

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Eugenia Mote,

Petitioner,

NO. 16-2506

v.

Denis McDonough,

Secretary of Veterans Affairs,

Respondent.

PETITIONER’S RESPONSE TO THE COURT’S MARCH 1, 2021 ORDER

Like too many other veterans, Wayne Mote died before the VA resolved his disability benefits appeal. His widow, Eugenia, continued to fight for the benefits she needed and deserved before she, too, passed away last year.

Mrs. Mote’s death came on the heels of a second successful Federal Circuit appeal following *seven years* of attempting to work within the broken appeals system. Her experience, and the fact that counsel must now write to confirm the mootness of her current appeal to this Court,¹ is a poignant illustration of the failures of the VA system.

¹ The Motes’ son continues to pursue their underlying benefits claim with separate counsel. Nothing in this filing should be taken to waive any rights related to that proceeding.

RELEVANT BACKGROUND

Below is an overview of the Motes' decade-long appellate battle.

A. Ten Years of Fighting

Even in a system that imposes staggering delays on veterans and their families, Eugenia Mote was an outlier. Her husband, Wayne Gary Mote, honorably served in the United States Air Force from February 16, 1961, to May 14, 1965. Among other hazards Mr. Mote faced, his helicopter crew participated in two covert, special operations missions to Da Nang, Vietnam—where Agent Orange had been employed—providing search and rescue training to South Vietnamese and U.S. soldiers and recovering aircraft that had been shot down by enemy fire.

After leaving the service, Mr. Mote developed coronary artery disease and lung cancer. In November 2010, Mr. Mote filed a claim of entitlement to service connection for ischemic heart disease due to Agent Orange exposure.² The Secretary first denied Mr. Mote's claim in November 2012. Mr. Mote then initiated an appeal in early 2013, but he died from heart disease in April 2013 while still waiting for the Secretary to act on that appeal.

² Coronary artery disease and lung cancer are included in the “presumptive list” for Agent Orange exposure, which means that the Secretary in adjudicating a veteran's disability claim must presumptively assume causation from Agent Orange. *See* <https://www.publichealth.va.gov/exposures/agentorange/conditions/>.

Mrs. Mote was deeply affected by the loss of her husband. She described Mr. Mote as “my rock, my best friend, my everything; I was lost at that point in my life.” As her husband’s authorized representative for accrued claims, she filed a claim for Dependency and Indemnity Compensation based on her husband’s service-connected death. The Secretary finally began to process the appeal by issuing a “Statement of the Case” in May 2016, three years after Mrs. Mote’s late husband began the appeal process.

In September 2016, Mrs. Mote joined more than a dozen other veterans in filing petitions for writs of mandamus in this Court. *See Martin v. O’Rourke*, 891 F.3d 1338, 1340 (Fed. Cir. 2018). The petitioners sought to require the Secretary to decide their disability benefits appeals without further delay. As authority for these requests, petitioners cited the Due Process Clause of the Constitution, as well as 38 U.S.C. § 7261, the statute outlining the scope of this Court’s review of VA actions. Section 7261 empowers this Court to “compel action of the Secretary unlawfully withheld or unreasonably delayed.” 38 U.S.C. § 7261(a)(2).

The Court denied Mrs. Mote’s mandamus petition in November 2016, applying the *per curiam* decision in *Costanza v. West*, 12 Vet. App. 133 (1999). Mrs. Mote moved for panel rehearing of the single-judge order. Without further briefing, a panel of this Court retained the single-judge decision.

Mrs. Mote appealed to the Federal Circuit (the first time) in March 2017. The Federal Circuit consolidated Mrs. Mote's appeal with those of nine related petitioners, and then vacated and remanded this Court's decisions, holding that the Court had erred in applying *Costanza*'s "arbitrary refusal to act" standard. *Martin*, 891 F.3d at 1349. In place of *Costanza*, the Court directed this Court to apply the standard first articulated by the U.S. Court of Appeals for the District of Columbia Circuit in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"). As the Federal Circuit explained, "the *TRAC* standard provides a more balanced approach because it requires consideration of the veterans' interests and does not require a showing of intent." *Martin*, 891 F.3d at 1345. The Court instructed this Court on remand to carefully apply the *TRAC* factors to the remaining cases, including Mrs. Mote's. *Id.* at 1349.

On October 24, 2018, this Court ordered the Secretary to summarize the status of Mrs. Mote's appeal. The Secretary filed his response on November 21, 2018, arguing that Mrs. Mote was not entitled to relief under the *TRAC* factors. Mrs. Mote received leave to respond to the Secretary and did so.

