

**VETERANS LEGAL
ADVOCACY GROUP,**

Petitioner,

V.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Respondent.

Vet. App. No. 20-2346

SECRETARY'S RESPONSE TO COURT ORDER DATED APRIL 16, 2020

Pursuant to U.S. Vet. App. Rule 21(b), and the April 16, 2020, Order of the Court, Respondent, Robert L. Wilkie, Secretary of Veterans Affairs (Secretary), hereby responds to the Court's Order.

On April 2, 2020, the Veterans Legal Advocacy Group, Petitioner, filed a petition for extraordinary relief seeking to enjoin the Secretary from scheduling in-person VA compensation and pension examinations during the coronavirus pandemic. Petitioner filed a motion to dismiss the case on April 10, 2020, stating that “since the petition was filed, the VA and its contractors have stopped providing in-person examinations.” On April 16, 2020, Petitioner filed an opposed motion to “resume litigation.” As grounds for the motion, Petitioner states that the original petition is not moot because VA is continuing to schedule examinations during the pandemic. The Court has directed the Secretary to respond to Petitioner’s motion to resume litigation.

Petitioner Lacks Standing

Petitioner asserts that “[i]t is a non-profit entity representing veterans’ interests—with clients directly affected by the VA’s exam scheduling.”¹ It alleges that it has been contacted by various veterans and “it represents at least one client that has an in-person exam scheduled in Queens, New York next week”. Petition at 2. However, Petitioner does not identify the alleged veteran(s) or client(s), nor was the petition filed on behalf of said persons. Petitioner likewise makes no cogent argument, nor provides any support, that it has third-party standing to bring the current action. Accordingly, Petitioner lacks standing and the Court should deny the motion to resume litigation.

The Court has adopted the “case or controversy” requirement of Article III, § 2, of the United States Constitution. *Mokal v. Derwinski*, 1 Vet.App. 12, 15 (1990). “One element of the case-or-controversy requirement’ is that plaintiffs ‘must establish that they have standing to sue.’” *Clapper v. Amnesty Int’l, USA*, 568 U.S. 398, 408, 133 S. Ct. 1138, 1146, 185 L. Ed. 2d 264 (2013) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)). “[T]he irreducible constitutional minimum of standing contains three elements.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, the party invoking a court’s jurisdiction must have suffered an “injury in fact – an invasion of a legally protected interest which

¹ Petitioner describes itself as a “non-profit law firm for veterans.” See <http://vetlag.org/wp/>. While an association may seek third-party standing, see *DAV v. Gober*, 234 F.3d 682, 689-91 (Fed. Cir. 2000), Petitioner has failed to

is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” *Id.* (internal quotation, footnote, and citation omitted). Second, the complained-of injury must be causally related to the conduct of the defendant. *Lujan*, 504 U.S. at 560. “Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Id.* at 561 (internal quotation omitted).

In addition to direct standing, the Supreme Court has recognized limited circumstances “where it is necessary to grant a third party standing to assert the rights of another.” *Kowalski v. Tesmer*, 543 U.S. 125, 129-30, 125 S. Ct. 564, 160 L. Ed. 2d 519 (2004); *In re Stanley*, 9 Vet.App. 203, 210-11 (1996). To invoke third-party standing, “the party asserting the right [must have] a ‘close’ relationship with the person who possesses the right.” *Kowalski*, 543 U.S. at 130. The party asserting the right must also show that “there is a ‘hindrance’ to the possessor’s ability to protect his own interests.” *Id.*

In *Warth v. Seldin*, the Supreme Court held that third-party standing was generally disfavored and would only be permitted “when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties’ rights.” 422 U.S. 490, 510, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). The Supreme Court extended this principle to attorney-client relationships where an attorney invokes the rights of an *existing* client, *Caplin & Drysdale, Chartered*,

present any argument as to why it would be entitled to associational standing versus third-party standing based upon an attorney-client relationship.

v. United States, 491 U.S. 617, 624 n.3, 109 S. Ct. 2646, 109 S. Ct. 2667, 105 L. Ed. 2d 528 (1989), but has expressly rejected the attorney-client relationship as insufficiently close where it involves the representation of a hypothetical client. See *Kowalski*, 543 U.S. at 131. In addition, the Supreme Court has noted a hesitancy to grant third-party standing to attorneys on behalf of their clients except in unusual cases, such as where the enforcement of a restriction against an attorney prevents his clients from contracting for his services, thus violating their due process right to obtain legal representation. *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 720-21, 110 S. Ct. 1428, 108 L. Ed. 2d 701 (1990).

