IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-1518

WILFRED D. BEAN

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

RESPONSE TO RESPONDENT'S RESPONSE TO THE COURT'S ORDER DATED MARCH 10, 2020

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ISSUES PRESENTED

1. Whether the Secretary's April 4, 2020, rating decision moots Mr. Bean's Petition for Writ of Mandamus.

2. Whether the Secretary's actions continue to unreasonably delay the issuing a rating decision on the issue of service connection for anxiety and depression.

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

The Appellant, Wilfred D. Bean, petitioned the Court for a writ of mandamus on March 2, 2020.

A. RELEVANT FACTS AND PROCEEDINGS

The essential facts of this claim are not in dispute. Mr. Bean served honorably in the U.S. Army from November 1966 to November 1969, with service in Vietnam for almost a year. R. 512.[1] While in Vietnam, Mr. Bean experienced several traumatic events, including being mistaken for a member of the Viet Cong. R. 520 (R. 513-20), R. 633. Once stateside, he sought medical attention for nervousness and was diagnosed with anxiety reaction disorder while still in the Army. R. 69, R. 70.

[1] The Petitioner attached the cited pages from the Record Before the Agency to the Petition for Writ of Mandamus.

Mr. Bean applied for service connection in February 1997. R. 828-31. He was diagnosed with major depressive disorder and generalized anxiety at a June 1997 Compensation & Pension (C&P) examination. R. 731-34.

The Regional Office (RO) denied Mr. Bean's claims for service connection for PTSD, chloracne, and sarcoma on July 11, 1997, finding that Mr. Bean did not have a current diagnosis for any of the specific conditions claimed. R. 727-29. Nineteen years later, on August 14, 2006, Mr. Bean made an informal claim for service connection for an acquired psychiatric disorder to include major depression and generalized anxiety disorder and/or PTSD. R. 644. He followed this up with a specific claim in January 2007. R. 640-43.

On October 4, 2007, the RO granted service connection for PTSD, at 30%, effective August 14, 2006, the date the RO received the informal claim. R. 498-501. The decision acknowledged that, while the RO had not confirmed Mr. Bean's in-service stressors, Mr. Bean had been "treated for anxiety reaction in service, which is evidence that [he] suffered from a psychiatric condition during military service." R. 499 (R. 498-501). The decision did not separately address whether Mr. Bean should be service connected for anxiety or depression, despite the VA medical evidence of record containing a separate diagnosis. *Cf. Murray v. Shinseki*, 24 Vet.App. 420, 423 (2011) (reiterating that separate disability ratings are warranted if the symptoms of the conditions are "distinct and separate").

Mr. Bean appealed both the rating and the effective date of the claim. R. 488. He also submitted a statement, dated December 8, 2007, which argued that he had a pending, unadjudicated claim and that his initial claim for service connection for PTSD in 1997 had included major depressive disorder and anxiety. R. 473-74. Mr. Bean submitted his Substantive Appeal in August 2008, in which he once again claimed that he had an unadjudicated, pending claim for service connection for anxiety and depression. R. 441-43.

On appeal, the May 2012 Board acknowledged that Mr. Bean had claimed that he had a pending, unadjudicated claim, but stated that the appropriate way to challenge that would be through a motion for revision based on clear and unmistakable error (CUE). R. 305-25. Under the laws governing CUE, this is wrong. *See Ingram v. Nicholson*, 21 Vet.App. 232 (2007)[2]; *DiCarlo v. Nicholson*, 20 Vet.App. 52, 56-57 (2006).[3]

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[2] After discussing the history of the pending claim doctrine and the Federal Circuit's decisions in *Deshotel v. Nicholson*, 457 F.3d 1258 (Fed. Cir. 2006) and *Andrews v. Nicholson*, 421 F.3d 1278 (Fed. Cir. 2005), the Court explained that the "Secretary's failure to adjudicate a reasonably raised claim can be the basis of a CUE motion as to a final decision of the Secretary *where the issue was relevant to a decision actually made*." *Ingram v. Nicholson*, 21 Vet.App. 232, 254-55 (2007) (emphasis added). However, the Court continued, it must be "reasonable to expect the claimant to know that his claim was implicitly denied by the action taken by the RO on a related claim." *Id.* at 255.

