

**IN THE UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS**

**KATHY GARDNER-DICKSON,**

Petitioner,

v.

**ROBERT L. WILKIE,**

Secretary of Veterans Affairs,

Respondent.

Vet.App. No. 19-4765

**RESPONDENT’S OPPOSED MOTION TO DISMISS**

Pursuant to U.S. Vet. App. R. 27(a), Respondent, Robert L. Wilkie, Secretary of Veterans Affairs, respectfully moves the Court to dismiss Petitioner’s petition for a writ of mandamus (Writ Petition), and dependent motion for class certification and class action (Class Motion), for a lack of jurisdiction.<sup>1</sup> See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006) (“The objection that a federal court lacks subject-matter jurisdiction [ ] may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment.”) (citation omitted); see also *Sellers v. Shinseki*, 25 Vet.App. 265, 274-75 (2012) (recognizing the Court’s “independent obligation to police its own jurisdiction.”).

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<sup>1</sup> The Secretary recognizes the late hour of this submission but, in preparation for oral argument, the jurisdictional issue presented here became more apparent. See Court’s August 26, 2019, and October 15, 2019, Orders. During these proceedings, the Secretary has not responded to Petitioner’s Writ Petition. See U.S. Vet. App. R. 21(d).

## RELEVANT BACKGROUND

Petitioner's July 2019 Writ Petition alleged that the April 2, 2019, remand order from the Board of Veterans' Appeals (Board) for additional development, which included attempting to verify the Veteran's, Herbert E. Dickson, exposure to herbicides in Thailand and ordering a VA examination for his heart condition, "unlawfully withheld and unreasonably delayed" the appeal of the claim under 38 U.S.C. § 7261 because it sought to develop negative evidence. See Writ Petition (citing *Hart v. Mansfield*, 21 Vet.App. 508 (2007); *Mariano v. Principi*, 17 Vet.App. 305 (2003); *Martin v. O'Rourke*, 891 F.3d. 1338 (Fed. Cir. 2018)). Petitioner acknowledged that the Court does not have the authority to review "non-final" remands. *Id.* at 1; 8 (citing *Breeden v. Principi*, 17 Vet.App. 475 (2004)). Yet, Petitioner requested the Court issue "[a] writ of mandamus ordering the Secretary to require the Board to recall its legally defective April 2, 2019, decision and immediately re-adjudicate the pending claims consistent with established legal standards and any other relief that the Court deems reasonable and appropriate." *Id.* at 2.

The Court denied Petitioner's Writ Petition because it "cannot entertain the petitioner's request for an extraordinary writ of mandamus in the context of a remand order." Court's August 26, 2019, Order at 2 (*withdrawn* per Court's October 15, 2019, Order). The Court explained that, while "[t]he All Writs Act provides the Court with a useful tool in aid of its jurisdiction," "[b]ecause the Court

does not have jurisdiction over non-final decisions, 38 U.S.C. § 7252, a writ would not ultimately be consistent with the purpose of the act.” *Id.*

Petitioner sought reconsideration and panel consideration because “[t]he Court [] apparently did not consider whether Section 7261 provides the necessary authority (i.e., jurisdiction) for the Court to provide – otherwise unobtainable – relief in the precise situation(s) Congress directed the Court to so act.” Petitioner’s August 30, 2019, Motion for Reconsideration and Panel. The Court granted Petitioner’s motion for reconsideration but again denied the Writ Petition. See Court’s October 15, 2019, Order. The Court explained that, because “the petitioner challenges a remand order, mak[es] this matter distinguishable from *Hart* and *Mariano*, in that a remand order is not a final Board decision,” and that “should the petitioner receive a negative determination as part of a final Board decision, he can appeal that final decision through a traditional appeal and the Court can address at the time whether VA improperly developed evidence.” *Id.* at 2. The Court recognized that “[t]he Supreme Court has held that petitions for writs of mandamus are not to be used as a substitute for appeals,” and “[n]either Section 7261 nor 7252 allows the Court to ignore this longstanding principle.” *Id.*

Petitioner then moved for panel consideration of whether “Section 7261 *requires* that the Court compel action by the Secretary and provides the jurisdiction for the Court to do so under the conditions presented in this matter would modify or clarify an existing, significant rule of law – namely whether a Board decision remanding a veteran’s appeal *based on a clear and obvious error of law* is or is

not directly reviewable by this Court.” Petitioner’s October 18, 2019, Motion for Panel at 1 (emphasis in the original). Petitioner alleged that the Court should “hold unlawful and set aside decisions . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* at 1-2 (citing 38 U.S.C. § 7261(a)(3)). Petitioner further clarified the issue as “whether or not Section 7261 provides the authority to review [Board] decisions *based on clear and obvious error(s) of law[.]*” *Id.* at 3 (emphasis in the original).