While not entirely clear, it does not appear that Petitioner is alleging direct standing, but rather seeks to establish third-party standing. See *generally* Petition at 2. Petitioner has not, however, presented any argument to support the invocation of that limited exception to direct standing in this case. *Id.*; see *Padgett v. Peake*, 22 Vet.App. 159, 162 (2008) (confirming that the party seeking to invoke jurisdiction must establish that it has standing).

First, Petitioner has not shown that it and the veterans being scheduled VA examinations are closely related. As noted above, the Supreme Court has expressly rejected the attorney-client relationship as insufficiently close where it involves the representation of a hypothetical client. See *Kowalski*, 543 U.S. at 131. While Petitioner stated in its original petition that it had “at least one client that has an in-person exam scheduled in Queens, New York next week”, it did not identify the client, did not indicate in its motion to resume litigation whether

said client's examination has already occurred, been canceled, or remains scheduled, and vaguely referenced an uncertain number of clients ("at least one"). Petition at 2; Motion to Resume Litigation. Moreover, in its Motion to Resume, Petitioner states that it was contacted by a veteran who has had a VA examination scheduled but does not identify the veteran or indicate whether it directly represents that veteran. See Motion to Resume. As such, Petitioner has failed to demonstrate that it and the veterans are closely related so as to establish third-party standing.

In addition, and most importantly, Petitioner has not demonstrated that there is a hindrance to the veterans' ability to protect their own interests and directly bring a petition on their own behalf. See *Kowalski*, 543 U.S. at 129-30. The Secretary readily concedes that an individual veteran could have standing to file a petition for extraordinary relief seeking to enjoin the Secretary from scheduling an in-person VA compensation and pension examination during the coronavirus pandemic. That is not the case here, however. Petitioner, as a non-profit law firm, is attempting to enjoin the Secretary from certain actions yet has presented no support for why the referenced veterans and/or clients could simply not bring the action on their own behalf. Without such a showing, Petitioner cannot establish third-party standing.

Even Assuming Standing, Petitioner Fails to Demonstrate Entitlement to the Writ

“The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.” *Vargas-Gonzalez v. Principi*, 15 Vet.App. 222, 224-25 (2001) (quoting *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976)). A petitioner seeking an extraordinary writ must satisfy three conditions: (1) The petitioner must demonstrate a “clear and indisputable” entitlement to the writ; (2) the petitioner must demonstrate that he lacks adequate alternative means to obtain the desired relief, thus ensuring that the writ is not used as a substitute for the appeals process; and (3) the Court must be convinced, given the circumstances, that the issuance of the writ is warranted. See *Ramsey v. Nicholson*, 20 Vet.App. 16, 21 (2006) (citing *Cheney v. United States Dist. Ct. for D.C.*, 542 U.S. 367, 380-81 (2004)).

Moreover, the Court adheres to the case-or-controversy jurisdictional constraints provided for in Article III of the U.S. Constitution. See *Mokal*, 1 Vet.App. at 13-15. When the relief requested in a petition has been obtained, the appropriate course of action is for the Court to dismiss the petition as moot. See *Thomas v. Brown*, 9 Vet.App. 269, 270-71 (1996) (per curiam order).

Due to the national COVID-19 emergency, the Veterans Benefit Administration (VBA) Program Office instructed all VBA contract examination vendors to cease all in-person examinations on April 3, 2020. See Attached Declaration. On April 4, 2020, a Temporary Suspension Notice was sent to all

VBA contract vendors ordering the temporary suspension of all in-person, face-to-face examinations. See Attached Notice Letter.