It is not reasonable to expect that Mr. Bean would have understood that his claim for service connection for generalized anxiety and depression would have been implicitly denied when the Regional Office denied his claim for service connection

But, in accordance with the Board's suggestion, and without the benefit of an attorney, Mr. Bean submitted a Motion for Revision Based on Clear and Unmistakable Error on July 26, 2012. R. 296. He again raised the point that his original claim for service connection included generalized anxiety and major depression disorder, and that there was a pending, unadjudicated claim on that issue. *Id.* The RO denied Mr. Bean's claim, perceiving the motion as a freestanding claim for an earlier effective date for service connection for PTSD. R. 237-38. Mr. Bean appealed, again without the benefit of an attorney, and again

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for PTSD. *See id.* Mr. Bean's claim for service connection for PTSD was denied because he did not have a current diagnosis of PTSD. *See* R. 727-29. Mr. Bean did have a current diagnosis of generalized anxiety and depression, R. 731-34, and had been treated for nervousness and was diagnosed with anxiety reaction disorder while still in the Army. R. 69, R. 70.

[3] In *DiCarlo*, the Court noted

> a claim may remain in an unadjudicated state due to the failure of the Secretary to process it. In such instances, the appropriate procedure for a claimant to press a claim believed to be unadjudicated (and for which there is no final decision that arguably failed to consider the claim) is to pursue a resolution of the original claim, e.g. seek issuance of a final RO decision with proper notification of appellate rights and initiate an NOD. *See* 38 U.S.C. § 5104, 7105. If the Secretary fails to process the claim, then the claimant can file a petition with this Court challenging the Secretary's refusal to act.

DiCarlo v. Nicholson, 20 Vet.App. 52, 56-57 (2006).

arguing that there was a pending, unadjudicated claim for service connection for depression and generalized anxiety. R. 34-35, R. 223.

In May 2019, the Board dismissed Mr. Bean's appeal. R. 5-9. It held that the Motion for Revision Based on Clear and Unmistakable Error had not been properly made and that the issue of an earlier effective date for service connection for PTSD had been previously denied by a May 2012 Board decision. *Id*. The Board continued that Mr. Bean had not appealed that decision or sought reconsideration, and therefore, the May 2012 Board decision was final on that issue. *Id.* The Board did not address – or even mention – Mr. Bean's claim that there was a pending, unadjudicated claim for service connection for depression and generalized anxiety. *Cf. id.*

Mr. Bean appealed to the Court and retained counsel through the Veterans Consortium Pro Bono Program. *See Bean v. Wilkie*, docket no. 19-4116. Once it became apparent to counsel that the Secretary had never addressed the issue of a pending, unadjudicated claim, despite Mr. Bean specifically raising the issue multiple times since December 2007, counsel sought a stay of that appeal and filed a Petition for Writ of Mandamus. *See Bean v. Wilkie*, docket no. 19-4116, *Bean v. Wilkie*, docket no. 20-1518. The Court then ordered the Secretary to file a response to the petition. *See id.*

B. THE SECRETARY'S RESPONSE

On April 9, 2020, the Secretary responded to the Court's order, asking the Court to dismiss the petition as moot. *See id.* The Secretary attached an April 4, 2020, rating decision, which he purports addresses the issue raised by Mr. Bean's Petition for a Writ of Mandamus. *See id.*

SUMMARY OF ARGUMENT

Instead of addressing the issue that Mr. Bean raised with the Court, the Secretary has once again ignored Mr. Bean's plea. The April 4, 2020, rating decision only addresses whether the July 1997 rating decision contained a clear and unmistakable error and therefore does not moot Mr. Bean's petition. Moreover, based on the Secretary's lack of appropriate action, Mr. Bean continues to be entitled to a Writ of Mandamus.

ARGUMENT

I. MR. BEAN'S PETITION IS NOT MOOT.

The Court "adheres to the case-or-controversy jurisdictional requirements imposed by Article III of the U.S. Constitution." *Wolfe v. Wilkie*, 32 Vet.App. 1, 22 (2019). If a case becomes moot, "the proper outcome is to dismiss the case for lack of jurisdiction." *Id.*

Had the Secretary considered whether Mr. Bean had a pending, unadjudicated claim or actually adjudicated Mr. Bean's claim for service

connection for depression and generalized anxiety in the April 4, 2020, decision, the Secretary would be correct that the petition was moot; but the Secretary's decision did not do that, leaving Mr. Bean with a live "case or controversy." *Id.* at 23-24.