In January 2020, Petitioner filed the Class Motion seeking to certify a class of claimants “who have received or will receive a [Board] remand decision in whole or in part not in accordance with law.” Class Motion at 2. Petitioner emphasized the “common issue of this Court’s jurisdiction to review certain ‘non-final’ decisions of the [Board] under 38 U.S.C. section 7261.” *Id.* at 1. Petitioner argued that the inability to seek review of the April 2019 remand “undermined the Court’s authority to ‘compel action of the Secretary *unlawfully* withheld or unreasonable delayed’ or ‘not in accordance with law’ under 38 C.F.R. § 7261(a).” *Id.* at 2 (emphasis in original). The following month, the Secretary filed an opposition to Petitioner’s Class Motion. See Secretary’s February 4, 2020, Opposition to Class Motion. The Court then convened a panel and set this case for oral argument. See Court’s March 20, 2020, and April 1, 2020, Orders.

## **BASIS FOR DISMISSAL**

Petitioner does not seek a writ of mandamus to aid the Court's statutorily limited jurisdiction; she<sup>2</sup> seeks a writ of mandamus that expands the Court's statutorily limited jurisdiction. Petitioner mistakenly contends that section 7261 provides the Court an independent source of jurisdiction to review the Board's non-final remand orders. However, it is well settled that the Court does not have jurisdiction to review the Board's non-final remand orders. And the All Writs Act (AWA) does not create jurisdiction where it does not already exist, nor does section 7261 provide an independent basis for jurisdiction. Accordingly, the Court should dismiss Petitioner's Writ Petition, and her dependent Class Motion, for a lack of jurisdiction because the Court cannot review the Board's non-final April 2019 remand order.

The Court's jurisdiction is limited by statute. 38 U.S.C. § 7252(a). The Court has "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals" and the "power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." *Id.*; see 38 U.S.C. § 7266(a) (providing a person obtains review of a "final decision" of the Board by filing a timely notice of appeal); *Mayer v. Brown*, 37 F.3d 618, 619 (Fed. Cir. 1994) ("The [Court's] jurisdiction is limited by statute to review of 'decisions of the Board of Veterans' Appeals.'"); see also *Maggitt v. West*, 202 F.3d 1370, 1376 (Fed. Cir. 2000) (defining what

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<sup>2</sup> In February 2020, Kathy Gardner-Dickson, was substituted as the Petitioner. See Court's February 21, 2020, Order.

constitutes a Board “decision” for purposes of the Court’s jurisdiction); 38 U.S.C. § 7104(d). Both this Court and the Federal Circuit have held that a Board remand order is not a final decision within the meaning of 38 U.S.C. § 7252(a). See *Kirkpatrick v. Nicholson*, 417 F.3d 1361 (Fed. Cir. 2005); *Breeden v. Principi*, 17 Vet.App. 475 (2004); see also 38 C.F.R. § 20.1100(b) (“A remand is in the nature of a preliminary order and does not constitute a final decision of the Board.”).

The AWA allows the Court to issue only those writs that are in aid of its jurisdiction. 28 U.S.C. § 1651(a); see *Erspamer v. Derwinski*, 1 Vet. App. 3, 9 (1990) (holding that the Court has authority to issue writs of mandamus under the AWA). This is because the AWA is not an independent grant of jurisdictional authority. *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 26 (1943). The AWA does not expand a court’s jurisdiction. *Cox v. West*, 149 F.3d 1360, 1363 (Fed. Cir. 1998). Rather, it is “a residual source of authority” that allows the Court to protect its statutorily prescribed jurisdiction. *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 43 (1985). More simply, the AWA does not create jurisdiction where it does not already exist. *In re Tennant*, 359 F.3d 523, 530 (D.C. Cir. 2004) (“[M]andamus would otherwise be an original action, not in aid of appellate jurisdiction.”). Therefore, a petitioner must show “that the action sought by mandamus is within the court’s statutorily defined subject matter jurisdiction.” *Wick v. Brown (In re Wick)*, 40 F.3d 367, 372-73 (Fed. Cir. 1994).

The Court has also recognized that it cannot consider a petition solely based on the Court's power under section 7261. *O'Branovic v. Nicholson*, 19 Vet.App. 81, 83 (2005) (per curiam). This is because section 7261 does not provide an independent basis for jurisdiction. *Wick*, 40 F.3d at 371 (citing *Mayer*, 37 F.3d at 620). "Section 7261 merely sets out the scope of the review to be conducted by the [Court] in cases within its jurisdiction; it does not itself create jurisdiction in the [Court]." *Mayer*, 37 F.3d at 630; see also *O'Branovic*, 19 Vet.App. at 83 ("[T]he authority granted to this Court in 38 U.S.C. § 7261(a)(2) is a grant of power to the Court, and not a grant of jurisdiction"). Because section 7261 does not create jurisdiction, a petition solely based on the Court's powers under the subsections of 7261(a) cannot be considered. Section 7261 merely "provides the standards the . . . Court must use when reviewing actions of the Secretary." *Martin*, 891 F.3d at 1343.

