

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Betty Scyphers

Petitioner,

v.

NO. 16-_____

Robert A. McDonald,
Secretary of Veterans Affairs,

Respondent.

PETITION FOR WRIT OF MANDAMUS AND OTHER RELIEF

Petitioner shows the following:

1. Petitioner, the spouse of a deceased veteran who has been denied disability benefits by the United States Department of Veterans Affairs (VA), seeks an order from this honorable Court holding that the VA's delay in processing appeals violates the Due Process Clause of the Fifth Amendment to the United States Constitution and the Secretary's statutory duties. Petitioner requests that the order impose a remedy sufficient to address these violations.
2. The United States has made a solemn commitment to individuals who serve in the Armed Forces: a promise to provide appropriate benefits to individuals who become injured in service and to the families who support them. President Lincoln's own words at his second inaugural in 1865, etched in

stone at the Lincoln Memorial, capture that commitment: “to care for him who shall have borne the battle and for his widow, and his orphan.”

3. Congress charged the VA and its Secretary with providing those benefits. Indeed, President Lincoln’s words have been the VA’s motto since 1959, memorialized on plaques that flank the entrance to the VA headquarters in Washington, D.C.
4. The VA has failed in that commitment to such a degree that it has deprived veterans and their families, including Petitioner here, of their rights under the Due Process Clause of the Fifth Amendment to the Constitution. A veteran whose disability benefits are denied by the VA waits, on average, 1448 days from the time the VA denies the veteran’s request for benefits to the time that the Board of Veterans Appeals (BVA) rules on the veteran’s appeal. In the meantime, 20 veterans commit suicide in the United States every day. Thousands of veterans die before their appeals are decided.
5. Taking four years to process an appeal is disgraceful. This inexcusable delay violates due process and the Secretary’s statutory duty to prepare appellate records for the Board of Veterans Appeals: So held a panel of the United States Court of Appeals for the Ninth Circuit in *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 851 (9th Cir. 2011) (“We hold that the VA’s failure to provide adequate procedures for veterans facing prejudicial delays in the

delivery of mental health care violates the Due Process Clause of the Fifth Amendment”), *vacated*, 678 F.3d 1013 (9th Cir. 2012) (en banc). Although the en banc court reversed, it did not disagree with the substance of the due process holding. Rather, the en banc court concluded that it lacked jurisdiction, finding that the question was properly addressed to this Court:

We conclude that we lack jurisdiction to afford such relief because Congress, in its discretion, has elected to place judicial review of claims related to the provision of veterans’ benefits beyond our reach and within the exclusive purview of the United States Court of Appeals for Veterans Claims and the Court of Appeals for the Federal Circuit.

Veterans for Common Sense v. Shinseki, 678 F.3d 1013, 1016 (9th Cir. 2012) (en banc); *see also id.* at 1021 (“[T]he Veterans Court’s authority would extend to *all* questions involving benefits under laws administered by the VA. This would include factual, legal, and *constitutional* questions.” (second emphasis added) (internal quotation marks omitted)).

6. Petitioner respectfully requests that this Court declare that the VA’s conduct violates the Due Process Clause of the Fifth Amendment and further requests that the Court impose a remedy sufficient to address these violations of her constitutional rights.

JURISDICTION

7. This petition is brought pursuant to Rule 21 of this Court. This Court has jurisdiction under 38 U.S.C. § 7252. Under that law, this Court has

supervisory jurisdiction over the Secretary to “(1) . . . interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary;” and “(2) compel action of the Secretary unlawfully withheld or unreasonably delayed.” 38 U.S.C. § 7261(a). This Court has recognized in other cases its duty to protect the due process rights of veterans. *See, e.g., Sellers v. Shinseki*, 25 Vet. App. 265, 279–83 (2012).