First, the rating decision must be read within the proper context of what it was addressing. The decision begins by acknowledging that a "special review of [Mr. Bean's] file was mandated *on May 10, 2019*." April 4, 2020, Rating decision, at 1 (emphasis added). Thus, the RO was responding to the *May 2019 Board decision*, which had construed Mr. Bean's submissions to be seeking an earlier effective date for his service-connected *post-traumatic stress disorder* and implied in its decision how Mr. Bean could go about obtaining *that benefit*, not how Mr. Bean could obtain service connection for generalized anxiety and depression. R. 7 (R. 5-9); *see* R. 296. And, as was noted in Mr. Bean's Petition for Writ of Mandamus, the 2019 Board did not mention the issue of an unadjudicated, pending claim. *See* Writ, at 6.

Second, the Court has acknowledged that whether an earlier decision contains a CUE is an entirely separate question from whether there is a pending, unadjudicated claim. *See Evans v. McDonald*, 27 Vet.App. 180, 191 (2014) (Kasold, J., concurring) (explaining "an assertion that an issue was *not* adjudicated is distinct from an assertion that an issue was *wrongly* adjudicated"). As such,

what the April 2020 adjudicator actually decided should be confined to the question it professed to be answering ("whether rating decision approved July 11, 1997 contained a clear and unmistakable error by not applying 38 C.F.R. [3.160(c)]," rating decision, at 2) *and* the actual decision reached ("Rating decision approved July 11, 1997 does not contain a clear and unmistakable error." Rating decision, at 1). *See Evans*, 27 Vet.App. at 191.

Third, for a motion for review based on CUE, the RO considers whether the law extant at the time was correctly applied. *See Simon v. Wilkie*, 30 Vet.App. 403, 407 (2018). Thus, when the April 2020 adjudicator was considering whether the 1997 rating decision contained a CUE because it did not discuss whether Mr. Bean should be service connected for depression and generalized anxiety, it could only consider whether the issues had been reasonably raised as the law stood *in 1997*. *See id*. at 407. That the RO was conducting that analysis, *and that analysis alone*, is made clear by the evidence that the April 2020 adjudicator relied on; or more accurately, did *not* rely on in making his decision. *Cf.* Rating decision, at 1.

[4] Counsel has corrected this to accurately reflect the correct regulatory provision; however, it is unclear where the adjudicator came up with this being the motion Mr. Bean made. *See* R. 296. When Mr. Bean raised the issue of a CUE, it was with regard to "the effective date assigned for [his] service connected [PTSD]." *Id.* Mr. Bean did not state that July 1997 decision contained a CUE by not applying 38 C.F.R. § 3.160(c). *Id.* Rather, he stated over and over again that he had a pending, unadjudicated claim in accordance with 38 C.F.R. § 3.160(c). R. 296, R. 441-43, R. 473-74.

The April 2020 adjudicator considered the facts as contained in the May 2012 and May 2019 Board decisions, the original claim made in February 1997, the motion for revision received September 6, 2012, and Mr. Bean's service treatment records. *Id.* The April 2020 adjudicator *did not* consider the 1997 C&P examination report or whether the information that the Secretary had obtained – in conjunction with his claim for service connection for a different mental disability – raised the issue of service connection for those two conditions.[5] R. 731-34; *see Clemons v. Shinseki*, 23 Vet.App. 1, 5 (2009); *see also Criswell v. Nicholson*, 20 Vet.App. 501, 504 (2006) (explaining medical records alone are not sufficient to raise a claim, there must be "some intent by the claimant to apply for a benefit").

Conversely, if the April 2020 adjudicator had considered whether there was a pending, unadjudicated claim – as opposed to whether the July 1997 RO erred when it did not address the issues of service connection for generalized anxiety and depression – the adjudicator would have to have considered that a claim for PTSD without more

> *cannot be a claim limited only to that diagnosis*, but must rather be considered a claim for any mental disability that may reasonably be encompassed by several factors including: the claimant's description of the claim; the symptoms the claim describes; and the information the claimant submits *or that the Secretary obtains in support of the claim*.

