IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

CHARLES J. LOVE, JR.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Vet. App. 21-1323
	)	
DENIS MCDONOUGH,	)	
in his capacity as	)	
Secretary of Veterans Affairs,	)	
	)	
Respondent.	)	

PETITIONER'S RESPONSE TO NOVEMBER 22, 2021, ORDER

On November 22, 2021, the Court ordered each party to answer three questions as to 38 U.S.C. § 511(a) (2021)'s scope and relevance to this case. Petitioner, Charles J. Love, Jr. ("Mr. Love"), respectfully responds to the Court's three questions as follows.

SUMMARY OF RESPONSES

1. The act of implementing a discontinuance is not a "decision" within that term's ordinary meaning. Unless the Court interprets § 511(a) to require the Secretary to decide all questions necessary to "an action," Mr. Love has no right to appeal the discontinuance's December 1, 2019, implementation. The Petition offers his only recourse. *See infra* Part I.

2. A discontinuance's proper implementation date is a matter "under a law that affects the provision of benefits." Irrespective of whether Mr. Love is entitled to a decision on that, here the Secretary is implementing the discontinuance by paying him less. Congress intends this Court to compel the Secretary to cease that here and now. *See infra* Part II.

3. Whether the Court may invoke 28 U.S.C. § 1651(a) to issue merits relief in the form of a writ in aid of its prospective 38 U.S.C. § 7252(a) jurisdiction depends on how the

Court resolves its first two questions. On one possible outcome, the Court may not invoke § 1651(a) to issue merits writ relief. But that does not matter. The Court has jurisdiction over this case, and Congress intends for it to compel the Secretary to cease the unlawful withholding. The Court may, should, and Mr. Love respectfully submits must issue a 38 U.S.C. § 7261(a)(2) or other order that does so. *See infra* Part III.

I. The Secretary's Unlawful Withholding Is Not a § 511(a) "Decision."

Section 511(a) provides that "[t]he Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." The Court has asked whether the Secretary's action to implement the discontinuance here is a "decision" within § 511(a)'s meaning of that term.

Mr. Love notes before responding further that he understands the Court's description of the "action" at issue—"to implement the rating discontinuance"—to be on the other side of the same coin as what Mr. Love has described as the Secretary's unlawful withholding of the "action" of paying him at the pre-discontinuance rate (by, instead, simply paying him at the post-discontinuance rate). Accordingly, Mr. Love will respond on the understanding that (A) implementing the discontinuance and (B) withholding payment at the pre-discontinuance rate by simply paying the veteran less are for all pertinent purposes describing the same thing.

That thing is an "action." It is not a "decision," at least according to the term's ordinary meaning. The only way for the action to be a "decision" within § 511(a)'s meaning would be if Congress intends for § 511(a)'s use of "decision" to be broader than the term's ordinary meaning. Mr. Love does not dispute that interpreting § 511(a) in this manner would be

reasonable. Doing so, after all, would align with Congress' intent to permit judicial review of *any* asserted VA error of law, no matter whether it is in a Board "decision" or a nondecisional "action." *See* Oral Arg. at 23:06–23:35.[1]

When Mr. Love wrote in the Reply that "neither a Higher Level Reviewer ["HLR"] nor the Board would have jurisdiction over the unlawful withholding here," Reply at 6, he was assuming that this Court would understand § 511(a)'s use of "decision" not to be broader than the term's ordinary meaning. Mr. Love would welcome the assumption being wrong. It would mean that HLR and Board review are available to challenge any "action"—or, at a minimum, any action similar to that at issue here. *See* 38 U.S.C. §§ 5104B, 7104(a); *Bates v. Nicholson*, 398 F.3d 1355, 1359 (Fed. Cir. 2005) (§ 7104(a) "limits the Board's jurisdiction"). It also would have further ramifications that, in his view, would help to effectuate the pro-claimant principles and protections with which Congress has suffused the entire claim system. As one example, § 5104 requires notice of § 511 decisions. To interpret § 511(a)'s "decision" to encompass any "action" beyond the scope of the ordinary meaning of "decision" would clarify that Congress intends for the Secretary to notify our country's veterans and their dependents

