

NOTE: This order is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

**DEE FULCHER, GIULIANO SILVA, THE
TRANSGENDER AMERICAN VETERANS
ASSOCIATION,**
Petitioners

v.

SECRETARY OF VETERANS AFFAIRS,
Respondent

2017-1460

Petition for review pursuant to 38 U.S.C. Section 502.

Before PROST, *Chief Judge*, TARANTO and HUGHES, *Circuit
Judges.*

PER CURIAM.

O R D E R

On May 9, 2016, petitioners submitted a petition for rulemaking to the United States Department of Veterans Affairs (VA). Petitioners requested that the Secretary of the Department exercise his authority pursuant to, *e.g.*, 38 U.S.C. §§ 501(a), 1705, 1710, to change the regulations governing the Medical Benefits Package available to veterans. Specifically, they asked the Secretary to amend

or repeal 38 C.F.R. § 17.38(c)(4), which excludes “gender alterations” from the services available, and to “promulgate regulations expressly including sex reassignment surgery for transgender veterans within the Medical Benefits Package.” J.A. 108–09.

The Department undertook consideration of initiating a proposed rulemaking along the lines requested. That consideration was announced in the Spring 2016 Semianual Unified Agenda of Regulatory and Deregulatory Actions. On November 10, 2016, then-Under Secretary David Shulkin, writing on behalf of the Department, sent letters responding to various members of Congress who had written to the Secretary on this subject. In each of his letters, Dr. Shulkin noted the Department’s consideration of the matter and then stated:

VA currently provides many services for transgender Veterans to include hormone therapy, mental health care, preoperative evaluation, and long-term care following sex reassignment surgery. Increased understanding of both gender dysphoria and surgical techniques in this area has improved significantly and is now widely accepted as medically necessary treatment. VA has been and will continue to explore a regulatory change that would allow VA to perform gender alteration surgery and a change in the medical benefits package, when appropriated funding is available. Therefore, this regulation will be withdrawn from the Fall 2016 Unified Agenda. While VA has begun considering factors impacting this rulemaking process, it is not imminent.

J.A. 1.

On January 9, 2017, petitioners filed a petition for review in this court, invoking 38 U.S.C. § 502. Under that provision, this court has jurisdiction to review, among other things, actions of the Secretary referred to in

5 U.S.C. § 553, which addresses rulemaking. Petitioners filed their principal brief on June 21, 2017; the Secretary filed his principal brief on November 28, 2017; and petitioners filed their reply on December 28, 2017. This court heard argument on May 3, 2018.

Petitioners make two contentions of significance for present purposes. First, they contend that the November 2016 letters to members of Congress constituted a reviewable denial of their petition for rulemaking. Second, they contend that if those letters do not amount to a reviewable denial, then the Secretary has unreasonably delayed acting on their petition.

The court would be assisted in deciding this case by the receipt of additional explanation and, if available, additional evidence. *See, e.g., Camp v. Pitts*, 411 U.S. 138, 142–43 (1973) (per curiam) (noting remedy for lack of explanation of final agency action to allow for “effective judicial review” is “to obtain from the agency, either through affidavits or testimony, such additional explanation”); *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989) (allowing submission of evidence in “cases where agencies are sued for a failure to take action”). To date, the submissions made to us offer scant explanation, or supporting evidence, concerning (i) whether consideration of the petition has been suspended pending an appropriation or for some other reason, and if not, what steps the Department has taken to consider the petition in the year and a half since the November 2016 letters were sent; (ii) what explains the pace of any consideration there has been; and (iii) what if any steps to address the petition the Secretary currently contemplates and on what schedule, as well as the reasons for any contemplated steps and schedule. The court directs respondent to file a supplemental brief to provide additional explanations on those topics and invites supplementation of the record to support such explanations, *e.g.*, by submission of evidence concerning

those matters coming directly from the Secretary or from someone authorized to speak for the Secretary.

IT IS ORDERED THAT:

Respondent shall file his supplemental brief, with any supplemental evidence, no later than July 9, 2018. Petitioners shall file any response no later than August 8, 2018. This Order constitutes authorization to both petitioners and respondent to supplement the record with evidence directly bearing on the matters summarized above. This Order does not contemplate discovery.

Respondent shall notify this court of any formal denial of the petition or initiation of a rulemaking that makes the additional submissions ordered here unnecessary.

FOR THE COURT

May 7, 2018
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court