NOS. 17-1747, 17-1761, 17-1768, 17-1771,
17-1772, 17-1774, 17-1780, 17-1862, 17-1967

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOHN MARTIN, BETTY D. SCYPHERS; SARAH AKTEPY; FRANTZ M. JEAN;
HUGH D. MATTHEWS; THOMAS MEISSGEIER; EUGENIA MOTE;
MARVIN MYERS; AND WILLIAM RHODES,

Appellants,

v.

DAVID J. SHULKIN, M.D.,

Appellee.

On Appeal from the United States Court of Appeals for Veterans Claims
(Nos. 16-2493, 16-2495, 16-2500, 16-2502,
16-2503, 16-2504, 16-2506, 16-2507, 16-2511)
(Hon. William S. Greenberg, Bruce E. Kasold, Alan G. Lance Sr.,
Coral Wong Pietsch, Marty J. Schoelen, J.J.)

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August 9, 2017

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, undersigned counsel for appellants certifies the following:

1. The full names of the parties represented by me are John Martin, Betty D. Scyphers, Sarah Aktepy, Frantz M. Jean, Hugh D. Matthews, Thomas Meissgeier, Eugenia Mote, Marvin Myers, and William Rhodes.
2. The name of the real party in interest represented: N/A
3. All parent corporations and any publicly held companies that own 10 percent or more of the party or amicus curiae represented: N/A
4. The names of all law firms and the partners or associates that appeared for the party now represented by me before the United States Court of Appeals for Veterans Claims (and who have not or will not enter an appearance in this case) are: None

August 9, 2017

/s/ John A. Chandler
John A. Chandler

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STATEMENT OF RELATED CASES

This is a consolidated appeal brought by Appellants John Martin, Betty D. Scyphers, Sarah Aktepy, Frantz M. Jean, Hugh D. Matthews, Thomas Meissgeier, Eugenia Mote, Marvin Myers, and William Rhodes from judgments entered by the United States Court of Appeals for Veterans Claims (CAVC). Related cases below that this Court consolidated into case number 17-1762 are *Edward Thomas Rose v. Shulkin* (CAVC No. 16-2494), *Taylor Daniels v. Shulkin* (CAVC No. 16-2498), *Herbert Mitchell Miller v. Shulkin* (CAVC No. 16-2505), and *Leslie Punt v. Shulkin* (CAVC No. 16-2510). In addition, Appellants are aware of another case pending on the Court's docket raising similar issues, *Ebanks v. Shulkin*, No. 17-1277.

STATEMENT OF JURISDICTION

The CAVC had jurisdiction under 28 U.S.C. § 1651(a) and 38 U.S.C. §§ 7252, 7261. The CAVC entered a final judgment on Appellants' Petitions on January 3, 2017 (Matthews), January 4, 2017 (Rhodes), February 8, 2017 (Martin), February 9, 2017 (Scyphers), February 24, 2017 (Mote), February 27, 2017 (Meissgeier), March 2, 2017 (Aktepy), March 16, 2017 (Jean), and April 6, 2017 (Myers). *See* Appx0024, Appx0006, Appx0001, Appx0030, Appx0012, Appx0019, Appx0038, Appx0043, and Appx0048. Appellants filed timely notices of appeal on February 16, 2017 (Scyphers), February 28, 2017 (Martin, Matthews, Mote, Rhodes),

March 6, 2017 (Aktepy, Meissgeier), March 22, 2017 (Jean), and April 11, 2017 (Myers). *See* Appx2522, Appx0349, Appx2050, Appx1401, Appx0567, Appx2812, Appx1832, Appx3324, and Appx3619. The Court consolidated the appeals under No. 17-1747 on April 28, 2017. *Martin v. Shulkin*, 2017-1747, ECF No. 20 (Fed. Cir. Apr. 28, 2017). The jurisdiction of this Court rests on 38 U.S.C. § 7292.

STATEMENT OF THE ISSUES

This case presents the following issues:

1. Substantial delay in adjudicating benefits claims violates the Due Process Clause of the Fifth Amendment to the United States Constitution. Appellants have suffered years-long delays and, by the Secretary's own admission, face indeterminate further delays of many years more. Did the Court of Appeals for Veterans Claims err by either not addressing Appellants' Due Process claims at all or holding that the delays in processing, adjudicating, and deciding these appeals do not violate the Due Process Clause?

2. The Court of Appeals for Veterans Claims is required under 38 U.S.C. § 7261 to "compel action of the Secretary . . . unreasonably delayed." Did the Court err by applying an "arbitrary refusal to act" legal standard to deny Appellants' requests for mandamus?

STATEMENT OF THE CASE

The Appellants are nine veterans who applied for disability benefits. David L. Shulkin, Appellee, is the Secretary of the Department of Veterans Affairs ("the Secretary") and is responsible for the administration of veterans benefits. The nine Appellants here have experienced years of delay in the processing and adjudication of their appeals of the Veterans Administration's (VA's) denial of their claims for disability benefits. Appellants contend this delay violates their rights under the Due Process Clause of the United States Constitution.

Along with eight other veterans, Appellants petitioned the Court of Appeals for Veterans Claims (CAVC) asking the CAVC to enforce its enabling statute, which provides that the CAVC "shall . . . compel action of the Secretary unlawfully withheld or unreasonably delayed." 38 U. S. C. 7261(a)(2).[1] Appellants sought a writ of mandamus or other writ finding that the Secretary had violated their constitutional rights and requiring the Secretary to decide their appeals in a constitutionally acceptable period of time. The Secretary opposed the petitions, arguing

[1] Of the original seventeen petitions, three were voluntarily dismissed after the Secretary provided them with full relief. Four other petitioners have been consolidated into case number 17-1762 before this Court.

that a delay amounting to an arbitrary refusal to act by the Secretary was necessary in order for the CAVC to issue a writ of mandamus.

In the CAVC, every Appellant alleged, and supported with evidence, the significant delays he or she has suffered in appealing benefit denials. The Secretary did not deny that Appellants have experienced those delays.

The CAVC denied each of the Appellants' petitions without applying the three factor test in *Mathews v. Eldridge,* 424 U.S. 319 (1976), the controlling precedent. In two cases, the CAVC did not provide a reason for denying Appellants' Due Process claims. *See* Appx0044–0045 and Appx0020–0021. In the remaining seven cases, the CAVC rejected Appellants' Due Process claims by faulting Appellants for not proving facts not required to obtain relief under *Mathews*.

Appellants sought to enforce their Due Process rights through a mandamus order requiring the Secretary to decide their appeals in a reasonable time period. The statute creating the CAVC provides that the CAVC "shall . . . compel action of the Secretary unlawfully withheld or unreasonably delayed." 38 U.S.C. § 7261(a)(2). Appellants argued that the Court was required to assess whether a final decision on their appeals was an unreasonable delay by the Agency under *Telecomms. Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984)

("*TRAC*"). Instead, the CAVC applied the "arbitrary refusal to act" standard adopted in *Costanza v. West*, 12 Vet. App. 133, 134 (1999).

Each of the nine Appellants timely appealed the final judgments to this Court. This appeal challenges the CAVC's decisions under the Due Process Clause and the mandamus standard used.

STATEMENT OF FACTS

A. Veterans Procedures for Disability Benefit Appeals

Veterans wait an average of nearly four years between the time they receive a denial of their claims for disability benefits and the time they obtain a decision on their appeals of those denials. *See infra* at 7. The Secretary concedes that veterans are entitled to disability benefits when they have been injured while serving their country. When the Secretary denies veterans' disability benefit claims in what are called "rating decisions," veterans can appeal those denials to the Board of Veterans' Appeals (BVA), which constitutes the final agency decision for the VA. Veterans commence that process by filing a Notice of Disagreement (NOD) with the VA. Upon filing an NOD, veterans have two options: proceed directly to the BVA, or request *de novo* review by a VA Decision Review Officer at the regional office. Regardless of the option chosen, veterans are at the mercy of the Secretary as to when and how efficiently their claims move forward.

The Secretary must issue the next required document in this process, the Statement of the Case (SOC). The SOC essentially reiterates the rating decisions denying benefits while adding the Secretary's boilerplate justification for the denial. The Secretary on average takes more than a year (419 days)[2] to prepare one.[3] Appx0337. Only after veterans have their SOCs can they file with the VA a notice of appeal, commonly known as a "Form 9," and advance their claim. Veterans have 60 days to file their Form 9s, but take on average just 39 days to do so. *Id.*

Once veterans file a Form 9, the Secretary's delays lengthen. Upon receiving the Form 9, the VA Regional Office must file two documents: the already-prepared SOC and a Certification of Appeal. The certification is a two-page ministerial document. On average, the certification takes the VA a mere 2.6 hours to prepare. Appx0508. Yet the Secre-

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[2] In *Monk v. Shulkin*, this Court noted that this process takes 330 days. 855 F.3d 1312, 1317–18 (Fed. Cir. 2017). As discussed throughout, however, the Board of Veterans' Appeals statistics now place this at 419 days, Appx2798, and the evidence adduced below indicates that this delay is only getting worse.

[3] Should the veteran submit additional evidence in support of his or her claim while waiting for the Secretary to act—as is his or her right in this system—the VA will prepare a Supplemental SOC (SSOC), which further delays the appeal process.

tary's own statistics demonstrate that the VA takes on average 537 days to certify the appeal, and an additional 222 days to deliver the certified file to the BVA for docketing. Appx0337. In all, this 2.6 hour task takes the VA on average 759 days—more than two years—to accomplish. *Id.*

By this point, the average time lapse between a veteran filing an NOD and simply getting the appeal to the BVA has been 1,178 days (3 years, 2 months). *Id.* At the time Appellants filed their petitions (July 21, 2016), VA statistics showed that the BVA then took 9 months to distribute the appeals and render a decision. *Id.* Under these statistics, the appeals process takes on average 1,487 days, or approximately four years.

Appellants here have already encountered delays of four, five, and more years awaiting a decision on their appeals, and are looking at significant additional delay. Their experience is consistent with, and surpasses, the Secretary's admissions in *Monk v. McDonald*, No. 2015-7092:

> The Secretary further notes he does not dispute that, in 2014: (1) veterans who filed an NOD 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). Based on those statistics, this Court stated:

> Data presented to the court indicate that veterans face, on average, about four years of delay between filing an NOD and receiving a final Board decision. According to the Board's Annual Report Fiscal Year 2014, veterans who filed an NOD waited an average of 330 days before receiving a Statement of the Case. Veterans then waited an average of 681 days for the VA to certify appeals to the Board, and then an average of 357 days for the Board to decide their appeals. Thousands of veterans seeking benefits are still awaiting results of their appeals.

Monk, 855 F.3d at 1317–18. This Court then used those average delay statistics as evidence of the future delay the petitioner in that case would face, saying "Mr. Monk . . . will *likely* be subject to the same average delay." *Id.* at 318 (emphasis added).

Since *Monk* was argued and decided, the delay plaguing disability benefit appeals has gotten significantly worse. Rather than the average four-year wait time cited in the BVA's statistics cited in *Monk* and conceded to exist in the BVA's own statistics, the average overall wait time appears to have now grown to approximately six years in some cases.

In Appellant Martin's case the VA admitted in a declaration that, as of October 2016, the BVA was only "distributing cases from its pending inventory with docket dates up to July 2014." Appx0227. This means that the 9-month average wait time from docketing until decision at the BVA has nearly tripled. Now veterans who have finally reached the BVA must wait more than two years just to have the BVA "distribute" their appeals, a term the Secretary left undefined but is something short of an actual BVA decision on the appeals. The Secretary went on to admit, "it is not possible to accurately predict when a decision on the Petitioner's appeal will be forthcoming." *Id.*

Another example was adduced through the case of Appellant Lt. Colonel Thomas Meissgeier, who advanced his claim through the VA Roanoke Regional Office. In the CAVC, Lt. Col. Meissgeier submitted written admissions by Roanoke VA personnel saying that, as of late 2016, the VA was only processing Form 9 appeals from 2010 and early 2011. *See* Appx1650 ("We are actively working F9s received in 2010 and early 2011."). The four-year average delay described above pales in comparison to the six to seven year delays now occurring in the Roanoke Regional Office.

When veterans finally do get a BVA decision, the BVA affirms only 17.8% of the VA's disability benefits decisions. Appx2803. According to

the most recent BVA statistics, the remaining decisions were remands (47.1%), outright reversals (31.8%), or "other" (3.4%). *Id.* Thus, even though many, if not most, of the veterans caught in the appeals process have been denied benefits to which they may be statutorily entitled, they must wait years and years to have those errors corrected. *See* Michael Serota & Michelle Singer, *Veterans' Benefits and Due Process*, 90 Neb. L. Rev. 388, 416 (2011) ("With regard to the VA's appellate process, the risk of erroneous deprivation is high, given the poor accuracy rate of the claims adjudicators.").

