

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-2346

VETERANS LEGAL ADVOCACY GROUP,

PETITIONER,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

RESPONDENT.

Before MEREDITH, *Judge*.

ORDER

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

On April 2, 2020, the Veterans Legal Advocacy Group filed a petition for extraordinary relief seeking to enjoin the Secretary from scheduling in-person VA compensation and pension examinations during the coronavirus pandemic. Petition (Pet.) at 1-2, 8. The petitioner asserts that, as of the date of the petition, VA through its contractors—Quality, Timeliness, Customer Service and Logistics Health Incorporated—is scheduling in-person examinations in New York City and elsewhere, putting veterans, their families, and examiners at risk. *Id.* at 1-6. The petitioner further maintains that this practice places veterans, who are assertedly at a greater risk of contracting the coronavirus, in the position of potentially having their claims denied for failure to appear for examinations or contracting the coronavirus. *Id.* at 5, 7-8. Consequently, the petitioner requests that the Court order the Secretary to stop conducting in-person examinations. *Id.* at 8.

Pursuant to the All Writs Act (AWA), the Court has the authority to issue extraordinary writs in aid of its prospective jurisdiction. 28 U.S.C. § 1651(a). "[J]urisdiction to issue a writ of mandamus pursuant to the AWA relies upon not *actual* jurisdiction but *potential* jurisdiction." *In re Fee Agreement of Cox*, 10 Vet.App. 361, 370 (1997) (*Cox I*), *vacated on other grounds sub nom. Cox v. West*, 149 F.3d 1360 (Fed. Cir. 1998) (*Cox II*).

This Court's appellate jurisdiction derives exclusively from statutory grants of authority provided by Congress and may not be extended beyond that permitted by law. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988). Hence, it is well established that the AWA does not extend this Court's jurisdiction. *See Cox II*, 149 F.3d at 1363; *see also Heath v. West*, 11 Vet.App. 400, 402-03 (1998). Rather, the Court's appellate jurisdiction is governed by 38 U.S.C. §§ 7252(a) and 7266(a) and is limited to review of final decisions of the Board of Veterans' Appeals (Board). *See* 38 U.S.C. § 7252(a) (the Court "shall have exclusive jurisdiction to review decisions of the Board"); 38 U.S.C. § 7266(a) ("In order to obtain review by the Court

of Appeals for Veterans Claims" a claimant must appeal "a final decision of the Board."). Therefore, the Court's jurisdiction to issue the order sought by the petitioner pursuant to the AWA depends on whether the grant of the petition would lead to a Board decision over which the Court would have jurisdiction. *See Cox I*, 10 Vet.App. at 371; *see also Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943).

"The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976). 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 an appeal; (2) the petitioner must demonstrate a clear and indisputable right to the writ; and (3) the Court must be convinced, given the circumstances, that issuance of the writ is warranted. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004).

Here, the petitioner asserts that it has standing to bring this action and that the Court has jurisdiction to provide the requested relief. Pet. at 2 (citing *Disabled American Veterans v. Gober*, 234 F.3d 682, 689-91 (Fed. Cir. 2000)). The petitioner further contends that the three conditions noted above have been met. *Id.* at 6-8.

Before adjudicating the merits of the petition, the Court will direct the Secretary to file a response addressing the allegations therein, as well as whether the petitioner has standing to seek and the Court has jurisdiction to provide the requested relief. Additionally, because the ultimate burden of establishing standing and jurisdiction rests with the petitioner, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 188-89 (1936); *Bethea v. Derwinski*, 2 Vet.App. 252, 255 (1992), the Court will order the petitioner to submit a supplemental memorandum of law further addressing both issues.

Upon consideration of the foregoing, it is

ORDERED that the Secretary, within 5 days from the date of this order, file an answer to the petition as described above. It is further

ORDERED that the petitioner, within 5 days from the date of this order, file a supplemental memorandum of law as described above.

DATED: April 9, 2020

BY THE COURT:



AMANDA L. MEREDITH
Judge

Copies to:

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VA General Counsel (027)