

GLORIA J. GREER,
Appellant,

Vet. App. No. 20-3047

APPELLEE’S OPPOSED MOTION FOR A STAY OF PROCEEDINGS

In this case, Appellant, who seeks entitlement to nonservice-connected pension benefits, argues in part that the Board erred as a matter of law by failing to provide notice as required by the provisions of 38 U.S.C. § 5104 as amended within the framework of the Appeals Modernization Act (AMA). See Appellant's Brief (App. Br.) at 4. With respect to this issue, she argues that because a Board decision issued under the AMA is, as a matter of law, a decision of the Secretary under the provisions of 38 U.S.C. § 511, the Board's January 8, 2020, decision did not comply with the notice requirements of amended § 5104(b). App. Br. at 4-7.

In *Cowan*, the claimant sought entitlement to increased ratings for a service-connected right knee disability, and also elected into claim adjudication under the AMA via the Rapid Appeals Modernization Program. See 20-6227, Board Decision. On appeal, the claimant argued in part that the Board erred by failing to provide notice under 38 U.S.C. § 5104 with respect to its decision, because Board decisions are decisions of the Secretary under 38 U.S.C. § 511(a); thus, the amended notice provisions of § 5104 apply to Board decisions. See 20-6227, Appellant's Brief at 11-16. In response, the Secretary argued in part that § 5104 as revised by the AMA does not apply to Board decisions generally because a Board decision is a review on appeal of a Secretary decision under 38 U.S.C. § 511. See 20-6227, Secretary's Brief at 17-24.

Following Oral Argument to address these matters, the Court then ordered supplemental briefing directing the parties to address a variety of issues. See 20-6227, Court Order dated March 2, 2022. While the Court's Order appears to focus on arguments made in briefing and during oral argument as to whether there were prejudicial notice errors in the RO's notice letters, *Id.* at *1-2, as indicated above, both the claimant's and Secretary's briefs addressed the issues of whether Board decisions should be considered decisions of the Secretary under § 511 and whether, as a result, the notice requirements of amended § 5104 pursuant to the AMA applies to Board decisions. See 20-6227, Appellant's Brief at 11-16; 20-6227, Secretary's Brief at 17-24. Thus, it cannot be disputed that there is overlap

in the instant case and *Cowan* over whether the amended § 5104 applies to the Board.

Furthermore, in the instant case, the Secretary has already conceded that remand is warranted for the Board to obtain a correct accounting/audit of the value of Appellant's trust and assets generally so as to ensure that any subsequent Board decision is based on a correct presentation of the facts, as well as for the Board to provide an adequate statement of reasons or bases as to whether the version of 38 C.F.R. § 3.274(a) prior to October 18, 2018, or the updated version of the regulation effective thereafter is applicable to Appellant's claim. See Secretary's Brief at 7. Thus, if the Court agrees that remand is appropriate, it should accept the Secretary's concession of remand.

However, if the Court decides that it is appropriate to address the merits of this case, then the issues presented in *Cowan* are sufficiently similar to those implicated by the arguments presented in Appellant's brief as discussed above, and the outcome of *Cowan* may be dispositive or instructive in resolving the current appeal. As to this latter outcome, this Court should stay proceedings in the interest of judicial efficiency. See U.S. VET. APP. R. 5(a)(3). A stay of proceedings would conserve resources, ensure uniformity in the Court's case law, and permit an orderly development of the law in this area. See *Tobler v. Derwinski*, 2 Vet.App. 8 (1991) (holding that any rulings, interpretations, or conclusions of law contained in a precedential decision of the Court are authoritative and binding on VA adjudications as of the date the decision is issued, unless and until overturned);

see also *Bethea v. Principi*, 2 Vet.App. 252 (1992) (holding that panel or single judge may not render decisions that materially conflict with earlier panel or en banc decisions).

Appellant is opposed to this motion and has indicated that he will file a written response.

WHEREFORE, Appellee respectfully moves the Court, that if it decides to address the merits of the above-captioned case, to stay proceedings pending resolution of and mandate in *Cowan*, or until further order of the Court.

Respectfully submitted,

RICHARD A. SAUBER
General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Sarah W. Fusina
SARAH W. FUSINA
Deputy Chief Counsel

/s/ Shanthala Raj
SHANTHALA RAJ
Appellate Attorney
Office of General Counsel (027H)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, DC 20420
(202) 632-4380

Attorneys for Appellee
Secretary of Veterans Affairs