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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-4633

RICHARD C. BAREFORD,

APPELLANT,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before BARTLEY, *Chief Judge*, and PIETSCH, GREENBERG, ALLEN,
TOTH, FALVEY, LAURER, and JAQUITH, *Judges*.¹

ORDER

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

On February 28, 2022, in a panel opinion, a majority vacated the July 1, 2019, decision of the Board of Veterans' Appeals, and remanded the matter for additional development, if necessary, and readjudication consistent with its decision. In so doing, the Court set aside 38 C.F.R. § 38.631(c) (2021). On March 18, 2022, the Secretary filed (1) a motion for panel reconsideration or, in the alternative, for full Court review, and (2) an opposed motion to stay the precedential effect of the panel decision pending reconsideration or full Court review and pending potential appeal to the U.S. Court of Appeals for the Federal Circuit. On April 1, 2022, the appellant filed an opposition to the Secretary's motion to stay the precedential effect of the panel decision. On April 26, 2022, the Court denied the Secretary's motion for panel reconsideration and held in abeyance the alternative motion for full Court consideration. On June 1, 2022, the Court ordered the appellant to respond to the Secretary's motion for full Court review. The appellant filed his response on June 30, 2022.

"Motions for full Court review are not favored. Ordinarily they will not be granted unless such action is necessary to secure or maintain uniformity of the Court's decisions or to resolve a question of exceptional importance." U.S. VET. APP. R. 35(c). In this matter, the Secretary has not shown that either basis exists to warrant full Court review.

Upon consideration of the foregoing, it is

ORDERED that the motion for full Court review is denied. It is further

¹ Judge Meredith recused herself from this matter.

ORDERED that the Secretary's motion to stay the precedential effect of the panel decision is held in abeyance pending further order of the Court.

DATED: August 11, 2022

PER CURIAM.

FALVEY, *Judge*, with whom ALLEN, *Judge*, joins, dissenting: I write to express disagreement with the Court's denial of en banc review. As laid out in my dissent to the panel decision, VA made a reasonable policy choice and reasonably explained why it did so. *See Bareford v. McDonough*, 35 Vet.App. 171, 193-94 (2022) (Falvey, J., dissenting in part). Thus, under the arbitrary and capricious standard of review, the Court should defer to VA's decision. *Id.* The Court's failure to correctly apply this standard of review sets bad precedent and may mislead parties and the Court in future cases.

Under Rule 35(c), motions for full court review "[o]rdinarily . . . will not be granted unless such action is necessary to secure or maintain uniformity of the Court's decisions or to resolve a question of exceptional importance." U.S. VET. APP. R. 35(c). Here, en banc review is necessary to safeguard proper application of the arbitrary and capricious standard and to ensure that the Court does not overstep its authority. In my view, this qualifies as both "necessary to secure or maintain uniformity of the Court's decisions" and a "question of exceptional importance." Thus, I must respectfully dissent from the Court's order denying en banc review.

Copies to:

Stephen B. Kinnaird, Esq.

VA General Counsel (027)