NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

STEVEN L. LONDON,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2022-1503

Appeal from the United States Court of Appeals for Veterans Claims in No. 19-5784, Judge Michael P. Allen.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.

PER CURIAM.

ORDER

Steven L. London filed a combined petition for panel rehearing and rehearing en banc. The petition was referred

to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue August 31, 2022.

FOR THE COURT

August 24, 2022
Date

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

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

STEVEN L. LONDON,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2022-1503

Appeal from the United States Court of Appeals for Veterans Claims in No. 19-5784, Judge Michael P. Allen.

Decided: June 9, 2022

STEVEN LONDON, Blagoevgrad, Bulgaria, pro se.

AUGUSTUS JEFFREY GOLDEN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent-appellee. Also represented by BRIAN M. BOYNTON, PATRICIA M. MCCARTHY, LOREN MISHA PREHEIM.

Before MOORE, *Chief Judge*, DYK and CHEN, *Circuit Judges*.

PER CURIAM.

Steven L. London appeals a decision of the United States Court of Appeals for Veterans Claims denying his petition for a writ of mandamus. Because Mr. London obtained the relief sought in his mandamus petition, we *dismiss*.

BACKGROUND

On July 12, 2013, Mr. London filed multiple disability claims with the Department of Veterans Affairs (VA). J.A. 47. The VA granted some of his claims and denied the rest. *Id.*

On March 23, 2017, Mr. London began the appeal process by submitting a notice of disagreement. J.A. 229. Almost a year later, the VA certified Mr. London's appeal to the Board of Veterans' Appeals. J.A. 189. More than a year after that, the Board had not held a hearing in Mr. London's case. J.A. 274 ¶ 3.

Alleging unreasonable delay, Mr. London petitioned the Veterans Court for a writ of mandamus compelling the Board to "render full adjudication." J.A. 278. Based on the Secretary's representation that the VA was "in the process of providing that relief," the Veterans Court denied the petition. J.A. 17–18. Mr. London appealed.

We vacated and remanded with instructions for the Veterans Court to apply the correct legal standard in deciding whether to grant Mr. London's mandamus petition. *London v. McDonough*, 840 F. App'x 596, 597 (Fed. Cir. 2021) (non-precedential). On remand, the Veterans Court again denied the petition. *London v. McDonough*, No. 19-5784, 2021 WL 4227879, at *1 (Vet. App. Sept. 17, 2021). Again, Mr. London appealed.

On October 18, 2021, the Board provided the relief that Mr. London sought in his mandamus petition. That is, it "made a decision on [his] appeal." J.A. 64. The Board affirmed the VA's denial of Mr. London's claims. J.A. 66–67.

DISCUSSION

"A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III [of the Constitution]—when the issues presented are no longer live." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (cleaned up). If no court is capable of granting the relief a petitioner seeks, no live controversy remains. *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 169 (2016).

Here, there is no live controversy because the Veterans Court cannot order the Board to do what it has already done: adjudicate Mr. London's appeal. Mr. London does not dispute that the Board fully resolved his appeal in its October 18, 2021 decision. He instead argues only that the Board's decision "relied upon erroneous evidence." Appellant's Reply Br. 3. This argument is beyond the scope of Mr. London's mandamus petition, as it challenges the merits of the Board's decision. The appropriate avenue for Mr. London's merits-based argument is direct appeal. Because the Board provided the relief sought and no live controversy remains, we dismiss Mr. London's appeal as moot.

DISMISSED

COSTS

No costs.

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-5784

STEVEN L. LONDON, PETITIONER,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before ALLEN, *Judge*.

ORDER

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

On August 21, 2019, self-represented petitioner Steven L. London filed a petition for extraordinary relief. Petitioner sought a writ of mandamus directing the Secretary to hold a hearing on his pending claims and to render a decision on each of petitioner's claims that were at that time before the Board of Veterans' Appeals. As we will explain, we will deny the petition.

