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NON-PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 19-4633

RICHARD C. BAREFORD, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before BARTLEY, *Chief Judge*, and PIETSCH and FALVEY, *Judges*.

O R D E R

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

In a February 28, 2022, panel decision, the Court vacated the July 1, 2019, decision of the Board of Veterans' Appeals, and remanded the matter for additional development, if necessary, and readjudication consistent with its decision. In so doing, the Court set aside 38 C.F.R. § 38.631(c) (2021). On March 18, 2022, the Secretary filed a motion for panel reconsideration or, in the alternative, for full-Court review. "[A] motion for . . . panel [reconsideration] . . . shall state the points of law or fact that the party believes the Court has overlooked or misunderstood." U.S. VET. APP. R. 35(e)(1). The Court did not overlook or misunderstand any argument that was properly before it.

Upon consideration of the foregoing, it is

ORDERED that the motion for reconsideration by the panel is denied. It is further

ORDERED that the motion for full-Court consideration is held in abeyance pending further order of the Court.

DATED: April 26, 2022 PER CURIAM.

PIETSCH, *Judge*, concurring: I concur with the denial of the Secretary's motion for reconsideration.

The Secretary argues: "The Court made important findings in its decision that are internally inconsistent and that render it an advisory opinion." Motion at 2. This argument is unpersuasive. The Court's prohibition against advisory opinions is based on the case-or-controversy jurisdictional restrictions found in Article III of the United States Constitution, to which this Court

adheres. *See Teva Pharm. USA, Inc. v. Novartis Pharm. Corp.*, 482 F.3d 1330, 1337 (Fed. Cir. 2007); *Mokal v. Derwinski*, 1 Vet.App. 12, 15 (1990). "Under this doctrine, federal courts are to decide only 'actual controversies by judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in the case before it.'" *Teva Pharm. USA*, 482 F.3d at 1337-38 (quoting *Local No. 8-6, Oil, Chem. & Atomic Workers Int'l Union v. Missouri*, 361 U.S. 363, 367 (1960)). The Supreme Court has explained that the case-or-controversy requirement is satisfied when the dispute is "'definite and concrete, touching the legal relations of parties having adverse legal interests'; and that it be 'real and substantial' and 'admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts.'" *Id.* at 1339 (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007)).

Mr. Bareford demonstrated concrete harm to him resulting from VA's promulgation of 38 C.F.R. § 38.631(c) (2021) as a gap-filler for 38 U.S.C. § 2306(b). Under section 2306(b)(1),

> [t]he Secretary shall furnish, when requested, an appropriate memorial headstone or marker for the purpose of commemorating an eligible individual whose remains are unavailable. Such a headstone or marker shall be furnished for placement in a national cemetery area reserved for that purpose under [38 U.S.C. § 2403] . . . .

38 U.S.C. § 2306(b)(1). In our decision, we explained that Mr. Bareford's application for a memorial headstone or marker to memorialize Mr. Anderson had been co-signed by a representative of the South Florida National Cemetery in Lake Worth, Florida, the cemetery that had agreed to accept delivery of the headstone or marker. *Bareford*, slip op. at *5. This cemetery is within the control of the VA National Cemetery Administration (NCA).[1] We also explained that the question whether Mr. Anderson's remains were available for burial was not at issue in this case. *See id.* at *14-15; *see also id.* at *28 n. 9 (Falvey, J., dissenting in part). Mr. Bareford demonstrated that he is precluded from applying for a memorial headstone or marker for Mr. Anderson under § 38.631(c) because he is not a family member of Mr. Anderson. The Court did not issue an advisory opinion based on a hypothetical set of facts when it set aside § 38.631(c).