Upon discussions with VBA vendors concerning the temporary suspension, it was discovered that one vendor, Veterans Evaluation Services (VES), had erroneously sent out examination notices to numerous veterans. See Declaration at 2. The letters indicated that the veteran had been scheduled for an in-person examination when, in fact, no such examination had been scheduled. *Id.* Rather, VES was blocking time slots for future examinations to ensure that they could resume examinations as quickly as possible once the restrictions on in-person examinations are lifted. *Id.* VES has stated that they are actively working to identify and retract all of those letters and inform anyone who received such a letter that the notice of an examination appointment was sent to them in error. *Id.* VES has further indicated that each veteran who received an appointment notification letter will be informed that the appointment information was merely a placeholder. *Id.*

The Secretary concedes that numerous veterans have received notices scheduling in-person examinations. Those notices were sent in error. Neither VBA nor its vendors are currently conducting formal in-person examinations. Rather, placeholder time slots have been entered so that examinations may be resumed as quickly as possible once it is deemed safe to do so. Unfortunately, an error resulted, and some veterans were notified of those placeholder examination time slots and led to believe that they must report for an

examination. The Secretary sincerely apologizes for that error and for the anxiety which it may have caused. However, that error is being remedied. Accordingly, because VA is not currently conducting in-person examinations and because the above-mentioned notice error is being remedied, the petition should be denied as moot.

CONCLUSION

In response to the Court's April 16, 2019, Order, the Secretary requests that the Court deny Petitioner's Motion to Resume Litigation and deny the Petition for Extraordinary Relief.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Christopher W. Wallace
CHRISTOPHER W. WALLACE
Deputy Chief Counsel

/s/ Sarah E. Wolf
SARAH E. WOLF
Senior Appellate Attorney
Office of the General Counsel (027G)
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420
(202) 632-6727

ATTACHMENTS

**Department of
Veterans Affairs**

Memorandum

Date: April 17, 2020

From: Mary Glenn, Deputy Executive Director, Contract Medical Disability Examination Program Office, Compensation Service

Subj: VBA "In-Person Exam" Declaration

To: Richard Hipolit, General Counsel, Veterans Programs

1. The Veterans Benefits Administration (VBA) has established Indefinite Delivery, Indefinite Quantity (IDIQ) contracts with three (3) vendors to conduct Compensation and Pension (C&P) examinations for Veterans who have filed disability claims. The contracts are held by QTC Inc., Veterans Evaluation Services (VES) and Logistics Health Inc. (LHI). The vendors conduct in-person, Acceptable Clinical Evidence (ACE) and Tele-C&P exams for Veterans who have filed disability claims with the Department of Veterans Affairs.
2. Due to the national COVID-19 emergency, the VBA program office instructed all VBA contract examination vendors to cease all in-person examinations on April 3, 2020. The notice was provided in writing by the Medical Disability Examination Program Office, in coordination with actions taken by VHA to ensure the safety of all Veterans during this national emergency. Vendors were asked to maximize use of other modalities that do not involve in-person appointments, to ensure continued service to Veterans.
3. A formal "Temporary Suspension Notice" (attached via email) conveying the same guidance, was sent by the Contracting Officer on April 4, 2020. Upon receipt, all Vendors sent written acknowledgement and understanding of the notice to implement the order.
4. Upon executing the order to cease in-person examinations, the Program Office held several discussions with the Vendors between April 4th and present time, to discuss daily challenges, data requirements and program changes implemented to further support the order to cease in-person examinations. The Program Office was advised that all in-person examinations were no longer occurring. On Thursday, April 16th, the Program Office conducted meetings with each Vendor to discuss challenges faced as a result of the order to cease in-person exams and the status of their respective exam request inventories. The following provides a summary of those activities as reported by each Vendor:

a. VES:

