

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

CHARLES J. LOVE, JR.,
Claimant-Appellant

v.

**DENIS MCDONOUGH, SECRETARY OF
VETERANS AFFAIRS,**
Respondent-Appellee

2022-2285

Appeal from the United States Court of Appeals for
Veterans Claims in No. 21-1323, Judge Amanda L. Meredith,
Judge Joseph L. Falvey, Jr., Judge Scott Laurer.

BRIAN M. AUMILLER, TAMORA E. DIEZ,
Claimants-Appellants

ROGER A. GEORGES,
Claimant

v.

**DENIS MCDONOUGH, SECRETARY OF
VETERANS AFFAIRS,**
Respondent-Appellee

2022-2296

Appeal from the United States Court of Appeals for Veterans Claims in No. 21-3565, Judge Amanda L. Meredith, Judge Joseph L. Falvey, Jr., Judge William S. Greenberg.

JAMES R. LINDGREN,
Claimant-Appellant

v.

**DENIS MCDONOUGH, SECRETARY OF
VETERANS AFFAIRS,**
Respondent-Appellee

2023-1135

Appeal from the United States Court of Appeals for Veterans Claims in No. 22-1154, Judge Coral Wong Pitsch.

Decided: May 3, 2024

KRISTINA MCKENNA, Latham & Watkins LLP, Boston, MA, argued for claimants-appellants. Also represented by ROMAN MARTINEZ, Washington, DC; MELANIE L. BOSTWICK, Orrick, Herrington & Sutcliffe LLP, Washington, DC; KENT A. EILER, JOHN D. NILES, Carpenter Chartered, Topeka, KS.

EMMA EATON BOND, Commercial Litigation Branch, Civil Division, United States Department of Justice,

LOVE v. MCDONOUGH

3

Washington, DC, argued for respondent-appellee. Also represented by BRIAN M. BOYNTON, MARTIN F. HOCKEY, JR., PATRICIA M. MCCARTHY; BRIAN D. GRIFFIN, RICHARD STEPHEN HUBER, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before DYK, SCHALL, and HUGHES, *Circuit Judges*.

DYK, *Circuit Judge*.

Four veterans in three separate cases appeal from judgments of the United States Court of Appeals for Veterans Claims (“Veterans Court”) dismissing the veterans’ petitions for writs of mandamus for lack of jurisdiction. We previously consolidated two cases, *Love v. McDonough*, No. 22-2285, and *Aumiller v. McDonough*, No. 22-2296, and the *Love*¹ case and *Lindgren v. McDonough*, No. 23-1135, were argued together. Because there is an alternative remedy by appeal, we affirm.

BACKGROUND

The underlying issue in these cases is whether a veteran whose rating is reduced is entitled to have the original rating continue pending final resolution of the validity of the reduction. The factual background for each of the two companion cases is as follows.

I. *Love v. McDonough*

Charles Love served on active duty in the Army from January 1968 to March 1971. Mr. Love was evaluated at a 100 percent disability rating for prostate cancer from 2005 to 2007, at which point his rating was reduced to 20 percent. Most recently, Mr. Love was again evaluated at a 100 percent disability rating for prostate cancer, effective May 8, 2009. In September 2019, Mr. Love’s rating was reduced

¹ We refer to the three plaintiffs in the *Love* and *Aumiller* consolidated case (Love, Aumiller, and Diez) as *Love*.

to 20 percent, effective December 1, 2019. This reduction also discontinued his special monthly compensation (“SMC”) that he had been granted under 38 U.S.C. § 1114(s)(1). Mr. Love contends that his disability compensation has been reduced by nearly \$400 each month since December 1, 2019. Mr. Love sought review of his reduction and, after the regional office upheld the reduction, he unsuccessfully appealed the decision to the Board of Veterans Appeals (“Board”) and then to the Veterans Court. His appeal of his rating reduction is currently before this court. *Love v. McDonough*, No. 23-1465.

Brian Aumiller served on active duty in the Army at different times from 2002 to 2007. Mr. Aumiller was also entitled to SMC and had a total disability rating evaluation based on individual unemployability (“TDIU”) in addition to ratings for other service-connected disabilities. On November 5, 2019, the Department of Veterans Affairs (“VA”) notified Mr. Aumiller that his TDIU rating would be discontinued based on evidence of gainful employment. This discontinuance also affected his entitlement to SMC. He asserts that his disability compensation has been reduced by nearly \$2,000 each month since May 1, 2020. Mr. Aumiller filed a Notice of Disagreement with the Board, and his appeal remains pending.

Tamora Diez served in the Navy from August 1979 to August 1999. On June 1, 2020, the VA notified Ms. Diez that her evaluation for her service-connected scar would be reduced from 10 percent disabling to 0 percent. The reduction would reduce her total service-connected disability evaluation from 80 percent to 70 percent, affecting her disability compensation. She contends that her disability compensation has been reduced by over \$200 per month since September 2020. Ms. Diez filed a Notice of Disagreement, challenging the rating reduction. Her appeal remains pending.

None of these three appellants requested that the VA continue their benefits pending resolution of the question whether their benefits were properly reduced.

On March 2, 2021, Mr. Love petitioned the Veterans Court for a writ of mandamus to compel the VA to resume his payments in the pre-reduction amount, arguing that the VA could not lawfully decrease or discontinue his payments until his appeals challenging the reduction were exhausted. At that point, according to Mr. Love, the VA could seek to recover the interim payments, and the veteran could argue for waiver of the overpayment by establishing “that recovery [of the overpayment] would be against equity and good conscience.” 38 U.S.C. § 5302(a)(1). Mr. Love argued that the Secretary’s action, by decreasing or discontinuing the payments while his appeal was pending, was an unlawful withholding, and that mandamus is available for “compelling unlawfully withheld agency action.” *Love*, J.A. 42. The Veterans Court found that there was no “basis on which we could issue a writ under the [All Writs Act] in aid of our jurisdiction.” *Love v. McDonough*, 35 Vet. App. 336, 353 (2022).

On May 25, 2021, Mr. Aumiller and Ms. Diez filed a nearly identical petition. The Veterans Court stayed the proceedings for Mr. Aumiller and Ms. Diez pending the decision in *Love v. McDonough*, U.S. Vet. App. No. 21-1323. Following the *Love* decision, the Veterans Court dismissed Mr. Aumiller’s and Ms. Diez’s petition for lack of jurisdiction. All three claimants appealed to this court.

II. *Lindgren v. McDonough*

James Lindgren served in the Army from 2009 to 2012. Mr. Lindgren had a service-connected disability rating of 100 percent due to post-traumatic stress disorder (“PTSD”) with depressive disorder. He also was entitled to SMC. On April 16, 2021, the VA notified Mr. Lindgren that it planned to reduce his PTSD rating and discontinue his entitlement to SMC effective September 1, 2021. He contends that his disability compensation has been withheld by more than \$400 each month since October 1, 2021. His appeal before the Board remains pending.

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