

BILLY RAY KIDWELL, PETITIONER, v. ANTHONY J. PRINCIPI, SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

2002 US App Vet Claims LEXIS 3142002 U.S. App. Vet. Claims LEXIS 314

NO. 01-1766

May 1, 2002, Decided

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Before JOHN J. FARLEY, III, Judge.

Disposition                    Petitioner's motion for extraordinary relief in the nature of mandamus was DENIED.

Notice: DESIGNATED FOR ELECTRONIC PUBLICATION ONLY.

PURSUANT TO U.S. VET. APP. R. 30(a), THIS ACTION MAY NOT BE CITED AS PRECEDENT.

Opinion

Opinion by:                    JOHN J. FARLEY, III

ORDER

On October 9, 2001, the pro se petitioner filed a petition for extraordinary relief in the nature of a writ of mandamus. The Court construes his petition as raising 4 issues: (1) Entitlement to effective date earlier than October 1984 for his 100% disability rating for his service-connected post-traumatic stress disorder (PTSD) because the St. Petersburg, Florida Regional Office (RO or VARO) destroyed his claims file (Petition (Pet.) at 21, 17); (2) failure of the RO to adjudicate his claim for his dependent son's entitlement to VA Civilian Health and Medical Program (CHAMPVA) benefits (Pet. at 23-25); (3) failure of the RO to adjudicate his benefit entitlement claim for his wife (Pet. at 27); and (4) failure of the RO to adjudicate his benefit-entitlement claim for his dependent daughter. Pet. at 23-25.

On October 29, 2001, the Court ordered the Secretary to file an answer to the petition. The Secretary responded on November 28, 2001. Attached to that response are five exhibits titled A through E. Exhibit A is the affidavit of B. J. Harker (Harker Affidavit), the veterans service manager for the VARO in St. Petersburg, Florida. Exhibit B is a copy of a Veteran's Application for Compensation or Pension form (C&P Application), signed and dated, April 21, 1972, by the petitioner. Exhibit C is a copy of a rating decision dated October 10, 1994 (Rating Decision). Exhibit D is a copy of a letter, dated September 28, 2000, from B. J. Harker to the petitioner requesting documentation from the petitioner in order to process the desired benefits claim (RO Letter 1). Exhibit E is another letter from B. J. Harker to the petitioner explaining why the petitioner's claim for spousal benefits had been denied (RO Letter 2). The Secretary argued that the petition should be denied because the petitioner has failed to exhaust his administrative remedies and has not demonstrated a compelling basis for an issuance of an extraordinary writ.

This Court has authority to issue extraordinary writs in aid of its jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651 (a). See *Cox v. West*, 149 F.3d 1360 (Fed. Cir. 1998). However, "the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. United States District Court*, 426 U.S. 394, 402, 48 L. Ed. 2d 725, 96 S. Ct. 2119 (1976). Before a court may issue a writ, a petitioner must demonstrate: (1) A clear and indisputable right to the writ, and (2) a lack of adequate

alternative means to obtain the relief sought. See *Erspamer v. Derwinski*, 1 Vet. App. 3, 9 (1990). Moreover, although the Court's jurisdiction does include the power to "compel action of the Secretary unlawfully withheld," 38 U.S.C. § 7261 (a)(2), "the Court may compel action of the Secretary only if the Secretary's action is necessary to [the Court's] decision in a matter over which it has subject matter jurisdiction," *Wick v. Brown*, 40 F.3d 367, 371-72 (Fed. Cir. 1994) (internal quotations omitted). The Court "has exclusive jurisdiction to review decisions of the Board of Veteran's Appeals [BVA]." 38 U.S.C. § 7252 (a). "The All Writs Act does not augment the jurisdiction of a court." *Wick*, 40 F.3d at 373.

