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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-5697

JAMES E. LAWRENCE, PETITIONER,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before BARTLEY, *Chief Judge*, and PIETSCH, GREENBERG, ALLEN, MEREDITH, TOTH, FALVEY, LAURER, and JAQUITH, *Judges*.

ORDER

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

On December 22, 2020, in a panel order, a majority dismissed the petition for extraordinary relief in the form of a writ of mandamus. The petitioner filed a motion for panel reconsideration or, in the alternative, for full-Court review. On February 5, 2021, the Court denied the petitioner's motion for panel reconsideration and held in abeyance the alternative motion for full-Court consideration. On March 10, 2021, the Court ordered the Secretary to respond to the petitioner's motion for full-Court review. The Secretary filed his response on April 8, 2021.

On January 29, 2021, Military-Veterans Advocacy, Inc., filed a motion for leave to file a brief as amicus curiae in support of the petitioner's motion. On February 12, 2021, the Secretary filed written opposition to that motion. Additionally, on March 8, 2021, the petitioner filed a motion requesting that the full Court take judicial notice of a single-judge order in *Wright v. McDonough*, U.S. Vet. App. No. 21-0910. Because the Court is denying the motion for full-Court review, both motions will be denied as moot.

"Motions for full-Court review are not favored. Ordinarily they will not be granted unless such action is necessary to secure or maintain uniformity of the Court's decisions or to resolve a question of exceptional importance." U.S. VET. APP. R. 35(c). In this matter, the petitioner has not shown that either basis exists.

Upon consideration of the foregoing, it is

ORDERED that the motion for full-Court review is DENIED. It is further

ORDERED that the motion of Military-Veterans Advocacy, Inc., for leave to file a brief as amicus curiae is denied. It is further

ORDERED that the petitioner's motion requesting that the Court take judicial notice of *Wright v. McDonough*, U.S. Vet. App. No. 21-0910, is denied.

DATED: May 26, 2021 PER CURIAM.

MEREDITH, *Judge*, with whom PIETSCH, FALVEY, and LAURER, *Judges*, join, concurring: We agree with the denial of the petitioner's motion for full-Court review because the narrow holding in *Lawrence v. Wilkie*, 33 Vet.App. 158 (2020), raises no issues of exceptional importance; the petitioner inappropriately seeks to raise entirely new arguments in his motion; and this Court is not an appropriate forum for resolving policy concerns about the best mechanism to compel VA to fulfill a records request.

First and foremost, the petitioner's motion for full-Court review and the dissent's reading of the *Lawrence* panel decision are mistaken. The *Lawrence* panel did *not* hold—categorically or otherwise—that the Court definitively lacks jurisdiction to consider whether VA has unreasonably delayed in providing a claimant with his or her claims file. Rather, the Court, relying on well-settled caselaw, held that, in order to establish that the Court has jurisdiction to issue a writ in that regard, a petitioner must show "that [his] request for records was made pursuant to a law affecting the provision of VA benefits, that VA's decision on the matter could be the subject of a Board [of Veterans' Appeals (Board)] decision, and that the Court would have subject matter jurisdiction to review the Board's decision." 33 Vet.App. at 164. Because, in this case, it was undisputed that the petitioner sought records only pursuant to the Privacy Act and the Freedom of Information Act (FOIA), *id.* at 162, and the entirety of his jurisdictional argument consisted of an unsupported assertion that the Court's authority derives from the All Writs Act and a brief reference to 38 C.F.R. § 1.577, Petitioner's Supplemental Memorandum of Law at 2, 3-5, the Court determined that he fell short of demonstrating that the Court could compel VA to comply with the Privacy Act or FOIA, *Lawrence*, 33 Vet.App. at 165.

Although the Court highlighted a number of issues that may make such a showing difficult—including that Congress has expressly vested U.S. district courts with jurisdiction over Privacy Act and FOIA compliance—the Court did not foreclose the possibility that a petitioner could demonstrate that this Court has jurisdiction to compel VA to provide claims-related records pursuant to those or other statutory provisions. *Id.* at 164-65. To the contrary, the Court specifically noted that "further delay in processing [the petitioner's claims file] request could not only delay a decision on his claims but also potentially frustrate the Court's review of a final Board decision." *Id.* at 165. However, the Court found, based on the arguments and facts presented, that the petitioner *in this case* had not addressed any of the necessary elements. *Id.*[1] Ultimately, then, *Lawrence v. Wilkie* stands for the unremarkable proposition that a petitioner bears the burden of

[1] Indeed, the majority concluded as to each element as follows: the petitioner (1) "does not contend that, or explain how, the Privacy Act or FOIA constitutes 'a law that affects the provision of benefits by the Secretary,'" *id.* at 164 (quoting 38 U.S.C. § 511); (2) does not "acknowledge[] . . . [VA] regulations, []or challenge[] the validity of the Secretary's delegation of authority therein" to the VA Office of General Counsel and thus "has not demonstrated how the grant of a writ . . . would lead to a final Board decision," *id.* at 164-65; and (3) "has not argued or demonstrated that this Court would . . . have subject matter jurisdiction over a VA decision concerning his Privacy Act and FOIA request," *id.* at 165.

demonstrating that the Court has jurisdiction to provide the requested relief and, where he or she fails to meet that burden, dismissal is warranted. Thus, it does not in any way, as the dissent suggests, undermine the statutory grant of subject matter jurisdiction provided by Congress.

