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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 11-3083

CARMEN J. CARDONA, APPELLANT,

V.

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

BIPARTISAN LEGAL ADVISORY GROUP
OF THE U.S. HOUSE OF REPRESENTATIVES, INTERVENOR.

Before KASOLD, *Chief 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 August 6, 2012, the Secretary filed a proposed record of proceedings (ROP) and an index to the record before the agency (RBA), but still had not permitted the intervenor access to the RBA. On August 9,[1] the Court held a hearing to address the parties' disagreement with regard to this issue. At that hearing, the appellant and the Secretary agreed to provide the intervenor – no later than August 14, 2012 – a copy of all documents in the RBA, except those designated by the Secretary as medical records in his RBA index, to wit: pages 272-311, 316-18, 323-24, 327-46, 361-69,[2] 374-97, 411, 434-35, 479-89, 496, 506-18, 560-842, and 848-1444.

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[1] This case was expedited before the Board of Veterans' Appeals (Board) as a "case involv[ing] interpretation of law of general application affecting other claims," 38 U.S.C. § 7107(a)(2), and has been expedited before the Court upon the Secretary's affirmation that he would not defend the constitutionality of 1 U.S.C. § 7 and 38 U.S.C. § 101(31), the primary issue on appeal. *See* U.S. VET. APP. R. 2, 47; Court's May 2 and May 3, 2012, orders.

[2] The Secretary initially characterized pages 353-69 as "Response to request for records (including authorization and consent form) and medical records." Index of RBA Documents at 4. However, the Secretary agreed at the hearing to provide further clarification on this set of documents, and – in an August 10, 2012, filing of a revised RBA index – clarified that pages 361-69 were medical records and 353-60 were not. *See* Revised Index of RBA Documents at 4.

As to the RBA documents identified by the Secretary as medical records, the appellant and the Secretary contend that these documents contain sensitive, personal information, and are not relevant to the purposes for which the intervenor has been admitted as a party, to "defend[Section 3 of the Defense of Marriage Act] and 38 U.S.C. § 101(31) against [the appellant's] equal protection claims (and litigat[e] related jurisdictional issues, if any)." Motion to Intervene at 1-2.

The intervenor asserts its right as a party to review the entire RBA, including the appellant's medical records contained therein, and cites in support of its assertion, inter alia, U.S. VET. APP. R. 10(d) ("[T]he Secretary shall permit a party . . . [to review] any original material in the record before the agency that is not subject to a protective order."). However, Rule 10(d) of the Court's Rules of Practice and Procedure (Rules) was promulgated with the traditional veterans benefits case in mind, where the parties, including any intervenor, were parties of interest in the Board proceeding on appeal. Nothing in the Court's Rules suggests that a party who intervened for limited purposes at the Court (namely, to defend the constitutionality of a statute) has an absolute right to review the entire RBA, which is veteran specific as opposed to claim specific. Moreover, Rule 2 permits the Court to suspend its Rules "as it sees fit," and the appellant's privacy interest in her medical records and the intervenor's failure to establish the possible relevance of the records (as discussed below) constitute good cause for limiting the application of Rule 10(d) in this case.

Similarly, although the intervenor cites *Butler v. Office of Personnel Management*, 168 F. App'x 439, 441 (Fed. Cir. 2006) ("Permissive intervenors have the same rights and duties as parties, except they do not have an independent right to a hearing; and they may participate only on the issues affecting them." (citing 5 C.F.R. § 1201.34(d)), as binding precedent on this Court, *Butler* was citing a specifically promulgated Merit Systems Protection Board (MSPB) rule in an MSPB case, and neither VA nor this Court has such a rule. Moreover, this statement in *Butler* and other persuasive statements by Federal courts recognize a court's discretion to circumscribe an intervenor's role in discovery in accordance with its purpose for entering the litigation. *See In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1188-89 (10th Cir. 2009) ("[T]he actual scope of discovery should be determined according to the reasonable needs of the action." (quoting FED. R. CIV. P. 26 Advisory Committee's Note (2000)); *Beauregard, Inc. v. Sword Servs. L.L.C.*, 107 F.3d 351, 354 n.9 (5th Cir. 1997) ("[T]he district court may . . . restrict the intervenor's right to discovery."); *Columbus-Am. Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 469 (4th Cir. 1992) ("[A] federal district court is able to impose almost any condition [on intervenors], including the limitation of discovery."); *see also Cox v. West*, 13 Vet.App. 461, 463 (2000) (citing 7C CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1920, at 488 (2d ed. 2000) for the proposition that an "intervenor is treated as if he were an original party and has equal standing with the original parties" *unless the court provides otherwise*).

