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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 and FALVEY, *Judges*.

O R D E R

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

On February 28, 2022, the Court issued a split panel decision in the above-captioned appeal, setting aside 38 C.F.R. § 38.631(c) (2021) and vacating and remanding a July 1, 2019, Board of Veterans' Appeals decision finding that Mr. Bareford was not eligible to apply for a memorial marker for deceased veteran Roy H. Anderson. *Bareford v. McDonough*, 35 Vet.App. 171 (2022).

On March 18, 2022, the Secretary filed (1) a motion for panel reconsideration or, in the alternative, en banc review; and (2) an opposed motion to stay the precedential effect of the decision pending the Court's reconsideration or en banc review and, if applicable, an appeal to and decision by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). Mr. Bareford filed his opposition to the latter motion on April 1, 2022. On April 26, 2022, the panel denied reconsideration, and, on August 11, 2022, the Court denied en banc review. Having resolved those matters, we now turn to the motion to stay the precedential effect of the panel decision.

Rule 8 of the Court's Rules of Practice and Procedure (Rules) permits a party adversely affected by a Court decision to file a motion to stay the precedential effect of that decision pending an appeal. U.S. VET. APP. R. 8. The Court considers four factors when deciding whether to exercise its discretion to stay the precedential effect of a decision pending appeal: (1) The movant's likelihood of success on the merits of the appeal; (2) whether the movant will suffer irreparable harm in the absence of a stay; (3) the impact of a stay on the non-moving party; and (4) the public interest. *Ribaudo v. Nicholson*, 21 Vet.App. 137, 140 (2007); *see Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Standard Havens Prod., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 512 (Fed. Cir. 1990). "[W]hether a stay is appropriate depends on the totality of the circumstances," and the movant bears the burden of demonstrating that such a stay is warranted. *Ribaudo*, 21 Vet.App. at 140.

The Secretary argues that a stay of the precedential effect of the panel decision in this case is warranted based on the first, second, and fourth *Ribaudo* factors. *See* Secretary's Motion (Mot.) at 2-5.[1] As to the first factor, the Secretary asserts that he has a strong likelihood of success on the merits because the case involves a novel and substantial issue of law and the panel decision was not unanimous. *Id*. at 2-3. With respect to the second factor, the Secretary contends that he will suffer irreparable harm without a stay because he will have to potentially "deal with the consequences of improperly placed memorial markers." *Id*. at 4. He argues that the fourth factor—the public interest—also weighs in his favor because if the *Bareford* decision is overturned, VA will have to expend its limited resources readjudicating memorial marker applications. *Id*. at 4-5. Mr. Bareford disputes each of these contentions and urges the Court to deny the Secretary's motion. Opposition to Mot. at 1-10.[2]

The Court concludes that the Secretary has not carried his burden of demonstrating that, based on the totality of the circumstances, a stay of the precedential effect of our decision is warranted.

Turning first to the fourth factor, in this Court's *Ribaudo* order concerning the standard for a stay of precedential effect it was uncontested, based on Secretarial information, that the ruling the Secretary sought to stay could affect up to 832,000 veterans. 21 Vet.App. at 144. Given that potentiality, the Court concluded that modification or reversal of that ruling by the Federal Circuit "could result in a substantial burden on the system, in terms of development, adjudication, and readjudication if such claims had to be readjudicated some months or years in the future." *Id.* Therefore the *Ribaudo* Court concluded that the fourth factor weighed in favor of a stay. But here, the Secretary has provided no evidence throughout these proceedings as to the potential number of claims that may later have to be readjudicated after a judicial decision.[3] Consequently, there is no basis, other than the Secretary's bare assertion that it will be so, on which the Court can evaluate the extent to which any potential readjudications would burden the VA system. *See Vazquez-Flores v. Peake*, 22 Vet.App. 91, 94-95, 97 (2008) (rejecting the Secretary's speculative, unsupported allegations as inadequate to meet his burden under *Ribaudo*). Accordingly, the Secretary has not met his burden to demonstrate that the fourth *Ribaudo* factor weighs in his favor. *See Ribaudo*, 21 Vet.App. at 140.

Similarly, as regards the second factor, the Secretary asserts that "deal[ing] with the consequences of improperly placed memorial markers" will cause irreparable harm but provides no explanation as to what those consequences might be, no estimate as to the number of markers that might hypothetically be involved, and no justification for his bare assertion that any potential harm will be "irreparable." Secretary's Mot. at 4. Consequently, there is no basis for the Court to

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[1] The Secretary acknowledges that there is a potential impact on the non-moving party—the third *Ribaudo* factor—because non-relatives, such as Mr. Bareford, would not be able to request memorial markers.

[2] Mr. Bareford also asserted that the motion was premature because the Court had not yet ruled on the then-pending motion for reconsideration. *Id*. at 1-2. Because the Court has since denied the motion for reconsideration, this assertion is moot; the Court will not address it further.

[3] As the Court noted in *Bareford*, the version of the regulation in effect through May 31, 2009, placed no restriction on the eligibility of applicants for memorial markers. 35 Vet.App. at 184-185. The Court presumes that if data concerning the number of memorial marker applications from non-relatives before May 31, 2009, supported the Secretary's argument (that readjudication would over-burden the VA system), such data would have been provided.

evaluate the extent to which allowing the decision to stand will cause irreparable harm to the Secretary; accordingly, the Secretary has not met his burden to demonstrate that the second *Ribaudo* factor weighs in his favor. *See Vazquez-Flores*, 22 Vet.App. at 94-95*; Ribaudo*, 21 Vet.App. at 140.

As for the first *Ribaudo* factor, even assuming for the sake of argument that the Secretary has carried his burden with respect to the likelihood that he will succeed on the merits on appeal, the Court has already concluded that he has failed to meet his burden with respect to the second and fourth factors, and he does not argue that the third factor weighs in his favor. Therefore, he has not met his burden to demonstrate that deleterious effects would result from modification or reversal of the Court's decision such that a stay is warranted. *Ribaudo*, 21 Vet.App. at 140. In other words, his failure to submit any evidence supporting his allegations of irreparable harm or detriment to the public interest is fatal to his request for a stay. *See Vazquez-Flores*, 22 Vet.App. at 95. Accordingly, the Court concludes that the totality of the evidence is against staying the precedential effect of our decision in *Bareford*.

Upon consideration of the foregoing, it is

ORDERED that the Secretary's March 18, 2022, opposed motion to stay the precedential effect of *Bareford v. McDonough*, 35 Vet.App. 171 (2022), is denied. It is further

ORDERED that, in accordance with Rule 36 of the Court's Rules, judgment is entered and effective the date of this order.

DATED: September 16, 2022 PER CURIAM.

Copies to:

Stephen B. Kinnaird, Esq.

VA General Counsel (027)