[5] The April 2020 adjudicator stated "[y]ou did not claim service connection for generalized anxiety disorder or major depression." Rating decision, at 2.

Clemons, 23 Vet.App. at 5 (emphasis added); *see Coker v. Nicholson*, 19 Vet.App. 439, 441-42 (2006) (explaining whether the issues were reasonably raised by the entire record, not just what the claimant put on the initial form), *vacated on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam). Thus, once Mr. Bean submits to the June 1997 C&P examination, and the examiner diagnoses him with generalized anxiety and depression, his initial claim includes not only PTSD, but generalized anxiety and depression as well. *See Clemons*, 23 Vet.App. at 5.

Since the April 2020 adjudicator did not provide any discussion for whether the issues were reasonably raised by the record, it is apparent that the adjudicator was *not* considering whether there was a pending, unadjudicated claim, but simply was addressing whether the RO erred in not discussing the other claims in 1997. *See Evans*, 27 Vet.App. at 191. Therefore, the Court should find Mr. Bean's "case or controversy" remains alive and deny the Secretary's request to dismiss the petition. *Cf. Wolfe*, 32 Vet.App. at 22.

II. MR. BEAN IS ENTITLED TO A WRIT NOW MORE THAN EVER.

If the Court agrees that the April 4, 2020, rating decision does not moot Mr. Bean's request, a writ is warranted even more so now.

Having been presented with cogent arguments in a writ request, and having the opportunity to directly address the issue, the Secretary's response was to avoid

it. *Martin v. O'Rourke*, 891 F.3d 1338, 1347-48 (Fed. Cir. 2018). That is, instead of addressing the unadjudicated, pending claim – one way or the other – the Secretary backhandedly addressed it in the context of a motion for CUE.[6] *See DiCarlo v. Nicholson*, 20 Vet.App. 52, 56-57 (2006). Therefore, the Court should find that a writ is still warranted. *Martin*, 891 F.3d at 1347-48 (addressing the 6th factor announced by the D.C. Circuit in *Telecomms. Research & Action Ctr. v. FCC (TRAC)*, 750 F.2d 70 (D.C. Cir. 1984)).

Moreover, the RO's failure to address the issue in the April 4, 2020, decision keeps the clock ticking. Mr. Bean has now been waiting 23 years and 2 months for a decision on his claim for service connection for generalized anxiety and depression. *See Clemons*, 23 Vet.App. at 4-6, 9. This continues to not fit within any "rule of reason," continues to be unreasonable – especially since he has essentially been punished for following VA's advice to file a CUE motion – and borders on absurd. *See Godsey v. Wilkie*, 31 Vet.App. 207, 228 (2019); *MCI Telecomm. Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980) (explaining the "rule

[6] The Court has also held that "a claimant may assert that VA failed to adjudicate a reasonably raised claim in the context of a request for revision of a prior decision on the basis of CUE," and in those instances, the first step for the VA is to determine whether the claim was reasonably raised and, if so, whether it is pending, as there "is no claim to revise" if it remains pending. *Richardson v. Nicholson*, 20 Vet.App. 64, 71-72 (2006). As noted above though, the RO did not undertake this analysis. *See infra* Arg. I.

of reason" assumes that action on a ratemaking would take place within "months, occasionally a year or two but not several years or *a decade*").

Therefore, as the Secretary continues to ignore Mr. Bean's plea to have his pending, unadjudicated claim considered, and the *TRAC* factors continue to weigh in Mr. Bean's favor, the Court should grant Mr. Bean's petition and issue the writ.

CONCLUSION

Based on the foregoing, and the arguments presented in the Petition for Writ of Mandamus, Mr. Bean asserts that a writ is still warranted. Mr. Bean has no "adequate alternative means to obtain relief from the Secretary," as he has repeatedly asked for the Secretary to adjudicate his claims, to no avail. There is also no question that Mr. Bean has a "clear and indisputable right to the writ," as the *TRAC* factors weigh heavily in his favor. *See Godsey*, 31 Vet.App. at 229.

Mr. Bean therefore requests that the Court (1) grant his petition and (2) issue a writ of mandamus, ordering the Secretary to issue a decision on his claim for service connection for generalized anxiety and depression, dating back to 1997.

Respectfully submitted,

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