

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 28, 2020, the Court dismissed as moot the Veterans Legal Advocacy Group's April 2, 2020, petition for extraordinary relief seeking to enjoin the Secretary from scheduling in-person VA compensation and pension examinations during the coronavirus pandemic. Petition at 1-2, 8. The petitioner filed a motion for reconsideration and a panel decision on May 19, 2020, in which it asserted that, contrary to what the Secretary informed the Court on April 17, 2020, VA has continued to schedule in-person examinations. Motion at 1-5. In that regard, the petitioner noted that the Senate Committee on Veterans' Affairs has inquired into the Secretary's guidelines, processes, and procedures regarding examinations; attached a May 5, 2020, rating decision that denied a veteran's disability compensation claim because he did not appear for an examination on April 21, 2020; asserted that veterans, who are not clients of the petitioner, and attorneys generally have informed the petitioner that VA is still scheduling examinations; and alleged that a contractor started to blind schedule examinations to begin on June 1, 2020. Motion at 2-3.

The Court initially held the motion in abeyance and ordered the petitioner to file a supplemental memorandum of law addressing the petitioner's standing to seek and the Court's jurisdiction to provide the relief requested in the petition for extraordinary relief. The petitioner responded that it has organizational, third-party, and direct standing to pursue and the Court has jurisdiction to grant the requested relief. The Secretary filed a response disputing both matters and further asserted that reconsideration is not warranted.

A motion for reconsideration must set forth the points of law or fact that the movant believes the Court overlooked. U.S. VET. APP. R. 35(e)(1). Here, the petitioner has not demonstrated that the Court overlooked or misunderstood any fact presented in the petition for extraordinary relief. Rather, as explained below, the publication of a VA-wide policy prohibiting

in-person examinations under unsafe circumstances was directly responsive to the petitioner's request.

As indicated in the Court's order dismissing the petition as moot, the Secretary maintained in his April 17, 2020, response that the petition was moot because the Veterans Benefits Administration (VBA) Program Office instructed all VBA contract examination vendors to cease all in-person examinations; a temporary suspension notice was sent to all VBA contract vendors on April 4, 2020; and, to the extent that veterans received notice of scheduled examinations, those notices were sent in error and steps were being taken to retract those letters. *See Veterans Legal Advocacy Group v. Wilkie*, No. 20-2346, 2020 WL 2027775, *1 (Vet. App. Apr. 28, 2020).

The petitioner essentially disagrees with the Court's determination based upon newly obtained information. However, the Secretary's response to the motion demonstrates that, as he previously stated, VA is scheduling place-holder examinations so that examinations may resume once it is deemed safe to do so; VA recently determined that examinations may safely resume in 20 select locations nationwide; and, to the extent that any veterans were erroneously denied benefits for failing to attend an examination, the Agency is working to remedy those mistakes. *See* June 4, 2020, Response at 10-11, Attachment at 4-5, 7; *see also* Apr. 17, 2020, Response at 7 (explaining that place-holder time slots were being entered so that examinations may quickly resume when safe, but notices of examinations were sent in error). Further, to the extent that examinations are resuming in select locations, the Secretary's policy reflects that veterans who are not yet comfortable attending an in-person examination may opt to schedule their examinations at a later date without any impact on their disability claims and, if possible, Acceptable Clinical Evidence or telehealth examinations should be applied. *See* June 4, 2020, Response, Attachment at 4.

In sum, the petitioner has not shown that the Court overlooked or misunderstood any facts. Although the petitioner has alleged and VA has conceded that errors have occurred, the petitioner has not demonstrated that the Secretary's *underlying policy* does not align with the specific relief it requested—that VA cease holding in-person examinations until it is safe to do so; that VA conduct telehealth examinations when feasible; and that claimants not be penalized for not attending an examination during the pandemic. *See* Petition at 8. Moreover, individual veterans who may have been aggrieved by VA's failure to follow its guidelines in particular cases are free to seek redress from the Agency or this Court. Finally, although the parties have proffered competing arguments as to whether the petitioner had standing to bring the instant petition, the Court need not resolve that question, because, as indicated above, there is no case or controversy. *See Chandler v. Brown*, 10 Vet.App. 175, 177 (1997) (per curiam order); *Thomas v. Brown*, 9 Vet.App. 269, 270-71 (1996) (per curiam order).

Accordingly, it is

ORDERED that the petitioner's motion for reconsideration is denied. It is further

ORDERED that the petitioner's motion for a panel decision is held in abeyance pending further order of the Court.

DATED: June 10, 2020

BY THE COURT:



AMANDA L. MEREDITH
Judge

Copies to:

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VA General Counsel (027)