8. Congress has given this Court a second source of power: The All Writs Act empowers “[t]he Supreme Court and all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a). The Court has the power to issue a writ to eliminate the unconstitutional delays suffered by Petitioner and thousands of other veterans.
9. The political branches of government have utterly failed to address the delay caused by the VA in what was supposed to be a quick and veteran-friendly program. For example, in 2013, the House of Representatives passed a bill that “established a commission or task force to evaluate the backlog of claims within the [VA] and the appeals process of claims.” H.R. 2189, 113th Cong., § 101 (2013). Although the House passed the bill, it died in the Senate. When

the political branches fail to correct constitutional violations of the rights of their citizens, the Court must act.

10. Veterans have challenged the VA's unconstitutional delays outside this Court without success. While sympathetic to the plight of veterans and recognizing the due process issues, two appellate courts of the United States have held that it is this Court's job, not theirs, to address the unconstitutional delays. *E.g.*, *Veterans for Common Sense*, 678 F.3d at 1021; *Beamon v. Brown*, 125 F.3d 965, 974 (6th Cir. 1997).
11. This Court must take action. The Court should invalidate and hold unconstitutional any statute, regulation, or practice that contributes to the inexcusable delay—a delay that denies veterans and their families their most fundamental rights under the Constitution. The Court has the power to take this action based on the Fifth Amendment of the U.S. Constitution, the Court's enabling statute, the All Writs Act, and Rule 21. Petitioner asks this Court to require Respondent to process promptly the individual claim embodied in this petition, and to declare that the delays regarding the approximately 146,000 pending appeals violate the veterans' due process rights.

PARTIES

12. Petitioner is the spouse of a deceased veteran who has filed a survivorship claim for veteran's benefits with the VA and whose claim the VA has denied.

After denial of Petitioner's claim, the VA has failed to process Petitioner's appeal to the Board of Veterans Appeals in a timely fashion, and as demonstrated below, Petitioner faces a delay of four years or more on appeal. Relief from the unconstitutional delay in processing of veterans' appeals will ameliorate Petitioner's injury.

