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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-1450

GORDON A. GRAHAM, PETITIONER,

v.

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

Before BARTLEY, *Judge*.

ORDER

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

On May 12, 2017, self-represented veteran Gordon A. Graham filed a petition for extraordinary relief in the nature of a writ of mandamus, with an attached appendix. Therein, he asks the Court to order the Secretary to (1) construct an Americans with Disabilities Act (ADA)-compliant greenhouse as part of an individualized independent living program (IILP) and (2) grant an effective date of March 31, 1994, for the award of a 100% evaluation for porphyria cutanea tarda (PCT). Petition at 1.¹

This Court is authorized to issue writs pursuant to the All Writs Act to the extent that it is in aid of its "prospective jurisdiction." *Yi v. Principi*, 15 Vet.App. 265, 267 (2001) (per curiam order); *see Cox v. West*, 149 F.3d 1360, 1363-64 (Fed. Cir. 1998); *Kelley v. Shinseki*, 26 Vet.App. 183, 185 (2013). However, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976). Three conditions must be met before the Court can issue a writ: (1) The petitioner must demonstrate the lack of adequate alternative means to obtain 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 issuance of the writ is warranted. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004). As explained below, the Court concludes that the petition must be denied.

¹ Unless otherwise noted, "Petition" refers to the petition for extraordinary relief filed in the present case.

A. IILP Claim

The background of Mr. Graham's efforts to obtain an ADA-compliant greenhouse as part of his IILP are recounted in this Court's recent order denying another petition for extraordinary relief in the nature of a writ of mandamus. *See generally Graham v. McDonald*, No. 16-2098, 2016 U.S. App. Vet. Claims LEXIS 1298 (Aug. 25, 2016) (non-precedential order). The Court concluded that order with the expectations "that VA will address Mr. Graham's IILP disagreement in a timely manner and in accordance with 38 C.F.R. § 21.92(b)" and "that no further petitions on this matter will be necessary and that the IILP will proceed forward in a prompt and nonadversarial manner." *Id.* at *8.

In the present petition, Mr. Graham argues that extraordinary relief is necessary because VA (1) has yet to formalize his rehabilitation plan in VA Form 28-8872 (Rehabilitation Plan), which he describes as "a legally approved, signed agreement orchestrated by all stakeholders"; (2) has asked him to sign a VA Form 28-1905m (Request for and Receipt of Supplies) "for VA items as yet not received pertinent to any proposed IILP"; and (3) has requested, in connection with his IILP, information regarding household income despite the absence of any apparent authority making such information relevant to this matter. Petition at 1-2. These allegations do not demonstrate entitlement to a writ.

Taking the last allegation first, Mr. Graham objects to an April 8, 2017, emailed request from Vocational Rehabilitation and Education (VR&E) counselor Kris Holloway for the veteran's household income.² He worries that his refusal to provide such information "will result in further delay or outright denial." Petition at 2. Mr. Holloway stated that such information was necessary for a report he was preparing for the VR&E Director. Mr. Graham responded the same day that he did not believe financial information was relevant to the IILP process, but he nevertheless provided some of the requested information. Mr. Graham's response evidently sufficed, because an April 25, 2017, email from Mr. Holloway stated that he had completed his portion of the report to the VR&E Director and that all that remained was for the Director to forward his memorandum to the central office. In light of the facts that Mr. Graham disclosed some financial information and that Mr. Holloway indicated that such information allowed him to complete the task for which he requested it, the Court finds no merit in Mr. Graham's concern.