I. PROCEDURAL BACKGROUND

This matter has a long procedural history. On October 25, 2019, the Court ordered the Secretary to respond to the petition, and the Secretary did so on December 9, 2019. The Secretary explained that although an earlier scheduled Board hearing had been canceled due to unspecified technical issues, a Board hearing was ultimately held on petitioner's claims on December 2, 2019. Following the hearing, the presiding veterans law judge requested that the hearing transcript be expedited.

On December 18, 2019, the Court dismissed petitioner's request for a writ of mandamus after considering the Secretary's response. Petitioner appealed. On March 15, 2021, the Federal Circuit vacated our decision so that we could address the portion of petitioner's petition concerning "full adjudication" of his pending claims.[1] The Court received the Federal Circuit's mandate on May 6, 2021.

[1] *London v. McDonough*, 840 F. App'x 596, 597 (Fed. Cir. 2021).

On May 13, 2021, we ordered the Secretary to file a status update concerning the claims at issue in the petition. He did so on June 10. We will not recount the Secretary's supplemental response in full here. Suffice it to say, the Secretary reported that petitioner's claims had been remanded to the Pittsburgh regional office (RO) for further development and adjudication. At that point, VA had resolved one of petitioner's claims (granting service connection for fibromyalgia) but had not resolved 13 other pending claims. It appeared those claims were awaiting development that had not been accomplished even though medical examinations/opinions had been requested through a private contractor.

In his June 10 response, the Secretary argued that we should deny the petition because VA was processing petitioner's claims. We declined to do so because the timeline for addressing petitioner's pending claims remained unclear. In a June 24, 2021, order, the Court deferred ruling on the petition and ordered the Secretary to submit periodic status reports to the Court setting forth, in detail, the steps being taken to process petitioner's claims.[2]

On July 26, 2021, the Secretary submitted his first status update. The Secretary reported that on July 14, 2021, the RO granted petitioner service connection for major depressive disorder and combined that grant with petitioner's service-connected TBI award.[3] The effect of this grant was a 70% disability rating for this condition, effective April 26, 2021.[4] In addition, this action increased petitioner's combined disability rating for all his service-connected conditions from 90% to 100%, effective April 26, 2021.[5] With this July 14 decision, the RO included a notice of appellate rights.[6]

The Secretary further reported that the RO had addressed petitioner's remaining 12 claims in a July 20, 2021, Supplemental Statement of the Case (SSOC).[7] The claims at issue in that decision are

- service connection for facial twitches;
- service connection for a disorder manifested by chronic tiredness;
- service connection for a left ankle disorder;
- service connection for floating spots in the eyes;
- service connection for a neck disorder;
- service connection for a left elbow disorder;
- service connection for a right elbow disorder;
- service connection for right knee pain and clicking;
- service connection for left knee pain and clicking;
- service connection for right knee instability;

[2] *See Mote v. Wilkie*, 976 F.3d 1337, 1344-45 (Fed. Cir. 2020).

[3] Secretary's July 26, 2021, Response (July Resp.) Attachment 1.

[4] *Id.* at 19.

[5] *Id.* at 22.

[6] *Id.* at 9-10.

[7] July Resp. Attachment 2.

- service connection for left knee instability; and
- an initial disability rating greater than 10% for service-connected TBI.[8]

The July 20, 2021, SSOC continued the denial of these claims.[9] In his July 26 update, the Secretary provided context for those denials. The issue with these claims concerned the difficulty of scheduling examinations through VA contractors for a claimant who does not live in the U.S.[10] Petitioner resided in Bulgaria, a country in which VA does not have relationships with contractors.[11] In a June 25, 2021, email, VA informed petitioner of the difficulty with the examinations and provided four options: (1) Arrange examinations through the U.S. Embassy in Bulgaria; (2) submit additional medical evidence; (3) travel to a country where VA has a relationship with a contractor supplying medical evaluations; or (4) have a private physician complete appropriate disability benefits questionnaires.[12] The Secretary asserted that petitioner did not respond within the 15 days VA provided, leading to the issuance of the July 20, 2021, SSOC.[13]

The Secretary additionally reported that petitioner had 30 days following the issuance of the SSOC to respond.[14] Assuming petitioner did not respond, the Secretary stated that the claims would then be returned to the Board for adjudication.[15]