At the hearing, the intervenor argued that a review of the medical records might provide insight into (1) whether this Court lacks jurisdiction or (2) whether the Secretary erred in granting the appellant benefits for her underlying disability. Neither argument has merit. As to the first argument, this Court has jurisdiction over Board decisions, 38 U.S.C. § 7252, the proposed ROP contains a Board decision, and the docket reflects that the appellant timely appealed that decision.

See Proposed ROP at 3-14. Moreover, although this Court has adopted the requirements of Article III standing and the requirement of a case or controversy, *Mokal v. Derwinski*, 1 Vet.App. 12, 15 (1990), the Board decision on its face denied the appellant benefits that she requested, creating the case or controversy. *Cf. Padgett v. Peake*, 22 Vet.App. 159, 162 (2008) (en banc order) (noting that standing requires an "injury in fact" caused by the challenged conduct of the defendant and likely to be redressed by a favorable decision). Thus, the intervenor fails to demonstrate – and the Court cannot conceive – how any medical record could contravene this Court's or a subsequent reviewing court's jurisdiction. *See Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 382 (8th Cir. 1992) ("Some threshold showing of relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case."); *Martinez v. Cornell Corrs. of Tex.*, 229 F.R.D. 215, 218 (D.N.M. 2005) ("Discovery . . . is not intended to be a fishing expedition, but rather is meant to allow the parties to flesh out allegations for which they initially have at least a modicum of objective support." (internal quotation marks omitted)); *see also Food Lion, Inc. v. United Food and Commercial Workers Intern. Union*, 103 F.3d 1007, 1012-13 (D.C. Cir. 1997) ("'While the standard of relevancy is a liberal one, it is not so liberal as to allow a party to roam in shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so.'" (quoting *In re Fontaine*, 402 F. Supp. 1219, 1221 (E.D.N.Y. 1975))).

As to the second argument, the intervenor's desire to attack a previous VA grant of benefits reflects a misunderstanding of the Court's role in the veterans benefits scheme for adjudication and judicial review. Succinctly stated, findings by the Board that are materially favorable to the appellant are not subject to being overturned by the Court. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) ("The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority." (citing 38 U.S.C. § 7261(a)(4) (Court shall "set aside or reverse" a "finding of material fact *adverse to the claimant*" if "clearly erroneous" (emphasis added)))). In this case, the Board decision on appeal reflects findings by the Board that the appellant is a veteran, honorably discharged after 12 years of service, with disabilities warranting an 80% combined disability rating. This Court is bound by those favorable findings and any attack against them must be initiated below through certain, limited avenues. *See*, *e.g.*, 38 U.S.C. § 5109A (authorizing the Secretary to request revision of a decision based on clear and unmistakable error). Moreover, the 80% combined disability rating was not awarded by the Board decision on appeal; rather, this rating is the result of an earlier decision of the Secretary that is not on appeal and cannot now be attacked in this appeal. *See* Proposed ROP at 234; *see also Juarez v. Peake*, 21 Vet.App. 537, 541 (2008) (asserting error in a final decision requires submitting to VA in the first instance a request for revision of the prior decision based on clear and unmistakable error).

In the decision on appeal, the Board also found that the appellant is married under Connecticut law. That too is a favorable finding of fact, not subject to being overturned by the Court. *See Badua v. Brown*, 5 Vet.App. 472, 473 (1993) (determining whether a marriage exists is a finding of fact). Finally, the Board decision on appeal found that the appellant's disability rating rendered her eligible for additional dependency benefits for a spouse pursuant to 38 C.F.R. § 3.4(b)(2) (2010), but further found the appellant barred from such benefits because the appellant's

marriage is a same-sex marriage and a "spouse" for VA benefits purposes must be a person of the opposite sex. *See* 38 U.S.C. § 101(31) (defining "spouse" as "a person of the opposite sex who is a wife or husband").[3] The appellant's sole argument on appeal is that the statutes preventing her from additional VA compensation are unconstitutional, and the intervenor's primary purpose for intervention (as noted above) is defending the constitutionality of those statutes.

