

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 22-1216

WALTER P. JONES,

PETITIONER,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

RESPONDENT.

Before MEREDITH, *Judge*.

ORDER

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

On March 1, 2022, the petitioner, Walter P. Jones, through counsel filed a petition for extraordinary relief in the form of a writ of mandamus compelling the Secretary to adjudicate a claim for entitlement to disability compensation for ischemic heart disease, award entitlement to compensation, and award the maximum rating and earliest effective date permitted by law, including but not limited to a claim for aid and attendance. Petition (Pet.) at 1, 16. The petitioner asserted the following: (1) he initially filed a claim for compensation for a heart condition in January 2011; (2) the Board of Veterans' Appeals (Board) denied benefits for ischemic heart disease in February 2019; (3) he appealed to the Court and filed a joint motion for remand (JMR) with the Secretary, which the Court granted in April 2020; (4) the Board remanded his appeal in January 2021 to obtain service personnel records, obtain VA and private treatment records, and verify with the Joint Services Records Research Center (JSRRC) the petitioner's herbicide exposure during service; and (5) VA received service records in May 2021 and VA medical records in July 2021. Pet. at 2-5; Appendix (App.) at 5-14, 21-22, 40-45, 83-89, 90-444; *see Jones v. Wilkie*, U.S. Vet. App. No. 19-2499 (Apr. 8, 2020) (unpublished order). The JMR reflects that the petitioner, through the same law firm as current counsel, agreed with the Secretary that remand was required for the Board to submit a research request to JSRRC to verify the petitioner's exposure to herbicides. Pet. at 3; App. at 42-43.

The petitioner further asserted that, in August and December 2020, he asked VA to expedite processing his remand, and that from February 2021 until he filed his petition, his claim was assigned to over 40 different VA employees without substantive action being taken. Pet. at 4-6; App. at 74-75, 79-80, 446-56. Moreover, he averred that "VA has known, since March 23, 2021, that the JSRRC 'no longer exists,'" but that closure of the organization should not impede adjudication of his claim because VA may review the official records, and he is not aware of any impediment to an immediate adjudication of his claim. Pet. at 5 (quoting 86 Fed. Reg. 15,413,

15,413 (Mar. 23, 2021)); App. at 445. Accordingly, he contended that he is entitled to a writ because VA has gathered all of the evidence required by the January 2021 Board remand, he has been effectively shut out of the adjudicative process, and he has no reasonable belief that VA intends to act on his claim during his lifetime. Pet. at 10. He thus maintained that VA has unreasonably delayed a decision on his claim, he lacks adequate alternative means to obtain the requested relief, and the factors for assessing whether mandamus is warranted weigh in his favor. Pet. at 6-16.

Pursuant to Court order, the petitioner filed a response addressing the steps he has taken since January 2021 to obtain adjudication of his claim. He asserted that a paralegal from his counsel's law firm contacted VA in May and July 2021 to request expedited adjudication and was informed that counsel did not need to take further action. Petitioner's Mar. 11, 2022, Response at 1-3.

Also pursuant to Court order, the Secretary filed a response to the petition on April 6, 2022. The Secretary avers that, although there has been some delay in the development of the petitioner's claim, the Court should deny the petition because there has not been complete inaction by the Agency; rather, the Secretary is actively attempting to complete the required development. *See* Secretary's Response at 4-5, 7. In that regard, in part, the Secretary asserts that "what was formerly known as JSRRC is now known as the VA Military Records Research Center (MRRC)," that a research request was submitted to the MRRC on March 25, 2021, and that the MRRC has not yet responded because of a severe backlog caused by the Covid-19 pandemic. *Id.* at 3; Exhibit 2. The Secretary also asserts that VA conducts a review of the petitioner's electronic claims file every 30 days to determine if MRRC has responded to the request. Secretary's Response at 3, 4. The Secretary thus contends that VA's actions demonstrate ongoing efforts to bring this matter to a conclusion, the factors relevant to assessing unreasonable delay weigh against granting a writ, and the petitioner has not demonstrated a clear and indisputable right to a writ. Secretary's Resp. at 6-9.

The petitioner, with leave from the Court, filed a reply on April 27, 2022, arguing that the Secretary has not demonstrated an "interest in *denying* immediate adjudication of the [ischemic heart disease claim]," Petitioner's April 27, 2022, Reply at 2 (emphasis in original), and he maintains that he is entitled to a writ of mandamus because he lacks alternative means to obtain adjudication of his claim and the factors relevant to assessing unreasonable delay support entitlement to a writ, *id.* at 2-5. Specifically, he alleges that his "interest in staying alive" weighs in his favor. *Id.* at 3. He also contends that VA has waived any dispute that the delay has been unreasonable, and that expediting adjudication of the claim would not affect competing agency activities. *Id.* at 3-4. He further asserts that VA does not appear to have requested research from the MRRC regarding herbicide exposure in Cambodia. *Id.* at 4. Finally, he asks, if the Court determines that a writ should not yet issue, that the Court order the Secretary to provide additional information regarding the MRRC request, provide weekly status reports as to VA's actions on the claim, and provide a date by which VA will complete adjudication of the claim. *Id.* at 5.

Because the development ordered by the Board in January 2021 has not yet been completed, and the Secretary has not provided assurances as to when the MRRC search will be completed, the Court will require the Secretary to file status reports until further order of the Court.

Further, the Court seeks additional information from the Secretary. First, the MRRC Field Playbook referenced in the Secretary's response indicates that MRRC requests may be expedited in certain circumstances, including extreme financial hardship.¹ Secretary's Response, Exhibit 2 at 19. It is unclear from the parties' pleadings whether the MRRC research request has been expedited, as a separate matter from whether the petitioner's appeal has been expedited on the Board's docket. Second, the petitioner in his reply indicated that VA does not appear to be developing the allegation of herbicide exposure in Cambodia, Petitioner's April 27, 2022, Reply at 4, and VA's response appears to reflect that the MRRC request pertains only to Thailand, Secretary's Response, Exhibit 3 at 1 ("On March 25, 2021, a request was submitted to [the MRRC] to verify [the petitioner's] exposure to herbicides while assigned to Korat [Royal Thai Air Base] in Thailand."). Finally, although the Secretary has attributed the delay to a backlog at the MRRC caused by the pandemic, the Secretary did not provide any information as to the typical response time by the MRRC prior to the pandemic, the typical response time currently, the size of the backlog, or where the petitioner's claim falls within the MRRC's queue. Accordingly, the Court will direct VA to provide information as to whether the MRRC request has been expedited, as to whether the research request pertains to service in Cambodia, and as to the specifics of the backlog at the MRRC.

Upon consideration of the foregoing, it is

ORDERED that the Secretary, not later than 30 days after the date of this order, file a response providing the information described above, as well as an update on the status of the petitioner's claim. It is further

ORDERED that the Secretary, every 30 days thereafter, file an updated status report advising the Court of the status of the petitioner's ischemic heart disease claim. It is further

ORDERED that consideration of the petition for a writ of mandamus is deferred pending further order of the Court.

DATED: May 4, 2022

BY THE COURT:



AMANDA L. MEREDITH
Judge

Copies to:

Christopher F. Attig, Esq.

VA General Counsel (027)

¹ In that regard, the petitioner has asserted that he does not have sufficient financial resources to purchase or rent a home with drinkable water. Petitioner's April 27, 2022, Reply at 1.