While their appeals are pending, veterans are deprived of all or part of these necessary and, indeed, life-saving benefits. Many veterans depend on disability benefits to feed, clothe, provide medical care for, and house themselves and their families. Some veterans die while waiting.[4] *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 860 (9th Cir. 2011), *vacated on other grounds*, 678 F.3d 1013 (9th Cir. 2012) (en banc). At last estimate, about 20 veterans commit suicide every day. Appx1555.

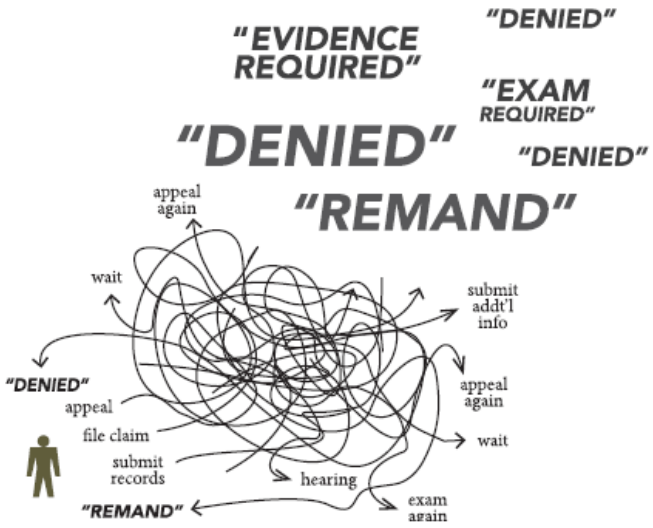
[4] Two of the nine Appellants in related cases (Appeal Nos. 17-1774 and 17-1768)—Mrs. Scyphers and Mrs. Mote—were widowed while their husbands' claims stalled at the VA.

The VA openly admits that the delays are real and, in the proceedings below, never denied them. Indeed, in a recent study, the VA itself put the problem in stark relief:

> When [veterans commence an appeal]—whether they know it or not—they will enter into a process that takes years, sometimes decades, to complete. It will stretch across the Veterans Benefits Administration into the Board of Veterans' Appeals and likely back again, often without them realizing it, and perhaps dozens of times. It might even transcend VA and head to the U.S. Court of Appeals for Veterans Claims. Some will be satisfied, many will not. Everyone will have to jump through hoops, absorb dozens of letters, fill out confusing paperwork, and learn to live with waiting. They'll have "to fight."

Appx1510; *see also* Appx1517 (referring to the "endless churn" veterans face).

Below is the VA's own depiction of how veterans experience this system:



Id.

As the Secretary summarized, "[t]here is no end in sight," Appx1514, and, "the length and labor of the process takes a toll on Veterans' lives," Appx1520. The veterans' experience is a crude and embarrassing caricature of the VA's motto.

B. Appellant John Martin

John Martin, the lead Appellant here, is an Army veteran who filed an NOD with the VA in December 2013 and a Form 9 in December 2015. It took the VA 794 days (more than two years and well beyond the 537-day average) to certify Mr. Martin's appeal to the BVA. Appx0230. As of October 2016, when the VA filed its response below, seven months had already passed since the VA certified that appeal. The Secretary himself admitted that the BVA was then considering on-

ly those appeals certified more than two years before the VA certified Mr. Martin's, *id.*, demonstrating that Mr. Martin faces at least seventeen months of additional delay before the BVA distributes his appeal to the panels and another year before the Board decides his appeal. Combining the actual delays Mr. Martin has already experienced with the average delays for the remaining parts of the appellate process he must still get through, Mr. Martin will suffer an approximate 1700-day delay from the filing of his NOD to obtaining a BVA decision on his appeal—a delay that greatly exceeds the already staggering average delay statistics published by the BVA discussed above.

C. Appellant Betty Scyphers

Seventy-seven-year-old Appellant Betty Scyphers has been advancing her husband's claims since he died during the pendency of those claims. When she filed her Petition for Mandamus below, 639 days had lapsed since her husband—who served during the Vietnam War—filed his NOD. Neither she nor her husband ever received an SOC from the VA. The VA claimed it did not have a correct mailing address, but the documents the VA itself submitted to the CAVC demonstrate otherwise. The VA had the correct address but failed to use it. Ignoring its own evidence, the Secretary opposed Ms. Scyphers' petition, arguing that "It is not the responsibility of the Secretary to act as a private detective to in-

vestigate the whereabouts of a missing person." Appx2102 (internal quotation marks and citations omitted).

D. Appellant Eugenia Mote

Like Mrs. Scyphers, Appellant Eugenia Mote was left to advance her husband's claim after he died. Her husband served as a member of an elite U.S. Air Force team that flew covert search and rescue missions in the Vietnam War. Due to the VA's piecemeal adjudication of her husband's claims, Mrs. Mote and her husband filed three NODs, in February 2013, April 2013 (two days before he died), and December 2015. Appx0639. By the Secretary's own admission, the VA never issued her an SOC. Mrs. Mote nevertheless filed a Form 9 in June 2016, which the VA certified to the BVA on October 4, 2016. Based on average delays alone, she conservatively faces a delay from the date of that certification of at least another 500 days while the BVA dockets, distributes, and decides her appeal.

E. Appellant Sarah Aktepy

Appellant Sarah Aktepy is a Navy veteran who submitted a claim in September 2013 for disability benefits. Her claim was based in part on an in-service sexual assault. After the VA denied her benefits, she filed an NOD in February 2014. As of the July 21, 2016 filing of her Petition below, 958 days had elapsed since her Notice of Disagreement. In his

response to Ms. Aktepy's Amended Petition, the Secretary admitted that the Roanoke regional office "is currently processing a backlog of over 600 cases involving pending appeals to the Board, and cannot predict when Petitioner's case will be completed." Appx2617. Even were Ms. Aktepy's claim to begin proceeding at the average delay rate—which it will not, given the Secretary's candid admissions regarding the Roanoke office—Ms. Aktepy can expect to wait nearly three more years before her appeal is decided.

F. Appellant William Rhodes

Appellant William Rhodes is a nine-year veteran of the United States Marine Corps who served part of that time during the Vietnam War at an airbase in Thailand. Appx0403. He filed timely NODs in September 2012 and July 2014. He did not receive his two SOCs until, respectively, almost four years and two years later, in July 2016. Appx0403–0404. Based on the average delays experienced by other veterans, from the date of those SOC's, Mr. Rhodes can expect to wait more than 1,000 more days (nearly three years) before receiving a decision from the BVA.

G. Appellant Frantz Jean

Appellant Frantz Jean served as a Marine in Afghanistan and continues to serve in the reserves today. Appx2861. He filed NODs in Au-

gust 2014 and March 2015 but still has not received an SOC as to either. Appx2861; Appx2886–2887. As of November 1, 2016, when the CAVC was addressing his petition, 760 days (more than two years) had elapsed since he filed his earlier NOD. This delay exceeds the average delay by nearly a year. Even were Mr. Jean to receive an SOC as of the date of this brief, he would be facing more than an additional 1,000-day delay based on the averages described above.

H. Appellant Lt. Col. Thomas Meissgeier

Appellant Lt. Col. Thomas Meissgeier served in the Army and Army Reserve for 33 years. Appx1454. He first submitted his claim for benefits in May 2013. *Id.* In December 2014 and January 2015, he filed multiple NODs after the VA refused to fulfill its Duty to Assist, *see* 38 U.S.C § 5103A, in obtaining his service medical records. Appx1454; Appx1597. The VA provided an SOC in March 2015, and Lt. Col. Meissgeier filed his Form 9 in November 2015. Appx1454. He has heard nothing since. *Id.* Optimistically assuming Lt. Col. Meissgeier's case proceeds at the BVA's published average rate, he can expect to wait at least another 1000 days (more than a year) before his appeal is certified to the BVA by the Regional Office, docketed by the BVA, distributed, and then decided.

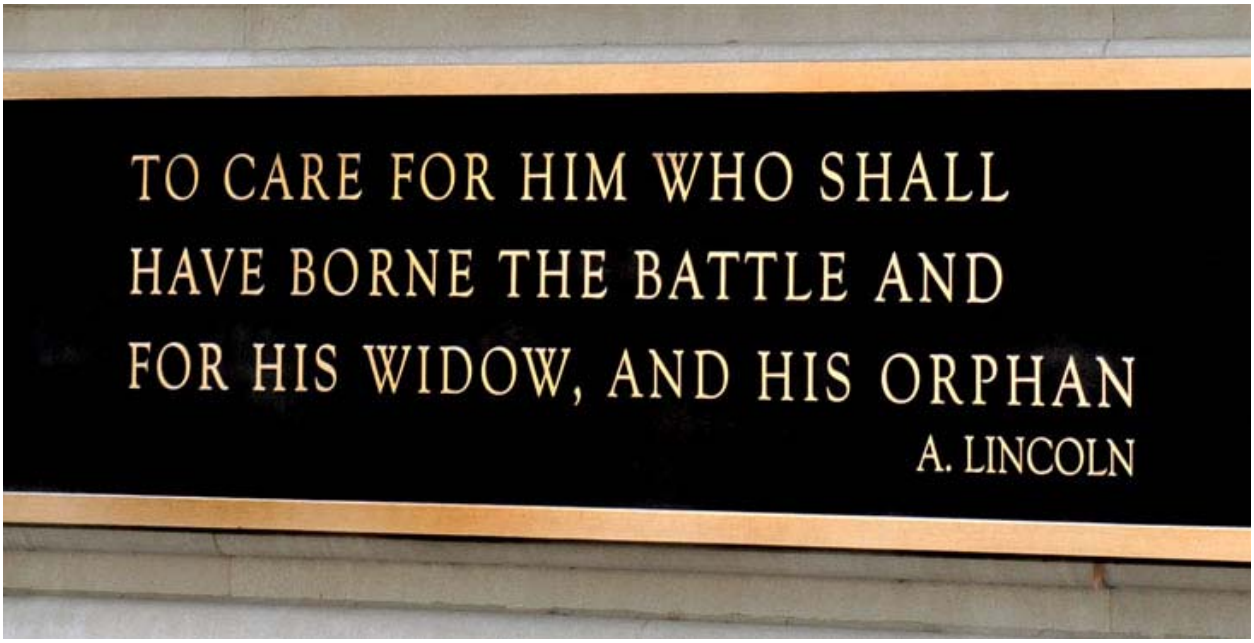
I. Appellant Hugh Matthews

Appellant Hugh Matthews is an Army veteran exposed to Agent Orange in Vietnam. Appx1886. He filed an NOD in January 2014 but, more than three-and-one-half years later—three times longer than the average delay in getting an SOC—he was still waiting for an SOC. Appx1886–1887. Thus, Mr. Matthews's delay-clock has hardly even begun to tick, but it is guaranteed from the averages and the Secretary's admissions that it will be measured in many years.

J. Appellant Marvin Myers

Appellant Marvin Myers, an Army combat helicopter pilot, was awarded the Silver Star, two Bronze Stars, and 26 Air Medals (two for valor) for his service in Vietnam. He filed an NOD on December 2, 2014. Appx0050–0051. The VA did not issue an SOC until October 3, 2016, or 617 days later—a delay the CAVC observed was "much longer" than the 419-day average. *Id.* His appeal remains pending and, given the average delays veterans are experiencing, Mr. Myers is also likely to wait more than 1,000 additional days before receiving a decision on his appeal.

SUMMARY OF ARGUMENT



The United States promises to provide appropriate benefits to veterans injured in service to this nation and to the families who support them. President Lincoln's words at his second inaugural in 1865, etched in stone at the Lincoln Memorial, capture that commitment. Those words have been the VA's own motto since 1959, memorialized on plaques that flank the entrance to VA headquarters just steps from this courthouse.

The Secretary has broken that solemn promise to hundreds of thousands of veterans, including the nine Appellants here, by forcing them to suffer unconscionable and unconstitutional delay in the handling of their appeals of denials of disability benefits—benefits owed when veterans suffer injury in the course of their military service and benefits

that are often needed to provide food, shelter, and clothing for veterans and their families. The Secretary admits that on average veterans now wait nearly four years—and potentially as long as six years—to receive a decision on those appeals, and further admits that "there is no end in sight" to this delay. The numbers establish that these appeals are far from frivolous: when veterans finally do get a decision on their appeals, the original denial is reversed or remanded more than eighty percent of the time.