Under the circumstances of this case, the intervenor fails to demonstrate – and the Court cannot conceive – how the appellant's medical records might be relevant to the constitutionality of the statutes at issue, or how access to the appellant's medical records by the intervenor is reasonably calculated to lead to the discovery of any information relevant to the constitutionality of the statutes at issue. *See Degan v. United States*, 517 U.S. 820, 825-26 (1996) ("In a civil case . . . , a party is entitled as a general matter to discovery of any information sought if it appears 'reasonably calculated to lead to the discovery of admissible evidence.'" (quoting FED. R. CIV. P. 26(b)(1))); *Food Lion,* 103 F.3d at 1012 ("[N]o one would suggest that discovery should be allowed of information that has no conceivable bearing on the case." (internal quotation marks omitted)).

The intervenor admitted at the hearing that it has no good faith basis for disbelieving the Secretary's characterization of certain documents as medical records, but it noted a concern that nonmedical records might have been mixed with medical records and characterized by the Secretary as a set of medical records. The Court considered undertaking in camera review of the medical records, but finds such review unnecessary given the Secretary's RBA index, which is sufficiently analogous to the privilege log recommended for weighing interests in access to documents and resolving discovery disputes in Federal civil litigation. *See* FED. R. CIV. P. 26(b)(5); *see also In re Sealed Case (Med. Records)*, 381 F.3d 1205, 1218 (D.C. Cir. 2004) (noting that a court may resolve a relevance dispute based on the production of a privilege log, and – if that fails – it may review documents in camera). Moreover, concerns about the mingling of documents are reduced by the detailed nature of the RBA index, which specifically noted when some nonmedical records were grouped with a set of medical records. *See* n.2, *supra*.

Given the appellant's privacy interest in her medical records and the lack of any conceivable relevance of these records to the limited issues in this appeal, the intervenor's request to review the medical records will be denied.[4] *See In re Mack*, 976 F.2d 746, 1992 WL 217766, at *2 (Fed. Cir. 1992) (noting Court's discretion in balancing the competing interests of privacy and public access); *Pritchett v. Derwinski*, 2 Vet.App. 116, 120 (1992) (Court must balance the privacy interests with the public's need for access); *see also Nixon v. Warner Commc'ns*, 435 U.S. 589, 599 (1978) ("[T]he decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.").

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[3] The Board did not predicate its denial on 1 U.S.C. § 7.

[4] The Court acknowledges the intervenor's reservation of the right to seek further review of this denial.

Moreover, in light of the agreement of the Secretary and the appellant to provide the intervenor with all nonmedical records in the RBA, the Court finds no need to have the RBA filed. *See* U.S. VET. APP. R. 10(c) ("The [RBA] . . . will not be filed with the Court unless the Court so orders.").

Upon consideration of the foregoing, it is

ORDERED that the Secretary transmit to the intervenor the RBA, save pages 272-311, 316-18, 323-24, 327-46, 361-69, 374-97, 411, 434-35, 479-89, 496, 506-18, 560-842, and 848-1444, no later than August 14, 2012.[5] It is further

ORDERED that the intervenor confer with the appellant and Secretary no later than August 28, 2012, regarding any intent to cite in its brief any RBA pages not included in the proposed ROP. If the appellant or Secretary objects to such a page being included in the eventual ROP (which will be locked, *see* E-Rule 4(e); *see also* E-Rule 1(a)(4) ("The term 'locked' means that an electronic file will be inaccessible to the public, and only accessible to CM/ECF Users in a particular case.")), the appellant or Secretary shall promptly file a motion to that effect. If the appellant or Secretary has no objection, the intervenor shall file its brief no later than August 31, 2012. It is further

ORDERED that the parties thereafter follow the briefing schedule set forth in the Court's May 30, 2012, order. It is further

ORDERED that the intervenor's motion for access to the RBA is granted in part, as the intervenor will receive all pages of the RBA that are not designated as medical records. It is further

ORDERED that the intervenor's motion for extension of time to file its brief is granted in part, as noted above. It is further

ORDERED that the Secretary's motion to seal the RBA and the appellant's motion to seal the RBA and exclude the intervenor from electronic access to the RBA are denied as moot.

DATED: August 13, 2012

BY THE COURT:

BRUCE E. KASOLD
Chief Judge

[5] Counsel for the intervenor pledged at oral argument not to disclose the content of RBA documents to those not involved in this litigation. The Court trusts that counsel will abide by its statement and its ethical obligations.

Copies to:

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