- VES is no longer conducting in-person examinations. They stopped conducting in-person examinations on 4/7/2020.
- VES is currently blocking time slots for the future (June 2020 forward) to ensure that they can pick-up and run as soon as the restriction on in-person exams are lifted.
- As a result of blocking time slots, appointment notification letters were erroneously released to numerous Veterans during the first twelve days after in-person exams were halted. They are working to actively identify and retract all of those letters.
- Anyone who has received a letter for any appointment in June will be contacted and told that the letter was sent to them in error.
- VES has provided written validation that they are not, nor have they been, conducting in-person examinations since 4/7/20. They will also ensure that each Veteran who received an appointment notification letter understands that the appointment information was merely a placeholder.
- They also report taking immediate steps to stop sending all appointment notification letters that appear to be for in-person examinations.

b. QTC:

- QTC is no longer conducting in-person examinations. They stopped conducting in-person exams on 4/4/2020.
- QTC is currently blocking time slots in the future to ensure that they can pick-up and run as soon as shelter in place orders are lifted.
- QTC continues to notify Veterans concerning cancelled examinations that were scheduled for May and June prior to the suspension of in-person appointments on April 3, 2020.
- Any Veteran who has received a letter for an appointment in the future, will be contacted and told that the appointment information is a place holder pending shelter in place restrictions being lifted. If necessary, the time slot will be cancelled, and they will use multiple avenues to ensure Veterans are notified. This includes telephone calls and letters mailed overnight via FedEx.

c. LHI:

- LHI is no longer conducting in-person examinations. They stopped conducting all but two in-person exams on April 8th. The vendor reports that the exams were cancelled, but on two occasions, the Veterans reported anyway. The providers on site conducted the exams. One of these examinations was completed on April 11, and the second was completed on April 14.
- LHI has cancelled all in-person examinations for appointments scheduled in May 2020. All Veterans that were previously scheduled for in-person exams in May have received cancellation notices.
- LHI has confirmed that they are only sending notification letters for ACE and tele-C&P exams (as required to do so to share provider credentialing information).

5. It is important to note that all vendors are continuing to send letters to Veterans for medical opinions, ACE and tele-C&P examinations. Even if the Veteran is not contacted in relation to the examination, the vendors are notifying them of the credentials of the provider who is reviewing their records in order to comply with the requirements set forth in the case of *Mathis V. McDonald*.

6. This declaration is being provided to confirm that all contract examination vendors have validated their compliance with the order to cease in-person examinations.
7. Please let me know if you have additional questions.

Director Signature

Glenn, Mary
Digitally signed by Glenn, Mary
Date: 2020.04.17 12:57:05
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Mary Glenn, Deputy Executive Director

04/17/2020

Date



U.S. Department
of Veterans Affairs

Date: April 4, 2020

From: Roxana Cepeda, Supervisory Contracting Officer

To: Medical Disability Examination (MDE) Vendors

Subject: Temporarily Suspension of In-Person Examination due to COVID-19
Pandemic

This letter is to inform the MDE Vendors, effective April 3rd, 2020, the Department of Veteran Affairs has issued an order to stop all in-person, face-to-face examinations due to COVID-19.

As such, we ask the MDE Vendors to maximize the use of Telehealth and Acceptable Clinical Evidence (ACE) Examinations. As the result of the temporary halt to all in-person examinations, the MDE Program Office (PO) is currently working on determining which exams can be done through another modality. Further guidance will come from MDEPO as soon as practicable. **Please note:** If any directive/guidance is contrary to the terms and conditions of the contracts, the contracting support staff will work with MDEPO to promptly modify the contract to ensure continued service.

This temporary suspension of in-person, face-to-face examinations and the maximization of Telehealth and Ace Examinations will allow the VA to continue to serve our Nation's Veterans, while protecting all from COVID-19. We appreciate the Vendors support, continued partnership and collaboration during this extraordinary time and request that you bear with us as we navigate through this together.

If you have any questions, please do not hesitate to contact me.

Sincerely,

ROXANA CEPEDA

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Roxana Cepeda

Supervisory Contracting Officer

cc: Agency Counsel (Jason.Fragoso@va.gov)

Digitally signed by ROXANA CEPEDA
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Date: 2020.04.04 14:43:43 -04'00'