This brings us to the petitioner's motion for panel reconsideration or, in the alternative, for full-Court review, in which he asserted *for the first time* that the Court may have jurisdiction pursuant to 38 U.S.C. §§ 5103A and 5701 to compel VA to provide him with copies of his records. It is wholly contrary to the Court's Rules of Practice and Procedure, as well as longstanding caselaw, to permit a represented party to raise new arguments at this stage of the proceedings. "'[W]here litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again.'" *Dixon v. Shinseki*, 741 F.3d 1367, 1378 (Fed. Cir. 2014) (quoting *Off. Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 167 (2d Cir. 2003)); *see id.* ("Motions for reconsideration do not afford litigants the opportunity to take a 'second bite at the apple' or to advance arguments that properly should have been presented in an earlier proceeding." (first citing *Bluebonnet Sav. Bank, F.S.B. v. United States*, 466 F.3d 1349, 1361 (Fed. Cir. 2006); then citing *Lamle v. Mattel, Inc.*, 394 F.3d 1355, 1359 n.1 (Fed. Cir. 2005)); *see also* U.S. VET. APP. R. 35(e)(1) ("[A] motion for . . . panel . . . reconsideration shall state the points of law or fact that the party believes the Court has overlooked or misunderstood."). Additionally, although the Court has discretion to hear late-raised arguments, before dismissing the petition here the Court afforded the petitioner multiple opportunities to demonstrate jurisdiction.[2] Under these circumstances, the Court should not encourage or excuse piecemeal litigation.

To be clear, we do not dispute that, if timely raised and properly supported, an argument as to the Court's jurisdiction pursuant to section 5701 or VA's duty to assist could address a matter of exceptional importance warranting en banc consideration. But such an extraordinary step is not appropriate where the petitioner presents these arguments only after the Court issues a decision. As the Court noted in its order dismissing the petition, only the dissent sua sponte raised these potential paths to demonstrating jurisdiction. *See Lawrence*, 33 Vet.App. at 162 n.2 (declining to "address the import of section 5701 because the represented petitioner does not acknowledge that provision or make any arguments pertaining to it, despite multiple opportunities to meet his burden to establish the Court's jurisdiction over the matter"); *see also Timberlake v. Gober*, 14 Vet.App. 122, 129 (2000) (noting that the Court is not inclined to conjure arguments on behalf of claimants).

Finally, the dissent raises concerns that veterans seeking copies of their own records will be compelled to seek relief in the U.S. district courts and suggests that this Court may serve as a better forum for seeking VA records. Again, *Lawrence v. Wilkie* does not definitively answer the question whether relief is available in this Court, despite the dissent's insistence to the contrary. More importantly, Congress has expressly provided that compliance with Privacy Act and FOIA

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[2] Specifically, because the petitioner in his August 13, 2020, petition should have but did not address the Court's jurisdiction to provide the requested relief, the Court ordered him to file a supplemental memorandum of law explicitly addressing jurisdiction; in response he submitted a September 3, 2020, supplemental memorandum of law; and after the Secretary filed a response to the petition in which he asserted that the petitioner failed to demonstrate jurisdiction, the Court permitted the petitioner to file a reply on September 29, 2020.

requests will be enforced through U.S. district courts. *See* 5 U.S.C. §§ 552(a)(4)(B), 552a(g)(1). Thus, even if district courts ultimately prove to be the only legally viable option for compelling the release of VA records, any policy decision as to whether that forum is appropriate to handle these matters is a question for Congress, not for our Court sitting en banc or otherwise. *See SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, __ U.S. __, __, 137 S. Ct. 954, 967 (2017) ("[W]e cannot overrule Congress's judgment based on our own policy views."); *In re Ferguson*, 558 F.3d 1359, 1366 n.7 (Fed. Cir. 2009) ("The essence of the [dissent] is an argument premised on policy and philosophical grounds. We disagree with this approach, as it is not the role of courts to make such arguments but rather the responsibility of Congress.").

Moreover, although the facts of this case certainly reflect that VA's compliance with Privacy Act and FOIA requests can be significantly delayed, it is unclear on what basis the dissent concludes that seeking relief in district courts will cause an undue burden on veterans or those courts. In this regard, it is noteworthy that the *Veterans Benefits Manual*—which is colloquially referred to as the VA benefits "Bible" because "it provides a comprehensive summary of virtually every topic encountered in VA benefits practice and is regularly consulted by seasoned and new practitioners alike," Michelle S. Wolf & Jeffrey J. Bunten, *VA Claims Adjudication*, 35 No.1 GPSolo 22, 25 (2018)—for at least the past 5 years, has specifically advised veterans' representatives that they should "consider filing a lawsuit in a U.S. District Court seeking to compel the VA to provide a copy of the claims file" if the file has not been received within a reasonable amount of time; that such lawsuits routinely result in VA providing the claims file before the Agency is required to file a substantive response; and that the matter is typically then dismissed as moot. *See* VETERANS BENEFITS MANUAL § 16.2.2.1, Advocacy Tip (2016).

