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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 21-3565

BRIAN M. AUMILLER, ET AL., PETITIONERS,

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 May 25, 2021, the petitioners, Brian M. Aumiller, Tamora E. Diez, and Roger A. Georges, through counsel filed a petition for extraordinary relief in the nature of a writ of mandamus compelling the Secretary to cease withholding their disability compensation in connection with rating reductions that are pending on appeal before the Agency and to pay them at their prereduction rating levels until their respective appeals are finally adjudicated. Petition (Pet.) at 1-20. They asked the Court to declare the withholding (1) unlawful, (2) prejudicial, and (3) to constitute Agency action unlawfully withheld. *Id.* at 2. The petitioners argued in part that VA's payment of monthly benefits at the reduced amount before the rating reduction becomes final is contrary to statute, violates principles of fair process, and prevents the petitioners from availing themselves of overpayment related rights. *Id.* at 13-20.

The petitioners also maintained that the Court has jurisdiction to issue a writ under 38 U.S.C. § 7252(c), in aid of the U.S. Court of Appeals for the Federal Circuit's jurisdiction, or, in the alternative, pursuant to the All Writs Act (AWA), 28 U.S.C. § 1651(a), in aid of the Court's prospective jurisdiction over decisions relating to overpayment relief. Pet. at 2-15; *see* 38 U.S.C. § 7252(a). They also argued that, because the Court has jurisdiction under the AWA, it may exercise supplemental jurisdiction and compel the Secretary to cease the allegedly unlawful withholdings under 38 U.S.C. § 7261(a)(2). Pet. at 13-14.

Because closely related issues were then under review by a panel of the Court in *Love v. McDonough*, __ Vet.App. __, 2022 WL 2262956 (June 23, 2022) (per curiam order), and the disposition in *Love* might have materially affected the outcome of this case, the Court, in the interest of judicial efficiency, did not seek a response from the Secretary regarding those issues. *See* U.S. VET. APP. R. 2, 5(a)(3), 21(d). Nonetheless, the Court ordered the parties to submit

memoranda of law addressing which standard the Court should apply to assess whether joinder is appropriate and why the petitioners satisfy the proffered standard; the Court referred that procedural question to a panel and scheduled oral argument. Ultimately, after the Secretary withdrew his opposition to the petitioners' request for joinder, the Court granted the petitioners' construed request for permissive party joinder, revoked the order scheduling oral argument, and stayed proceedings pending the disposition of the petition in *Love*. See Nov. 4, 2021, Order; see also U.S. VET. APP. R. 5(a)(3).

The Court decided *Love* on June 23, 2022, dismissing Mr. Love's petition because he failed to show that a writ would be in aid of the Court's jurisdiction under the AWA, and holding that 38 U.S.C. § 7252(c) is not an independent source of jurisdiction. *Love*, 2022 WL 2262956, at *4-13. The same result is warranted here.¹

To begin, the Court's decision in *Love* disposes of the petitioners' assertions that the Court has jurisdiction under section 7252(c) to order the requested relief. The *Love* Court unequivocally concluded that "section 7252(c) is *not* a source of jurisdiction." *Love*, 2022 WL 2262956, at *13. Because the petitioners, represented by the same counsel as Mr. Love, make nearly identical arguments in this regard, nothing more is required to address this portion of their petition. See *id.* at *9-13. Compare Pet. at 3-11, with Pet. at 3-11, *Love v. McDonough*, U.S. Vet. App. No. 21-1323 (Mar. 2, 2021).

Additionally, the Court concludes, similar to the *Love* Court, that the petitioners have not demonstrated that they have a right to an overpayment, and therefore the Court is not persuaded that the Secretary's implementation of a rating reduction before all appeals have been exhausted barred a possible overpayment and thereby foreclosed their ability to appeal a denial of overpayment relief to the Court. See *Love*, 2022 WL 2262956, at *4-6; *id.* at *5 n.3 (concluding that, because "Mr. Love . . . failed to establish that his premise, that the law entitles him to an overpayment, is correct, . . . [the Court] find[s] it unnecessary to address his fair process arguments based on that same premise"). Compare Pet. at 13-20, with Pet. at 11-20, *Love*, U.S. Vet. App. No. 21-1323.²

Finally, because the *Love* Court held that "the proper implementation date of the discontinuance decision generally is a matter that can be resolved by turning to the agency of original jurisdiction (AOJ) and thereby obtaining a decision under [38 U.S.C. §] 511(a)," and there is no indication here that the petitioners initiated proceedings at the AOJ that may implicate the Court's prospective jurisdiction, see 38 U.S.C. §§ 7104(a), 7252(a), the Court concludes that mandamus would be improper. *Love*, 2022 WL 2262956, at *8 (first citing *In re Tennant*, 359 F.3d 523, 529 (D.C. Cir. 2004); and then citing *Wolfe v. McDonough*, 28 F.4th 1348, 1359 (Fed. Cir. 2022) ("[M]andamus does not aid prospective jurisdiction where a party has not initiated any proceeding whatsoever.")).

Upon consideration of the foregoing, it is

¹ The panel in this case has determined that the petition may be decided by a single judge, and the matter was returned to the undersigned by separate order for disposition.

² Again, the Court notes that the petitioners' arguments are nearly identical to the arguments raised in *Love*.

ORDERED that the stay of proceedings pending the disposition of the petition in *Love* is lifted. It is further

ORDERED that the petitioners' May 25, 2021, petition for extraordinary relief in the nature of a writ of mandamus is DISMISSED.

DATED: July 13, 2022

BY THE COURT:



AMANDA L. MEREDITH
Judge

Copies to:

John Niles, Esq.

VA General Counsel (027)