

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

ROBERT B. GOSS,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 21-0442
)	
DENIS MCDONOUGH)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

**APPELLEE’S RESPONSE IN OPPOSITION TO APPELLANT’S
SEPTEMBER 30, 2022, MOTION TO SUSPEND THIS COURT’S RULE
ON MOTIONS FOR RECONSIDERATION**

Pursuant to U.S. Vet. App. Rule 27(b), Appellee, Denis McDonough, Secretary of Veterans Affairs, submits this response in opposition to Appellant’s September 30, 2022, Motion to Suspend this Court’s Rule on Motions for Reconsideration (App. Mot.). For the following reasons, this Court should deny Appellant’s motion because 1) the Court’s rule does not contemplate reconsideration of non-dispositive orders, 2) absent a case decided by the Court, there are no overlooked or misunderstood points of law or fact requiring reconsideration, and 3) any additional issues not briefed are unnecessary to a decision on the matter on appeal.

Procedural Background

Following the parties’ briefings, on May 11, 2022, the case was submitted to a panel of judges for decision. See Order, *Goss v. McDonough*, Vet. App. No. 20-0442 (May 11, 2022). Oral argument was

scheduled for September 7, 2022. See Order, *Goss v. McDonough*, Vet. App. No. 20-0442 (June 21, 2022). On August 23, 2022, Appellee notified the Court of a change of position, agreeing with Appellant's argument that the Board did not have jurisdiction to determine the reasonableness of attorney fees under 38 U.S.C. § 5409 and 38 C.F.R. § 14.636(i), and recommended dismissal of the appeal. Appellee's Notice to the Court, *Goss v. McDonough*, Vet. App. No. 20-0442 (August 23, 2022). On September 19, 2022, the Court ordered the panel dissolved, and the matter proceed before a single judge. Order, *Goss v. McDonough*, Vet. App. No. 20-0442 (September 19, 2022). Appellant then filed the motion to suspend the rule for reconsideration under U.S. Vet. App. Rule 2.

Bases for Opposition to Appellee's Motion

First, a party may move for reconsideration of "a case decided by" a single judge, a panel, or the full Court. U.S. Vet. App. Rule 35(a)(1). The rule contemplates that the merits of the underlying appeal, i.e., the "case," be decided. *Id.* Here, the Court's September 19, 2022, Order dissolving the panel did not decide the case as contemplated by Rule 35. *Bair v. Brown*, 6 Vet. App. 68, 69 (1993) (noting "there is a distinction between the final case decision and the determination of a procedural motion during the pendency of a case"). Rather, the September 19, 2022, Order was a resolution of a procedural matter. *Hayes v. Derwinski*, 1 Vet. App. 482,

483 (1991) (single-judge order). Rule 35, and this Court's precedent, does not contemplate motions for reconsideration on procedural matters.

The Secretary notes that Rule 35 contains express prohibitions on the filing of motions for reconsideration. U.S. Vet. App. R. 35(a)(2). However, these express prohibitions on motions for reconsideration also presume that a case has been decided by the Court as a predicate for reconsideration. See *id.* Rule 35 clearly only contemplates reconsideration of cases decided by the Court, and thus application of Rule 2 should be limited to suspension of the express prohibitions against motions for reconsideration of such cases. For example, Rule 2 can be used to overcome the express prohibitions of Rule 35(a)(2), but not for the threshold requirement contained in the Rule that a case be decided. Thus, suspension of the rule to afford Appellant the opportunity to seek reconsideration of the order dissolving the panel, a procedural matter, would not be appropriate.

Second, a motion for reconsideration "shall state the points of law or fact that the party believes the Court has overlooked or misunderstood." U.S. Vet. App. Rule 35(e)(1). Absent a case decided by a single judge, panel, or the full Court, it is unclear how the Court has overlooked or misunderstood any points of law or fact, such that reconsideration would be required. Indeed, in its September 19, 2022, Order, the Court made no determinations of law or fact as they relate to the merits of the case being

decided on appeal. See September 19, 2022, Order at 1. Thus, Appellant's motion for suspension of Rule 35 is misplaced, and his intention to seek reconsideration is premature. Upon a decision of the case by a judge of the Court, Appellant may seek reconsideration pursuant to Rule 35, if he elects.

Last, while both Appellant and the dissent in the September 19, 2022, Order raise additional and unresolved issues, both also acknowledge that the parties have cited no cases and presented no arguments related to those issues. See App. Mot. at 3, 4; September 19, 2022, Order at 3 (Jaquith, J., dissenting). The Court has explained that it "will not invent an argument for a represented party who had ample opportunity and resources to make that same argument, but, for whatever reason—be it strategy, oversight, or something in between—did not do so." *Mason v. Shinseki*, 25 Vet.App. 83, 95 (2011), *aff'd*, 496 Fed. App'x 86 (Fed. Cir. 2013). Also, while the Court has the discretion to address issues not raised by the parties, the Court exercises that discretion only to resolve issues necessary to the disposition of the case. See *id.* (citing 38 U.S.C. § 7261(a) (limiting the Court's scope of review to issues "necessary to its decision and when presented")). Here, the parties agree that under 38 U.S.C. § 5409 the Board did not have the authority to consider the reasonableness of attorney fees in the first instance. See App. Mot. at 2. Thus, it is unclear how resolution of any additional issues not presented

would be necessary to decide the matter on appeal, such that reconsideration of the dissolution of the panel would be warranted.

For the foregoing reasons, it would be inappropriate, premature, and unwarranted to suspend the rule allowing for reconsideration and thus permit Appellant to move for reconsideration of the Court's September 19, 2022, Order dissolving the panel in this case. Overall, Appellant has not demonstrated why granting his motion would be in the interest of judicial economy and efficiency, and the Court should deny the motion.

WHEREFORE, Appellee, the Secretary of Veterans Affairs, respectfully requests that the Court deny Appellant's Motion to Suspend this Court's Rule on Motions for Reconsideration.

Respectfully submitted,

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