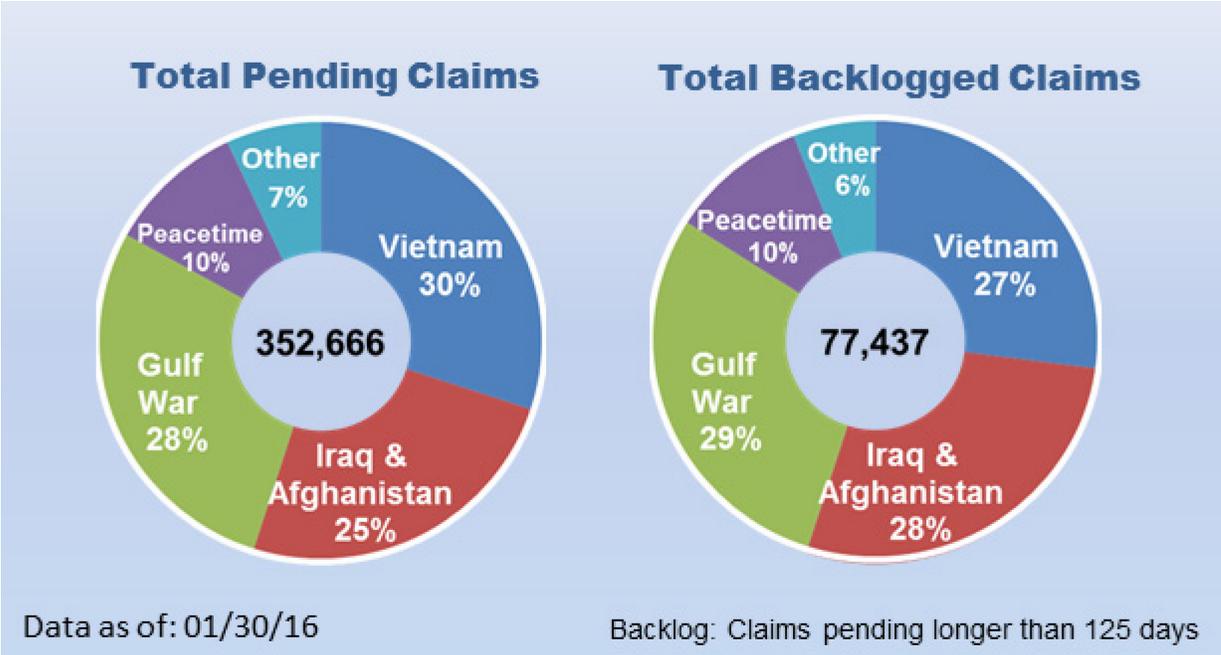
Respondent Robert A. McDonald

13. Respondent Robert A. McDonald is the Secretary of Veterans Affairs and is charged by Congress with providing timely benefits to deserving veterans and their families.

FACTS

14. There are more than 22 million veterans in the United States. All of those veterans are potentially eligible for VA services. Their families add millions more of potential claimants. According to information from the VA, 352,666 claims are pending before the VA as of January 2016. U.S. Dep't of Veterans Affairs, Veterans Benefits Administration Reports, http://benefits.va.gov/REPORTS/detailed_claims_data.asp (last updated June 27, 2016).
15. The VA expects the number of claims to increase significantly as veterans returning from wars in Afghanistan and Iraq continue to enter the system.

16. The VA has a goal to decide applications for benefits in 125 days. But of the 352,666 pending claims, 77,437 have been pending more than 125 days, even though many veterans are completely dependent on disability benefits for financial support.



17. The VA was created to look after veterans’ interests. The system as it existed until 1988 required the VA to review veterans’ claims in an informal, non-adversarial, pro-claimant manner at all stages of the process. For many years, lawyers were excluded from the system. In 1988, Congress introduced lawyers into the system by creating this Court to provide judicial review of the VA system. Veterans’ Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988). With the 1988 amendment, Congress imposed an

adversarial system on top of one that was originally intended to be non-adversarial.

18. For veterans seeking disability benefits, their journey through the VA process begins with filing a notice of claim with one of the VA's 58 regional offices. If the VA denies a veteran's disability benefit claim, the veteran may send the VA a Notice of Disagreement. The veteran's Notice of Disagreement is due within one year of the adverse decision, but veterans on average file that Notice within 60 days. The veteran then has two options for how to proceed: directly to an appeal to the BVA or by way of *de novo* review of the claim by a VA Decision Review Officer at the regional office. Both avenues lead ultimately to the Board of Veterans Appeals, which makes the final VA decision on veterans' claims.
19. After filing a Notice of Disagreement, veterans on average wait more than a year for the VA to prepare a Statement of the Case, describing the relief sought and the reason for denial. Should the veteran during the interim submit additional evidence in support of her claim, the VA will prepare a Supplemental Statement of the Case, which further delays the progress of the appeal. If the veteran is still dissatisfied after receiving the Statement of the Case (or any supplements), the veteran can file a Notice of Appeal (also called a "Form 9") within 60 days of receipt of the Statement of the Case. On

average, veterans file the Notice of Appeal with the VA regional office within 39 days of an adverse decision.

20. To perfect the appeal, the VA Regional Office must then file two documents: a Certification of Appeal and the already-prepared Statement of the Case (unless a Supplemental Statement of the Case is required). The Certification is a two-page, ministerial document. The Statement of the Case and the Certification on average take 2.6 hours to prepare. Yet the most recent statistics show that this 2.6 hour task takes the VA on average 537 days after receiving the Notice of Appeal and that it takes another 222 days before the BVA actually receives the certified appeal, for a total of 759 days. More than two years. With exceptions for severe hardship or claims involving the interpretation of law of general application, 38 U.S.C. § 7107, the veteran can do nothing to speed the process.

