

Designated for electronic publication only

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 VA to issue a rating decision adjudicating a claim for entitlement to disability compensation for ischemic heart disease, awarding entitlement to compensation, and awarding 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. In short, the petitioner asserted that a January 2011 claim for disability compensation for heart disease has been unreasonably delayed, particularly following a January 2021 remand by the Board of Veterans' Appeals (Board) for further development of the claim. Pet. at 2-5; Appendix (App.) at 5-14, 21-22, 40-45, 83-89, 90-444. In that regard, he notes that the Board ordered the agency of original jurisdiction (AOJ) to verify with the Joint Services Records Research Center (JSRRC) his herbicide exposure during service, and he argued that "the JSRRC 'no longer exists,'" closure of the organization should not impede adjudication of his claim because VA may review the official records, and he was 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) (codified at 38 C.F.R. pt. 3)); 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 averred 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 was actively attempting to complete the required development. *See* Secretary's Apr. 6, 2022, Response at 4-5, 7. In that regard, in part, the Secretary asserted 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 asserted that VA conducts a review of the petitioner's electronic claims file every 30 days to determine if the MRRC has responded to the request. Secretary's Apr. 6, 2022, Response at 3, 4. The Secretary thus contended 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. *Id.* 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 Apr. 27, 2022, Reply at 2, and he maintained 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 alleged that his "interest in staying alive" weighs in his favor. *Id.* at 3. He also contended that VA has waived any disputes that the delay has been unreasonable and that expediting adjudication of the claim would affect competing Agency activities. *Id.* at 3-4. He further asserted that VA does not appear to have requested research from the MRRC regarding herbicide exposure in Cambodia. *Id.* at 4. Finally, he asked, 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.

On May 4, 2022, the Court ordered the Secretary to file status reports and provide additional information regarding the MRRC research request, the MRRC backlog, and whether VA is developing the allegation of herbicide exposure in Cambodia. The Secretary, on May 27, 2022, notified the Court of the following: (1) the AOJ in May 2022 requested that the MRRC expedite the research request; (2) the research request did not include research regarding herbicide exposure in Cambodia because such development was not ordered by the Board in January 2021; (3) the MRRC completed the research in May 2022 and provided a negative response to the AOJ; and (4) on May 13, 2022, the AOJ issued a Supplemental Statement of the Case (SSOC) denying benefits for ischemic heart disease. Secretary's May 27, 2022, Response at 3-4; Exhibits 2-5. Accordingly, the Secretary averred that VA has provided the requested relief and that the petition should be dismissed as moot. *Id.* at 4-5.

The Secretary provided an additional status update on June 27, 2022, stating that the petitioner's claim for benefits for ischemic heart disease had been returned to the Board and had

resumed its place on the Board's docket. Secretary's June 27, 2022, Response at 3; Exhibits 1-2. The Secretary maintains that the petitioner has been provided the requested relief and the Court should dismiss the petition as moot. Secretary's June 27, 2022, Response at 3.

Pursuant to the All Writs Act (AWA), the Court has the authority to issue extraordinary writs in aid of its prospective jurisdiction. 28 U.S.C. § 1651(a). "[J]urisdiction to issue a writ of mandamus pursuant to the AWA relies upon not *actual jurisdiction* but *potential jurisdiction*." *In re Fee Agreement of Cox*, 10 Vet.App. 361, 370 (1997) (*Cox I*), *vacated on other grounds sub nom. Cox v. West*, 149 F.3d 1360 (Fed. Cir. 1998) (*Cox II*). Therefore, the Court's jurisdiction to issue the order sought by the petitioner pursuant to the AWA depends on whether the grant of the petition could lead to a Board decision over which the Court would have jurisdiction. *See Cox I*, 10 Vet.App. at 371. However, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976). Accordingly, three conditions must be met before a court may issue a writ: (1) The petitioner must lack adequate alternative means to attain the desired relief, thus ensuring that the writ is not used as a substitute for an appeal; (2) the petitioner must demonstrate a clear and indisputable right to the writ; and (3) the Court must be convinced, given the circumstances, that issuance of the writ is warranted. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004).

Further, this Court has adopted the case-or-controversy jurisdictional requirements imposed by Article III of the U.S. Constitution. *Aronson v. Brown*, 7 Vet.App. 153, 155 (1994). Where all relief sought by a petition for extraordinary relief has been afforded, the petition is moot. *See Chandler v. Brown*, 10 Vet.App. 175, 177 (1997) (per curiam order); *Thomas v. Brown*, 9 Vet.App. 269, 270-71 (1996) (per curiam order). Thus, to the extent that the petitioner requests that VA adjudicate his claim for ischemic heart disease, the Secretary's responses demonstrate that VA issued an SSOC in May 2022 denying the claim. The Court is therefore persuaded that, in this respect, the relief the petitioner seeks has been granted, and the petition will be dismissed in this regard as moot.

To the extent the petitioner asks the Court to order VA to grant benefits and award the earliest effective date and highest rating possible, including entitlement to aid and attendance, a writ of mandamus may not be used to compel a particular outcome. *See Wolfe v. McDonough*, 28 F.4th 1348, 1357-58 (Fed. Cir. 2022) ("[M]andamus . . . could only compel action on the appeal[;] [i]t could not dictate a particular outcome."). Moreover, because an order compelling VA to grant benefits and award the earliest effective date and highest rating possible could not lead to an adverse Board decision that might make its way to the Court, the Court concludes that the requested relief is not in aid of the Court's prospective jurisdiction. Thus, the petition in this respect also will be dismissed. *See Love v. McDonough*, __ Vet.App. __, __, No. 21-1323, 2022 WL 2262956, at *8 (June 23, 2022) (per curiam order); *see also Gardner-Dickson v. Wilkie*, 33 Vet.App. 50, 55 (2020) ("The AWA 'permits federal courts to fill gaps in their judicial power where those gaps would thwart the otherwise proper exercise of their jurisdiction.'" (quoting *Monk v. Shulkin*, 855 F.3d 1312, 1318 (Fed. Cir. 2017))), *aff'd sub nom. Gardner-Dickson v. McDonough*, No. 2021-1462, 2021 WL 5144367 (Fed. Cir. Nov. 5, 2021) (per curiam judgment).

Similarly, the Court cannot exercise direct review over the petitioner's contention that the AOJ, in seeking evidence of in-service exposure, failed to comply with the prior Board remand or violated its duty to assist. *See Gardner-Dickson*, 33 Vet.App. at 57-58. Those arguments, including those pertaining to Cambodia, may be addressed as part of his pending Board appeal. *See* Petitioner's Apr. 27, 2022, Reply at 4. However, if the Board fails to take further action on the denied claim within a reasonable period of time and the petitioner continues to pursue alternative means to obtain such action, he may return to the Court and file a new petition asking it to compel the Board to respond. *See DiCarlo v. Nicholson*, 20 Vet.App. 52, 56-57 (2006), *aff'd sub nom. DiCarlo v. Peake*, 280 F. App'x 988 (Fed. Cir. 2008).

Upon consideration of the foregoing, it is

ORDERED that the March 1, 2022, petition for extraordinary relief in the nature of a writ of mandamus is DISMISSED.

DATED: July 11, 2022

BY THE COURT:

A handwritten signature in blue ink, appearing to read 'Amanda L. Meredith', with a long horizontal flourish extending to the right.

AMANDA L. MEREDITH
Judge

Copies to:

Christopher F. Attig, Esq.

VA General Counsel (027)