IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

JEREMY AND MAYA BEAUDETTE,	)	
	)	
Petitioners,	)	
	)	
v.	)	Vet. App. No. 20-4961
	)	
DENIS McDONOUGH,	)	
Secretary of Veterans Affairs,	)	
	)	
Respondent.	)	

RESPONDENT'S MOTION FOR FULL COURT REVIEW

Pursuant to U.S. Vet. App. Rule 35(c), Denis McDonough, Secretary of Veterans Affairs, respectfully moves this Court for full Court review of the April 19, 2021, Order, in which the Court held that decisions under the clinical Program of Comprehensive Assistance for Family Caregivers (PCAFC or Caregiver Program) may be appealed to the Board of Veterans' Appeals (Board) and granted a petition for a writ of mandamus ordering the Secretary to begin notifying claimants of their right to appeal adverse PCAFC determinations to the Board. The Court also certified a class of "All claimants who received an adverse benefits decision under the Caregiver Program, exhausted the administrative review process within the VHA, and have not been afforded the right to appeal to the Board of Veterans' Appeals." The Court ordered that the parties jointly submit to the Court for approval within 45 days of the order a plan to provide notice to members of the class of their right to appeal PCAFC benefits decisions to the Board and the procedure for obtaining Board review.

This Court's rules permit such review when it is "necessary . . . to resolve a question of exceptional importance." U.S. Vet. App. R. 35(c). The Secretary contends that this matter does in fact present a matter of exceptional importance.

The Court's April 19, 2021, Order undermines Congress' statutory mandate in 38 U.S.C. § 1720G(c)(1), leaving it with no meaning. In doing so, it dictates an outcome that is precisely the opposite of the intention expressed by Congress. By holding that PCAFC decisions are subject to Board review, the Court has, in effect, determined they are all not "medical determinations" which is in direct conflict with Congress' directive.

Since 1983, by unchallenged regulation, "medical determinations" have been defined as "not adjudicative matters" and therefore held to be "beyond the Board's jurisdiction." 38 C.F.R. § 19.3(b) (1983); 38 C.F.R. § 20.104(b). With this regulation the Secretary has sought to maintain within the purview of physicians and other clinical providers sensitive medical questions which would not benefit from nor fit comfortably within the format of judicial review. The regulation benefits the patient by ensuring that final decisions concerning a patient's health care and treatment are made by medical professionals with appropriate training and expertise.

The protection of "medical determinations" in this fashion pre-dates the Veterans Judicial Review Act in 1988 and the creation of this Court. Nothing in that act changed this longstanding status quo. VA's regulation has been recognized by this Court as an implementing regulation of 38 U.S.C. § 511(a), Decisions of the Secretary, and 38 U.S.C. § 7104(a), Jurisdiction of the Board. *See Meakin v. West*, 11 Vet.App. 183, 185-87 (1998) (applying this regulatory provision under its prior numbering to the facts of a particular type of determination).

When Congress created the PCAFC in 2010, some 30 years after the identification of "medical determinations" as being outside the adjudicative process, it included in 38 U.S.C. § 1720G(c) specific instructions to the Secretary as to the "Construction" of the statute. Congress told the Secretary, in no uncertain terms, that "[a] decision by the Secretary under this section affecting the furnishing

of assistance or support shall be considered a medical determination." 38 U.S.C. § 1720G(c)(1).

Despite Congress's clear intent regarding the clinical nature of PCAFC and its related instruction to the Secretary, the Court's Order ignores this mandate. The Court found that the statutory "Construction" provision "does not mention jurisdiction at all" and noted that Congress showed it "knew how to clearly limit the jurisdiction of this Court" when it passed other legislation. The Court found it important that the "contrast between the language" in Section 1720G(c)(1) and the recently passed Section 1703(f) "could hardly be starker" leading the Court to reject what the Court characterized as the Secretary's argument that Section 1720G(c)(1) unambiguously strips the Board and Court of jurisdiction over PCAFC determinations.

The Secretary notes that it is not Section 1720G(c)(1) that strips the Board of jurisdiction over medical determinations. The provision of law that does that is the longstanding and unchallenged regulation 38 C.F.R. § 20.104(b), a regulation implementing 38 U.S.C. §§ 511(a) and 7104(a), which mandates that "medical determinations" are "not adjudicative matters" and, on that basis, are "beyond the Board's jurisdiction."

What Section 1720G(c) does is mandate, in its "Construction" section ((c)(1)), how to construe a PCAFC decision. Such a decision must, by force of that statute, "be considered a medical determination." Having been so defined by Congress, it follows that the regulation, 38 C.F.R. § 20.104(b), that applies to "medical determinations" must and was intended to apply to PCAFC decisions. That would mean they are "not adjudicative matters" yet the Court's Order instructs VA to consider them as adjudicative matters. The Court's Order thus robs this statutory provision of any practical meaning.

The Court's Order concedes that the decision "does not tell us what section 1720G(c)(1) actually means," but holds "we do not have to settle on a definitive reading of section 1720G(c)(1) for the purposes of this appeal." The Secretary contends that an interpretation of the meaning of this statutory provision was the matter put before the Court by the parties and is of such exceptional importance that full Court review is required. As J. Falvey explained in his dissenting opinion, the majority has not presented a construction of "subsection (c)(1) that makes sense with the rest of the statute," and the "Secretary's construction of section 1720G is the only interpretation that gives effect to all the statute's provisions and presumes that Congress understands the implications of its words." By rejecting the Secretary's reading of the "Construction" section of the statute without providing subsection (c)(1) with any meaning, the Court has, in essence, made that provision mere surplusage and such a reading is to be avoided. *See Sharp v. United States*, 580 F.3d 1234, 1238 (Fed. Cir. 2009) (noting that the canon against surplusage requires the Court to avoid an interpretation that results in portions of text being read as meaningless); *see also Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001).

The Secretary's regulations contain a longstanding explanation of the term "medical determinations" and how such matters are reviewed. Congress used precisely that term when it created a new clinical program. The Secretary rightly gave the directive of Congress an effect consistent with the longstanding meaning of the words Congress chose. This matter is of exceptional importance because the Court's Order casts doubt on the Secretary's ability to apply long-defined meanings to terms used in a straightforward manner by Congress when crafting a new statute. Accordingly, the Secretary moves the Court to find this matter of exceptional importance, grant this motion, review the Court's April 19, 2021, Order by the full Court, and deny the petition.

WHEREFORE, Appellee Denis McDonough, Secretary of Veterans Affairs, pursuant to Rule 35(c), respectfully moves the Court to grant full Court review of the Court's April 19, 2021, Order and deny the petition.

Respectfully submitted,

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