[1] Interpreting § 511(a) in that manner would, to be sure, align with Congress' intent to permit judicial review of any asserted VA error of law through a different mechanism than the Petition contemplates. If § 511(a)'s usage of "decision" encompasses an "action" of the kind at issue here, that would permit Board review and, in turn, judicial review through the mechanism of a § 7252(a) appeal to this Court. The Petition contemplates, assuming an interpretation of § 511(a)'s usage of "decision" that mirrors the ordinary meaning, that a veteran may obtain judicial review of an allegedly unlawful withholding of action through the mechanism of a § 7252(c) petition in aid of the jurisdiction of the U.S. Court of Appeals for the Federal Circuit. *See* Pet. at 3–10; Reply at 2, 7. Mr. Love, to repeat, would welcome interpreting § 511(a)'s usage of "decision" to encompass the kind of action at issue here.

and survivors of such "action." Mr. Love agrees that is a reasonable interpretation of Congress' intent. Title 38's usages of "decision" are legion, and so similar ramifications abound.

Mr. Love cautiously will address why he does not understand the ordinary meaning of "decision" to encompass "action." A "decision" is "[a] judicial or agency determination after consideration of the facts and the law; esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case." "Decision," *Black's Law Dictionary* (11th ed. 2019). "Action" is "[t]he process of doing something; conduct or behavior." "Action," *Black's Law Dictionary* (11th ed. 2019). Between the two, the ordinary meaning of "action" is broader. To make a "decision" is to do something; it is conduct or behavior. Any decision thus is an action. To do a thing or to perform some conduct or behavior, though, is not necessarily to determine a matter after consideration of the facts and the law. Not all actions, then, are decisions.

Additionally, in candor to the tribunal, the difference between "decision" and "action" appears throughout the law. Even as far back as *Marbury v. Madison*, the judiciary has distinguished between ministerial action—which implies no "decision"—and discretionary action—which permits "decision." *See* 5 U.S. 137, 170–71 (1803). Compelling the Secretary to perform a ministerial act does not counsel nearly the same restraint as judicial intervention regarding how the Secretary wields discretion when making decisions. *See, e.g.*, *id.*; *see also, e.g.*, *Martin v. O'Rourke*, 891 F.3d 1338, 1346 (Fed. Cir. 2018) (incorporating into unreasonable-delay petitions' "rule of reason" analysis "whether delays are due to the agency's failure to perform … ministerial tasks"). That is particularly true when the context is an unlawful withholding of a ministerial, or otherwise nondecisional, action. *See* Pet. at 12–13 & n.2.

What is more, Congress distinguishes even within title 38 between "decision" and "action." For example, in § 7261(a)(2), it commands this Court to compel the Secretary's unlawfully withheld "action." In § 7261(a)(3), it addresses when this Court shall "hold unlawful and set aside decisions, findings …, conclusions, rules, and regulations." And in § 7105(c), Congress uses "action" and "decision" in the same sentence, stating that "[i]f no notice of disagreement is filed in accordance with this chapter within the prescribed period, the action or decision of the agency of original jurisdiction shall become final … ."[2] Unless § 511(a) or these other statutes use "decision" in a unique sense, then, to give effect to their terms "action" and "decision" would require that some actions be nondecisional. An ordinary-meaning would accomplish that. These are all reasons why Mr. Love assumed the Court would not interpret § 511(a)'s usage of "decision" to be broader than that term's ordinary meaning.

Here, the Secretary awarded Mr. Love a total disability rating evaluation and special monthly compensation ("SMC"). That was a "decision." Paying him monthly at the rate that 38 U.S.C. §§ 1110 and 1114 require was a ministerial (or otherwise nondecisional) action.

The Secretary since has issued a "decision" discontinuing the total evaluation and SMC. That also was a "decision." It remains non-final, under continuous challenge.

