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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-1518

WILFRED D. BEAN, 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 March 2, 2020, the petitioner, Wilfred D. Bean, through counsel filed a petition for extraordinary relief in the form of a writ of mandamus compelling VA to adjudicate his disability compensation claim for anxiety and depression, which he alleged has been pending since 1997. Petition (Pet.) at 1, 6-7, 14-15. The petitioner averred that he has no adequate alternative means to obtain the desired relief because "he has repeatedly asked for the Secretary to adjudicate his claims, to no avail." Pet. at 14.

He made the following allegations in support of his petition: He filed a disability compensation claim for post-traumatic stress disorder (PTSD) in 1997, Pet. at 2, Record (R.) at 828-31;¹ his service records and a VA examination report reflect diagnoses of anxiety reaction, major depressive disorder, and generalized anxiety, Pet. at 2, R. at 69, 70, 731-34; in July 1997, a VA regional office (RO) denied disability benefits for PTSD and, although the RO noted diagnoses of depression and generalized anxiety disorder, it did not address whether he was entitled to benefits for those conditions, Pet. at 2, R. at 727-29; he was ultimately awarded disability benefits for PTSD effective August 2006, the date of an informal claim for an acquired psychiatric disorder, including depression and PTSD, Pet. at 2-4, R. at 498-501, 644; he appealed the assigned effective date and argued both in his Notice of Disagreement and Substantive Appeal that he had pending unadjudicated claims from 1997, but in a May 2012 Board of Veterans' Appeals (Board) decision, the Board found no basis for an earlier effective date for PTSD and informed him that the appropriate way to assert that he had pending claims would be through a motion for revision based

¹ The Court notes that the petitioner also has an appeal pending before the Court under docket No.19-4116 and that the pages to the record referenced herein, and the documents attached to the petition, are from the record before the agency in that appeal. *See* Pet. at 1 n.1.

on clear and unmistakable error (CUE),² Pet. at 4-5, R. at 321, 441-43, 473-74; in July 2012, he submitted a motion for revision on the basis of CUE and again asserted that he had claims pending, Pet. at 5, R. at 296;³ the RO treated his CUE motion as a freestanding earlier effective date claim, Pet. at 5-6, R. at 237-38; and the Board, in May 2019, dismissed his appeal without "address[ing]—or even mention[ing]—[his] claim that there had been a pending, unadjudicated claim for service connection for depression and anxiety." Pet. at 6, R. at 5-9.

The May 2019 decision, which is attached to the petition, reflects that, in July 2012, the petitioner asked the RO to "'reconsider' the issue of an effective date assigned to the award of service connection for the PTSD," "argued that the Board should have considered whether he should have been service-connected for depression and anxiety from 1997 since his original claim had been for an 'acquired psychiatric disorder' and not just PTSD," and "therefore it remained an unadjudicated claim." R. at 6-7. The Board then identified the requested relief as an effective date prior to August 14, 2006, for the grant of service connection for PTSD; found that the effective date for PTSD was finally adjudicated in the May 2012 Board decision and that the petitioner had not contended that his request for an earlier effective date should be construed as a motion to revise the May 2012 Board decision; and dismissed the appeal because a claimant may not attack a final decision by filing a freestanding claim for an earlier effective date. R. at 7-9. On June 11, 2019, the petitioner filed a Notice of Appeal from the May 2019 decision, and on March 3, 2020, filed a motion to stay proceedings in that appeal pending disposition of the current petition.⁴

The Secretary filed a response to the petition on April 9, 2020, asserting that, on April 4, 2020, the RO issued a decision determining that the July 11, 1997, RO decision was not the product of CUE and did not leave unadjudicated disability compensation claims for generalized anxiety disorder and major depression "because neither of those conditions were ever claimed." Secretary's Response at 3; *see* Exhibit 1. The Secretary avers that VA informed the petitioner what to do if he disagrees with the decision and that he has 1 year to appeal the RO's determination. Secretary's Response at 3-4. The Secretary thus contends that the requested relief has been granted and, if the petitioner disagrees, he may avail himself of VA's appeals process. *Id.* at 4. Consequently, he requests that the Court dismiss the petition as moot. *Id.*

² The petitioner did not appeal the May 2012 decision.