There is no dispute that veterans have a constitutionally protected interest in the timely adjudication of their disability benefit appeals. They do, and the Secretary does not argue otherwise. In the CAVC, each of the Appellants established the facts that courts have long found adequate to establish procedural due process violations under the Supreme Court's required *Mathews* standard. *See Mathews v. Eldridge,* 424 U.S. 319 (1976). In response, the Secretary admitted many, and refuted none, of those facts. The Secretary did not even argue that the delay is unavoidable, justifiable, or otherwise comports with Due Process. The Secretary admits the problem, but does nothing to remedy it.

Instead, the Secretary attempts to avoid any accountability for the problem he admits, placing veterans in a procedural whipsaw whereby no forum can provide them relief, including the CAVC itself. When vet-

erans challenged the constitutionality of the delay in processing and adjudicating disability benefit claims in federal district courts, the Secretary convinced federal appellate courts that veterans could make such challenges only in the CAVC, through a mandamus action. *See, e.g.*, *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1016 (9th Cir. 2012) (en banc); *see also Beamon v. Brown*, 125 F.3d 965, 974 (6th Cir. 1997). But when veterans—including these nine Appellants—did just that, the Secretary convinced the CAVC to ignore the facts and adopt legal standards that contravene its own enabling statute and established case law, rendering this supposedly exclusive avenue for relief illusory.

The result of the Secretary's lack of accountability to any legal forum is predictable: The appeal delays not only continue, but they grow worse, even as Congress floods the VA with resources. As a result, veterans go longer and longer without the medical and financial benefits they have earned and need to support themselves and their families.

Summary of Due Process Argument: The CAVC improperly denied each Appellant's petition without analyzing Appellants' Due Process claims as required by the United States Supreme Court for the last forty years. In *Mathews*, the Supreme Court set forth a three-factor balancing test that must be applied when determining whether the gov-

ernment has violated the Due Process clause: (1) the nature and weight of the petitioner's private interest (here disability benefits); (2) the risk of erroneous deprivation of that interest in light of the procedures currently in place, and the probable value of additional procedural safeguards; and (3) the government's interest in avoiding additional procedural safeguards. Appellants prevail on all three factors.

The private interest at issue here—disability benefits—affects human health and welfare. The CAVC recognized this almost thirty years ago, *see Erspamer v. Derwinski,* 1 Vet. App. 3, 10 (1990) ("Claims for benefits due to military service clearly implicate human health and welfare concerns"), and other case law makes that clear as well. *See, e.g., Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009) ("Veteran's disability benefits are nondiscretionary, statutorily mandated benefits. A veteran is entitled to disability benefits upon a showing that he meets the eligibility requirements set forth in the governing statutes and regulations. We conclude that such entitlement to benefits is a property interest protected by the Due Process Clause of the Fifth Amendment to the United States Constitution.").

The Secretary does not dispute the importance of Appellants' interest in obtaining timely decisions on their disability benefit appeals. The first *Mathews* factor weighs heavily in Appellants' favor.

The risk of erroneous deprivation is high, another fact the Secretary does not dispute. The BVA affirms fewer than 20 percent of the original benefit decisions that veterans appeal; it reverses or remands the remainder. Appx2803. Thus, for those veterans (like Appellants) who have appealed their original benefit denials, the chances are overwhelming that their appeals are well-founded and that, as a result, they were deprived erroneously of their benefits. The second *Mathews* factor weighs heavily in Appellants' favor.

As to the third factor, the Secretary has no interest in preserving the extraordinary delay in disability benefit appeals. The VA's charge is to help veterans, and the Secretary himself has acknowledged that the delays in disability benefit denials are unacceptable. The CAVC, too, has recognized that the long delay in this appellate process undermines public confidence in the VA. *See Erspamer,* 1 Vet. App. at 10 ("[E]xcessive delay saps the public confidence in an agency's ability to discharge its responsibilities.") (quoting *Potomac Electric Power Co. v. ICC,* 702 F.2d 1026, 1034 (D.C. Cir. 1983). The third *Mathews* factor weighs heavily in Appellants' favor.

The *Mathews* factors establish that Appellants' Due Process rights were violated. The CAVC was wrong not to consider *Mathews* when assessing Appellants' Due Process claims. The CAVC's decisions below

should be reversed. Appellants all demonstrated that the delay in processing and adjudicating their disability benefits claims is unconstitutional under the Due Process clause of the Fifth Amendment of the United States Constitution.

Summary of Mandamus Argument: The CAVC should not have constructed an insurmountable legal standard for mandamus that effectively shuts down any attempt by veterans to obtain Due Process. The enabling statute for the CAVC contains a mandate: The CAVC "*shall* . . . compel action of the Secretary . . . *unreasonably delayed*." 38 U.S.C. § 7261(a)(2) (emphasis added). The CAVC ignored this mandate in its decisions on Appellants' claims.

In Appellant Aktepy's case, the Court observed that it "is not satisfied with much of the Secretary's response" and noted that her claim "will be pending for a good deal longer" but nonetheless found that mandamus was not appropriate because the Secretary had not "arbitrarily refused to take action on her claims" Appx0040. In so ruling, the CAVC completely ignored Congress's mandate, set forth above, that the CAVC "shall" compel action by the Secretary "unreasonably delayed." The CAVC accepted as true the facts alleged in Ms. Aktepy's petition—facts showing that the average delay veterans experience in having their appeals of disability benefit denials decided is four years

and that Ms. Aktepy personally had already experienced delay years longer than that average delay—yet conducted no analysis of whether that delay was "unreasonable." Instead, the CAVC summarily rejected Appellant Aktepy's petition for a writ of mandamus.

In other Appellants' cases, the CAVC denied the claims for a writ of mandamus by stating that "the Secretary's delay in deciding these claims was not so extraordinary that it amounted to an arbitrary refusal to act." *See, e.g.*, Appx0026; Appx0045; Appx0021; Appx0015; Appx0051; Appx0008; Appx0032. The "arbitrary refusal to act" standard applied by the CAVC is contrary to the CAVC's enabling statute, which requires a writ of mandamus when action by the Secretary is "unreasonably delayed," as opposed to "arbitrarily refused." This standard is also contrary to relevant mandamus case law.

In Appellant Martin's case, the CAVC essentially accepted his description of delay and acknowledged that the Secretary suggested Mr. Martin would suffer two additional years of delay because of new backlogs at the BVA. Without any analysis at all, the CAVC denied his petition for mandamus.

The CAVC's statutory mandate to "compel action of the Secretary . . . unreasonably delayed" is identical to the mandate that Congress issued years earlier in the Administrative Procedure Act (APA), which

applies to other federal courts' powers and responsibilities regarding other federal agencies. 5 U.S.C. § 706(1) ("reviewing court[s] shall . . . compel agency action unlawfully withheld or unreasonably delayed"). When interpreting this APA language, federal courts for years have applied a six-factor test to determine whether agency delay is "unreasonable." That test was first set forth in *TRAC*, 750 F.2d 70 (D.C. Cir. 1984). In the CAVC's seminal decision on delay, the CAVC itself recognized in 1990 that *TRAC* applies in mandamus actions filed in the CAVC to challenge VA action "unreasonably delayed." *See Erspamer,* 1 Vet. App. at 7, 9–10 (citing or quoting *TRAC* three times when assessing whether mandamus was appropriate in a case involving delay in adjudication of a disability benefits appeal).

The six factors set forth in *TRAC* show that the mandamus relief requested by Appellants should have been granted. By imposing the "arbitrary refusal to act" standard, and contrary to Congress's mandate that the CAVC "compel action of the Secretary . . . unreasonably delayed," the CAVC has made it impossible for veterans, including Appellants, to obtain relief for the many-year delay that not even the Secretary argues is reasonable or constitutional. Appellants all demonstrated that the Secretary's action on Appellants' disability benefit claims is

"unreasonably delayed" and that mandamus relief is required. The CAVC's decision should be reversed.

STANDARD OF REVIEW

This Court reviews the CAVC's interpretation of the Constitution and statutes de novo. *Monk*, 855 F.3d at 1315–16; *Cox v. West*, 149 F.3d 1360, 1362 (Fed. Cir. 2007). The Court reviews the denial of a petition for writ of mandamus for an abuse of discretion. *Lamb v. Principi*, 284 F.3d 1378, 1384 (Fed. Cir. 2002).

ARGUMENT

Congress created the CAVC "to provide a more independent review by a body which is not bound by the Administrator's view of the law, and that will be more clearly perceived as one which has as its sole function deciding claims in accordance with the Constitution and the laws of the United States." H.R. Rep. No. 100-963, at 26, 1988 U.S.C.C.A.N. at 5808; *see also Veterans for Common Sense*, 678 F.3d at 1021. In deciding Appellants' cases, the CAVC failed to uphold its mandate. It did not decide Appellants' claims in accordance with the Constitution or the laws of the United States.

The CAVC should have applied United States Supreme Court precedent construing the Due Process Clause. It also should have followed its own enabling statute and the widely accepted standard for assessing

mandamus in the context of a Congressional mandate to compel agency action "unreasonably delayed." Had it done so, the CAVC would have considered the Appellants' interests at stake here and would have taken a hard, objective look at whether the Secretary has a legitimate, cognizable justification for the extraordinary and indisputably painful delay veterans experience when appealing their disability benefit denials.

The CAVC, however, ignored these core considerations, giving no weight to the gravity of the situation or its human cost and instead granting the Secretary free rein to continue, and indeed increase, the delays. Veterans are entitled to better. Much better. Both the United States Constitution and the CAVC's enabling statute say so.

I. The CAVC Erred in Denying Appellants' Due Process Claims

Veterans who appeal the VA's adjudication of their benefits claims experience unacceptable delay in obtaining a decision on their appeals. The VA has repeatedly admitted it to be so. This Court has found it to be so. And each Appellant's experience demonstrates it to be so.[5]

[5] All Appellants' cases share four common features: (1) each Appellant is a veteran of the United States armed forces or the spouse of a veteran; (2) each has been denied—in whole or in part—service-connected disability benefits; (3) each has appealed that denial by, at a minimum, filing an NOD; and (4) each faces what the Secretary admits to be a six-year delay in the processing of his or her appeal.

In 1976, the United States Supreme Court spelled out how procedural Due Process claims must be analyzed. *See Mathews,* 424 U.S. 319 (1976). The Supreme Court held that a court assessing a procedural Due Process claim must consider three factors: (1) the nature and weight of the petitioner's private interest; (2) the risk of erroneous deprivation of that interest in light of the procedures currently in place, and the probable value of additional procedural safeguards; and (3) the government's interest in avoiding additional procedural safeguards. *Id.* 335. That analysis remains the law today. *See, e.g., Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017) ("The familiar procedural due process inspection instructed by *Mathews v. Eldridge* . . . governs these cases."); *Noah v. McDonald*, 28 Vet. App. 120, 130–32 (2016).

Each of these factors decisively favors Appellants—so decisively that the Secretary did not even argue in the CAVC that the VA's processing and adjudication of disability claims passes constitutional muster. Nonetheless, the CAVC denied every Appellant's Due Process claim, failing to analyze even one of them under *Mathews.* That failure constitutes legal error that should be reversed.

A. Appellants Assert an Interest of the Highest Order.

Under the first *Mathews* factor, courts evaluate the nature and weight of the private interest involved by "examin[ing] the importance

of the private interest and the harm to this interest occasioned by delay." *FDIC v. Mallen*, 486 U.S. 230, 242 (1988).

The Secretary does not dispute the well-established proposition that veterans' disability benefits are protected by the Due Process Clause. "Veteran's disability benefits are nondiscretionary, statutorily mandated benefits." *Cushman*, 576 F.3d at 1297–98. "'Every regional circuit [including this Court] to address the question has concluded that *applicants* for benefits, *no less than* benefits recipients, may possess a property interest in the receipt of public welfare entitlements.'" *Id.* (quoting *Kapps v. Wings*, 404 F.3d 105, 115 (2d Cir. 2005)) (collecting cases) (alterations accepted and emphasis added).

Nor does the Secretary dispute the importance of timely adjudicating veterans' disability benefits appeals. The case law is replete with examples, across multiple Circuits, of courts recognizing that a substantial delay in adjudicating claims for entitlement to benefits can, without more, violate the Due Process clause.

