DJD) of the right hip with limitation of flexion and limitation of the thigh; denied a rating in excess of 30% for right knee osteochondroma, a rating in excess of 10% for DJD of the right hip with limitation of extension of the thigh, and a total disability rating based on individual unemployability (TDIU); and proposed to reduce his 40% left knee osteoarthritis rating to a 10% rating. Petition (Pet.) at 3-4, Exhibit (Ex.) 1. On October 13, 2017, Mr. Saulsberry filed a Notice of Disagreement (NOD) as to all claims in the June 2017 decision. Pet. at 4, Ex. 2 (NOD specifically listing all six claims with which he disagreed).

On October 24, 2017, VA sent the veteran two letters. The first letter acknowledged receipt of the NOD and indicated the next steps of the appeal, including that a decision review officer (DRO) would review his case and may issue a new decision, or the RO would issue a Statement of the Case (SOC). The second letter informed him that his NOD as to the left knee rating reduction was premature because VA had not yet made the reduction. Pet. at 4, Ex. 3-4. Mr. Saulsberry asserts that, based on these letters, he assumed VA was processing the other five claims listed in his NOD that were not premature. Pet. at 5.

On September 19, 2019, VA sent the veteran a letter indicating that it had failed to send him notification of the June 2017 decision. Pet. at 5, Ex. 6. Mr. Saulsberry states that he was confused by this letter because he had received notification and had filed an NOD as to that decision. Pet. at 5. Thus, on October 8, 2019, he alerted VA that he had timely filed his NOD in

October 2017 and asked VA to decide the claims contained therein. Pet. at 5, Ex. 7 (he also attached the 2017 NOD). On October 20, 2019, Mr. Saulsberry called VA and was informed that his only pending appeals in the system were recently-filed appeals unrelated to the 2017 NOD. Pet. at 6. On December 19, 2019, he again asked VA to decide the issues presented in his October 2017 NOD. Pet. at 6.

On December 24, 2019, VA sent Mr. Saulsberry a letter stating that "[o]n October 8, 2019[,] we received mail indicating that you would like us to review a claim we previously denied"; and instructing him that, "[i]n response to VA Form 21-0958 [NOD] received October 8, 2019," he had to file the proper form before VA would begin processing his request. Pet. at 6, Ex. 9. He asserts that he was again confused because it appeared that VA construed his October 2019 letter inquiring about that status of his timely-filed 2017 NOD to be an attempt to file a new appeal. Pet. at 6. On January 8, 2020, the veteran's counsel contacted VA and he avers that VA confirmed receipt of the NOD on October 16, 2017 (3 days after he filed it); noted the October 24, 2017, letter indicating that the NOD as to the left knee rating reduction was premature; and stated that the system showed no pending appeals for the other five claims addressed in the October 2017 NOD. *Id.*

Mr. Saulsberry argues that a writ is necessary to compel VA to properly process and act on the five non-premature claims addressed in his October 13, 2017, NOD—i.e., the right hip DJD (limitation of flexion, limitation of the thigh, and limitation of extension of the thigh), right knee osteochondroma, and TDIU claims.

In light of these allegations, and pursuant to this Court's Rules of Practice and Procedure, the Court will defer ruling and order the Secretary to file a response to the petition. *See* U.S. VET. APP. R. 21(d).

Upon consideration of the foregoing, it is

ORDERED that the Secretary, within 30 days after the date of this order, file a response to Mr. Saulsberry's petition, addressing the specific allegations contained therein and providing any information and documentation pertinent to the Court's resolution of this matter.

DATED: February 25, 2020

BY THE COURT:



JOSEPH L. FALVEY, JR.
Judge

Copies to:

John V. Tucker, Esq.

VA General Counsel (027)