Paying Mr. Love at the post-discontinuance rate is, on the terms' ordinary meanings, a nondecisional action. Unless § 511(a) intends "decision" in a broader sense, so as to encompass nondecisional "actions," the Secretary's December 1, 2019, implementation of the

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[2] Mr. Love understands this passage to support interpreting §§ 511(a)'s and 7104(a)'s use of "decision" to encompass "action" as well. Section 7105(c) specifies where they do not that the "[nondecisional] action or decision" will become final unless the claimant challenges it.

discontinuance is not a "decision" within the meaning of § 511(a). In turn, then, Mr. Love has no right to challenge the December 1, 2019, implementation of the discontinuance through HLR or Board appeal. *See supra* at 3. The Petition offers Mr. Love's only recourse.

II. The Discontinuance's Proper Implementation Date Is a Question Under a Law That Affects the Provision of Benefits, Which Does Not Alter Congress' Intent That This Court Compel the Secretary to Cease the Unlawful Withholding.

A discontinuance's proper implementation date is a question under a law that affects the provision of benefits by the Secretary to a veteran. "[S]ection 511's reference to a 'law' is to a single statutory enactment that bears a Public Law number in the Statutes at Large." *Bates*, 398 F.3d at 1361. Here, the statutory provisions that a discontinuance's proper implementation date implicates include 38 U.S.C. §§ 1110 and 1114, which set forth both that and what amount of service-connected disability compensation the Secretary must provide to the veteran monthly. What is more, when the Secretary implements the discontinuance while, as here, the veteran continuously challenges the discontinuance's validity, the implementation's proper date also implicates—by possibly forever barring the veteran's access with respect to the amount at issue to—38 U.S.C. § 5302(a).

Public Law 85-857 codified all three of these provisions into title 38. *See* Pub. L. No. 85-857, §§ 310, 314, 3312, 72 Stat. 1105, 1119, 1120–21, 1230 (1958). Controlling precedent establishes that Public Law 85-857 "is a 'law that affects the provision of benefits.'" *Rosinski v. Shulkin*, 29 Vet. App. 183, 189 (2018) (per curiam order) (quoting *Bates*, 398 F.3d at 1361)).

What is more, although "[t]here is no basis … for construing the term 'law' to be limited to a particular statutory subsection," *Bates*, 398 F.3d at 1361, here, to repeat, the particular statutes at issue specify that and how much money in compensation the Secretary must provide

to a veteran each month. In so doing, plainly they affect the provision of benefits. *Cf. Chisholm v. McDonald*, 28 Vet. App. 240, 242 (2016) (per curiam order) (holding that even "[t]he action of authorizing or denying access to electronic records for counsel seeking benefits on behalf of clients, and for staff assisting such counsel, … pursuant to regulation," 38 C.F.R. § 14.629, "that was promulgated pursuant to 38 U.S.C. §§ 501(a) and 5904" is under a law affecting the provision of benefits). The Petition and Reply also note additional statutes enacted in laws affecting the provision of benefits, and regulations implementing them, that a discontinuance's proper implementation date involves. *See* Pet. at 13–15, 16–19.

For all of these reasons, a discontinuance's proper implementation date is under a law affecting the provision of benefits.

Mr. Love understands there to be a second part to the Court's question. It is whether the above conclusion means "that the petitioner is entitled to a decision by VA on" the proper date for his discontinuance's implementation. Nov. 22, 2021, Order, at 2. The answer is yes. Through the course of this case's proceedings before this Court, the Secretary has made plain (unless the Secretary's response to the November 22, 2021, Order, which Mr. Love has not reviewed, alters course) what the Secretary's decision is as to the discontinuance's proper implementation date: December 1, 2019.