Mrs. Mote filed an amended petition with updated information in November 2018. In her amended petition, Mrs. Mote specifically requested that this Court hold that the Secretary had violated her due process and statutory rights; order the Secretary to decide her appeal within 45 days of the order; and that this Court further

order the Secretary to provide a progress report every 30 days until a decision had been rendered in the appeal. The VA responded to the amended petition on March 8, 2019. On the same day—over eight years after Mr. Mote first filed his claim and nearly one thousand days after Mrs. Mote filed her Form 9—the BVA finally granted Mrs. Mote a hearing, scheduled for May 13, 2019.

On April 16, 2019, this Court again denied Mrs. Mote’s petition. Mrs. Mote sought panel review. On July 15, 2019, the panel adopted the single-judge opinion and denied Mrs. Mote’s request for oral argument. This Court entered judgement on August 6, 2019, and Mrs. Mote timely appealed to the Federal Circuit for a second time on August 23, 2019.

B. Successful Federal Circuit Appeal

On September 28, 2020, the Federal Circuit again ruled in favor of Mrs. Mote. *Mote v. Wilkie*, 976 F.3d 1337, 1339 (Fed. Cir. 2020). Chief Judge Prost, together with Judges Moore and Stoll, vacated and remanded this Court’s denial of Mrs. Mote’s petition for mandamus.

The opinion unequivocally rejected this Court’s process for reviewing her petition: “[T]he *TRAC* factors should be considered before dismissing or otherwise denying mandamus petitions alleging unreasonable agency delay. Here, they weren’t considered at all.” 976 F.3d at 1344. In response to the government’s argument that this Court did consider the *TRAC* factors, the opinion remarked “we

just don't see it" and noted that "the Veterans Court did not consider whether it was reasonable that the hearing had not already taken place—nor, more generally, whether it was reasonable that after several years Mrs. Mote had yet to receive a decision from the Board." *Id.* at 1345.

The Federal Circuit also rejected this Court's contention that it could not provide Mrs. Mote with relief: "Neither the Veterans Court nor the government has explained why the mere pendency of Mrs. Mote's hearing made compelling progress reports inappropriate—nor is it apparent to this court." *Id.* at 1344. The Court noted that "the Veterans Court was not powerless to fashion other relief, such as giving the Board a more lenient, yet still specific, deadline by which to issue a decision. A genuine *TRAC* analysis may have informed not only whether to provide Mrs. Mote any relief but also the appropriate character of relief." *Id.* at 1345.

The opinion concluded by emphasizing the significance of the appeal: "Mrs. Mote's quarrel, and our concern, is not so much with the opinion's organization or its treatment of one *TRAC* factor or another; it's that, on a potentially meritorious mandamus petition, the opinion failed to consider those factors at all." *Id.* And it issued a directive to this Court: "The point is not merely to check boxes; it's to engage with factors that help illuminate the mandamus inquiry to more reliably reach a sound result." *Id.* at 1346.

C. Mrs. Mote's Death and the Resulting Mootness of Her Appeal

Tragically, Mrs. Mote died shortly after the Federal Circuit issued its second opinion, rendering her appeal to this Court moot. She will never see the Federal Circuit's words turned into action in her case, and she will never receive the fruits of her tireless labor within this broken system.

* * *

Undersigned counsel is heartbroken over Mrs. Mote's passing and frustrated by the lack of resolution in adjudicating her husband's benefits over a full decade. The VA fought the Motes over an amount of money that is not even a rounding error in its budget—an amount that would have significantly improved the financial security of a proud military family. The VA waited the Motes out just as they have done to so many others. Now, the Motes will never receive resolution in this Court.

Any system in which death regularly moots access to benefits cannot be labeled just. May the Motes' experience serve not only as another warning of a broken system, but also as a call to action: Not one more veteran should suffer Mrs. Mote's fate.

This 15th day of March, 2021

/s/ Stephen D. Raber

Stephen D. Raber

Liam J. Montgomery

Charles L. McCloud

Melinda K. Johnson

WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 434-5000
sraber@wc.com
lmontgomery@wc.com
lmcccloud@wc.com
mkjohnson@wc.com

/s/ John A. Chandler

John A. Chandler
Elizabeth V. Tanis
957 Springdale Rd. NE
Atlanta, GA 30306-2627
Telephone: (404) 812-1960
jachandler@gmail.com
beth.tanis@gmail.com

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of March, 2021, the foregoing materials were served electronically through the Court's ECF system.

/s/ Melinda K. Johnson
Melinda K. Johnson