

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-6091

AMANDA JANE WOLFE, ET AL,

PETITIONER,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

RESPONDENT.

Before GREENBERG, ALLEN, and FALVEY, *Judges*.

ORDER

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

In September 2019, acting under the All Writs Act, we granted a writ of mandamus and held "that 38 C.F.R. § 17.1005(a)(5) is invalid because it is contrary to 38 U.S.C. § 1725." *Wolfe v. Wilkie*, 32 Vet. App. 1, 41 (2019). We also certified a class of VA claimants made up of those whose claims were denied or would be denied under the invalidated regulation. *Id.* On appeal, the Federal Circuit held that "[m]andamus was not available in this case because the petitioner did not have a clear and indisputable right with respect to deductibles and had other adequate legal remedies by appeal." *Wolfe v. McDonough*, 28 F.4th 1348, 1360 (Fed. Cir. 2022). And so, the Federal Circuit "reverse[d] . . . [this] Court's grant of the petition for a writ of mandamus." *Id.* Following its decision, the Federal Circuit issued mandate on May 9, 2022, and we thought the matter resolved.

Despite this, more than a year later, we received a motion filed by class counsel seeking to substitute Douglas Redwood, Terrance Fowler, James LePant, John Jelen, Kenneth, Schmidt, and Steven Butler, as petitioners in this matter. These potential petitioners would like to step in as class representatives and ask leave to file an amended petition along with leave to have that petition exceed the Court's typical page limitations. The Secretary informs us that he is opposed to all three motions as he believes this litigation has been resolved by the Federal Circuit. We agree with the Secretary.

Nothing in the Federal Circuit's decision suggests that the higher court left anything for us to do. Our decision was premised on a writ and the Federal Circuit "reverse[d] . . . [that] grant of the petition for a writ of mandamus." *Id.* Even if we had our doubts, they would be resolved by the Federal Circuit's own Internal Operating Procedures (IOP) which explain that "[t]he court will VACATE all or part of a judgment, order, or agency decision when it is being eliminated but not replaced with a contrary judgment or order of this court." Fed. Cir. IOP # 2(9). It "will REVERSE all or part of a judgment, order, or agency decision when it is being replaced with a contrary judgment or order of this court." *Id.* And it "will REMAND only when there is something more

for the trial court or agency to do, and will supply such guidance as the case may warrant." *Id.* The Federal Circuit did not remand anything. It simply reversed our decision. Thus, we agree with the Secretary that this matter is done and will deny all three motions. Because the lack of an order appears to have created uncertainty in this case, we will also order the clerk to close the docket in this case so that the Federal Circuit's mandate is fully implemented.

At the same time, we wish to be clear that we are not deciding the merits of the proposed Second Amended Petition. The potential petitioners are free to file that petition with this Court. If they chose to do so, it will have to originate as a new case. If their concern is about the panel's familiarity with this matter, we note that our own IOP provides in section I(a)(1)(C) that "[a]ny petition related to a case already acted upon by a Judge generally is assigned to that Judge." And the proposed petitioners are free to flag that as a consideration for the Court in their filings if they believe their case is related to this one.

Upon consideration of the above, it is

ORDERED that the motion to substitute party is DENIED. It is also

ORDERED that the motion for leave to file a second amended petition is DENIED. It is also

ORDERED that the motion for leave to exceed the page limit for the second amended petition is DENIED. It is also

ORDERED that the Clerk of the Court mark this matter as closed on the Court's docket.

DATED: May 26, 2023

PER CURIAM.

Copies to:

Mark B. Blocker, Esq.

VA General Counsel (027)