On August 2, 2021, petitioner filed a reply to the Secretary's July 26, 2021, status update.[16] Petitioner disputed the Secretary's contention that he did not respond to the VA's June 25, 2021, email.[17] Petitioner continued to argue that the manner in which VA was adjudicating his claims violated his due process rights.[18] In addition, he provided a detailed account of the factual bases

[8] *Id.*

[9] *Id.*

[10] July Resp. Attachment 3.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Petitioner did not seek leave to file a reply. We will order that the reply, which is currently marked as "received" on the Court's docket, be filed. We have fully considered the reply in formulating this order.

[17] Petitioner's Aug. 2, 2021, Reply, at 3

[18] *Id.* at 2.

and procedural history for the various claims at issue.[19] He also offered to settle his claims, including purported tort claims against the Secretary, for $964,894.93.[20]

On August 25, 2021, the Secretary filed his second status update pursuant to our June 24 order. He reported that on August 23, 2021, VA sent petitioner a letter notifying him that his appeal concerning the 12 claims listed above was being returned to the Board.[21] On August 25, 2021, the Board informed petitioner that his appeal had been docketed and that he had 90 days, or until the Board issued a decision, to submit additional evidence or argument (or change representation).[22] Thereafter, we directed petitioner to file a reply addressing why we should not deny the petition.

Petitioner filed his reply on September 7, 2021. He contested certain statements the Secretary had made about whether he responded to the RO's SSOC.[23] He continued to argue that the Secretary was violating his due process rights.[24] In addition, he once again argued that he was entitled to compensatory damages.[25] He also claimed:

> By denying the 12 issues in the SSOC and returning Mr. London's appeal to the Board without the required medical examinations, the Secretary and RO bypass and neglect the Board's instructions. The Secretary's subversion of the Board's instructions will likely cause further unreasonable delays in Mr. London's appeal.[26]

II. ANALYSIS

Pursuant to the All Writs Act, this Court has authority to issue extraordinary writs in aid of its jurisdiction.[27] However, "the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations."[28] Three conditions must be met before this Court may issue a writ: (1) Petitioner must demonstrate that he lacks adequate alternative means to obtain the desired

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[19] *Id.* at 5-12. Petitioner also referred to four claims he maintained the Secretary had not addressed in his response: Fibromyalgia, lumbosacral strain, and left and right wrist pain. *Id.* at 3-4. The Board granted service connection for fibromyalgia, so we are somewhat confused by that reference. In any event, the document to which petitioner cites when he discusses these disabilities is dated February 2, 2020, and entitled "Notice of Official Amend Request Based on Clear and Unmistakable Error." *Id.* Attachment 2. This document could not have been the basis for the petition, which was filed in August 2019. If petitioner believes he is entitled to extraordinary relief concerning these claims, he is free to file a separate action.

[20] *Id.* at 13.

[21] Secretary's Aug. 25, 2021, Response Attachment 1.

[22] *Id.* Attachment 2.

[23] Petitioner's Sept. 7, 2021, Reply at 1-2.

[24] *Id.* at 1, 4.

[25] *Id.* at 4.

[26] *Id.* at 2-3.

[27] 28 U.S.C. § 1651(a); *see Cox v. West,* 149 F.3d 1360, 1363-64 (Fed. Cir. 1998).

[28] *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976); *Gardner-Dickson v. Wilkie*, 33 Vet.App. 50, 54-55 (2020); *Monk v. Wilkie*, 32 Vet.App. 87, 101 (2019) (en banc).

relief, thus ensuring that the writ is not used as a substitute for the appeals process; (2) petitioner must demonstrate a clear and indisputable right to the writ; and (3) the Court must be convinced, given the circumstances, that the issuance of the writ is warranted.[29]