As the Seventh Circuit held, "implicit in the conferral of an entitlement," such as Appellants' disability benefits here, "is a further entitlement, to receive the entitlement within a reasonable time." *Schroeder v. City of Chicago*, 927 F.2d 957, 960 (7th Cir. 1991). Similarly, in *Veterans for Common Sense*, the Ninth Circuit held that the "VA's fail-

ure to provide adequate procedures for veterans facing prejudicial delays in the delivery of mental health care violates the Due Process Clause." 644 F.3d at 851. In *Kelly v. Railroad Retirement Board*, the Third Circuit held that a four-year delay in processing a claim for disability benefits violated Due Process, calling this delay "wholly inexcusable." 625 F.2d 486, 490 (3d Cir. 1980) ("Although there is no magic length of time after which due process requirements are violated, we are certain that three years, nine months is well past any reasonable time limit, when no valid reason for the delay is given."); *see also Kraebel v. New York City Dep't of Hous. Pres. and Dev.*, 959 F.2d 395, 405 (2d Cir. 1992) ("[D]ue process requires that eligibility for a variety of benefits be processed within a reasonable time . . . . [D]elay in processing can become so unreasonable as to deny due process." (citations omitted)); *Coe v. Thurman*, 922 F.2d 528, 530 (9th Cir. 1990) ("[E]xcessive delay in the appellate process may also rise to the level of a due process violation.") (emphasis omitted).

Timely adjudication is especially important when the benefits sought are essential for human health and welfare. *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (providing Due Process protection to benefits needed "to obtain essential food, clothing, housing, and medical care."). VA disability benefits fall into this protected category: They compen-

sate veterans for earning capacity lost due to their service-related disabilities. *See* 38 C.F.R. § 4.1 (the disability ratings "represent as far as can practicably be determined the average impairment in earning capacity" resulting from the disability); Serota & Singer, *supra*, at 413–14. In fact, many veterans' service-related disabilities leave them "totally or primarily dependent upon [VA benefits] compensation for their financial support and the support of their families." *Veterans for Common Sense*, 644 F.3d at 884–85.

Because veterans do not receive disability benefits until their claims are approved, the long delay in the appeals process "may deprive . . . eligible recipient[s] of the very means by which to live." *Goldberg*, 397 U.S. at 264. And, as the CAVC acknowledged in *Erspamer*, the retroactive payment of disability benefits once an appeal has been decided in a veteran's favor does not compensate for the delay in obtaining those benefits. 1 Vet. App. at 10 ("[W]e must reject the suggestion . . . that any and all prejudice resulting from the decade's delay would be offset by retroactive payment should the DVA ultimately determine that benefits were warranted. Payment of benefits ten years after they were due could never serve as full compensation.").

The "psychological stress" caused by the delays can also "lead to marital and family difficulties, domestic violence, divorce, and even sui-

cide." Serota & Singer, *supra*, at 414. Recent statistics show that, on average, 20 veterans commit suicide every day. Appx1555; *see also supra* note 5. In the words of the VA itself, "[t]he length and labor of the process takes a toll on Veterans' lives" and "[t]here is no end in sight." U.S. Dep't of Veterans Affairs Center for Innovation, *Veteran Appeals Experience*, at 5, 11 (Jan. 2016), *available at* https://www. innovation.va.gov/docs/VOV_Appeals_FINAL_20160115-1.pdf.

The first *Mathews* factor is easily met here.

B. The Risk Of Erroneous Deprivation Is High.

The second *Mathews* factor—"the risk of an erroneous deprivation of [the claimants'] interest through the procedures used, and the probable value . . . of additional or substitute procedural safeguards," 424 U.S. at 335—also weighs heavily in favor of finding a Due Process violation. The Regional Offices wrongfully deny the vast majority of the disability benefit claims denials that are appealed: In 2015, the BVA affirmed only 17.8% of the VA's initial disability benefits decisions. Appx0342. The remaining decisions were remands (47.1%),[6] outright

[6] Remands resulting from a change in circumstances of the veteran's health are self-inflicted wounds by the VA. If, for example, the VA did not take more than two years to certify appeals (which requires only the filing a two-page form), it would find many fewer changes in the health of veterans.

reversals (31.8%) or "other" (3.4%). *Id.* The high remand rates mean not only that the original denial was defective but also that, after waiting more than four years for the BVA's decision, those veterans whose claims are remanded will be thrust back into the very same appeal pipeline to suffer additional years of delay. Serota & Singer, *supra* at 416 ("Most distressingly, approximately 75% of the rating claims that the Board remands are subsequently appealed to the Board a second time.").

The extremely high error rate in disability benefit denials—an error rate reported by the BVA and not disputed by the Secretary—demonstrates that Appellants satisfy the second *Mathews* factor. *See Mallen*, 486 U.S. at 242 (courts must consider "the likelihood that the interim decision may have been mistaken"); *see also* Serota & Singer, *supra*, at 416 ("With regard to the VA's appellate process, the risk of erroneous deprivation is high, given the poor accuracy rate of the claims adjudicators."). The Secretary has not argued otherwise.

C. The Government's Interest in Maintaining the Status Quo Does Not Outweigh Appellants' Interests in Timely Adjudication of Their Appeals.

The third *Mathews* factor, the government's interest in preserving the status quo, also favors Appellants. The VA is charged "to care for him who shall have borne the battle and for his widow, and his orphan."

Appx2055–2056 The Secretary has not contended he has a legitimate interest in preserving the delay Appellants are experiencing in their disability claim appeals—nor could he credibly do so in light of the VA's charge.

Rather than defending the delays, the Secretary outright admitted in response to two of the Petitions that those Appellants' delays should not have occurred and that Appellants deserved better. Appx3406–3407 (acknowledging that "the handling of this appellant's appeal has certainly not been as timely as the Agency should deliver and that this Veteran deserves"); Appx3015–3016. And in none of Appellants' other cases has the Secretary even tried to justify the systemic delays in processing and adjudicating disability benefit claims.

The Secretary's inability to justify the delay has been going on for years. Six years ago, in another case in which the VA's delays in processing and adjudicating veterans' disability claims were at issue, the Ninth Circuit observed:

> During the district court proceedings in this case, senior VA officials were questioned about the extraordinary delays in the VBA's claims adjudication appeal system. None of those officials, however, was able to provide the court with a sufficient justification for the delays incurred. Bradley Mayes, the Director of Compensation and Pension Services at the VBA, testified at a deposition that the VBA had not "made a concerted ef-

> fort to figure out what [wa]s causing" the lengthy delays in its resolution of the appeals of veterans claims for service-connected death and disability compensation. And at trial, James Terry, the Chairman of the Board of Veterans' Appeals, was unable to explain the lengthy delays inherent in the appeals process before the Board.

Veterans for Common Sense, 644 F.3d at 859. In the six years since *Veterans for Common Sense*, the "extraordinary delays" have only gotten worse, and still the Secretary offers no justification for them.[7]

D. The CAVC Failed to Apply *Mathews* to Any of Appellants' Cases.

Instead of affording Appellants' Due Process claims the analysis *Mathews* requires, the CAVC denied each of Appellants' petitions without ever applying *Mathews*. In two cases, the CAVC did not even pro-

[7] In response to one of Appellants' petitions, the Secretary made the conclusory statement that "the volume of the appeals workload has impacted VA's ability to provide decisions in a more expedited fashion." Appx3398 (quoting Starke Decl., ¶ 5). That statement acknowledges that a serious problem exists but does not demonstrate any cognizable interest by the Secretary in preserving the status quo. Expense and lack of resources are not sufficient to overcome a Due Process challenge. *See Mathews*, 424 U.S. at 348 ("Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision."); *Harris v. Champion*, 15 F.3d 1538, 1562 (10th Cir. 1994) (delays in adjudicating direct criminal appeals not excused by "lack of funding and, possibly, the mismanagement of resources by the Public Defender"); *see also Veterans for Common Sense*, 644 F.3d at 885 ("the record does not suggest that staffing or funding shortages are responsible for the delays").

vide a reason for denying Appellants' Due Process claims. *See* Appx0044–0045 and Appx0020–0021. And, in the remaining seven cases, the CAVC rejected Appellants' Due Process claims by faulting Appellants for not proving facts that are not even required to be proven under *Mathews*.

For example, the CAVC rejected six of these seven Due Process claims because Appellants had not identified any specific law, policy or practice that caused the delay. Appx0003; Appx0027; Appx0015; Appx0053; Appx0008; Appx0035. Not one of the *Mathews* factors, however, requires the petitioner to identify *why* the government is doing what it is doing.[8] *Mathews* requires the petitioner to identify the of-

[8] Underscoring just how off the mark the CAVC's Due Process rulings were, the cases the CAVC cited in support of those rulings have nothing to do with Due Process requirements. *Locklear v. Nicholson*, 20 Vet. App. 410, 416 (2006), cited in the *Myers* Order at 5 (Appx0053), the *Mote* Order at 3 (Appx0015), and the *Scyphers* Order at 5 (Appx0035), is about waiver regarding a claim for service connection, not Due Process. *Cheney v. United States District Court*, 542 U.S. 367, 380–81 (2004), cited in the *Myers* Order at 5 (Appx0053), concerns a mandamus petition seeking to dissolve a discovery order directed to the Vice President of the United States, and says nothing about Due Process or the failure of an administrative agency to act in a timely fashion. *See id.* The CAVC cited *Coker v. Nicholson*, 19 Vet. App. 439 (2006), *rev'd on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam) in the *Matthews* Order at 3 (Appx0027), the *Mote* Order at 3 (Appx0015), the *Rhodes* Order at 2 (Appx0008), and the *Syphers* Order at 5 (Appx0035), for its general statement about the specificity with which an appellant must identify the lower court error. But *Coker* con-

(continued...)

fending conduct, not its cause. Here, there is no question about what the offending conduct is—the delay in processing and adjudicating Appellants' disability benefit appeals—a delay Appellants proved and that the Secretary admits. *See supra* 11–12. This Court, too, has acknowledged that these delays exist. *See Monk*, 855 F.3d at 1317–18; *see also Veterans for Common Sense*, 644 F.3d at 859.

Requiring Appellants to identify the cause of delay that the Secretary admits is occurring—and has already been found to exist—would also be an exercise in futility. If anyone knows or is in a position to find the cause of the delay, it is the Secretary. Yet not even he nor other VA officials can identify why the delay is occurring. *See Veterans for Common Sense*, 644 F.3d at 859 (setting forth the evidence of the Secretary's lack of knowledge—or lack of interest in obtaining knowledge—about

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cerned whether the appellant there had identified with sufficient specificity why the Secretary's notice required under 38 U.S.C. § 5103A was inadequate; it had nothing to do with a Due Process violation. *Id.* at 442. Finally, *Helfer v. West,* 174 F.3d 1332 (Fed. Cir. 1999), cited in the *Scyphers* Order at 5 (Appx0035), concerned whether the CAVC had properly denied a petition for costs and attorneys' fees under the Equal Access to Justice Act. *Id.* at 1335–36. The Court simply pointed out that appellant there was attempting to recast as a Due Process claim the allegedly wrong decision of the CAVC *on the merits* of the fees claim; that is distinct from the claims here, where the heart of Appellants' arguments were that their Due Process has been denied, not the actual merits of the underlying decisions.

the causes of the delays in processing and adjudicating veterans' disability claims).

In addition, the mandamus procedure below—which the Secretary himself has successfully argued to be Appellants' *sole* avenue of relief, *see, e.g.*, *Veterans for Common Sense*, 678 F.3d at 1016; *Beamon*, 125 F.3d at 974—did not permit Appellants *any* means to discover the source of delay. Such information might have been available in a traditional district court action through interrogatories, requests for production, and depositions. Instead, the only means for Appellants to uncover the cause of the delay below was through the Secretary's responses to their mandamus petitions, and in those responses, the Secretary foisted this task onto Appellants rather than identify the flaws in his own system.[9]

In one of these cases, *Martin,* the CAVC also denied the Appellant's Due Process claim because the CAVC was "unconvinced" that Mr. Martin's admittedly "extended" wait for adjudication of his claim "amounts

[9] It would be no answer for the Secretary to argue that a FOIA request could substitute for district court discovery. Although a FOIA request may or may not provide documentary evidence that sheds some light on the source of VA delays, it cannot substitute for direct discovery of VA officials through depositions, interrogatories, and document requests that have the force of a district court's discovery powers behind it.

to a due process violation." Appx0003. The CAVC provided no basis whatsoever for this conclusion, a conclusion all the more inexplicable considering that, as described above, Mr. Martin has already experienced delay far greater than the average delay veterans are experiencing and still faces significantly more delay before his appeal will be decided. *See supra* at 12–13.

