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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 22-3061

DOUGLAS L. HAILEY, APPELLANT,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before JAQUITH, *Judge*.

ORDER

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

On May 23, 2022, the appellant filed a Notice of Appeal (NOA) listing May 10, 2022, as the date of the Board of Veterans' Appeals (Board) decision being appealed. On May 27, 2022, the Secretary moved to dismiss the appeal for lack of subject matter jurisdiction. In his motion, the Secretary informed the Court that on May 10, 2022, the Board's Deputy Vice Chairman denied the appellant's motion to advance his case on the docket. The Secretary argues that the May 10, 2022, denial is of a predecisional motion and therefore it is not a final appealable decision of the Board. The Secretary submits that although the denial of the appellant's motion may be adverse, it is not a final decision. Instead, the Secretary asserts that a final decision of the Board is a decision that affects the provision of benefits by the Secretary to a claimant. Attached to the Secretary's motion is a copy of the May 10, 2022, letter from the Deputy Vice Chairman, explaining that he denied the appellant's motion because the appellant's case did not "involve[an] interpretation of law of general application affecting other claims" or "other sufficient cause" warranting advancement, including advanced age. 38 C.F.R. §§ 20.800(c)(1), 20.902(c)(1) (2022). On May 27, 2022, the Secretary filed, and the Court granted, an unopposed motion to stay proceedings pending a ruling on his motion to dismiss.

On May 31, 2022, the appellant filed a response to the Secretary's motion to dismiss. In his response, the appellant asserts that (1) the May 10, 2022, denial is "adverse" and affects the provision of benefits since he was prejudiced by remaining in the same "docket order"; (2) a decision denying a motion to advance on the docket is a "final" decision; and (3) the Board failed to provide proper appellate rights in denying the motion. Accordingly, the appellant argues that the Secretary's motion to dismiss should be denied.

This Court's review is limited by statute to timely appeals from claimants adversely

affected by a final Board decision. 38 U.S.C. §§ 7252, 7266(a); *In re Quigley*, 1 Vet.App. 1 (1990). "A "decision" of the Board, for purposes of . . . jurisdiction under section 7252, is the decision with respect to the benefit sought by the veteran: those benefits are either granted . . . , or they are denied." *Gardner-Dickson v. Wilkie*, 33 Vet.App. 50, 56, (2020) (order) (quoting *Maggitt v. West*, 202 F.3d 1370, 1376 (Fed. Cir. 2000)), *aff'd per curiam sub nom. Gardner-Dickson v. McDonough*, No.2021-1462, 2021 WL 5144367 (Fed. Cir. Nov. 5, 2021) (judgment). Absent such a Board decision, the Court lacks jurisdiction to consider an appeal. *Breeden v. Principi*, 17 Vet.App. 475, 477 (2004) (per curiam order).

Given the foregoing factual and legal landscape, and because the May 2022 letter from the Deputy Vice Chairman did not grant or deny a VA benefit, the appellant may not appeal it to this Court—it is not a decision of the Board as referenced in 38 U.S.C. §§ 7252 and 7266(a). *Mayer v. Brown*, 37 F.3d 618, 619-20 (Fed. Cir. 1994) (distinguishing administrative actions of the Board Chairman from the type of final appealable Board decisions referenced in 38 U.S.C. § 7252(a)), *overruled on other grounds by Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998). Because the May 10, 2022, denial letter is not a final adverse Board decision that granted or denied a VA benefit, this appeal must be dismissed.

Upon consideration of the foregoing, it is

ORDERED that the stay of proceedings in this matter is lifted. It is further

ORDERED that the Secretary's May 27, 2022, motion to dismiss the appeal is granted, and this appeal is DISMISSED.

DATED: July 29, 2022

BY THE COURT:



GRANT C. JAQUITH
Judge

Copies to:

Michael S. Just, Esq.

VA General Counsel (027)