

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 21-1323

CHARLES J. LOVE, JR.,

PETITIONER,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

RESPONDENT.

Before MEREDITH, FALVEY, and LAURER, *Judges*.

ORDER

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

Petitioner Charles J. Love, Jr., asks this Court to compel the Secretary to restore benefits payments in the amount that Mr. Love was paid before December 1, 2019. On that date, the Secretary began paying benefits in a reduced amount under a September 2019 rating decision that discontinued Mr. Love's 100% rating for a disability related to his prostate cancer surgery. In his petition, Mr. Love argues that the Secretary may not begin making payments in the reduced amount until all appeals of the VA decision are exhausted and, if an overpayment results, the Secretary may then recoup any such overpayment.

On October 22, 2021, the Court heard oral arguments from both parties. The Court raised the question of whether the Secretary's implementation of the rating discontinuance was "a decision by the Secretary under a law that affects the provision of benefits" as established in 38 U.S.C. § 511(a). The petitioner asserted that implementation of the discontinuance is not a *decision* by the Secretary, but rather a "nondecisional action." Oral Argument at 24:15-24:42. The Secretary, on the other hand, first asserted that whether the petitioner is entitled to payment at the rate prior to the discontinuance is not an issue contemplated by section 511(a), but counsel later contended that she could not say for certain that VA would not issue a decision as to the matter. *Id.* at 46:30-46:56, 47:52-48:00.

The Court finds that further analysis of these questions is required:

1. Whether the Secretary's action to implement the rating discontinuance on December 1, 2019, was "a decision by the Secretary under a law that affects the provision of benefits" within the meaning of section 511(a) that petitioner may appeal;

2. Regardless of whether the Secretary's action to implement a discontinuance is a decision that petitioner may appeal, is the matter of the proper implementation date of the discontinuance a question that falls under a law that affects the provision of benefits such that the petitioner is entitled to a decision by VA on that matter, *see, e.g., Rosinski v. Shulkin*, 29 Vet.App. 183 (2018) (per curiam order); *Chisholm v. McDonald*, 28 Vet.App. 240 (2016) (per curiam order), (i.e., as an alternative to question one above, may petitioner request that the Secretary render a decision on the timing of the implementation); and

3. What impact, if any, would finding either of these scenarios a section 511(a) question have on this Court's authority to issue a writ in aid of its jurisdiction under 28 U.S.C. § 1651(a)?

On consideration of the above, it is

ORDERED that, within 10 days of this order, Mr. Love and the Secretary each file a response, not to exceed 10 pages, addressing the questions identified above.

DATED: November 22, 2021

PER CURIAM.

Copies to:

John D. Niles, Esq.

VA General Counsel (027)