Likewise, the Court is unpersuaded by the argument Mr. Graham raises regarding VA Form 28-1905m. Mr. Holloway attached the form to an April 4, 2017, email to the veteran and asked for the veteran's signature on the first, but *not* the second, page. Mr. Holloway explained: "This Form is indicating and representing the fact that you do not already own such items. It is understood that it is general in scope and not specific as to every little line item of the project"; he further advised: "If you have any concerns about the 1905m as to what you are signing, let me know and we can talk about it over the phone." There is no indication in the petition whether Mr. Graham raised any concerns to Mr. Holloway, but the veteran asserts that he does not wish to sign this form because he "is leery of VR&E personnel bearing invisible or intangible gifts (and promises) requiring confirmatory signatures." Petition at 2. VA Form 28-1905m makes clear that

² This information is taken from a series of transcribed emails included as Item 1 in the Appendix to the veteran's petition; these emails are not paginated.

a veteran's signature in Section B, at the bottom of page 1 "acknowledges that he or she does not already possess the required items."³ By signing Section C on page 2—which Mr. Graham was advised *not* to do—a veteran certifies whether supplies were received in good or damaged condition. In other words, VA Form 28-1905m is clear and Mr. Holloway's instructions to the veteran regarding his signature were accurate.

Last, Mr. Graham complains that VA has yet to promulgate a completed VA Form 28-8872 memorializing his rehabilitation plan. VA regulations require that a rehabilitation plan "be developed for each veteran eligible for rehabilitation services under [c]hapter 31" of title 38 of the U.S. Code. 38 C.F.R. § 21.80(a) (2016). This obligation includes formulation of an IILP plan. 38 C.F.R. § 21.80(c); *see* 38 C.F.R. § 21.90 (2016). Mr. Graham has not cited—and the Court is not able to find—explicit authority for finalization of VA Form 22-8872. However, in its August 25, 2016, order, the Court explained the process for a veteran to request in writing review of an IILP plan, the time frame in which a VR&E officer must respond to that request, and the veteran's options to appeal to the Board of Veterans' Appeals (Board). *See Graham*, 2016 U.S. App. Vet. Claims LEXIS 1298, at *5-6. Mr. Graham initiated that procedure. *See id.* at *6. In his petition, the veteran stated that the VR&E Director began discussions with the veteran to formulate an IILP plan and that, on October 14, 2016, this plan was informally agreed to via email. Petition at 1. Although Mr. Graham avers that he has not received official memorialization of his plan in a VA Form 28-8872, based on the petition and attached appendix, it appears that communication between VA and the veteran continues and that VA is proceeding in good faith with construction of an ADA-compliant greenhouse. Thus, the Court declines at this time to supervise VA's implementation of his IILP plan more closely.

Based on the foregoing, the Court determines that Mr. Graham has not demonstrated an indisputable right to a writ in the context of his IILP claim. *See Cheney*, 542 U.S. at 380-81.

B. PCT Claim

Mr. Graham first sought service connection for PCT in March 1994; his claim was denied. Petition at 2. The claim was later reopened and service connection for PCT was granted in September 2008, with a February 23, 2007, effective date. *Id.* at 3. Although the veteran asserts that he ultimately appealed the effective date issue to the Court under docket number 12-1980, *see id.*, the Board decision filed under that docket number indicates that, although Mr. Graham filed a timely Notice of Disagreement as to the September 2008 decision, he failed to perfect an appeal to the Board; the Board decision also indicates that the Board received in October 2011 a motion to revise a March 2010 VA regional office (RO) decision regarding the PCT evaluation on the basis of CUE and referred that motion to the agency of original jurisdiction, *see* Board Decision, No. 09-11 035 (May 17, 2012), filed in *Graham v. Shinseki*, No. 12-1980. Thus, the April 2013 joint motion for partial remand filed in docket number 12-1980 and approved by the Court did not address either the proper evaluation or effective date for PCT.

