

BILLY R. KIDWELL, PETITIONER, v. R. JAMES NICHOLSON, SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

2005 US App Vet Claims LEXIS 2362005 U.S. App. Vet. Claims LEXIS 236

NO. 04-2447

April 7, 2005, Decided

Notice: DESIGNATED FOR ELECTRONIC PUBLICATION ONLY

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

Judges: Before LAWRENCE B. HAGEL, Judge.

Opinion

Opinion by: LAWRENCE B. HAGEL

ORDER

On December 16, 2004, Billy R. Kidwell, who is unrepresented, filed with the Court a petition for extraordinary relief in the nature of a writ of mandamus in which he asserts that, at some point and apparently in an attempt to obtain an earlier effective date for his service-connected post-traumatic stress disorder, he filed a claim of clear and unmistakable error with a VA regional office and that the regional office then "turned down" his claim. Petition at 16. He proceeds to raise various arguments with respect to that decision. Id. at 16-18. In addition, throughout his petition, Mr. Kidwell accuses VA of, among other things, fraud and obstruction of justice in the processing of his claims. Id. at 2-4, 9-14, 16-23. He contends that a petition is his only remedy because the regional office does not respond to his letters and because he cannot appeal the regional office decision because VA has "tainted" his records. Id. at 20. Attached as an exhibit to his petition is an application for compensation or pension that he filed with VA in April 1972; the condition for which he was claiming service connection is not listed on the attached form. In handwriting at the top of that form is the notation "Destroy This." Although there appear to be initials after the notation, its author is unknown. On December 30, 2004, Mr. Kidwell filed another pleading entitled "Notice of Obstruction of Justice by [the] Department of Veterans Affairs" in which he raises arguments similar to those raised in his petition.

On January 14, 2005, the Court ordered the Secretary to file an answer to the petition addressing (1) the status of Mr. Kidwell's alleged claims, (2) the notation at the top of the 1972 application for benefits, and (3) when the regional office denied the claim of clear and unmistakable error referred to by Mr. Kidwell in his petition. Attached to the Secretary's answer is an affidavit from Brent C. Gibbard, Service Center Manager of the VA regional office in St. Petersburg, Florida, in which Mr. Gibbard provides a history of Mr. Kidwell's claims. Mr. Gibbard informs the Court that in April 1972 Mr. Kidwell filed a claim for VA disability compensation for "nerves." With respect to that claim, Mr. Gibbard then asserts as follows: "The original document in his claims file includes the veteran's acknowledgment that he had not previously filed a claim for any benefit with the [VA]. There is no instruction to destroy or a notation to "destroy this" at the top of the original document." Attached as an exhibit to the Secretary's answer is a copy of that form, which does not bear the notation "destroy this." Answer, Exhibit 2.

Later in his affidavit, Mr. Gibbard informs the Court that after numerous claims and claims to reopen had been denied, Mr. Kidwell was eventually awarded service

connection for post-traumatic stress disorder, effective October 1, 1984, and that, in September 2003, Mr. Kidwell claimed clear and unmistakable error in the assignment of that effective date. VA denied that claim the following month. Then, in January 2004, Mr. Kidwell submitted a statement in which he argued that the effective date for that award should be October 8, 1970. In support of that claim, he argued that VA had destroyed records and obstructed justice. The regional office denied that claim in March 2004. In June 2004, VA received two statements from Mr. Kidwell, which Mr. Gibbard apprises the Court, "are being accepted as a formal Notice of Disagreement" with respect to the October 2003 and March 2004 regional office decisions. Answer, Exhibit 2. Finally, Mr. Gibbard acknowledges that Mr. Kidwell has initiated the appeals process and informs the Court that "the veteran and his representative will be advised of current procedural requirements." *Id.* Relying on the Gibbard affidavit, the Secretary argues that because the Secretary is acting on Mr. Kidwell's claims, which are now in the appeals process before VA, the Court should deny the petition. Answer at 4. On April 4, 2005, the Court received from Mr. Kidwell four separate pleadings in which he raises arguments similar to those in his petition and challenges the veracity of the Gibbard affidavit.

This Court has the 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, 1363-64 (Fed. Cir. 1998). However, "the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. United States Dist. Court for Northern Dist. of Cal.*, 426 U.S. 394, 402, 48 L. Ed. 2d 725, 96 S. Ct. 2119 (1976). Accordingly, three conditions must be met before a court may issue a writ: (1) The petitioner must lack adequate alternative means to attain the desired relief, thus ensuring that the writ is not used as a substitute for the appeals process, (2) the 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. See *Cheney v. United States Dist. Court for D.C.*, 542 U.S. , , 159 L. Ed. 2d 459, 124 S. Ct. 2576, slip op. at 10 (2004). When delay is alleged as the basis for a petition, this Court has held that a clear and indisputable right to the writ does not exist unless the petitioner demonstrates that the alleged delay is so extraordinary, given the demands on and resources of the Secretary, that it is equivalent to an arbitrary refusal by the Secretary to act. See *Costanza v. West*, 12 Vet. App. 133, 134 (1999) (per curiam order).

Here, despite Mr. Kidwell's assertion to the contrary, he does not lack adequate means to attain the relief that he desires, which, in this case, appears to be an earlier effective date for an award of service connection for post-traumatic stress disorder. In that regard, the Court notes that Mr. Kidwell is in the process of appealing to the Board regional office decisions on that very issue. In addition, although the Court acknowledges Mr. Kidwell's allegation of tainted records and his frustration with the handling of his claims, the Supreme Court has explained that "extraordinary writs cannot be used as substitutes for appeals, even though hardship may result from delay and perhaps unnecessary trial." *Lamb v. Principi*, 284 F.3d 1378, 1384 (Fed. Cir. 2002) (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383, 98 L. Ed. 106 (1953)). Finally, as for the alleged notation "Destroy This" found at the top of the copy of the April 1972 claim form submitted to the Court by Mr. Kidwell, the Court points out that (1) the form was obviously not destroyed, as the Secretary has provided the Court with a copy and (2) Mr.

Gibbard, in a sworn affidavit, has represented that the original document in the claims file bears no such notation.

On consideration of the foregoing, it is

ORDERED that the petition for extraordinary relief in the nature of a writ of mandamus is DENIED.

DATED: April 7, 2005

BY THE COURT:

LAWRENCE B. HAGEL

Judge

2005 U.S. App. Vet. Claims LEXIS 235::Kasinger v. Nicholson::April 7, 2005, Decided