³ The petitioner in his July 2012 submission asserted in part:

I am requesting the VA reconsider the issue of the effective date assigned for my service[-]connected [PTSD] under the provisions of 38 CFR [§] 3.105(a). As I have previously testified[,] . . . it is my contention that my original claim for service connection for PTSD constituted a claim for an acquired psychiatric disability[,] to include generalized anxiety disorder, major depression and/or PTSD[.] It is my further contention that based on the symptomatology clearly manifested while I was [on] active duty[,] the VA should have either scheduled me for a [c]ompensation and [p]ension examination to include medical opinion on the relationship of the above disabilities to my military service. As I have previously stated[,] I believe the VA's failure to do so constitutes an unadjudicated claim in accordance with 38 CFR [§] 3.160(c). . . . I am requesting the VA [RO] reconsider the issue of the effective date assigned for my [service-connected] PTSD as stated above.

R. at 296.

⁴ The Court has not yet acted on that motion. *See Bean v. Wilkie*, U.S. Vet. App. No. 19-4116 (Notice of Appeal filed June 11, 2019).

On April 15, 2020, the petitioner filed an unopposed motion for leave to file a response to the Secretary's response. That motion will be granted, and the Court will direct the Clerk of the Court to file the petitioner's response as of the date of this order.

In his response, the petitioner asserts that the RO's April 4, 2020, rating decision does not moot his request for relief because it "only addresses whether the July 1997 rating decision contained a clear and unmistakable error." Petitioner's Response at 6. He contends, to the contrary, that the petition would be moot *if* the Secretary considered whether he had a pending unadjudicated claim or actually adjudicated his claim for depression and generalized anxiety. *Id.* at 6-7. Based on his reading of the decision and the evidence cited, he asserts 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." *Id.* at 10; *see id.* at 7-10. Based on these purported inadequacies in the RO's decision, the petitioner maintains that the Secretary continues to ignore his unadjudicated claim and that he lacks alternative means to obtain the desired relief. *Id.* at 10-12. He thus asks the Court to issue a writ compelling the Secretary to adjudicate his 1997 claim for generalized anxiety and depression. *Id.* at 12.

This Court has the authority to issue extraordinary writs in aid of its jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). *See Cox v. West*, 149 F.3d 1360, 1363-64 (Fed. Cir. 1998). This includes writs of mandamus to "compel action of the Secretary unlawfully withheld or unreasonably delayed." 38 U.S.C. § 7261(a)(2); *see Martin v. O'Rourke*, 891 F.3d 1338, 1343 (Fed. Cir. 2018). However, "[t]he 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 Court concludes that the petitioner has not demonstrated that he lacks adequate alternative means to attain the relief he desires. Specifically, he has not explained why his appeal from the May 2019 Board decision or initiating review of the April 2020 rating decision are not adequate remedies. In this regard, the Court notes that, contrary to the petitioner's assertion, the May 2019 Board decision acknowledged his contention that his 1997 claim had been for an acquired psychiatric disorder, not just PTSD, and that claims for depression and anxiety remained pending. R. at 6-7. And, the RO, in April 2020, found that the 1997 rating decision "did not leave any unadjudicated claims of service connection for generalized anxiety disorder and major depression because neither of these conditions were ever claimed." Secretary's Response; Exhibit 1 at 2.

Although the petitioner is dissatisfied with both decisions, from the information before the Court, it appears that he has alternative means to correct any errors in the May 2019 Board decision and the April 2020 rating decision. Because a petition for extraordinary relief cannot be used as a substitute for the administrative process, *see Lamb v. Principi*, 284 F.3d 1378, 1384 (Fed. Cir. 2002) ("[E]xtraordinary writs cannot be used as substitutes for appeals, even though hardship may

result from delay and perhaps unnecessary trial.'" (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953))), the petition will be denied. Accordingly, it is

ORDERED that the petitioner's April 15, 2020, unopposed motion to file a response is granted. It is further

ORDERED that the Clerk of the Court file the petitioner's response as of the date of this order. It is further

ORDERED that the petitioner's March 2, 2020, petition for extraordinary relief in the form of a writ of mandamus is DENIED.

DATED: April 27, 2020

BY THE COURT:



AMANDA L. MEREDITH
Judge

Copies to:

Jennifer A. Zajac, Esq.

VA General Counsel (027)