For these reasons, we do not share our dissenting colleagues' concerns and we do support the denial of full-Court review.

GREENBERG, *Judge*, concurring: I write separately because I would have disagreed with the merits of the panel decision, yet I cannot in good conscience sanction the inevitable delay that accompanies en banc review.

From the beginning of the Republic, until the creation of our Court, Congress has had a special regard and particular solicitude for veterans. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792); *see also* Max Farrand, *The First Hayburn Case, 1792*, 13 AM. HIST. REV. 281 (1908). Alone among Federal courts, whether established under Article I or Article III of the Constitution, our Court was permitted *by statute* to decide all cases by a single Judge or by a panel of no fewer than three. *See* 38 U.S.C. §§ 7251, 7254. Congress knew exactly what it was doing. The language is clear and unmistakable. *See Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993). Congress understood that a veteran having survived the actual enemy should not be further subject to the injustice of the ultimate enemy–*delay*.

Though we have been established by Congress under Article I of the Constitution, we act as if we were an Article III court reviewing the action, or in this case inaction, of the Secretary. *See Henderson v. Shinseki*, 562 U.S. 428, 432 n.2 (2011).

En banc review should be rarely, if ever, invoked by the Court, either sua sponte or in response to an application for a party. The parties have their remedies in the United States Court of Appeals for the Federal Circuit and the United States Supreme Court. The thirty years of our existence has demonstrated the efficacy of this system.

Statistical review of recent developments at our Court is not necessary to suggest the obvious conclusion that single-judge determinations are issued promptly and effectively, while panel decisions, let alone en banc panel decisions, consume an inordinate amount of time and judicial resources.

For the reasons that I have stated consistently and at greater length and consistency elsewhere, I firmly believe that the prompt decision of a single Judge provides the greater likelihood of an adequate result for the veteran.

Finally, nowhere does the Constitution recognize or otherwise imply the concept of precedential rather than nonprecedential decisions in Federal courts. All courts decide justiciable matters. *See Marbury v. Madison*, 5 U.S. 137, 164, 2 L. Ed. 60, 69 (1803); *see also Hayburn's Case*, 2 U.S. (2 Dall) at 410.

What I am saying and what my colleagues have said in this case is a perfect example of the concept I have repeatedly emphasized---let the disappointed party appeal. This is ultimately a matter of judicial restraint. *See* Maeva Marcus and Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527 (1988).

Therefore, though the dissenting opinion perfectly explains why a VA records request does not constitute a FOIA request in any meaningful sense and why the majority's decision wrongly forecloses a claimant's ability to seek judicial intervention when the claimant tries to obtain his records from VA, I do not believe that en banc consideration is warranted in this case.

ALLEN, *Judge*, with whom BARTLEY, *Chief Judge*, and TOTH and JAQUITH, *Judges*, join, dissenting from denial of en banc review.

I respectfully dissent from denial of en banc review in this matter. This matter deserves en banc review. The panel decision holding that the Court lacks jurisdiction to address unreasonable delays in the Agency's responses to requests to produce the *veteran's own claims file* is one of exceptional importance that deserves full court review. Judge Toth's dissent to the panel decision argues forcefully why the majority is incorrect. But I focus not on the merits of the dispute, but rather on why we should address this matter en banc.

First, the panel decision goes to the heart of our jurisdiction. To hold that we lack jurisdiction–effectively categorically–to consider a matter going to a veteran's claim for benefits is certainly one important enough to merit assessment by the full Court. Congress decided to assign

us *exclusive* jurisdiction about decisions going to the provision of veterans benefits.[3] Yet, the panel holds we can't consider whether VA has unreasonably delayed acting in providing the claims documents on which a benefits determinations will be based. To me, that holding raises an important question about the system of judicial review Congress has adopted.

Second, the panel decision has the very real possibility of increasing the workload of our colleagues on district courts across the country. Our district court colleagues are busy. We should not lightly add to their workload.

Third, the panel decision potentially profoundly affects veterans. The men and women who served the Nation will now be compelled to seek access to *their own claims files* in Federal districts courts across the country, bearing the expense and inconvenience associated with those endeavors.

Finally, the panel decision seriously undermines the Court's ability to address systemic delays. If we cannot assess whether VA has unreasonably delayed in providing a veteran with *her own claims file*, how effective is our review of the veterans benefits system as a practical matter?

In sum, this case presents a question of exceptional importance. Perhaps the panel decision is correct. Perhaps not. But one way or other, we should have considered this matter en banc. Therefore, I respectfully dissent from the denial of full-Court review.

Copies to:

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[3] *See* 38 U.S.C. § 7252(a).