In addition, when delay is the basis for a petition, "[t]he overarching inquiry . . . is 'whether the agency's delay is so egregious as to warrant mandamus.'"[30] In *TRAC*, the U.S. Court of Appeals for the D.C. Circuit identified six factors relevant to that inquiry: (1) The time agencies take to make a decision must be governed by a "rule of reason"; (2) where, in the enabling statute, Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed, that statutory scheme may supply content for this rule of reason; (3) delay that might be reasonable in the sphere of economic regulation is less tolerable when human health and welfare are at stake; (4) the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the nature and extent of the interests prejudiced by delay; and (6) there need not be "any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."[31]

Petitioner is not entitled to a writ of mandamus. We will begin with the portion of the analysis concerning delay by applying the established *TRAC* factors to the facts. As to the first factor, applying a "rule of reason" to the actions at issue, we conclude that VA has not acted unreasonably in adjudicating petitioner's claims. To be sure, there has been delay in processing the claims, some of which is due to administrative errors. But the complexity of petitioner's claims, his location in a foreign country, and the global public health crisis have all played important roles as well.

We note that one difficulty in assessing whether delay is unreasonable is defining the material timeframe. Here, we think it most relevant to consider the course of proceedings beginning with the filing of the petition. We do so because to the extent there was "unreasonable delay" before that point in time, if there is no longer delay, then the filing of the petition has, in some sense, served the purpose of remedying the problem.

Petitioner filed his petition in August 2019, asking for a Board hearing and the prompt adjudication of his claims.[32] After the Court's intervention, VA scheduled the requested hearing, which was eventually held on December 2, 2019. The Board then issued two decisions in January 2020 addressing petitioner's claims in which it granted service connection for fibromyalgia and remanded 13 other claims for further adjudication.

On remand, the RO implemented the grant of service connection for fibromyalgia in late January 2020. The RO then developed the 13 matters on remand from the Board. This led to a July 14, 2021, rating decision in which the RO granted petitioner service connection for major

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[29] *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004); *Gardner-Dickson*, 33 Vet.App. at 54-55.

[30] *Martin*, 891 F.3d at 1344-45 (quoting *Telecomms. Rsch. Action Ctr. v. FCC* (*TRAC*), 750 F.2d 70, 79 (D.C. Cir. 1984)).

[31] *TRAC*, 750 F.2d at 80.

[32] We provided a detailed history of procedural aspects of this matter above. For brevity's sake, we will not repeat citations to developments we have previously discussed.

depressive disorder and combined that grant with petitioner's service-connected TBI award. As a result, petitioner has a 70% rating for this condition, effective April 26, 2021. In addition, the RO's action increased petitioner's combined disability rating for all his service-connected conditions from 90% to 100%, effective April 26, 2021.

This left 12 claims in development. The RO continued to deny those claims in a July 2021 SSOC. Then, after affording petitioner 30 days to respond, the RO returned those claims to the Board on August 23, 2021. The Board docketed the appeal on August 25, 2021, and provided petitioner 90 days (or until the Board issued a decision) to submit additional evidence or argument. That submission period remains open.

At least since petitioner sought the Court's intervention, VA has been actively processing petitioner's claims. Several have been granted, resulting in a combined 100% disability rating. And while others have been denied, a denial is not delay. So, we conclude that the first *TRAC* factor cuts against granting the petition.

The Federal Circuit has recognized that the second factor often relates to the first because a congressional "'timetable or other indication of the speed with which [Congress] expects the agency to proceed' may 'supply content' for the rule of reason."[33] Congress no doubt expects prompt adjudication of appeals for VA benefits. Yet, despite this concern, Congress chose to create a system with multiple steps for adjudication without providing deadlines for VA determinations. Here, the Board has been complying with its legal obligations to afford appellants with certain rights on remand from this Court.[34] Thus, applying the law to the facts, we conclude that the second *TRAC* factor also supports the Secretary and VA's actions here.[35]

The third and fourth *TRAC* factors focus on the veteran's interests. The petition here deals with petitioner's health and welfare. These are significant considerations that weigh strongly in petitioner's favor.

