No._____

IN THE

SUPREME COURT OF THE UNITED STATES

ALDON SMITH,

Petitioner,

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari
To the United States Court of Appeals
For the Federal Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AND FOR LEAVE FOR PROCEED AS A VETERAN

Petitioner, Aldon Smith, pursuant to SUP CT. R. 39.1, respectfully moves for leave to file the accompanying petition for writ of certiorari in the Supreme Court of the United States without payment of costs and to proceed *in forma pauperis*.

Petitioner was previously found financially unable to pay costs by the U.S. Court of Appeals for the Federal Circuit and U.S. Court of Appeals for Veterans Claims. In reliance upon lower court's previous determinations and Rule 39.1, Petitioner has not attached an affidavit which would otherwise be required by 28 U.S.C. § 1746.

Petitioner, pursuant to SUP CT. R. 40, additionally moves for leave to file for proceed as a veteran. Petitioner's veteran status is self certifying as he appeals from matters in front of the U.S. Court of Appeals for Veterans Claims.

Respectfully submitted,

/s/Michael Stanski
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Counsel for Petitioner

Appendix A

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

ALDON SMITH,
Claimant-Appellant

v.

ROBERT WILKIE, Secretary of Veterans Affairs,
Respondent-Appellee

2018-1483

Appeal from the United States Court of Appeals for Veterans Claims in No. 17-2787, Judge Joseph L. Toth.

ON APPLICTION

Before DYK, REYNA and TARANTO, *Circuit Judges*.

PER CURIAM.

O R D E R

Aldon Smith filed the underlying petition for a writ of mandamus at the United States Court of Appeals for Veterans Claims seeking to compel the Secretary of Veterans Affairs to reinstate his benefits and provide a predetermination hearing before any benefit reduction. The Veterans Court denied his petition. After Mr. Smith

filed his opening brief before this court, the Secretary determined that the initial notice of proposed benefits reduction may have gone to an address for Mr. Smith that was not current when the notice was sent, though Mr. Smith had not so alleged in his appeal. Based on that determination, the Secretary voluntarily reinstated Mr. Smith's benefits and provided Mr. Smith with notice that he could have a predetermination hearing before any future action to reduce his benefits was taken. Having been provided all the relief he sought on appeal, this court, over Mr. Smith's objections, granted the Secretary's motion to dismiss his appeal on mootness grounds. Mr. Smith now asks for $11,385 in attorney fees under the Equal Access to Justice Act, ("EAJA"), largely for the work done in preparing his opening brief.

We deny that request. Under the EAJA, a party may not be awarded fees unless it is the "prevailing party." 28 U.S.C. § 2412(d)(1)(A). In *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 601–02 (2001), the Court rejected the "catalyst theory" for awarding fees, under which a plaintiff "prevailed" if he achieved "the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." A defendant's voluntary change, even one precipitated by litigation, the Court explained, does not amount to "a court-ordered change in the legal relationship" between the plaintiff and defendant, as required to establish prevailing party status. *Id.* at 604. This court has recognized that *Buckhannon*'s analysis applies in the EAJA setting. *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371, 1383 (Fed. Cir. 2002).

This court's dismissal order in the present case—the only order issued by this court aside from two prior orders granting each party an extension of time to file their merits briefs—was nothing like an "enforceable judgment[] on the merits" or "court-ordered consent decree," that could establish prevailing party status. *Rice Servs.*,

Ltd. v. United States, 405 F.3d 1017, 1026 (Fed. Cir. 2005) (citing *Buckhannon*, 532 U.S. at 604). Far from materially altering the legal relationship between the parties, the dismissal order left undisturbed the Veterans Court's denial of relief to Mr. Smith. This court's order merely recognized that Mr. Smith's appeal could no longer continue after the Secretary voluntarily restored Mr. Smith's benefits and promised a predetermination hearing. In these circumstances, we conclude that Mr. Smith was not a prevailing party and therefore may not receive fees under EAJA.

Accordingly,

IT IS ORDERED THAT:

The application is denied.

FOR THE COURT

Mar. 12, 2019
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

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Appendix B

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

ALDON SMITH,
Claimant-Appellant

v.

ROBERT WILKIE, Secretary of Veterans Affairs,
Respondent-Appellee

2018-1483

Appeal from the United States Court of Appeals for Veterans Claims in No. 17-2787, Judge Joseph L. Toth.

ON MOTION

Before DYK, REYNA, and TARANTO, *Circuit Judges.*

TARANTO, *Circuit Judge.*

O R D E R

The Secretary of Veterans Affairs moves to waive Federal Circuit Rule 27(f) and to dismiss this appeal for lack of jurisdiction. Aldon Smith opposes the motion.