The CAVC went on to say that the VA system is "obviously overburdened" and that the Court would not exercise its writ authority to change the underlying VA process. Appx0003. The Secretary, however, provided no evidence that the VA system was overburdened, and the Ninth Circuit in *Veterans for Common Sense* pointed out that lack of VA resources was not the reason for the delay. *See Veterans for Common Sense*, 644 F.3d at 885 ("If resource constraints are an issue, the VA has not asserted as much, and the record does not suggest that staffing or funding shortages are responsible for the delays in the adjudication process. To the contrary, the district court found that the VBA is rapidly increasing its staff."). Even if the CAVC could somehow take judicial notice that the Secretary is over-burdened, that would not excuse it from applying *Mathews* to determine whether a Due Process violation exists. *See Mathews*, 424 U.S. at 348 ("Financial cost alone is not a controlling weight in determining whether due process requires a particu-

lar procedural safeguard prior to some administrative decision."); *Harris*, 15 F.3d at 1562. The CAVC never did so; it just reached a summary conclusion based on the Secretary's statement that the VA has an appeals backlog.

In *Aktepy,* the only other case in which the CAVC provided any reason for denying Appellants' Due Process claims, the CAVC's reasoning was also erroneous. The CAVC denied Ms. Aktepy's Due Process claim because the VA had provided medical examinations needed for Ms. Aktepy's benefits claims and thus was "acting on" the claim. Appx0040 ("Because the Secretary has provided evidence that VA is acting on petitioner's claim, the Court will not address any due process arguments at this time.").[10] That the VA took a small preliminary step it should have taken long ago does not answer the Due Process question. The Secretary himself proffered evidence that Ms. Aktepy's Regional Office is way behind in appeals and that the VA "cannot predict when Petitioner's case will be completed." *See supra* at 14–15. Based on average

[10] Never mind that the CAVC said it was "not satisfied with much of the Secretary's response, especially his acknowledgment that the petitioner's claim had been pending for 898 days, . . . and will be pending for a good deal longer," Appx0040, and that "a 2-year delay on the part of VA without any communication with a veteran is *unreasonable on its face*." *Id.* (emphasis added).

wait times (a conservative assumption given the greater-than-average delays in Ms. Aktepy's Regional Office), Ms. Aktepy still faces nearly three years of additional unconstitutional delay on top of the interminable delay she has already suffered.

The CAVC's denials of Appellants' Due Process claims were erroneous. All of the Appellants proved their Due Process claims under *Mathews*. The CAVC's orders denying (or ignoring) those claims should be reversed.

II. The CAVC Erroneously Denied Appellants' Requests for Writs of Mandamus to Correct the Delay.

The extraordinary delay in the Secretary's processing and adjudication of disability benefit appeals is nothing new, and veterans have been trying to get courts to address that delay for years through constitutional challenges brought in federal district courts. *See, e.g., Beamon*, 125 F.3d at 966. But those efforts have been to no avail due to the Secretary's success in obtaining rulings that 38 U.S.C. § 511 grants the CAVC exclusive jurisdiction to hear those constitutional challenges. *See, e.g.*, *Veterans for Common Sense*, 678 F.3d at 1016; *Beamon*, 125 F.3d at 974.

Once in the CAVC, veterans face a procedural hurdle not present in federal district courts: the need to convince the CAVC to issue a writ of mandamus, the only means a veteran has to advance a delay claim to

the CAVC before the delay has actually been suffered.[11] But when veterans—like Appellants here—try to obtain mandamus relief in the CAVC, they are met with a mandamus standard so onerous and decisions so ad hoc that mandamus relief is illusory. The result is that veterans, including Appellants, are left without a forum in which to raise their Due Process challenges and thereby obtain relief from the extraordinary delay that the Secretary openly admits is occurring.

The mandamus standard the CAVC imposed on Appellants is wrong. It is at odds both with the statute governing the CAVC's mandamus powers and with the standard routinely applied by other courts when assessing government agency inaction. The CAVC's rulings, as described below, effectively immunize the Secretary from Due Process challenges to delays in processing and adjudicating veterans' disability claims no matter how clear and egregious those Due Process violations are.

A. The CAVC Ignored the Mandate of Its Own Enabling Statute.

In eight of Appellants' cases, the CAVC denied the claims for a writ of mandamus by stating that "the Secretary's delay in deciding these

[11] In federal district courts, plaintiffs have many procedural methods for challenging unconstitutional delay.

claims was not so extraordinary that it amounted to an arbitrary refusal to act." *See, e.g.*, Appx0040; Appx0026; Appx0045; Appx0021; Appx0015; Appx0051; Appx0008; Appx0032. The "arbitrary refusal to act" standard is so forgiving to the Secretary that its application ensures that, even when delay is clearly unreasonable or violates the Due Process Clause (as it does here), no relief will be awarded. This standard is also contrary to relevant mandamus case law.

The CAVC's enabling statute erases any basis for the CAVC's choice of an "arbitrary refusal to act" standard. That statute unequivocally requires the CAVC to grant mandamus when the Secretary "unreasonably delays" action: "[T]he Court of Veterans Claims, to the extent necessary to its decision and when presented *shall* . . . compel action of the Secretary unlawfully withheld or *unreasonably delayed*." 38 U.S.C. § 7261(a)(2) (emphasis added). First, "unreasonably" is not synonymous with "arbitrarily." Second, the CAVC's additional requirement that the Secretary's delay amount to a "refusal" to act ratchets up the required conduct by the Secretary to an intentional act, not merely an "unreasonable" one. The CAVC's formulation essentially writes "unreasonably delayed" out of the statutory language, "unlawfully withheld or unreasonably delayed." *Gufstafson v. Alloyd Co.,* 513 U.S. 561, 562 (1995)

("this Court will avoid a reading which renders some words altogether redundant").

The CAVC's sole basis for imposing this far more onerous standard on Appellants is *Costanza*, 12 Vet. App. at 134, which likewise ignored the statutory "unreasonably delayed" language and is factually quite distinct from Appellants' cases.[12] *Costanza* is a four-paragraph per curiam decision addressing a mandamus petition that complained about the delay in docketing and transferring an appeal to the BVA. *Id.* Unlike here, the plaintiff did not argue a violation of the Due Process Clause and relied entirely on a "bald assertion based upon 'information and belief'" that he failed to support with any factual basis. *Id.* In stark contrast, Appellants here supported their Due Process claims with detailed evidence—including the Secretary's own admissions.

By writing "unreasonably delayed" out of 38 U.S.C. § 7261(a)(2), the CAVC gives the Secretary carte blanche for any delay as long as the Secretary is not "arbitrarily refusing to act"—words that appear no-

[12] This Court has considered *Costanza* largely in unpublished cases in which the appellant did not challenge its validity in the CAVC statutory scheme or as applied to a due process claim. *See, e.g.*, *Davis v. McDonald,* 593 F. App'x 992 (Fed. Cir. 2014).

where in Section 7261. The CAVC erred and abused its discretion by inventing a legal standard that is contrary to its own enabling statute.

B. The CAVC Should Have Applied Well-Established Mandamus Case Law to Evaluate Appellants' Claims.

The statutory language of "action . . . unreasonably delayed" found in 38 U.S.C. § 7261 does not spring from a vacuum. Congress used precisely the same statutory language decades earlier in the APA. The APA applies to federal agencies and requires that "reviewing court[s] shall . . . compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

The seminal APA case interpreting the statutory language "agency action . . . unreasonably delayed" is *TRAC*, 750 F.2d at 80. *TRAC* sets forth a six-factor analysis for determining whether mandamus is appropriate under the "unreasonable delay" prong of the statute. *Id.* at 80. For the past thirty years, *TRAC* has been the method by which federal courts assess mandamus in the context of delayed action by federal agencies. *TRAC* has been cited by courts in 600 cases measuring agency delay.

Given that the APA's language matches the CAVC's enabling statutory language, *TRAC*'s analysis for evaluating when mandamus is appropriate to compel unreasonably delayed agency action applies equally here. *See, e.g., Monk,* 855 F.3d at 1319 (in which this Court construed

another section of the CAVC enabling statute (38 U.S.C. § 7264) by reference to how federal courts interpret similar language in other federal statutes). Indeed, in *Erspamer*, one of the first CAVC cases to grapple with the CAVC's powers after the CAVC was created, the CAVC itself repeatedly looked to *TRAC* as authority, including for the meaning of "unreasonable delay." *See* 1 Vet. App. at 7, 9–10.

Under *TRAC,* courts apply six guidelines when evaluating whether an agency has unreasonably delayed action: (1) the time the agency takes to make a decision must be "governed by a rule of reason"; (2) if Congress has provided a timetable for action, that timetable can supply content for the rule of reason; (3) delays are less tolerable when "human health and welfare are at stake"; (4) the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the nature and extent of the interests prejudiced by delay; and (6) the court "need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed." *TRAC*, 750 F.2d at 80 *(*citations and internal quotation marks omitted).

The importance of applying these six factors in every case is far more than mere form over substance. The factors set forth in *TRAC* objectively guide a court's analysis of a mandamus petition, thereby ensuring that like cases are treated alike, without variations based on dif-

ferent standards and principles being applied from case to case. Rather than just having the court below declare a delay to be "not arbitrary" based on its own, case-specific analysis (as happened to Appellants), the *TRAC* factors channel the court's discretion and ensure that the court articulates concrete reasons for its decision. In this way, the *TRAC* factors regarding mandamus are much the same as the *Mathews* factors regarding Due Process. But never in any of the decisions below did the CAVC apply the six-factor test set forth in *TRAC*. Instead, as set forth above, the CAVC either imported the inapposite and impossibly strict "arbitrary refusal to act" from *Costanza* or applied no standard at all.

Untethered from the objective test in *TRAC*, the CAVC's decisions varied widely and all were off the mark, essentially ruling that "anything goes" at the VA. In some cases, the CAVC concluded that Appellants could not challenge the future delays that they are likely to encounter in the appeals process (which average more than four years), because Appellants had not yet been waiting for that long. In *Meissgeier*, for example, the Court held that Mr. Meissgeier had alleged only the "prospective possibility of a delay of five to six years," which had not yet occurred. Appx0021 ("[Petitioner's] argument is based on the prospective *possibility* of a delay of five to six years—a delay that has not yet occurred. The Court holds that the potential for future delay is not suf-

ficient justification for the issuance of a writ, and it will, accordingly, deny the petition." (emphasis in original)). The CAVC reached the same conclusion in *Jean*, *Myers*, *Matthews*, and *Rhodes*. *See* Appx0045 ("Mr. Jean seems to argue that he may be hurt by the possibility of a four-year delay in deciding his appeal—a delay that has not yet occurred. The Court holds that the potential for future delay is not a sufficient justification for the issuance of a writ."); Appx0026 (Petitioner's assertion that he faces a four-year delay "reflects the average processing time—i.e., some appeals are processed faster and some slower—rather than an actual delay affecting the petitioner"); Appx0052 ("To the extent that Mr. Myers argues that extraordinary relief is necessary to prevent future delay in the processing of his appeal, such argument is speculative."); Appx0008 ("[T]he petitioner also fails to appreciate that, even assuming the time periods between the NODs and SOCs reflect an inappropriate delay, his claims are now before the Board, and his assertions of possible, inappropriate delay are speculative at best.").

The CAVC was wrong to deny relief because the delays Appellants face are supposedly "mere speculation." *E.g.*, Appx0026. The CAVC's reasoning forecloses any claim seeking to avoid unreasonable delay: By this logic, if the delay has already occurred, the delay issue is moot; if

the delay has not yet occurred, the delay is too speculative to be actionable.

Contrary to the CAVC's rulings, the CAVC, as well as this Court, *see Monk*, 855 F.3d at 1317, have already acknowledged that veterans *can* assert claims for relief from future delay. The CAVC, in *Erspamer*, 1 Vet. App. at 9–10, recognized that claims to prevent future delay are appropriate because, by definition, "a claim of unreasonable delay cannot await final agency action before judicial review, since it is the very lack of agency action which gives rise to the complaint." (quoting *Air Line Pilots Ass'n, Int'l vs. CAB*, 750 F.2d 81, 85 (D.C. Cir. 1984). In *Monk,* this Court—also addressing constitutional challenges to delay in disability benefit appeals—embraced the very statistics of average delay that the CAVC rejected, using those statistics as evidence of the delays veterans challenging delay are "likely" to face in the future in their own claims. 855 F.3d at 1318 ("Mr. Monk . . . will likely be subject to the same average delay" experienced by other veterans.).