The fifth factor concerns the effect of granting a writ on other Agency actions. This factor weighs against petitioner. If the Court were to grant the writ, petitioner would essentially jump to the head of the line of those with expedited claims. Such "line-jumping" is a problem the Federal Circuit has warned against.[36] This is not to say that such an effect would always serve to prevent the issuance of a writ. For example, it may be that repeated and obvious adjudicative errors could overcome this hurdle. But in the context of this matter in which the "rule of reason" is satisfied, this factor cuts against petitioner.

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[33] *Martin*, 891 F.3d at 1345 (quoting *TRAC*, 750 F.2d at 80).

[34] *See, e.g.*, *Clark v. O'Rourke*, 30 Vet.App. 92, 96-98 (2018); *Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order).

[35] *See Martin*, 891 F.3d at 1346.

[36] *See Ebanks v. Shulkin*, 877 F.3d 1037, 1040 (Fed. Cir. 2017).

The sixth factor "is merely a caution that impropriety need not be present to find that delay was unreasonable."[37] Under the sixth factor, this Court "need not find 'any impropriety lurking behind agency lassitude' to hold that agency action is unreasonably delayed."[38] In any event, we find no evidence of impropriety on the part of the Secretary here.

In sum, we have carefully balanced the *TRAC* factors and conclude that they do not weigh in petitioner's favor in terms of exercising the extraordinary power we possess under the All Writs Act based on allegations of unreasonable delay. To be sure, and as we acknowledge, petitioner raises arguments about why that adjudication has been flawed. Among other things, he mentions the failure to obtain required examinations and noncompliance with the Board's remand directives. And he argues that his due process rights are being violated by the manner in which VA is processing his claims. However, remedying errors of the type to which petitioner points is not the office of an extraordinary writ.[39] These errors—if errors they be—may be addressed in petitioner's pending administrative appeal.[40]

Accordingly, based on an application of the settled law to the facts of this case, and exercising our discretion in the context of the All Writs Act, it is

ORDERED that petitioner's August 2, 2021, reply to the Secretary's July 26, 2021, status update, marked as "received" on the Court's docket, is accepted for filing. And it is further

ORDERED that the petition is DENIED.

DATED: September 17, 2021

BY THE COURT:

MICHAEL P. ALLEN
Judge

Copies to:

Steven L. London

VA General Counsel (027)

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[37] *Gardner-Dickson*, 33 Vet.App. at 60.

[38] *Martin*, 891 F.3d at 1348 (quoting *TRAC*, 750 F.2d at 80).

[39] *See Cheney*, 542 U.S. at 380-81; *Gardner-Dickson*, 33 Vet.App. at 54-55.

[40] To the extent petitioner seeks the award of compensatory damages against the Secretary, we lack jurisdiction over such request. *See* 38 U.S.C. §§ 7252(a), 7261(a).

APPENDIX L

Not published
NON-PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-5784

STEVEN L. LONDON, PETITIONER,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before BARTLEY, *Chief Judge*, and ALLEN and MEREDITH, *Judges*.

ORDER

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

Following a remand decision by the U.S. Court of Appeals for the Federal Circuit, in a September 17, 2021, order, this Court denied the pro se petitioner's request for extraordinary relief. On September 27, 2021, the petitioner filed a timely motion for reconsideration or, in the alternative, panel review. The motion for a decision by a panel will be granted.

Based on review of the pleadings, it is the decision of the panel that the petitioner fails to demonstrate that 1) the single-judge order overlooked or misunderstood a fact or point of law prejudicial to the outcome of the petition, 2) there is any conflict with precedential decisions of the Court, or 3) the petition otherwise raises an issue warranting a precedential decision. U.S. VET. APP. R. 35(e); *see also Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

Absent further motion by the parties or order by the Court, judgment will enter on the underlying single-judge order in accordance with Rules 35 and 36 of the Court's Rules of Practice and Procedure.

Upon consideration of the foregoing, it is

ORDERED, by the single judge, that the motion for reconsideration is denied. It is further

ORDERED, by the panel, that the motion for panel decision is granted. It is further

ORDERED, by the panel, that the single-judge order remains the decision of the Court.

DATED: November 2, 2021 PER CURIAM.

Copies to:

Steven L. London

VA General Counsel (027)

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