I

In 2013, Mr. Smith was granted entitlement to service-connection benefits for laryngeal cancer, at a 100% scheduler rating. In December 2015, the Department of Veterans Affairs issued a rating decision proposing to reduce certain of Mr. Smith's benefits, but sent notice of that proposed reduction to an address that the Secretary now says may not have been accurate.

After the Department took its proposed reduction action in March 2017, Mr. Smith petitioned for a writ of mandamus with the United States Court of Appeals for Veterans Claims, asking that court to compel the Secretary to reinstate his benefits and provide a predetermination hearing. The Veterans Court denied the petition. Mr. Smith appealed to this court and filed an opening brief in which he states in his relief sought section he "wants to return to his benefit award prior to the reduction of benefits in March 2017 and wants [the] opportunity to participate in a pre-determination hearing before any benefits are reduced." Appellant's Br. at 24.

After the opening brief was filed, the Secretary acted to reinstate Mr. Smith's benefits, applied a cost of living adjustment to those benefits, and, on August 29, 2018, provided Mr. Smith with a new decision proposing to reduce his benefits and notification that Mr. Smith may seek a predetermination hearing within 30 days. In light of those actions, the Secretary now moves to dismiss this appeal as moot. Mr. Smith opposes the motion.

II

If events occur during a case, including during the course of an appeal, that make it "impossible for the court to grant any effectual relief whatever to a prevailing party," the appeal must be dismissed as moot. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (internal quotation marks and citation omitted). We

agree with the Secretary that Mr. Smith's receipt of all the relief that he sought in his opening brief was such an event.

The only conduct challenged in this appeal was whether the Secretary could reduce Mr. Smith's benefits without a predetermination hearing. Once the Secretary restored the benefits and notified Mr. Smith that he may seek a predetermination hearing before any reduction of his benefits, any decision from this court on appeal as to whether the Veterans Court erred would provide Mr. Smith no meaningful relief in this case.

Mr. Smith invokes the voluntary cessation doctrine, which places the burden on the defendant claiming that its voluntary compliance with the law moots a case to show that it is absolutely clear the allegedly wrongful behavior "cannot reasonably be expected to start up again." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citation omitted). But there is no plausible argument that the Secretary will revert back to the old notice and prior failure to offer a predetermination hearing.

Mr. Smith points out that Secretary is still seeking to reduce his benefits and "may still ignore fundamental due process," "may still delay," and "may still ignore his own regulations." But the possibility of misconduct that may arise in a future adjudication of Mr. Smith's benefits does not suffice to create the sort of live injury needed to establish a continuing case or controversy. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 96 (2013) ("Although the voluntary cessation standard requires the defendant to show that the challenged behavior cannot reasonably be expected to recur, we have never held that the doctrine—by imposing this burden on the defendant—allows the plaintiff to rely on theories of Article III injury that would fail to establish standing in the first place.").

Accordingly,

IT IS ORDERED THAT:

(1) The motion is granted. This appeal is dismissed.

(2) Each side shall bear its own costs.

FOR THE COURT

Nov. 5, 2018
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

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ISSUED AS A MANDATE: November 5, 2018

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-2787

ALDON SMITH, PETITIONER,

V.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before TOTH, *Judge*.

ORDER

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

Veteran Aldon Smith filed through counsel a petition for extraordinary relief in the nature of a writ of mandamus, asking the Court to order the Secretary to reinstate his disability benefits until a predetermination hearing has been held under 38 C.F.R. § 3.105(i). He asserts that after receiving notice in March 2017 of VA's decision to reduce his benefits, he filed a timely request for a predetermination hearing and an appeal to the Board. His request was not acknowledged, and his benefits were subsequently reduced in July. Smith immediately demanded reinstatement of his benefits until a predetermination hearing could be held, but no response was received.

Acting on this Court's September 22, 2017 order, VA submitted a response to the petition. Upon review, the Court concludes that the appropriate notice concerning the proposed reduction was delivered to Mr. Smith in December 2015. The March 2017 letter to which Mr. Smith responded within 30 days was the implementation of the 2015 proposal; it was not the "advance written notice" described in 38 C.F.R. § 3.105(i) which triggers the 30-day clock. Because Mr. Smith did not respond within 30 days of the December 2015 notice, he fails to demonstrate a clear and indisputable right to the writ. *See Erspamer v. Derwinski*, 1 Vet.App. 3, 9 (1990).

Upon consideration of the foregoing, it is

ORDERED that the petition is DENIED.

DATED: November 29, 2017

BY THE COURT:

JOSEPH L. TOTH
Judge

Copies to:

Michael Stanski, Esq.

VA General Counsel (027)

Additional material from this filing is available in the Clerk's Office.