The CAVC's approach in Appellants' cases further ignores (1) the VA's own words that there is "no end in sight" to the delays, *see supra* at 12; (2) the VA's other admissions and public acknowledgements of average delays that Appellants proffered to the CAVC, *see supra* at 11–

12; and (3) the undisputed evidence of the delays already experienced by Appellants here, *see supra* at 12–17.

Relatedly, the CAVC also erroneously denied two of the Appellants' petitions because the Appellant had not taken certain steps to try to speed up the resolution of his claims. For example, Appellant Matthews did everything VA regulations required him to do to pursue an appeal of his benefit denial, yet the CAVC denied his petition in part because he had not "request[ed] assistance from the regional office or superior VA officials, such as the Under Secretary of Benefits or the Secretary, the latter against whom he now seeks a writ of mandamus." Appx0026. In another one of these cases, *Meissgeier,* the CAVC denied the Petition after faulting Lt. Col. Meissgeier for not contacting either the Director of Compensation or the Under Secretary of Benefits prior to initiating his petition. Appx1470. But no regulation, statute, or VA procedure required or even encouraged Mr. Matthews or Lt. Col. Meissgeier to request any such assistance. Indeed, the CAVC long ago rejected the contention that such extraordinary measures are a prerequisite to mandamus relief, characterizing it as "tantamount to having petitioner[] do a useless act." *See Erspamer*, 1 Vet. App. at 11 (citation omitted). In all events, it is hard to believe that even the Secretary would want a rule requiring the tens of thousands of veterans stuck in the appeals process

to call the Secretary of the Department of Veterans Affairs or the Undersecretary of Benefits as a prerequisite to relief.

The CAVC also simply accepted the VA's representations that it was trying hard to resolve a particular Appellant's claim. For example, in *Aktepy*, the CAVC found that it was "not satisfied with much of the Secretary's response, especially his acknowledgment that the petitioner's claim had been pending for 898 days, . . . and will be pending for a good deal longer . . . ." Appx0040. The court then went on to note that "a 2-year delay on the part of VA without any communication with a veteran *is unreasonable on its face*." *Id*. (emphasis added). Nevertheless, the CAVC accepted the VA's vague representation that it was "currently working on Petitioner's case," and held that "[b]ecause the Secretary has provided evidence that VA is acting on the petitioner's claim, the Court will not address any due process arguments at this time." *Id*.; *see also* Appx0045 ("The Secretary's response and exhibits demonstrate that VA is continuing to work on Mr. Jean's claims"); Appx0034.

Here again, Appellants' individual experiences are emblematic of a larger problem, in this instance, how the CAVC generally accepts the VA's claims that it is working to resolve the delay. The case law contains many instances of the CAVC refusing to intervene based on the Secretary's use of the magic words, "we're working on it," despite more

than two decades of broken VA promises. *See, e.g.*, *Bullock v. Brown*, 7 Vet. App. 69, 69–70 (1994) ("Based upon the petition and the response, it appears that administrative remedies *may* secure the relief ultimately sought." (emphasis added)); *Mathis v. Shinseki*, No. 09-3295, 2009 WL 3542529, at *1–2 (Vet. App. Nov. 2, 2009) ("The attachments to Secretary's response reveal that the Secretary is moving forward to implement the Court's decision."); *Keith v. Brown*, No. 96-1584, 15 Vet. App. 314, at *1 (1997) ("*The facts and circumstances, including the lengthy delay, in this case are extreme* and present the type of situation which could, under other circumstances, warrant the granting of extraordinary relief. However, based upon the written representations of respondent's counsel that the situation is being closely monitored and that the petitioner had a meeting scheduled on January 23, 1997, with the [Regional Office], the Court is constrained to find that a writ of mandamus is not warranted at this time." (emphasis added)).

Decades of VA promises to do better have resulted in nothing but more, and far worse, delays. There is no dispute that Appellants face delays measured in *years*, not months. Appellants have already suffered delays of 562 days (Meissgeier), 597 days (Myers), 639 days (Scyphers), 760 days (Jean), 794 days (Martin), 911 days (Matthews), 958 days (Aktepy), 1,268 days (Mote), and 1,402 days (Rhodes), and are fac-

ing significantly more delay. But the CAVC has used the arbitrary refusal to act standard to defeat every reported mandamus case complaining of delay.

The CAVC's orders on Appellants' claims must not be allowed to stand. They create an insurmountable barrier to veterans obtaining relief for "unreasonable delay" and for violations of their Due Process rights. If, as the Secretary has repeatedly argued, veterans are foreclosed from initiating their constitutional challenges in any court except the CAVC, the roadblock created by the CAVC's mandamus standard deprives Appellants from having access to any court that will protect their Due Process rights. That result itself raises serious constitutional questions.

Under the CAVC's decisions, all the Secretary needs to do to avoid any appellate relief whatsoever is to have taken the smallest, most insignificant and clerical action; fault the veteran for not having taken measures to obtain relief that are not required by any statute or regulation and likely futile, such as directly contacting the Secretary himself; or point out that the VA has an appeals backlog, an acknowledgment of the very problem the veterans were complaining about in the first place. That cannot be consistent with the rule of law or our obligation to those who have defended us. The decisions below render any hope of relief il-

lusory for veterans. The process has, to date, rendered the CAVC's statutory responsibility to "compel action of the Secretary unlawfully withheld or unreasonably delayed" a dead letter. *See* 38 U.S.C. § 7261(a)(2).

C. Under *TRAC*, Appellants Are Entitled To Writs Of Mandamus To Correct The Secretary's Delay.

Had the CAVC properly applied the objective *TRAC* factors, it would have been clear that Appellants should prevail on the merits.

As for the first and second *TRAC* guidelines, which focus on the rule of reason governing agency action, no Congressional timetable exists, and thus Congress has in no way endorsed the VA's admitted delay in processing benefit claims appeals. Decisions in other, analogous contexts demonstrate that the VA's delay does not satisfy any "rule of reason"; rather, it is egregious. In *MCI Telecomm. Corp. v. F.C.C.*, for example, the D.C. Circuit held that a four-year delay in agency ratemaking was unreasonable. 627 F.2d 322, 324–25, 340–41 (D.C. Cir. 1980). Individual veterans and their families in the appeal pipeline face average delays greater than that—and they seek benefits critical for their health and well-being. Likewise, in *Kelly*, the Third Circuit held that a four-year delay in "process[ing] of a single disability application . . . [was] wholly inexcusable" and was "well past any reasonable time limit." *Kelly*, 625 F.2d at 490. The CAVC itself long ago noted that, alt-

hough reasonable delay "may encompass months, [or] occasionally a year or two," it cannot stretch to "several years or a decade." *Erspamer*, 1 Vet. App. at 10 (citations and internal quotation marks omitted). Appellants agree, and so does the Secretary, who never argued in the CAVC that the delays are reasonable.

Under the third *TRAC* guideline, the Court's mandate to remedy delay is particularly strong when "human health and welfare are at stake." Human health and welfare are indisputably at stake here, as discussed in Appellants' Due Process argument. *See supra* at 28–32.

With respect to the fourth *TRAC* guideline, the effect of expediting delayed action on agency activities of a higher or competing priority, the Secretary has not identified a single effect that expediting delayed action would have on the VA, much less an effect that rises to the level of being a "higher or competing priority." As stated above, the Secretary offers no legitimate explanation for the delay in disability benefit appeals. And, in *Veterans for Common Sense*, 644 F.3d at 885, the Ninth Circuit stated: "If resource constraints are an issue, the VA has not asserted as much, and the record does not suggest that staffing or funding shortages are responsible for the delays in the adjudication process. To the contrary, the district court found that the VBA is rapidly increasing its staff."

The fifth *TRAC* guideline, relating to the nature and extent of the interests prejudiced by delay, also weighs in favor of finding the VA's delay unreasonable. *See TRAC*, 750 F.2d at 80. As discussed in connection with Appellants' Due Process claims, the CAVC already recognized long ago that retroactive payment of benefits does not compensate for long delay in getting that payment. The CAVC recognized long ago that delay also hurts the VA by reducing public confidence in it. *See supra* at 22.

The sixth *TRAC* guideline is really a statement about what the court need *not* find before it can conclude that agency delay is unreasonable. Specifically, the court need not "'find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.'" *TRAC*, 750 F.2d at 80 (quoting *Pub. Citizen Health Research Grp. v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 34 (D.C. Cir. 1984)). This guideline illustrates just how off-base the CAVC's "arbitrary refusal to act" standard is by requiring that the VA have "refused" to take action and that the refusal be done "arbitrarily." The CAVC puts a premium on whether impropriety lurks behind the agency lassitude, whereas *TRAC* says that's irrelevant.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

"A man who is good enough to shed his blood for his country is good enough to be given a square deal afterwards." Speech by Teddy Roosevelt, Springfield, IL, July 4, 1903.

This Court should take a step toward that square deal by putting an end to the decades of CAVC inaction that has permitted the Secretary to deprive veterans of their constitutional rights. The Court should enter an order finding the delays suffered by Appellants unconstitutional and directing the Secretary to eliminate unreasonable delay. In the alternative, this Court should remand these cases with instructions that the CAVC must apply the "unreasonable delay" legal standard embodied in its enabling statute through a *TRAC* analysis. Then our country's promises will have meaning for veterans who have suffered far too long. Our veterans deserve much better than the current regime, which affords them no relief at all.

Respectfully submitted,

/s/ John A. Chandler

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Counsel for Appellants

August 9, 2017

CERTIFICATE OF COMPLIANCE

I certify that this paper complies with the type-volume limitation of Fed. Cir. R. 8(b)(1) because it contains 12,507 words, inclusive of 46 words in the figures, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This paper complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point, proportionally spaced typeface using Microsoft Word.

August 9, 2017

/s/ John A. Chandler
John A. Chandler

CERTIFICATE OF SERVICE

I certify that on August 9, 2017, I caused the foregoing to be filed with the Court electronically using the CM/ECF system, which will send a notification to all counsel of record.

August 9, 2017

/s/ John A. Chandler
John A. Chandler

ADDENDUM

Not Published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO: 16-2502

JOHN MARTIN, PETITIONER,

V.

ROBERT D. SNYDER,
ACTING SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

JUDGMENT

The Court has issued a decision in this case, and has acted on a motion under Rule 35 of the Court's Rules of Practice and Procedure.

Under Rule 36, judgment is entered and effective this date.

Dated: February 8, 2017

FOR THE COURT:

GREGORY O. BLOCK
Clerk of the Court

By: /s/ Sharon Marshall
Deputy Clerk

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2502

JOHN MARTIN, PETITIONER,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before GREENBERG, *Judge*.

O R D E R

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On September 26, 2016, the petitioner, John Martin, through counsel, filed a petition for extraordinary relief in the nature of a writ of mandamus asking the Court to order the Secretary to take action on his claim. According to the petition, the petitioner filed a Substantive Appeal to the Board on December 15, 2015. It was not clear from the petition whether any actions had been taken by VA since this appeal was filed. However, the petitioner alleges that "[a] veteran whose disability benefits are denied by [] VA waits, on average, 1448 days from the time []VA denies the veteran's request for benefits to the time that the Board of [Veterans'] Appeals (BVA) rules on the veteran's appeal." Amended petition at 2. The petitioner alleges that forcing him to wait four years for a Board decision violates his due process rights.

On October 27, 2016, the Secretary responded that on February 11, 2016, the petitioner's appeal was certified to the Board. The response from the Secretary includes a declaration from Principal Deputy Vice Chairman of the Board David C. Spickler indicating:

> For the week beginning October 24, 2016, the Board is distributing cases from its pending inventory with docket dates up to July 2014. Due to the fluid nature of the Board's docket (dependent upon the dates of the substantive appeals of all arriving appeals – to include original appeals and returning remands), it is not possible to accurately predict when a decision on the Petitioner's appeal will be forthcoming.

Response, Exhibit 7 (emphasis in original).

The Court agrees with the Secretary that a writ is not warranted here. The petitioner originally filed a bald petition alleging general delay on the part of VA, and then merely inserted the

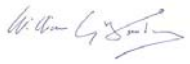
date the petitioner filed his appeal of a rating decision to the Board. Although it is clear that the petitioner must wait an extended period for the adjudication of his claim, the Court is unconvinced that such a wait amounts to a due process violation. Rather, the VA benefits system is obviously overburdened and the Court will not exercise its writ authority to change the underlying processes provided by VA. The Court's usage of such authority to accomplish the desired result would not only be reckless, but would also provide no guarantee that delays at VA would actually improve.

