

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-5352

September Term, 2017

FILED ON: FEBRUARY 14, 2018

STANLEY G. KINKAID,
APPELLANT

v.

DAVID J. SHULKIN, SECRETARY AND JAMES MATTIS, SECRETARY,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:15-cv-00797)

Before: GARLAND, *Chief Judge*, and SENTELLE and RANDOLPH, *Senior Circuit Judges*.

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the district court's decision be affirmed for the reasons set forth in the memorandum filed simultaneously herewith.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

MEMORANDUM

This appeal arises from the district court’s dismissal of Dr. Stanley Kinkaid’s petition for a writ of mandamus. *See Kinkaid v. McDonald*, 208 F. Supp. 3d 212, 213-14 (D.D.C. 2016).

Kinkaid filed a petition for a writ of mandamus in the district court to compel the Secretary of Veterans Affairs and the Secretary of Defense to pay him past-due back pay that had been ordered by the Principal Deputy Under Secretary for Health at Veterans Affairs. Kinkaid had been improperly discharged from employment, and the Principal Deputy Under Secretary ordered the government to pay Kinkaid “the appropriate amount of back pay.” During the pendency of the action in the district court, the Defense Finance and Accounting Service (“DFAS”) mailed Kinkaid a check for \$116,499.87 for back pay plus interest. The government moved to dismiss, and the district court dismissed the action on grounds of mootness.

Kinkaid appeals, arguing that the action is not moot because he is entitled to additional back pay as DFAS improperly deducted outside earnings.

This Court reviews de novo a district court’s dismissal for “lack of subject matter jurisdiction, including on mootness grounds.” *Schmidt v. United States*, 749 F.3d 1064, 1068 (D.C. Cir. 2014). We also review “the threshold requirements for mandamus jurisdiction de novo.” *American Hosp. Ass’n v. Burwell*, 812 F.3d 183, 190 (D.C. Cir. 2016). “Mandamus is proper only if ‘(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff.’” *Northern States Power Co. v.*

U.S. Dep't of Energy, 128 F.3d 754, 758 (D.C. Cir. 1997) (quoting *Council of & for the Blind of Del. Cty. Valley, Inc. v. Regan*, 709 F.2d 1521, 1533 (D.C. Cir. 1983) (en banc)). “The party seeking mandamus has the burden of showing that ‘its right to issuance of the writ is clear and indisputable.’” *Id.* (quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988)).

The order promising Kinkaid back pay did not specify any particular amount due to him, and the government satisfied the only clear duty owed to Kinkaid by paying him \$116,499.87. Kinkaid has not shown a clear and indisputable right to additional back pay based on his disputed interpretation of the Back Pay Act. Kinkaid cited no relevant authority that supports his interpretation of moonlight employment or his application of that interpretation in the Back Pay Act context. Kinkaid also cited no relevant authority to support his argument that the Back Pay Act requires outside earnings to have been received through substantially similar employment in order to be deductible from the back pay award. Likewise, Kinkaid cited no relevant authority to support his argument that earnings from overtime hours should not have been deducted from his back pay award. “We need not definitively resolve that statutory debate at this stage . . . [because] [w]e cannot say that the statute[] afford[s] [Kinkaid] a ‘clear and indisputable’ right to mandamus relief.” *In re Khadr*, 823 F.3d 92, 99-100 (D.C. Cir. 2016). On the allegations in his petition, Kinkaid fails to establish a clear and indisputable right to relief under his preferred interpretation of the Back Pay Act.

Kinkaid further asserts that there is still a live controversy as to whether the district court erred in rejecting an APA claim for unreasonable delay. However, even if this constituted a clear and indisputable right, Kinkaid’s mandamus petition did not allege an APA claim and has never

been amended. *See Schmidt v. United States*, 749 F.3d 1064, 1068-69 (D.C. Cir. 2014).

Moreover, the agency paid Kinkaid interest to compensate for any delay.

For the foregoing reasons, we affirm the district court's dismissal of this action.