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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

DOUGLAS L. HAILEY,

Appellant,

v.

DENIS McDONOUGH,
Secretary of Veterans Affairs,

Appellee.

Vet.App. No. 22-3061

**MOTION FOR SINGLE JUDGE RECONSIDERATION, OR IN THE ALTERNATIVE
REFERRAL FOR A PANEL DECISION**

INTRODUCTION

Mr. Douglas Hailey, the appellant moves the Court for single judge reconsideration of the Court's decision dated July 29, 2022 to dismiss his appeal of the decision of the Board of Veterans Appeals to deny advancement of his appeal on the Board's docket. In the alternative, the appellant moves for referral of this case to a panel

for decision. Mr. Hailey submits that the single judge overlooked that Congress in 38 U.S.C. § 7107(b)(1) provided appellant's before the Board with a statutory right to present to the Board a motion for advancement on the Board's docket. Further, the Secretary in the provisions of 38 C.F.R. § 20.800(c)(3) interpreted § 7107(b)(1) to require that if a motion to advance a case on the docket was denied by the Board that the appellant and his or her representative will be immediately notified of that decision.

The Case

The facts in this matter are not in dispute. Mr. Hailey appealed a decision of the Secretary to the Board for review and his appeal was duly docketed by the Board. Mr. Hailey, prior to the assignment of his appeal to an individual Board Member or panel of Board Members, submitted a motion for advancement on the Board's docket. On May 10, 2022, the Board of Veterans' Appeals issued a decision denying Mr. Hailey's motion to advance his appeal on the docket. On May 23, 2022, Mr. Hailey 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. On May 31, 2022, Mr. Hailey filed a response to the Secretary's motion to dismiss. On July 29, 2022, this Court issued an Order granting the Secretary's motion to dismiss on the basis that the Board's May 10, 2022 letter from the Deputy Vice Chairman did not grant or deny a VA benefit.

Congress created a statutory right in 38 U.S.C. 7107 which provides a right to

appellant's with pending appeals to the Board to present a motion for advancement on the Board's docket. A decision denying a motion for advancement on the Board's docket is, as a matter of law, under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans or the dependents or survivors of veterans.

ARGUMENT FOR RECONSIDERATION

I.

A decision denying a motion for advancement on the Board's docket is a decision under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans.

Congress gave to this Court exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. *See* 38 U.S.C. § 7252(a). This Court correctly stated in its Order of July 29, 2022 that "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). Court's July 29, 2022 Order, p. 2. However, this Court incorrectly concluded:

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.

Id. The Board’s May 10, 2022 denial letter was as a matter of law a final adverse Board decision that denied Mr. Hailey a VA benefit in the form of an advancement of his Board appeal on the Board’s docket.

The Secretary argued that the Board’s May 10, 2022 denial was what it characterized as “predecisional motion.” Chapter 71 of Title 38 of the United States Code where Congress addresses the Board of Veterans Appeal includes no reference to or definition of a “predecisional motion.” Congress in the provisions of 38 U.S.C. § 7107 does use the term “motion,” and unambiguously provides that a motion may be filed for advancement on the Board’s docket. Congress did not qualify the term “motion,” with the term, “predecisional.” Thus, there is no basis in § 7107 for the Secretary’s argument in his motion to dismiss that:

A ruling on a motion for advancement on the Board’s docket is not a final decision of the Board and, therefore, this Court does not have jurisdiction over an appeal of this type of pre-decisional motion.

Sec. Mot. Dis., p. 2. Thus, this Court only has the Secretary's bald and unsubstantiated assertion that "A ruling on a motion for advancement on the Board's docket is not a final decision of the Board" *Id.*

The Secretary correctly asserted that a final decision of the Board is a decision that affects the provision of benefits by the Secretary to a claimant. *Id.* This Court in accepting this assertion overlooked that Congress has spoken directly to the question of what is a final decision as shown by the following:

The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

38 U.S.C. § 511(a). In this matter, the Board is the Secretary affording one review of the decisions of the Secretary by the Secretary. *See* 38 U.S.C. § 7104(a). (All questions in a matter which under section 511(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary).

Thus, here, when the Deputy Vice Chairman denied Mr. Hailey's motion for advancement on the docket, that was a decision by the Secretary of a question of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to Mr. Hailey. Furthermore, as provided for by Congress in

§ 511(a) that decision of the Secretary by the Deputy Vice Chairman to deny Mr. Hailey's motion for advancement on the docket was a final and conclusive decision which was adverse to Mr. Hailey.