The Secretary also appears to argue that the underlying purpose for the provision of memorial markers did not include commemorating the gallant dead. *See* Motion at 3-5. The Court is free to consider VA's own explanations underlying its policy decisions, and the Court properly relied on VA's own explanation that "government-furnished headstones and markers serve a particular, congressionally mandated purpose, namely, to commemorate the gallant dead in a manner commensurate with the dignity of their sacrifice." *Bareford*, slip op. at 15-16 (relying on Headstone and Marker Application Process, 72 Fed. Reg. 2480 (Jan. 19, 2007) and Headstone and

[1] National Cemetery Administration, South Florida National Cemetery, https://www.cem.va.gov/cems/nchp/southflorida.asp (last accessed Apr. 28, 2022); *see generally Tagupa v. McDonald*, 27 Vet.App. 95, 100 (2014) ("[T]he Court may take judicial notice of facts not subject to reasonable dispute if such facts are generally known or are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

Marker Application Process, 74 Fed. Reg. 26,092-01, 26,094 (Jun. 1, 2009)). VA's explanation relied on 38 U.S.C. § 2403(b) and (c); this statute pertains to memorial headstones and markers that may be placed in areas within national and veterans' cemeteries under the control of the NCA, for individuals whose remains are unavailable for burial. *See* Headstone and Marker Application Process, 72 Fed. Reg. 2480 (Jan. 19, 2007); Headstone and Marker Application Process, 74 Fed. Reg. 26,092-01, 26,094 (Jun. 1, 2009). The Secretary has not demonstrated that the Court misunderstood VA's own explanation of Congress's mandated purpose underlying the provision of memorial headstones and markers. And as the majority explained in our decision, VA failed to provide a reasoned explanation as to how its policy of restricting the applicant class for memorial headstones and markers to just family members represents a reasonable accommodation of conflicting policies that Congress would have sanctioned. *Bareford*, slip op. at *19-22.

And the Secretary argues that it was reasonable for VA to "prioritize" the right of family members of the deceased veteran to apply for memorial headstones and markers. *See* Motion at 7-9; *see also Bareford*, slip op. at *27 (Falvey, J., dissenting in part). The Secretary also argues that "the panel decision produced an absurd result not contemplated by the statute: specifically, anyone may now apply for a memorial headstone or marker." Motion at 9 (adopting *Bareford*, slip op. at *28 (Falvey, J., dissenting in part)). But if VA's intended policy was to give family members' applications for memorial headstones and markers precedence before non-family members' applications, VA could have said so. Instead, as we explained, VA simply excluded non-family members from applying without providing any explicit explanation as to why. *See Bareford*, slip op. at *20-21. Ultimately, VA is free to define the applicant classes for burial and memorial headstones and markers differently, and VA is free to prioritize family members' wishes before those of non-family members, but VA is still required to provide sound reasoning for its policy change, as well as a satisfactory explanation reconciling its new policy with conflicting policies.

FALVEY, *Judge*, dissenting: I respectfully dissent from the panel's denial of the Secretary's motion for reconsideration. Review under the "arbitrary and capricious" standard requires us to defer to VA's "reasonable and reasonably explained" regulations. *FCC v. Prometheus Radio Project*, 141 S.Ct. 1150, 1158 (2021). It does not grant us license to reject policy decisions with which we disagree.

Here, VA chose to differentiate between the applicant classes for burial headstones and memorial markers, limiting potential memorial marker applicants to family members of the deceased veterans to be commemorated. *See* 38 C.F.R. §§ 38.630(c) (2021), 38.631(c) (2021). It did so because memorial markers are intended not to mark gravesites but to provide families with places to "mourn and remember their loved one[s]." 81 Fed. Reg. 10,768. VA reasoned that "requests for memorial . . . markers should be made by family members who are likely to want to memorialize someone whose life had specific meaning to them." *Id*. at 10,769. And thus, VA explained, families of deceased veterans should get to decide how their loved ones are memorialized with non-burial markers. *Id*. at 10,768-69.

We may have chosen to draw this line differently. But VA made a reasonable choice and it reasonably explained why it made that choice. *See Prometheus Radio* at 1158; 81 Fed. Reg.

10,768-69. By rejecting VA's explanation for § 38.631(c), the panel has imposed a more stringent requirement than that its choice be "reasonably explained." Thus, I would grant the Secretary's motion for reconsideration. And I respectfully dissent from the panel's decision not to do so.

Copies to:

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