Because the Court does not have jurisdiction to review non-final Board remand orders under section 7252, and neither the AWA nor section 7261 create jurisdiction or expand the Court's statutorily limited jurisdiction to allow for such review, the Court does not have jurisdiction to review the Board's April 2019 remand order, nor can the Court issue "[a] writ of mandamus ordering the Secretary to require the Board to recall its legally defective April 2, 2019, decision and immediately re-adjudicate the pending claim[] consistent with established legal standards and any other relief that the Court deems reasonable and appropriate." Writ Petition at 2. Such action would be inconsistent with the purpose of the AWA.

*See Pennsylvania Bureau of Correction*, 474 U.S. at 43 (“Although that [AWA] empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.”). Petitioner simply seeks a writ of mandamus that expands the Court’s statutorily limited jurisdiction outside the bounds of the accepted jurisdictional principles of this Court, and this Court and the Federal Circuit’s understanding of jurisdiction vested by Congress in section 7252. The Court should decline Petitioner’s invitation to depart from the accepted principles of this Court’s jurisdiction and its understanding of the limitations and purposes of the AWA and section 7261.

And, because the Court does not have jurisdiction to review non-final Board remand orders, the entire class of claimants Petitioner seeks to certify would suffer from the same jurisdictional failing. See Class Motion at 2 (seeking to certify a class of claimants “who have received or will receive a [Board] *remand* decision in whole or in part not in accordance with law.”) (emphasis added). “The requirement that jurisdiction be established as a threshold matter ‘springs from the nature and limits of the judicial power of the United States’ and is ‘inflexible and without exception.’” *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94 (1998) (quoting *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884)); see, e.g., *Beamon v. Brown*, 125 F.3d 965, 969-70 (6th Cir. 1997) (“Although the Federal Rules of Civil Procedure make class actions available to some plaintiffs in United States district courts, the rules themselves do not confer those courts with



jurisdiction over claims that they could not hear if brought individually.”) (citing FED. R. CIV. P. 82 (“These rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . .”)). The class action device also does not create jurisdiction where it does not already exist.

Certainly, the Court may use the AWA to protect its prospective and potential jurisdiction, particularly when presented with instances of unreasonable agency delay following a remand order from the Board for additional development. See *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 603 (1966) (providing that the AWA “extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected.”); *Erspamer*, 1 Vet.App. at 8 (“[AWA] jurisdiction extends beyond pending case; it embraces the prospective and potential jurisdiction of the court as well.”). It just cannot use the AWA to review and effectively vacate or modify a non-final Board remand order because it does not otherwise have jurisdiction to conduct that review, and the AWA does not provide that jurisdiction. Here, Petitioner has not alleged that VA has unlawfully withheld or unreasonably delayed the development ordered by the Board’s April 2019 remand, which included a request to verify whether the Veteran’s claimed exposure to herbicide agents was consistent with his service in Thailand *and* a VA examination to determine the nature and etiology of the Veteran’s diagnosed ischemic heart disease. See Writ Petition at Exhibit G. Rather, Petitioner asks the Court to review the Board’s April 2019 remand order, vacate that order, and direct the Board to re-adjudicate the claim. Writ Petition at 2.

In the absence of alleged delay, Petitioner is not without recourse. As the Court observed, because “the petitioner challenges a remand order, mak[es] this matter distinguishable from *Hart* and *Mariano*, in that a remand order is not a final Board decision,” and that “should the petitioner receive a negative determination as part of a final Board decision, he can appeal that final decision through a traditional appeal and the Court can address at the time whether VA improperly developed evidence.” October 15, 2019, Court Order at 2; see *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004). (holding that petitions for writs of mandamus are not to be used as a substitute for appeals); *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, 382 (1953))); see also *Mathews v. McDonald*, 28 Vet.App. 309, 315 (2016) (“[T]he Board is not permitted to sub silentio incorporate its reasons or bases from a prior remand order into a later decision.”).

Counsel for Petitioner is opposed to this motion and indicated that he reserves the right to respond.

**WHEREFORE**, the Secretary respectfully moves the Court to dismiss Petitioner Writ Petition, and dependent Class Motion, for a lack of jurisdiction.

Respectfully submitted,

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