Congress in the provisions of 38 U.S.C. § 7107(b)(1) unambiguously afforded appellant's the statutory right to submit a motion for the advancement of their appeal on the Board's docket. The denial of such a motion adversely affects the provision of benefits by the Secretary to Mr. Hailey by delaying the consideration of his appeal by the Board. As result of the Board's denial of Mr. Hailey's motion for advancement of his appeal on the Board's docket, his appeal will now not be decided for more than a year and possibly more than two years. This is because of the statutory requirement imposed upon Congress to hear appeals in docket order. *See* 38 U.S.C. § 7107(a)(4). Mr. Hailey has been denied the right to advancement on the Board's docket which is a final decision of the Secretary and if this Court's decision stands can never be reviewed by this Court or any other Court. This is so, because when the Board eventually decides his appeal, this question of the Board's denial of his motion for advancement will have evaded judicial review because that issue is moot.

Congress was clear in § 511(a) that subject to subsection (b) the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any court. Congress was equally clear in § 511(b) that the second sentence of § 511(a) does not apply to matters covered under **four specific statutory circumstances**. None

of the circumstances identified in §511(b) include matters covered by Chapter 71 of title 38. Put another way if Congress had wanted to exclude judicial review of any decisions made under Chapter 71 including the Board's denial of a motion for advancement on the docket, it would have included that provision in § 511(b). It follows then that in accordance with § 511(a), the Board's denial of his motion for advancement is, as a matter of law, such a decision by the Secretary denying for a motion for advancement on the docket is a decision made under a law that affects the provision of benefits by the Secretary to veterans. Furthermore, the Board's denial of his motion for advancement is a decision of the Secretary which is final and conclusive. As such, in accordance with the provisions of 38 U.S.C. § 7266, the Board's denial of his motion for advancement was a decision of the Secretary which adversely affected Mr. Hailey.

Therefore, this Court should reconsider its decision to dismiss Mr. Hailey's appeal because the Board's May 10, 2022 denial letter was not a final adverse Board decision that granted or denied a VA benefit. Reconsideration is required because this Court's July 29, 2022 Order was not made in accordance with the applicable provisions of law.

II.

In the Alternative, A Panel Decision Is Required.

In *Frankel v. Derwinski*, 1 Vet. App. 23, 25-26 (1990), this Court held that there were six factors the Court would look to determine if the case was appropriate for single judge consideration. These included if the case: (1) does not establish a new rule of law;

(2) does not alter, modify, criticize, or clarify an existing rule of law; (3) does not apply an established rule of law to a novel fact situation; (4) does not constitute the only recent, binding precedent on a particular point of law within the power of the Court to decide; (5) does not involve a legal issue of continuing public interest; and (6) the outcome is not reasonably debatable. *Frankel* at 25-26. In this case, the Court's decision fails *Frankel* factor 1.

The *Frankel* rule has been incorporated in this Court's Internal Operating Procedures at ¶ II, especially ¶ II(b). The IOP is not discretionary¹: A court must follow its own rules. *Ballard v. IRS*, 544 U.S. 40, 59, 125 S.Ct. 1270, 1282, 161 L.Ed.2d 227, (2005) ("The Tax Court, like all other decisionmaking tribunals, is obliged to follow its own Rules.").

The decision in this case establishes a *new rule of law*, specifically that a Board decision denying a motion for advancement on the docket is not a final adverse Board decision that granted or denied a VA benefit. Neither this Court nor the Federal Circuit has issued a precedential opinion that a Board decision denying a motion for advancement on the docket is not a final adverse Board decision that granted or denied a VA benefit. Therefore, the question of whether a Board decision denying a motion for advancement on the docket is not a final adverse Board decision that granted or denied

¹ If this Court were to conclude that IOP ¶ II and *Frankel* are discretionary, that, in itself, would be a new principle requiring a panel decision.

a VA benefit must be referred to a panel pursuant to *Frankel, supra*.

CONCLUSION

Wherefore, the appellant respectfully requests that this Court reconsider its decision of July 29, 2022 to dismiss Mr. Hailey's appeal.

In the alternative, this matter should be referred to a panel for a precedential decision regarding whether a Board decision denying a motion for advancement on the docket is a final adverse Board decision because it denied Mr. Hailey the statutory benefit of advancement on the docket without the right to judicial review of this final Board decision.

Respectfully Submitted,

/s/ Kenneth M. Carpenter
Counsel for Appellant
Douglas L. Hailey
Electronically filed on
August 16, 2022