This part of the question, Mr. Love respectfully submits, is somewhat beside the point. The Secretary *is* withholding the action of paying Mr. Love at the pre-discontinuance rate even though Mr. Love continuously has challenged the discontinuance's validity. Because the Secretary is doing so, Mr. Love is out of pocket as to that money. This is harmful for reasons including that, if the Secretary were to prevail in Mr. Love's validity challenge, the withholding

would deprive Mr. Love of access to overpayment-related rights. Accordingly, even if an appeal were possible, it would not provide the same degree of relief that Mr. Love seeks through the Petition. Mr. Love reiterates his request that the Court grant the Petition.

III. How the Court Resolves Its First Two Questions Affects Whether It Possesses Authority to Issue a Writ Pursuant to 28 U.S.C. § 1651(a) in Aid of Its 38 U.S.C. § 7252(a) Jurisdiction But Does Not Alter That It Should Grant the Petition and Compel the Secretary to Cease the Unlawful Withholding.

One possible outcome of the Court's first two questions is that the Secretary's action to implement the discontinuance is a § 511(a) "decision" that Mr. Love may appeal—and that such an appeal would provide an adequate alternative for obtaining the relief that Mr. Love seeks through the Petition. If that is how the Court resolves those questions, then as the law stands today the appellate alternative would prevent this Court from invoking 28 U.S.C. § 1651(a) to issue a writ compelling the Secretary to cease the unlawful withholding. *See* Oral Arg. at 24:15–25:05.

Even that outcome, however, would affect only the Court's access to § 1651(a) for the purpose of providing merits relief. The fact would remain that the Court has jurisdiction over the Petition. *See* Pet. at 3–13; Reply at 2–10. Because the Court has opened its jurisdictional door on *a* ground—and *any* ground suffices—, Mr. Love respectfully submits that Congress contemplates that the Court "shall" issue a § 7261(a)(2) order compelling the Secretary to cease the unlawful withholding. *See* Pet. at 10–11, 12–13. Indeed, to whatever extent the Court relies on § 1651(a) to open the jurisdictional door, Mr. Love respectfully submits that the Court should move immediately to § 7261(a)(2) and its less-restrictive standard for relief—mere unlawfulness as opposed to the All Writs Act criteria—to assess whether Mr. Love is entitled to relief. *See id.* at 12 n.1.

That, meanwhile, is on the outcome in which Mr. Love has an appellate alternative. On the ordinary meaning of "decision," he has none. *See supra* Part I. On the facts as they exist today, which include that the Secretary began implementing the rating discontinuance on December 1, 2019, without providing Mr. Love with the prior notice and opportunity to respond that are incumbent upon the Secretary to provide, *see, e.g.*, 38 U.S.C. § 5104; 38 C.F.R. § 3.103(b), the Secretary is harming Mr. Love such that an appeal, even were it possible, should not be deemed an "adequate" alternative. *See supra* Part II. On any of these outcomes, the Court would possess authority to issue merits relief in the form of a § 1651(a) writ.

CONCLUSION

For all of these reasons, Mr. Love respectfully submits that the Secretary's December 1, 2019, implementation of the rating discontinuance, by simply paying him at the post-discontinuance rate instead of the higher pre-discontinuance rate, is a nondecisional action within the ordinary meanings of "decision" and "action"—but that interpreting § 511(a)'s term "decision" to encompass such action would be reasonable. Additionally, the discontinuance's proper implementation date is a question that falls under a law that affects the provision of benefits.

If the Court were to resolve the first two of its November 22, 2021, questions such that the Secretary's action to implement the discontinuance permits an appellate alternative to obtain the relief that Mr. Love seeks through the Petition, that would foreclose the Court from invoking 28 U.S.C. § 1651(a) as authority to issue a writ in aid of its jurisdiction. Even that scenario would not, however, affect this case's proper outcome. Mr. Love respectfully reiterates his request, for all of the reasons that he has presented in this case, that the Court

grant the Petition and issue an order, whether pursuant to 38 U.S.C. § 7261(a)(2) or otherwise, that compels the Secretary to cease the unlawful withholding of the action of paying Mr. Love at the pre-discontinuance monthly rate until his continuous challenge to the discontinuance's validity becomes final.

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Respectfully submitted,

/s/ John D. Niles

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