On consideration of the foregoing, it is

ORDERED that the petitioner's petition is DENIED.

DATED: November 22, 2016

BY THE COURT:



WILLIAM S. GREENBERG
Judge

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2502

JOHN MARTIN, PETITIONER,

V.

ROBERT D. SNYDER,
ACTING SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before SCHOELEN, PIETSCH, and GREENBERG, *Judges.*

O R D E R

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On November 22, 2016, the Court denied the petitioner's petition for extraordinary relief in the nature of a writ of mandamus. On December 13, 2016, the petitioner filed a motion for reconsideration or, in the alternative, a panel decision pursuant to Rule 35 of the Court's Rules of Practice and Procedure. The motion for decision by a panel will be granted.

Based on review of the pleadings, it is the decision of the panel that the petitioner fails to demonstrate that 1) the single-judge order overlooked or misunderstood a fact or point of law prejudicial to the outcome of the appeal, 2) there is any conflict with precedential decisions of the Court, or 3) the order otherwise raises an issue warranting a precedential decision. U.S. VET. APP. R. 35(e); *see also Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

Absent further motion by the parties or order by the Court, judgment will enter on the underlying single-judge order in accordance with Rules 35 and 36 of the Court's Rules of Practice and Procedure.

Upon consideration of the foregoing, it is

ORDERED, by the single-judge, that the motion for reconsideration is denied. It is further

ORDERED, by the panel, that the motion for panel decision is granted. It is further

ORDERED, by the panel, that the single-judge order remains the decision of the Court.

DATED: February 8, 2017 PER CURIAM.

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

Not Published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO: 16-2511

WILLIAM RHODES, PETITIONER,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

JUDGMENT

The Court has issued a decision in this case, and has acted on a motion under Rule 35 of the Court's Rules of Practice and Procedure.

Under Rule 36, judgment is entered and effective this date.

Dated: January 4, 2017

FOR THE COURT:

GREGORY O. BLOCK
Clerk of the Court

By: /s/ Michael V. Leonard
Deputy Clerk

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2511

WILLIAM RHODES, PETITIONER,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before KASOLD, *Judge*.

O R D E R

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On July 21, 2016, the petitioner filed through counsel a petition for extraordinary relief in the nature of a writ of mandamus and in the nature of a holding that certain statutes, regulations, or practices are unconstitutional. He filed through counsel an amended petition on September 26. The amended petition asks the Court to compel the Secretary to (1) expeditiously process his claims, and (2) eliminate all delays in processing veterans' appeals. In addition to asking for a writ, he asks the Court to hold unconstitutional under the Due Process Clause of the Fifth Amendment "any statute, regulation, or practice that interferes" with prompt claims processing and to declare that the delays regarding approximately 146,000 pending appeals violate due process.

In the amended petition, the petitioner asserts delay with regard to two claims. As to the first claim, he states that (1) in December 2011 he filed a claim for benefits for diabetes mellitus type II, prostate cancer, and peripheral neuropathy that was denied on September 13, 2012, (2) he filed a timely Notice of Disagreement (NOD) on September 18, 2012, with a Statement of the Case (SOC) not issued until almost 4 years later, in July 2016, and (3) he filed a Form 9 Substantive Appeal (SA) to the Board of Veterans' Appeals (Board) in August 2016. As to the second claim, he states that (1) in January 2014 he filed a claim for benefits for ischemic heart disease that was denied in June 2014, (2) he filed an NOD in July 2014, and an SOC was not issued until 2 years later, in July 2012, and (3) he filed his SA in August 2016. He also includes general information about VA's claims process and statistics about average wait times for veterans with pending claims and asserts that the delays inherent in VA's claims adjudication process are unconstitutional.

"The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations," *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976), and only when, inter alia, there is a clear and

indisputable right to the writ and a lack of adequate alternative means to attain the desired relief, *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004). As to the petitioner's claims, although he notes that 4 and 2 years, respectively, elapsed between the petitioner's NODs and receipt of the SOCs, he fails to note that the claims adjudication system envisions a fair amount of development on the part of the Secretary, and the petitioner fails to assert what, if any, claim development took place during that period. *See* 38 U.S.C. § 7105(d)(1) (noting that following the filing of an NOD the Agency must "take such development or review action as it deems proper under the provisions of regulations not inconsistent with this title"); 38 U.S.C. § 5103A(b), (c), (d) (noting that the Secretary's duty to assist claimants includes in certain cases making appropriate efforts to obtain the claimant's private records, service medical records, records of "relevant medical treatment or examination . . . at Department health care facilities," "other relevant records held by any Federal department or agency," and to arrange for a VA medical examination).

More significantly, the petitioner also fails to appreciate that, even assuming the time periods between the NODs and the SOCs reflect an inappropriate delay, his claims are now before the Board, and his assertions of possible, inappropriate delay are speculative at best. Succinctly stated, he fails to present a prima facie case that might warrant issuance of a writ. *See Cheney*, *supra*.

As to the claims of other veterans, the petitioner fails to demonstrate that he has standing to seek a writ as to the processing of such claims; indeed, he fails to demonstrate any authorization to represent veterans as a whole. *Cf. Am. Legion v. Nicholson*, 21 Vet.App. 1, 7 (2007) (en banc) (holding that the American Legion lacked standing to bring a petition for extraordinary relief on behalf of aggrieved veterans because "the Court has jurisdiction to issue a writ of mandamus only if granting the petition could lead to a final Board decision *for the petitioner* over which the Court would have jurisdiction" (emphasis added)); *see also Waterhouse v. Principi*, 3 Vet.App. 473, 475 (1992) (standing requires that a party must "'personally ha[ve] suffered some actual or threatened injury as a result of the putative illegal conduct'" (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982))).

With regard to the petitioner's request to "hold unconstitutional" any "statute, regulation, or practice" that leads to delays in processing veterans' appeals, he also fails to identify any statute, regulation, or practice that gives rise to an unconstitutional violation. *See Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments."), *rev'd on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order).

Upon consideration of the foregoing, it is

ORDERED that the petition for extraordinary relief in the nature of a writ of mandamus and in the nature of a holding regarding the constitutionality of certain statutes, regulations, or practices is DENIED.

DATED: October 11, 2016

BY THE COURT:

BRUCE E. KASOLD
Judge

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

Designated for electronic publication only
NON-PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2511

WILLIAM RHODES, PETITIONER,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before DAVIS, *Chief Judge,* KASOLD and GREENBERG, *Judges.*

O R D E R

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On October 11, 2016, the Court denied the petitioner's motion for extraordinary relief in the nature of a writ of mandamus. On November 1, 2016, the petitioner filed a motion for reconsideration or, in the alternative, a panel decision pursuant to Rule 35 of the Court's Rules of Practice and Procedure. The motion for decision by a panel will be granted.

Based on review of the pleadings, it is the decision of the panel that the petitioner fails to demonstrate that (1) the single-judge order overlooked or misunderstood a point of law or fact prejudicial to the outcome of the petition, (2) the order conflicts with any precedential decisions of the Court, or (3) the petition otherwise raises an issue warranting a precedential decision. U.S. VET. APP. R. 35(e); *see also Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

Absent further motion by the parties or order by the Court, judgment will enter on the underlying single-judge order in accordance with Rules 35 and 36 of the Court's Rules of Practice and Procedure.

Upon consideration of the foregoing, it is

ORDERED, by the single judge, that the motion for reconsideration is denied. It is further

ORDERED, by the panel, that the motion for panel decision is granted. It is further

ORDERED, by the panel, that the single-judge order remains the decision of the Court.

DATED: December 12, 2016 PER CURIAM.

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

Not Published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO: 16-2506

EUGENIA MOTE, PETITIONER,

V.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

JUDGMENT

The Court has issued a decision in this case, and has acted on a motion under Rule 35 of the Court's Rules of Practice and Procedure.

Under Rule 36, judgment is entered and effective this date.

Dated: February 24, 2017

FOR THE COURT:

GREGORY O. BLOCK
Clerk of the Court

By: /s/ Anthony R. Wilson
Deputy Clerk

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2506

EUGENIA MOTE, PETITIONER,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before SCHOELEN, *Judge*.

O R D E R

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On July 21, 2016, the petitioner filed through counsel a petition for extraordinary relief in the nature of a writ of mandamus, and on September 26, 2016, the petitioner submitted an amended petition. The amended petition alleges that the petitioner faces a 4-year delay in the resolution of her appeal, which is tantamount to a denial of benefits and a violation of the Due Process Clause of of the Fifth Amendment of the U.S. Constitution. Amended Petition (Pet.) at 6, 17. The petitioner asks the Court to (1) issue a writ of mandamus ordering the Secretary to eliminate delays in processing appeals; (2) hold unconstitutional under the Due Process Clause any statute, regulation, or practice that interferes with prompt and speedy appeals; and (3) direct the Secretary to prepare necessary appellate documents in a fashion that does not deprive veterans of their rights under the Due Process Clause. *Id*. at 18.

In the amended petition, the petitioner alleges delay with regard to her deceased husband's claim for disability compensation for ischemic heart disease and her claim for dependency and indemnity compensation (DIC). *See id*. at 5-6. The petitioner states that she is the surviving spouse of the veteran who served on active duty in the U.S. Air Force during the Vietnam War. On November 10, 2010, the veteran filed a claim for disability compensation benefits for ischemic heart disease, allegedly caused by exposure to Agent Orange. VA denied his claim, and on January 30, 2013, the veteran filed a Notice of Disagreement (NOD). On April 25, 2013, the veteran died from complications of ischemic heart disease. The petitioner was substituted to pursue the veteran's claim and filed a DIC claim. On January 21, 2015, VA denied her claim, and on November 24, 2015, the petitioner filed an NOD. On May 16, 2016, VA issued a Statement of the Case (SOC), and 1 month later, the petitioner filed her Substantive Appeal. Additionally, the petitioner includes general

information regarding VA's claims process and statistics about average wait times for pending claims, alleging that the delays inherent in VA's claims adjudication process are unconstitutional.

On September 29, 2016, the Court ordered the Secretary to file a response to the amended petition. At the outset, the Secretary provided a chronology of the veteran's claim for disability compensation, the petitioner's request to be substituted to continue the veteran's claim, and the petitioner's DIC claim. Secretary's Response (Resp.) at 1-2. The Secretary's recitation of the claims-processing times does not substantially differ from the facts alleged by the petitioner. Most notably, the Secretary asserts that on October 4, 2016, the petitioner's appeal was certified to the Board. *Id*. at 2. However, with regard to when the Board might issue a decision on the appeal, the Secretary states that because the petitioner requested a Travel Board hearing before a veterans law judge at the Atlanta regional office (RO), the Board cannot decide her appeal until *after* the hearing is completed or the petitioner withdraws her request. *Id*. at 2-3. The Secretary further states that the RO informed the petitioner that it could not predict how long the petitioner might wait for a Travel Board hearing because Travel Board hearings are limited by the availability of Board personnel and resources. *Id*. at 2; *see also id*. at 2 (noting that Travel Board hearings are currently being scheduled for Substantive Appeals dated November 2013). Although the RO offered the petitioner several options, the petitioner has not exercised any option that might accelerate the time in which she may expect a decision from the Board. *Id*. at 3.

This Court has the authority to issue extraordinary writs in aid of its jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). *See Cox v. West*, 149 F.3d 1360, 1363-64 (Fed. Cir. 1998). However, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976). Accordingly, three conditions must be met before a court may issue a writ: (1) The petitioner must lack adequate alternative means to attain the desired relief, thus ensuring that the writ is not used as a substitute for an appeal; (2) the petitioner must demonstrate a clear and indisputable right to the writ; and (3) the Court must be convinced, given the circumstances, that the issuance of the writ is warranted. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004).

The instant petition fails to satisfy the requirements for issuance of a writ. The chronology of the petitioner's claim demonstrates that reliance on the *average* time that veterans wait at each step of the administrative appellate process is not a sufficient basis for issuance of a writ. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (constitutional standing requires that the party bringing the action must have suffered an "injury in fact" – an invasion of a legally protected interest that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical'" (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990))). For example, although the petitioner alleges that veterans on average wait more than 1 year for VA to prepare an SOC and 537 days for the RO to certify the appeal, the facts in this case show that the petitioner waited less than 6 months at each step – i.e., approximately 174 and 110 days, respectively. Moreover, as argued by the Secretary, many factors, including processes that are mandated by statute or regulation, affect the time that it takes to develop and decide a claim. *See*, *e.g.*, 38 U.S.C. §§ 5103, 5103A.

