

*Designated for electronic publication only*

**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

NO. 15-0112

GORDON A. GRAHAM, PETITIONER,

V.

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

Before DAVIS, *Judge*.

**ORDER**

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

On January 6, 2015, petitioner Gordon A. Graham filed a petition for extraordinary relief in the nature of a writ of mandamus.<sup>1</sup> In his petition, Mr. Graham asks that the Court order VA to award a 100% disability rating for porphyria cutanea tarda (PCT) and special monthly compensation (SMC), both effective March 31, 1994. He further argues that VA has failed to process his October 2012 claim for cryoglobulinemia and fibromyalgia, and his appeal from VA's denial of independent living program (ILP) benefits for a greenhouse. Mr. Graham also requests that the Court order VA to convert his paper claims file to an electronic format, and prevent veterans law judge Mark Hindin from adjudicating his future claims.

On January 29, 2015, the Court ordered the Secretary to respond to the allegations in Mr. Graham's petition. Mr. Graham then filed with the Court three notices of supplemental authority, in which he alleged that VA had granted in part the relief requested in his petition. Specifically, he demonstrated that the regional office (RO) had issued a February 2015 decision granting benefits for PCT and a Supplemental Statement of the Case regarding this claim.

On March 2, 2015, the Secretary filed a response explaining that the RO's February 2015 decision granted entitlement to SMC and a 60% disability rating for PCT, both effective March 31, 1994. Secretary's Response at 2, Exhibit (Ex.) 1 (declaration of Seattle RO veterans service center manager Ayn-Marie Lofgren noting that a retroactive payment of \$69,341 was remitted to Mr. Graham). The Secretary also stated that the RO requested VA examinations for Mr. Graham's

---

<sup>1</sup> Although Mr. Graham filed his petition pro se, on January 17, 2015, attorney Robert P. Walsh filed a notice of appearance to represent Mr. Graham in this matter.

pending claims for cryoglobulinemia and fibromyalgia, requested expeditious treatment of the examination results, and informed Mr. Graham that he would be contacted in order to schedule the examinations. *Id.*, Ex. 1-3. As to the ILP benefits for a greenhouse, the Secretary stated that this claim was certified to the Board on February 27, 2015, and that Mr. Graham's request for a travel board hearing in this matter is currently being reviewed for scheduling. The Secretary further explained that Mr. Graham's claims file will be sent electronically when it is available for scanning, and that a copy will be sent to Mr. Graham's attorney, who is now being recognized as Mr. Graham's representative.

On March 4, 2015, Mr. Graham filed a reply to the Secretary reiterating the arguments in his petition. Of note, Mr. Graham argued that he is entitled to a 100% disability rating for PCT. He further stated that the Secretary's requests for examinations for his pending claims are "efforts to develop [his claims] to deny [them]," and that the certification of his ILP claim to the Board will further delay the claim because the Secretary did not provide a "date for action." Petitioner's Reply to Secretary's Response at 2, 5.

Mr. Graham also filed a March 5, 2015, motion to strike Exhibit 1 from the Secretary's Response. He argues that, although the declaration is purportedly based on personal knowledge, "[u]pon review it is obvious that the declaration contains a great deal of hearsay." Motion to Strike at 1. He also alleges that the declaration contains factual errors, because Ms. Lofgren stated that \$69,341 was remitted to Mr. Graham, whereas only \$68,994.16 was received.

The Court has the authority to issue extraordinary writs in aid of its prospective jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). 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); *see also Youngman v. Peake*, 22 Vet.App. 152, 154 (2008); *Constanza v. West*, 12 Vet.App. 133, 134 (1999) (holding that a petitioner seeking a writ of mandamus based on delay must demonstrate an extraordinary delay equivalent to a refusal to act). Three conditions must be satisfied before the Court issues a writ of mandamus: (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. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004) (citing *Kerr*, 426 U.S. at 403); *see also Youngman*, 22 Vet.App. at 154.

Here, Mr. Graham has not evidenced a clear and indisputable right to the writ. As both parties recognized, the RO's February 2015 decision adjudicated Mr. Graham's PCT and SMC claims. Although Mr. Graham is not satisfied with the 60% disability rating awarded by the RO, he has alternative means to appeal this rating decision. *See Cheney, supra* (a writ is not a substitute for the appeals process). The Secretary's response also demonstrates that VA is also in the process of adjudicating Mr. Graham's other claims; the RO has ordered VA medical examinations as to cryoglobulinemia and fibromyalgia, and certified to the Board Mr. Graham's claim for ILP benefits. Accordingly, the Mr. Graham has not demonstrated that the Secretary has refused to act as to these

claims. *See Constanza, supra*. The Secretary also indicated that Mr. Graham's file will be converted to an electronic format when it is eligible for scanning, and Mr. Graham has not established a clear and indisputable right to have his file converted before it is eligible. Similarly, the Court is not convinced that a writ is warranted to prevent veterans law judge Hindin from adjudicating Mr. Graham's future claims, because Mr. Graham has not demonstrated that he lacks adequate alternative means to attain this desired relief. *See Cheney, supra* (a writ is not a substitute for the appeals process). Because Mr. Graham has been granted in part the relief requested, and has failed to demonstrate that the Secretary has otherwise refused to act, the issuance of a writ is not warranted. *See Cheney and Constanza, both supra*.

As to Mr. Graham's motion to strike based on hearsay, the Court notes that it is not bound by the Federal Rules of Evidence. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 302 (2008) (stating that the Federal Rules of Evidence are not binding on the Court or on the Board). The Court further declines to entertain Mr. Graham's dispute with that portion of Exhibit 1 stating that VA remitted a payment in the amount of \$69,341.00, both because the exact retroactive payment made is not relevant to his writ and because Mr. Graham has conceded that he received a retroactive payment for PCT and SMC.

On consideration of the foregoing, it is

ORDERED that the petitioner's March 5, 2015, motion to strike is denied. It is further

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

DATED: March 20, 2015

BY THE COURT:

A handwritten signature in black ink, appearing to read "Robert N. Davis", written in a cursive style.

ROBERT N. DAVIS  
Judge

Copies to:

Robert P. Walsh, Esq.

VA General Counsel (027)