With respect to argument (1), the Secretary refuted the petitioner's claim that he is entitled to an effective date of October 1970 for his service-connected PTSD. The Secretary, referring to the Harker Affidavit at paragraph 3, informed the Court that there is no record of any claim filed by the petitioner before April 1972. The Secretary pointed to question 9A on the C&P Application, dated April 21, 1972, as further evidence that the petitioner never filed a prior claim. Under question 9A, "have you previously filed a claim for any benefit with the Veteran's Administration?", the "None" box is checked. C&P Application. The Secretary contended that the evidence indicated that the petitioner submitted no prior claims. There is no indication that there has been a claim filed for an earlier effective date by the petitioner. As mentioned above, the Court has jurisdiction only to review BVA decisions and cannot compel the Secretary to act if it does not have jurisdiction over the matter. The Court notes that the petitioner is free to file such a claim and avail himself of the assistance of the RO in doing so.

The Secretary also refuted the petitioner's argument that VA has failed to adjudicate his claim for entitlement to benefits for his dependent child, Raymond Kidwell. The Secretary maintained that the petitioner was compensated for his dependent son, Raymond, until Raymond's 18th birthday in October 1999. (Harker Affidavit at 11). With respect to the issue of CHAMPVA coverage for Raymond, the Secretary informed the Court that this is an issue under the jurisdiction of the VA Health Administration Center in Denver, Colorado, and that "the RO does not process CHAMPVA benefit applications." Secretary's Response (Resp.) at 4-5. On March 20, 2002, the Court ordered the Secretary, within 15 days after the date of the order, to file a supplemental response on the alleged failure to adjudicate the claim for CHAMPVA benefits for petitioner's dependent son, Raymond. On April 4, 2002, the Secretary responded that no CHAMPVA claim pertaining to the petitioner's son has been received by either the VA Health Administration Center in Denver, Colorado, or the VARO at St. Petersburg, Florida.

With respect to argument (3), the Secretary asserted that the petitioner has failed to provide VA the documentation needed for his wife, Tara Kelly, to receive benefits. See 38 C.F.R. §§ 3.205, 3.206 (2001). In RO Letter 1, the RO requested that the petitioner submit proof that his previous marriage and that of his spouse has ended. In RO Letter 2, the RO informed the petitioner that his claim had been denied because the documentation needed to add benefits for his spouse had not been submitted. The petitioner has not shown that the requested documentation has been submitted. Accordingly, he has failed to demonstrate that his administrative remedies have been exhausted.

Regarding argument (4), B. J. Harker informed the Court that on September 21, 2000, the petitioner submitted a Declaration of Status of Dependents to establish his wife, Tara Kelly, and daughter, Hannah, as dependents. Harker Affidavit at 16. The claim was

denied on January 12, 2001. As mentioned above, the claim for his wife was denied because of lack of sufficient evidence of the petitioner's marital status. The claim to establish benefits for Hannah was denied because the Secretary could not establish the child's mother as the wife of the petitioner, and because "the name of the child's father does not appear on the birth certificate of record." Harker Affidavit at 16. As with his claim for spousal benefits, here too the petitioner failed to demonstrate that he lacks alternative means to obtain the relief he seeks.

The Court notes that the petitioner did attach a birth certificate to his petition. The birth certificate, issued March 1, 2001, displays the name of the father of Hannah Kidwell as the petitioner, Billy Ray Kidwell. The birth certificate, however, was issued after the RO denied the petitioner's claim. The Court notes, without deciding, that the birth certificate may be considered new and material evidence, which, if submitted to the RO, might prompt readjudication of the petitioner's claim with respect to Hannah Kelly. See 38 U.S.C. § 5108.

Since he filed the petition for extraordinary relief in the nature of a writ of mandamus, the petitioner has submitted several documents and motions to this Court. The Court construes these documents and motions as primarily restating the arguments presented in the original petition. Thus, the Court will not further address these arguments.

Upon consideration of the foregoing, and concluding that the petitioner has failed to demonstrate a clear and indisputable right to the writ and to show a lack of adequate alternative means to obtain the relief sought, it is

ORDERED that the petitioner's motion for extraordinary relief in the nature of mandamus is DENIED.

DATED: May 1, 2002

BY THE COURT:

JOHN J. FARLEY, III

Judge