| Time Interval | Responsible Party | Average Elapsed Processing Time | |
|--|-------------------|---------------------------------|---------|
| Notice of Disagreement Receipt to Statement of the Case | VBA | 419 days | } AOJ |
| Statement of the Case Issuance to Substantive Appeal (VA Form 9) Receipt | Appellant | 39 days | |
| Substantive Appeal Receipt to Certification of Appeal | VBA | 537 days | |
| Certification of Appeal to Board Receipt of Certified Appeal | Board | 222 days | } Board |
| Receipt of Certified Appeal to Issuance of Board Decision ⁺ | Board | 270 days | |
| Average Remand Time Factor | VBA | 255 days | } AOJ |

21. Between the 419 days it takes for the VA to prepare the Statement of the Case and the 759 days it takes for the VA to prepare the Certification and forward the certified appeal to the BVA, veterans are caught in limbo for an average of more than 1,100 days, or approximately 3 years 3 months. It then usually takes the Board of Veterans Appeals nearly another year to render a decision, often resulting in a remand in which the veteran again finds himself or herself caught in the VA's web. The process of trying to right what the veteran thinks is wrong takes 1448 days (or approximately 4 years) on average. Some veterans die while waiting; a shocking number commit suicide.
22. Although it has failed to take action itself, Congress continually berates the VA for moving more slowly than it intended. *See, e.g., Why Are Veterans*

Waiting Years on Appeal?: A Review of the Post-Decision Process for Appealed Veterans' Disability Benefits Claims: Hearing Before the Subcomm. on Disability Assistance & Memorial Affairs of the H. Comm. on Veterans' Affairs, 113th Cong. 22 (2013).

23. The VA appellate delay puts veterans' health and welfare at risk and thereby deprives them of their right to due process in the consideration of their appeals. Courts recognize six factors in determining whether an agency's delay is so egregious as to warrant mandamus. *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984). The workload of the agency is only one of the six factors. *Id.* Another important factor considers that "delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake" *Id.* This Court likewise has observed that when health and welfare are at stake, unwarranted delays are intolerable. *Erspamer v. Derwinski*, 1 Vet. App. 3, 10 (1990).
24. The demands on the resources of the Secretary of the VA do not and cannot justify a four-year delay. The Secretary's arbitrary refusal to act—whether as to individual veteran's claims or as to the systemic problem the Secretary admits to exist, *see infra* ¶ 31—unconstitutionally violates veterans' due process rights.

- c. In *Deloach v. Shinseki*, 704 F.3d 1370 (Fed. Cir. 2013), the two veterans' claims languished for twelve years before the Federal Circuit remanded for further review. Once flushed back into the morass, the veterans' cases will be resolved much later. *See infra* ¶ 36.
- d. The VA subjected the veteran in *Andrews v. Shinseki*, 26 Vet. App. 193 (2013), who sought vocational rehabilitation services, to a delay of sixteen years before this Court decided his case a year later.
- e. Lady Byron's claim on behalf of her deceased husband was pending for more than 16 years, when she died. *Byron v. Shinseki*, No. 13-2329, 2014 WL 2178244 (Vet App. May 27, 2014) (dismissing appeal as moot). Because of appellate delays, she received nothing on this claim.

Lady Byron and her husband were not unique. In the six month period between October 2007 and April 2008, 1467 veterans—roughly a *regiment* of soldiers or Marines—died while their appeals were pending. Truly, the VA defines the axiom that justice delayed is justice denied.

- 27. Petitioner's case is emblematic of the delays all veterans and their families face on appeal. Ernest W. Scyphers served in the Air Force for 20 years, retiring in 1974. While on active duty at Ubon RTAFB in Thailand from February 27, 1970 to February 27, 1971, he was exposed to tactical herbicides that resulted in service-connected medical problems. Nearly twelve years ago, on July 22, 2004, he applied for disability benefits. Benefits were denied because he did not serve in Vietnam.
- 28. After several other steps, Mr. Scyphers filed a request to reopen the decision on July 26, 2013 after the VA changed its policy and found service connection for Agent Orange and tactical herbicide use at air bases in Thailand. The VA

approved such claims when a veteran served as a security policeman or dog handler or otherwise served near the perimeter of the air base. Mr. Scyphers proved that he lived and worked on the perimeter at Ubon as a flight line expediter. Mr. Scyphers submitted supporting reports from five physicians. The VA Atlanta office sent his file to St. Paul, which denied his claim on July 27, 2014 and refused to provide a copy of the related rating decision dated April 25, 2014. Mr. Scyphers filed his notice of disagreement on October 22, 2014. The VA has never provided a Statement of the Case, despite repeated requests. Mr. Scyphers filed a request to expedite his claim because of his health and advanced age, but the VA never even responded to his request. Mr. Scyphers died April 4, 2015.

