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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 14-3928

KENNETH W. CHAKY, PETITIONER,

v.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before HAGEL, *Judge*.

ORDER

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

On November 17, 2014, Kenneth W. Chaky, who is self-represented, filed a petition for extraordinary relief in the nature of a writ of mandamus. According to Mr. Chaky, on June 8, 2011, he filed a motion to revise a prior final Board of Veterans' Appeals (Board) decision pertaining to a lower back claim (Board Docket Number 11-20-139) based on clear and unmistakable error. He asserts that on July 22, 2011, the Board acknowledged receipt of that motion, but has not yet issued a decision in response.

On December 15, 2014, the Court ordered the Secretary to respond to Mr. Chaky's petition. On January 14, 2105, the Secretary filed his response, explaining that the Board misplaced Mr. Chaky's June 2011 motion to revise a July 1987 Board decision based on clear and unmistakable error. The Secretary further explained that, on December 18, 2014, the Board provided Mr. Chaky with the opportunity to resubmit that motion and, on January 13, 2015, "the Board forwarded correspondence to [Mr. Chaky] acknowledging receipt of his [motion to revise the July 1987 Board decision based on clear and unmistakable error]," and informing him that he had 30 days to file a response. Secretary's Response at 4.

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).

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. *Costanza v. West*, 12 Vet.App. 133, 134 (1999) (per curiam order). Because it appears that VA is now actively processing Mr. Chaky's motion, the Court concludes that Mr. Chaky has failed to demonstrate that the alleged delay is so extraordinary that it amounts to the Secretary's arbitrary refusal to act, *see id.*, and will therefore deny Mr. Chaky's petition.

Upon consideration of the foregoing, it is

ORDERED that Mr. Chaky's petition for extraordinary relief is DENIED.

DATED: February 3, 2015

BY THE COURT:


/s/ Lawrence B. Hagel

LAWRENCE B. HAGEL
Judge

Copies to:

Kenneth W. Chaky

VA General Counsel (027)