In January 2015, Mr. Graham filed in this Court a petition for extraordinary relief in the nature of a writ of mandamus, asking the Court, inter alia, to order the Secretary to award a 100%

³ *See* www.benefits.va.gov/VOW/docs/28-1905m.pdf.

evaluation for PCT effective March 31, 1994. *See* Petition at 2, filed in *Graham v. McDonald*, No. 15-0112. The Secretary responded in that case and advised that a February 17, 2015, RO decision granted a 60% evaluation for PCT and a separate 10% evaluation for PCT skin involvement, both effective March 31, 1994. Based on the Secretary's representations, the Court found that Mr. Graham could appeal the PCT evaluations assigned and, thus, had adequate alternative means of attaining the relief sought; accordingly, the Court denied the petition. *See Graham v. McDonald*, No. 15-0112, 2015 U.S. App. Vet. Claims LEXIS 329 (March 20, 2015); *see also* Petition, Appendix Item 11 (February 17, 2015, Supplemental Statement of the Case).

Mr. Graham timely perfected an appeal of the PCT evaluations assigned, resulting in a September 2015 Board decision granting a 100% evaluation for PCT residuals and a 30% evaluation for PCT skin manifestations. *See* Petition, Appendix Item 12. The implementing November 2015 RO decision assigned an August 14, 2012, effective date for both the 100% and 30% evaluations; according to the RO, this was the date the veteran filed claims for increased evaluations. *See* Petition, Appendix Item 13. Mr. Graham avers that he timely filed a February 2016 NOD as to the effective date assigned in the RO decision and appealed to the Board, which advanced his appeal on its docket due to the "extreme age of the appeal," but that no decision has yet been reached.⁴ Petition at 4.

Mr. Graham appears to argue that he is entitled to a writ based on the Board's delay in adjudicating his appeal for an earlier effective date for a 100% PCT evaluation. *See* Petition at 5, 7. He asserts that this claim has still not been finally resolved 23 years after he first filed it and 10 years after he sought to reopen it. *Id.* at 4. When delay is alleged as the basis for a petition, a clear and indisputable right to a writ does not exist unless the petitioner demonstrates that the alleged delay is "so extraordinary, given the demands and resources of the Secretary, that [it] amounts to an arbitrary refusal to act, and [is] not the product of a burdened system." *Costanza v. West*, 12 Vet.App. 133, 134 (1999) (per curiam order). Mr. Graham has not demonstrated an indisputable right to a writ.

Although the Court acknowledges that the veteran first filed a service-connection claim for PCT in March 1994, that claim was finally denied and not reopened until September 2008. Since reopening, it has undergone development and numerous phases of adjudication and appeals based on the veteran's disagreement with the disability evaluations and effective dates assigned. Given the various issues requiring review and adjudication, this period cannot reasonably be characterized as one in which VA arbitrarily refused to act.

With respect to the more recent discrete period since Mr. Graham appealed to the Board the effective date assigned for his 100% and 30% PCT evaluations, the Court is likewise not persuaded that the Board has been dilatory in deciding the matter. While the veteran asserts that his appeal was advanced on the Board's docket because of its "extreme age," he has not supplied any evidence supporting that assertion. In any event, even if the Board had advanced his appeal, and even if he filed that appeal immediately after he filed his February 2016 NOD disagreeing with the effective date assigned, this would constitute a pendency at the Board of fewer than 17 months. Understandably, Mr. Graham wishes to resolve this matter as promptly as possible. But

⁴ Mr. Graham did not specify the date of his appeal to the Board.

the Court is unable to conclude that the absence of a decision within 17 months of the veteran's filing his appeal to the Board constitutes an arbitrary refusal to act demonstrating an indisputable right to a writ. *See Constanza*, 12 Vet.App. at 134; *see also Erspamer v. Derwinski*, 1 Vet.App. 3, 10 (1990) (noting that a delay of one to two years is not necessarily unreasonable).

C. Conclusion

In sum, because Mr. Graham has not demonstrated an indisputable right to a writ of mandamus in these circumstances, it is

ORDERED that the May 12, 2017, petition for extraordinary relief is DENIED.

DATED: June 26, 2017

BY THE COURT:

A handwritten signature in blue ink that reads "Margaret Bartley". The signature is written in a cursive, flowing style.

MARGARET BARTLEY
Judge

Copies to:

Gordon A. Graham

VA General Counsel (027)