29. By denying Mr. Scyphers' claim and delaying the appeals process, the VA avoided making any payments to Mr. Scyphers. His widow, continuing the decade-long fight for benefits, has filed a Survivorship Claim, a claim for Dependency and Indemnity Compensation and a request to substitute as petitioner in Mr. Scyphers' claim. On August 18, 2015, Ms. Scyphers filed a Notice of Appeal, Form 9, even though the Scyphers never received a Statement of the Case.
30. On October 8, 2015, at the age of 76, Ms. Scyphers asked the VA to expedite consideration of her claims. Ms. Scyphers had triple bypass heart surgery and

has since received eight heart stents. Even though the VA automatically advances consideration of the claims of an applicant age 75 or older, the VA has not responded. The VA has deprived Ms. Scyphers and her deceased husband of due process by failing to provide a copy of his rating decision (which has since been obtained from another source), by refusing to provide a required Statement of the Case, and by refusing to advance consideration of the appeal in light of their advanced age and failing health.

31. The case of Edward Thomas Rose, whose Petition was filed contemporaneously with Petitioner's, is equally emblematic of the delay facing veterans and their families. The Army certified Mr. Rose physically and mentally fit for deployment to Iraq in 2009. In August 2010, he was shipped to the Balad area of Iraq to serve as a truck driver in a reserve engineering unit. In March 2011, the Army medevac'd him to Germany for debilitating knee pain. Upon his return to the United States, he began to exhibit symptoms of severe mental distress and other physical injuries. He has not been able to hold down any gainful employment since his return from Iraq—a sharp contrast to his consistent ability to support his family before his deployment. In short, he is a changed man.
32. Mr. Rose submitted his claim for VA benefits on November 22, 2011. The VA partially denied Mr. Rose's claim in March 2013 and then, in November

2013, denied any mental health benefits. But Mr. Rose has kept fighting.

33. In February 2014, Mr. Rose filed his first Notice of Disagreement. In November 2014, the VA and the Army jointly granted Mr. Rose additional partial benefits for certain physical injuries as part of the Army's process of medically discharging Mr. Rose, but continued to deny Mr. Rose benefits for mental health or unemployability. In February 2015, Mr. Rose appeared before a VA Decision Review Officer ("DRO") for a *de novo* hearing on his claim. Ignoring the substantial evidence before her—including hundreds of pages of medical records attesting to his injuries and inability to hold gainful employment and testimony from two experts—the DRO again denied the claim and issued Mr. Rose a Statement of the Case on April 28, 2015. Mr. Rose timely filed his appeal on June 18, 2015. But due to the VA's piecemeal adjudication of Mr. Rose's claim, Mr. Rose was forced to continue submitting additional Notices of Disagreement to the VA's various decisions, in May 2015 and September 2015. As of the date of this Petition, Mr. Rose has yet to receive any Supplemental Statements of the Case or a Certification of Appeal to the BVA.
34. Mr. Rose has exhausted all available administrative remedies to prompt the VA into action, including numerous letters and phone calls to the agency, and even phone calls to Secretary McDonald himself. On April 26, 2016, the

Roanoke Regional Office responded to Mr. Rose's repeated request for timely handling of his claim by admitting that it only now is processing VA Form 9 appeals from 2010 and early 2011 and Notices of Disagreement from 2013. In other words, the Roanoke office has admitted that Mr. Rose faces further delays of *five years or more*.

