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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 10-3686

SHIRLEY R. ALVAREZ, PETITIONER,

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before HAGEL, *Judge*.

O R D E R

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

On November 8, 2010, Shirley R. Alvarez, who is self-represented, filed a petition for extraordinary relief in the nature of a writ of mandamus. Ms. Alvarez asserts that a VA regional office has failed to issue a rating decision or a Statement of the Case in response to a September 16, 2009, remand from the Board of Veterans' Appeals. Petition at 14-15. Ms. Alvarez also contends that she has sent numerous letters to the regional office over the past fifteen months, but that "[t]hey do not answer, or respond." *Id.* at 10. On November 15, 2010, the Court ordered the Secretary to respond to Ms. Alvarez's petition.

On December 15, 2010, the Secretary filed his response, arguing that the Court should deny Ms. Alvarez's petition because her assertions are without merit. Specifically, the Secretary asserts:

Contrary to [Ms. Alvarez]'s plagiarized¹ accusations of deliberate delay by VA, violations of her due process and Constitutional rights, and correspondence to VA going unanswered, the [Appeals Management Center] has, in fact, been working as quickly and diligently as possible pursuant to the Board's September 2009 remand order. In accordance with the Board's remand order, [Ms. Alvarez]'s medical treatment records . . . for the period of January 2007 to the present were obtained and associated with [her] claims file. In addition, on November 13, 2009, the [regional

¹The Secretary asserts that "large portions of [Ms. Alvarez]'s lengthy petition appear to have been copied verbatim in style and language from a prior case before the Court, *Hubbert v. Principi*, docket number 01-1188." Secretary's Response at 1-2. The Secretary also notes that the text of the petition in *Hubbert* is available online on the VetsForJustice.com website. *Id.* at 2 n.1. The Court reminds Ms. Alvarez that any argument submitted to the Court must be based on the individualized facts of her case.

office] requested that [Ms. Alvarez] be scheduled for a medical examination . . . to determine whether her sleep apnea is etiologically related to in-service symptomatology or pathology. [Ms. Alvarez] was afforded the medical examination on December 3, 2009, and the results were associated with the claims file. Currently additional case development regarding [her] claim to reopen a previously-denied claim of entitlement to service connection for an acquired psychiatric disorder, and her claims for increased ratings for current service-connected disabilities is still in progress, and a [S]tatement of the [C]ase . . . has not yet been issued. Moreover, in spite of [Ms. Alvarez]'s statement that the [regional office] was instructed "to see if Appellant still wanted the hearing before the Regional Office[]" (Pet. at 11), no such directive is found in the remand portion of the Board's September 16, 2009, decision. This assertion appears to have been copied directly from the *Hubbert* petition with no basis for relevancy to [Ms. Alvarez]'s case.

Regarding Petitioner's plagiarized claim of correspondence to VA going unanswered, the Secretary states that a review of [Ms. Alvarez]'s claims file reveals that the only correspondence of record from her since the September 2009 remand order is a letter to the [regional office] dated April 15, 2010, in which [she] provided additional evidence in her case in response to the Board indicating in its remand order that she may do so while her case is in remand status at the [regional office].

Secretary's Response at 2.

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, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 402 (1976) (citations omitted). 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. *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004). Moreover, 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).

The Court concludes that Ms. Alvarez has not demonstrated that a writ of mandamus is necessary in this case. The Court finds that VA is proceeding in a reasonable manner in responding to the Board's September 2009 remand order, including requesting and obtaining medical records and providing Ms. Alvarez with a VA medical examination. Consequently, the Court concludes that the delay in this case is not so extraordinary that it rises to the level of a refusal to act on the part of

the Secretary. Moreover, to the extent that Ms. Alvarez contends that VA has not responded to her correspondence, the Court concludes that she has not carried her burden of demonstrating error. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999). Accordingly, the Court will deny Ms. Alvarez's petition for extraordinary relief in the nature of a writ of mandamus.

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: January 3, 2011

BY THE COURT:



/s/ Lawrence B. Hagel

LAWRENCE B. HAGEL
Judge

Copies to:

Shirley R. Alvarez

VA General Counsel (027)