

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

WENDELL ANDREWS,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 19-3227
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

**APPELLANT’S MOTION FOR INITIAL
REVIEW BY A PANEL OF THE COURT**

Pursuant to U.S. Vet. App. R. 27, Appellant respectfully moves for initial review of this appeal by a panel of the Court. The parties agree that the Court should vacate the decision of the Board of Veterans’ Appeals (Board) on certain claims and remand this matter to the Board for further administrative proceedings. As discussed in more detail below, the key areas of dispute between the parties involve the following important issues of first impression: what right does the appellant have to submit additional evidence to the Board on remand, and what is the nature of the Board’s decision-making obligations on remand.

For at least the last two decades, when the Court has vacated the Board’s decision and remanded the case to the Board for further administrative proceedings, the practice of the Court has been to include in its remand instructions that the appellant has the right to submit additional evidence to the Board on remand, citing *Kutscherousky v. West*, 12 Vet. App. 369, 372 (1999), and the Board must conduct a critical examination of the

justification for its decision on the remanded claims, citing *Fletcher v. Derwinski*, 1 Vet. App. 394, 397 (1991). In his initial brief and reply brief, Appellant asserts that if the Court agrees with the position of the parties that this appeal should result in vacating the Board decision and a remand for further proceedings, the foregoing instructions should be included in the Court's remand Order. Appellant's Initial Brief at 14-16; Appellant's Reply Brief at 2-13.

Although the propriety of these instructions is deeply embedded in the Court's jurisprudence, the Secretary opposes the inclusion of these instructions in this case. The Secretary points out—correctly—that the claims before the Court are subject to the modernized appeals system created by the Veterans Appeals Improvement and Modernization Act of 2017 (“AMA”), Pub. L. No 115-44, 131 Stat. 1105 (2017). The Secretary contends that the issue of the propriety of the remand instructions is not ripe for judicial review, but in any event, that (a) *Kutscherousky* and *Fletcher* are inconsistent with the AMA and (b) Appellant does not have the right to submit the additional evidence to the Board on remand that appellant represents to the Court that he wishes to submit. Secretary's Brief at 15-24; Appellant's Reply Brief at 3.

Under the standards set forth in *Frankel v. Derwinski*, 1 Vet. App. 23, 25-26 (1990), the Court should address these issues in a precedential panel decision, because it would be inappropriate to address them in a single judge decision. In *Frankel*, the Court explained that a single judge disposition of a case is appropriate if the case “is of relative

simplicity” and

1. does not establish a new rule of law;
2. does not alter, modify, criticize, or clarify an existing rule of law;
3. does not apply an established rule of law to a novel fact situation;
4. does not constitute the only recent, binding precedent on a particular point of law within the power of the Court to decide;
5. does not involve a legal issue of continuing public interest; and
6. the outcome is not reasonably debatable

1 Vet. App. at 25-26. In the present case before the Court, several of these requirements for a single judge decision would not likely be satisfied.

First, the Court’s decision will likely either establish a new rule of law or alter, modify, or clarify an existing rule of law. If the Court were to agree with the Secretary, it would establish a new rule of law by determining, for remanded cases subject to the modernized appeals system, what rights an appellant has with respect to the submission of evidence and what obligations the Board has with respect to the justification for its decision. If the Court were to agree with Appellant, it would be clarifying that *Kutscherousky* and *Fletcher* apply to remanded cases subject to the modernized appeals system. If the Court were to agree in part with Appellant and in part with the Secretary, the Court would likely be altering or modifying the holdings of *Kutscherousky* and/or *Fletcher*.

Second, the Court will be addressing whether established case law—*Kutscherousky* and *Fletcher*— should apply to what is currently a novel fact situation: claims that are subject to the new modernized VA appeals system.

Third, no Court decision has addressed an appellant's rights and the Board's obligations during proceedings following a remand from the Court for claims subject to the modernized appeals system. In particular, the Court has not previously addressed whether the holdings of *Kutscherousky* and *Fletcher* remain binding precedent or otherwise whether appellants have the right to submit evidence to the Board and whether the Board must conduct a critical examination of the justification for its decision for remanded claims subject to the modernized appeals system. Thus, the Court's decision in this case will likely be the first decision to address these issues.

Fourth, the legal issues in this case are of continuing public interest. The number of cases before the Court that involve claims subject to the modernized VA appeals system will continue to grow. It is of great interest to VA claimants, veterans advocates, and the VA for there to be clarity about what rights an appellant has and what obligations the Board has during proceedings following a remand from the Court.

Finally, the briefs of the parties appear to reflect that the outcome of this dispute is reasonably debatable.

For the foregoing reasons, Appellant respectfully requests that, consistent with *Frankel*, 1 Vet. App. at 25-26, a panel of the Court conduct the initial review of this case and issue a precedential decision.

Counsel for the Secretary advised the undersigned counsel that the Secretary of Veterans Affairs takes no position on the motion at this time, but reserves the right to

respond in writing upon having the opportunity to review the substance of the motion as filed and written.

WHEREFORE, the appellant respectfully requests that the Court grant this motion for initial review by a panel of the Court.

Respectfully submitted,

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