

DOUGLAS L. HAILEY,
Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,

Appellee.

DENIS MCDONOUGH,)
Secretary of Veterans Affairs,)
)
Appellee.)

On May 27, 2022, the Secretary filed a motion to dismiss the appeal for lack of jurisdiction. The Secretary's motion should be denied by the Court for the following reasons.

The law is clear that “[t]he Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans’ Appeals.” 38 U.S.C. § 7252(a); *see* 38 U.S.C. § 7261(a)(1) (“*decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary . . .*”).

1

Secretary in his motion to dismiss. *See* Aee Mot. Dis. at 2 (the Board’s denial “may be adverse.”).

Next, the Secretary admits that although the Board’s denial was an “adverse” decision, “it is not a final decision” since it is not “a decision that affects the provision of benefits by the Secretary to a claimant.” *See* Aee Mot. Dis. at 2. The Veteran submits that the decision by the Board denying the motion to advance on the docket is in fact “adverse” and affects the provision of benefits since the Veteran was prejudiced by remaining in the same “docket order.”

The Board here has issued a decision. That decision was to deny the Veteran’s request, on motion, to advance his case on the docket. It is a decision after all. Either the case should be advanced on the docket or it should not be advanced. The Board determined in Mr. Hailey’s case that it should not be advanced. This, again, is a decision, which affects the provision of benefits. *See Sandstrom, supra*.

The Court cannot, and should not, look past what the Board has decided. The Board has *decided* to not advance Mr. Hailey’s case on the docket. What is most important is that the Secretary in his motion was to overlook these relevant facts.

The Secretary somehow believes that a decision was not made. But a decision was rendered. And it was adverse, which the Secretary concedes. The Secretary’s “hang-up” is on the term “final”. A decision denying a motion to advance is, in fact, a “final” decision.

What is more, the Board did not provide proper appellate rights. It is well understood that claimants have a right to fair process in the development and adjudication of their claims and appeals before VA. *See Bryant v. Wilkie*, 33 Vet.App. 43, 46 (2020); *Austin v. Brown*, 6 Vet.App. 547, 551-52 (1994); *Thurber v. Brown*, 5 Vet.App. 119, 122-26 (1993). This non-constitutional right stems, in part, from the nature of the nonadversarial VA benefits adjudication system, which “is predicated upon a structure which provides for notice and an opportunity to be heard at virtually

every step in the process.” *Thurber*, 5 Vet.App. at 123; *see Prickett v. Nicholson*, 20 Vet.App. 370, 382 (2006) (explaining that the procedural right to fair process “is primarily based on the underlying concepts of the VA adjudicatory scheme, not the U.S. Constitution”), *aff’d sub nom. Prickett v. Mansfield*, 257 F. App’x 288 (Fed. Cir. 2007). This includes providing fair process during VA’s solicitation, gathering, and development of evidence. *See Austin*, 6 Vet.App. at 551 (noting that the fair process framework articulated in *Thurber* applies during the periods set forth in § 20.1304).

Nowhere in its letter did the Board provide appellate rights in denying the Veteran’s motion to advance on the docket. The Secretary fails to mention this in his motion to dismiss. If the Secretary wishes the Court to dismiss a case, then he must provide grounds for such. The Secretary has not provided such here.

The Secretary admits that there was a “decision” to deny a motion to advance on the docket that was “adverse” to the Veteran. But the Secretary leans to the language “final”. Nonetheless, the decision is final if it affects the monetary value that the Veteran may ultimately receive would be granted. *See Sandstrom, supra*.

In view of the foregoing the Veteran respectfully submits that the Court should deny the Secretary’s motion to dismiss the appeal.

Respectfully submitted,

FOR APPELLANT:

/s/ Michael S. Just

Michael S. Just

JUST LAW

6 Fremont Street

Providence, RI 02906

(401) 400-2822

1-(844) 484-JUST