35. In a brief filed in the United States Court of Appeals for the Federal Circuit, Secretary Robert McDonald admitted the following:

The Secretary further notes he does not dispute that, in 2014: (1) veterans who filed an NOD [Notice of Disagreement] waited an average of 330 days before receiving a Statement of the Case necessary to complete the appeals process; (2) veterans who initiated a formal appeal with the Veterans Benefits Administration (VBA) waited an average of 681 days for the VBA to certify appeals to the board; and (3) veterans whose appeals were certified to the board waited an average of 357 days for the board to decide their appeals, totaling, on average, 1,368 days from the filing of an NOD to the board's decision on appeal.

Brief of Respondent-Appellee, *Monk v. McDonald*, No. 2015-7092, 2016 WL 265708, at *5 n.3 (Fed. Cir. Jan. 14, 2016). The Secretary's candor is refreshing. But candor does not provide a wounded veteran the life-saving care he or she needs or feed the veteran's family when he or she cannot work by virtue of the wounds suffered in serving our country.

36. Endless delay is only part of the problem: the error rate in initial decisions that are appealed is greater than 75%. According to the Board of Veterans Appeals, its decisions in the most recent year were as follows: 46.4% were

remands; 31.0% were reversals, 3.5% were “other” and only 19.1% were affirmed. As veterans have stated with understandable sarcasm for many years, the appellate process is a hamster wheel. But it is a deadly serious one.

37. This Petition presents this Court with grave questions of life and death. These questions arise because there are serious, fundamental, and structural problems that have caused the VA to fail in honoring its duty to veterans.
38. Veterans suffering from disabilities caused by active duty service during periods of war are entitled by law to veterans’ benefits to sustain themselves and their families.
39. A four-year delay is tantamount to a denial of benefits. It therefore violates the veterans’ due process right to receive care and benefits provided by statute for harms and injuries sustained while serving our country.
40. The average delay encountered over many years is evidence of the delay facing Petitioner. This Court must act to prevent the VA from violating Petitioner’s constitutional rights.
41. A claim of delay cannot await a final decision by the VA because it is the very delay—lack of VA action—that gives rise to the complaint. *Cf. Gordon v. Norton*, 322 F.3d 1213, 1220 (10th Cir. 2003) (“An agency’s failure to act . . . can also become a final agency action . . . if the agency delays unreasonably in responding to a request for action”); *see also Telecomms. Research &*

Action Ctr., 750 F.2d 70. By definition, Petitioner will have already suffered the unconstitutional delay by the time Petitioner reaches this Court in the ordinary course.

42. Two Courts of Appeal have held that no other remedy is available to Petitioner to attack the VA's delay in processing appeals. This Court is the first court in the VA appellate process. This Court has the jurisdiction to address delay before it happens. This Court has the power to declare unconstitutional the statutes, regulations, and practices impeding just and speedy appeals. This Court can issue a writ of mandamus compelling VA agency action in these extraordinary circumstances. Petitioner is clearly entitled to a writ of mandamus ordering the VA to eliminate improper delays.

WHEREFORE, Petitioner prays:

- (1) that this Court issue a writ of mandamus to the Secretary ordering him to eliminate delays in processing appeals;
- (2) that this Court hold unconstitutional under the Due Process Clause of the Fifth Amendment to the Constitution any statute, regulation or practice that interferes with prompt and speedy appeals;
- (3) that this Court issue a writ of mandamus directing the Secretary to prepare necessary appellate documents in a fashion that does

not deprive veterans of their rights under the Due Process Clause
of the Fifth Amendment to the Constitution; and

- (4) for such other relief as is appropriate in the premises.

This 21st day of July, 2016.

/s/ John A. Chandler

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of July, 2016, the foregoing materials will be filed with the Court and sent by United States Mail to the Respondent at the following address:

Robert A. McDonald, Secretary of Veterans Affairs
c/o General Counsel (027), Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, DC 20420-0002

/s/ Liam J. Montgomery
Liam J. Montgomery