Where, as here, the petitioner seeks a writ of mandamus based on alleged delay in the processing of her appeal, the delay must be so extraordinary that it is the equivalent to an arbitrary refusal to act. *See Costanza v. West*, 12 Vet.App. 133, 134 (1999) (per curiam order) (holding that a clear and indisputable right to the writ does not exist unless the petitioner demonstrates that the alleged delay is so extraordinary, given the demands on and resources of the Secretary, that it is equivalent to an arbitrary refusal by the Secretary to act). "The delay involved . . . must be unreasonable before a court will inject itself into an administrative agency's adjudicative process" and "[t]he mere passage of time in reviewing a matter does not necessarily constitute" unreasonable delay. *Bullock v. Brown*, 7 Vet.App. 69, 69 (1994) (per curiam order). As the facts in this case show, the petitioner's appeal-processing time was vastly improved from the *average* appeal-processing time and, the petitioner has not alleged, given the demands and resources of the Secretary, that the time to wait for a Travel Board hearing constitutes unreasonable delay. The petitioner's reliance on *average* processing time fails to inform the Court about the causes for such processing time and does little to demonstrate whether any delay in the petitioner's claim was so extraordinary as to give rise to a due process violation.

To the extent that the petitioner seeks redress for other veterans with appeals pending before VA, the petitioner fails to demonstrate that she has standing to seek a writ as to the processing of claims by other veterans. Indeed, she fails to demonstrate any authorization to represent veterans as a whole. *See Lujan supra*; *see also Waterhouse v. Principi*, 3 Vet.App. 473, 475 (1992) (standing requires that a party must "'personally ha[ve] suffered some actual or threatened injury as a result of the putative illegal conduct'" (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982))).

Finally, with regard to the petitioner's request to "hold unconstitutional" any "statute, regulation, or practice" that leads to delays in processing veterans' appeals, she also fails to identify any specific statute, regulation, or practice that gives rise to a constitutional violation. *See Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments."), *rev'd on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order); *see also Helfer v. West*, 174 F.3d 1332, 1335 (Fed. Cir. 1999) (merely characterizing a claim as constitutional is insufficient to raise a constitutional issue). Accordingly, the Court will not entertain this underdeveloped argument. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments).

Upon consideration of the foregoing, it is

ORDERED that the amended petition for extraordinary relief is DENIED.

DATED: November 22, 2016

BY THE COURT:

MARY J. SCHOELEN
Judge

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

Designated for electronic publication only
NON-PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2506

EUGENIA MOTE, PETITIONER,

V.

ROBERT D. SNYDER,
ACTING SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before SCHOELEN, PIETSCH, and BARTLEY, *Judges.*

O R D E R

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On November 22, 2016, the Court denied the petitioner's request for extraordinary relief in the form of a writ of mandamus. On December 13, 2016, the petitioner filed a motion for reconsideration or, in the alternative, a motion for panel decision. The motion for reconsideration by the single judge will be denied, and the motion for a decision by a panel will be granted.

Based on review of the pleadings, it is the decision of the panel that the petitioner fails to demonstrate that 1) the single-judge order overlooked or misunderstood a fact or point of law prejudicial to the outcome of the petition, 2) there is any conflict with precedential decisions of the Court, or 3) that the petition otherwise raises an issue warranting a precedential decision. U.S. VET. APP. R. 35(e); *see also Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

Absent further motion by the parties or order by the Court, judgment will enter on the underlying single-judge order in accordance with Rules 35 and 36 of the Court's Rules of Practice and Procedure.

Upon consideration of the foregoing, it is

ORDERED, by the single judge, that the motion for reconsideration is denied. It is further

ORDERED, by the panel, that the motion for panel decision is granted. It is further

ORDERED, by the panel, that the single-judge order remains the decision of the Court.

DATED: February 2, 2017 PER CURIAM.

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

Not Published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO: 16-2504

THOMAS MEISSGEIER, PETITIONER,

V.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

JUDGMENT

The Court has issued a decision in this case, and has acted on a motion under Rule 35 of the Court's Rules of Practice and Procedure.

Under Rule 36, judgment is entered and effective this date.

Dated: February 24, 2017

FOR THE COURT:

GREGORY O. BLOCK
Clerk of the Court

By: /s/ Anthony R. Wilson
Deputy Clerk

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2504

THOMAS MEISSGEIER, PETITIONER,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before LANCE, *Judge*.

O R D E R

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On July 21, 2016, the petitioner, through counsel, filed a petition for extraordinary relief in the nature of a writ of mandamus. In it, he asks the Court to order the Secretary to "eliminate delays in processing appeals" and "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." Petition (Pet.) at 19. On July 27, 2016, the petitioner filed an opposed motion to consolidate his case with 16 other cases. The Court denied the motion on September 14, 2016. On September 23, 2016, and October 8, 2016, the Court ordered the petitioner to amend his petition to provide sufficient facts and supporting documentation for the Court to determine whether a writ is warranted.

On September 26, 2016, the petitioner responded to the Court's September 23, 2016, order. In his response, he asserts that he filed a claim for entitlement to service connection for sleep apnea on May 20, 2013, that VA denied his claim on November 13, 2014, and that he filed a Notice of Disagreement on January 6, 2015. Amended Pet. at 5. He contends that he has "heard nothing since" he perfected his appeal on November 9, 2015, following VA's issuance of a Statement of the Case (SOC) on March 25, 2015. *Id.*

On October 24, 2016, the petitioner submitted evidence supporting his contentions. *See* Petitioner's Oct. 24, 2016, Response (Resp.), exhibits (exs.) C-T. He argues that he "will wait an average of 537 days" for the Board of Veterans' Appeals to receive his appeal, Resp. at 1, and further asserts that he sent emails to VA on October 20, 2015, and November 6, 2015, but has received no replies, *id.* at 27. The petitioner contends that he "can expect that his [Substantive Appeal] will not even be 'worked' until approximately five to six years from now." *Id.* at 18.

This Court has the authority to issue extraordinary writs in aid of its jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). *See Cox v. West*, 149 F.3d 1360, 1363-64 (Fed. Cir. 1998). However, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976). Accordingly, three conditions must be met before the Court may issue a writ: (1) The petitioner must demonstrate a lack of adequate alternative means to obtain the desired relief, thus ensuring that the writ is not used as a substitute for the appeals process; (2) the petitioner must demonstrate a clear and indisputable right to the writ; and (3) the Court must be convinced, given the circumstances, that the issuance of the writ is warranted. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004).

When delay is alleged as the basis for a petition, a clear and indisputable right to the writ does not exist unless the petitioner demonstrates that the alleged delay is so extraordinary, given the demands on and resources of the Secretary, that it is equivalent to an arbitrary refusal by the Secretary to act. *Costanza v. West*, 12 Vet.App. 133, 134 (1999) (per curiam order).

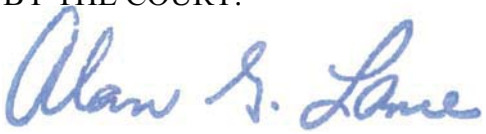
Here, the Court is not convinced that the issuance of a writ is warranted. Specifically, the petitioner has not demonstrated that the year since he filed a Substantive Appeal constitutes a delay "so extraordinary . . . that it is equivalent to an arbitrary refusal by the Secretary to act." *Id.* Rather, his argument is based on the prospective *possibility* of a delay of five to six years—a delay that has not yet occurred. The Court holds that the potential for further delay is not sufficient justification for the issuance of a writ, and it will, accordingly, deny the petition.

Upon consideration of the foregoing, it is

ORDERED that the petition is DENIED.

DATED: November 30, 2016

BY THE COURT:



ALAN G. LANCE, SR.
Judge

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

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NONPRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2504

THOMAS MEISSGEIER, PETITIONER,

V.

ROBERT D. SNYDER,
ACTING SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before DAVIS, *Chief Judge*, and LANCE and BARTLEY, *Judges.*

O R D E R

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On July 21, 2016, the petitioner filed pro se a petition for extraordinary relief in the nature of a writ of mandamus. The petition was denied on November 30, 2016, and the pro se petitioner timely moved for reconsideration or, in the alternative, for panel decision, on December 21, 2016. Reconsideration will be denied by the single judge, and the motion for decision by a panel will be granted.

Based on review of the pleadings, it is the decision of the panel that the petitioner fails to demonstrate that 1) the single-judge order overlooked or misunderstood a fact or point of law prejudicial to the outcome of the petition, 2) there is any conflict with precedential decisions of the Court, or 3) the petition otherwise raises an issue warranting a precedential decision. U.S. VET. APP. R. 35(e); *see also Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

Absent further motion by the parties or order by the Court, judgment will enter on the underlying single-judge decision in accordance with Rules 35 and 36 of the Court's Rules of Practice and Procedure.

Upon consideration of the foregoing, it is

ORDERED, by the single judge, that the motion for reconsideration is denied. It is further

ORDERED, by the panel, that the motion for panel decision is granted. It is further

ORDERED, by the panel, that the single-judge order remains the decision of the Court.

DATED: February 2, 2017 PER CURIAM.

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

Not Published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO: 16-2503

HUGH D. MATTHEWS, PETITIONER,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

JUDGMENT

The Court has issued a decision in this case, and has acted on a motion under Rule 35 of the Court's Rules of Practice and Procedure.

Under Rule 36, judgment is entered and effective this date.

Dated: January 5, 2017

FOR THE COURT:

GREGORY O. BLOCK
Clerk of the Court

By: /s/ Abie M. Ngala
Deputy Clerk

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2503

HUGH D. MATTHEWS, PETITIONER,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before KASOLD, *Judge*.

O R D E R

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On July 21, 2016, the petitioner filed through counsel a petition for extraordinary relief in the nature of a writ of mandamus and in the nature of a holding that certain statutes, regulations, or practices are unconstitutional. He filed through counsel an amended petition on September 26. The amended petition asks the Court to compel the Secretary to (1) expeditiously process his claims, and (2) eliminate all delays in processing veterans' appeals. In addition to asking for a writ, he asks the Court to hold unconstitutional under the Due Process Clause of the Fifth Amendment "any statute, regulation, or practice that interferes" with prompt claims processing and to declare that the delays regarding approximately 146,000 pending appeals violate due process.

In the amended petition, the petitioner asserts that he (1) filed a claim for benefits and received a rating decision on January 10, 2014, (2) filed a Notice of Disagreement (NOD) on January 22, 2014, but has not yet received a Statement of the Case (SOC), and (3) advanced his claim diligently at all stages. He asserts that a writ is warranted because he believes he faces a delay of 4 or more years in the resolution of his appeal. He also includes general information about VA's claims process and statistics about average wait times for veterans with pending claims, and he asserts that the delays inherent in VA's claims adjudication process are unconstitutional.

"The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations," *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976), and only when, inter alia, there is a clear and indisputable right to the writ and a lack of adequate alternative means to attain the desired relief, *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004).

As to the petitioner's claim, he fails to appreciate that the claims adjudication system envisions a fair amount of development on the part of the Secretary, and the petitioner fails to assert what, if any, claim development might have taken place since he filed his NOD. *See* 38 U.S.C. § 7105(d)(1) (noting that following the filing of an NOD the Agency must "take such development or review action as it deems proper under the provisions of regulations not inconsistent with this title"). Additionally, although the petitioner asserts that he has diligently advanced his claim at all stages, he has not shown any effort to resolve the delay by requesting assistance from the regional office or superior VA officials, such as the Under Secretary for Benefits or the Secretary, the latter against whom he now seeks a writ of mandamus. *Cf. Costanza v. West*, 12 Vet.App. 133, 134 (1999) (per curiam order) (finding that petitioner did not demonstrate that he lacked alternative means of relief when he did not undertake to resolve delay prior to filing the petition); *Erspamer v. Derwinski*, 1 Vet. App. 3, 11 (1990) (noting that an alternative to mandamus is bringing the delay to the Secretary's attention).

In sum, the petitioner fails to demonstrate that the amount of time that has elapsed since he filed his NOD amounts to an arbitrary refusal to act, or that he lacks an alternative to the drastic remedy of mandamus. *See Kerr*, *supra*; *Stratford v. Peake*, 22 Vet.App. 313, 314 (2008) (per curiam order) ("[T]his Court has held that a clear and indisputable right to the writ does not exist unless the petitioner demonstrates that the alleged delay is so extraordinary, given the demands on and resources of the Secretary, that it is equivalent to an arbitrary refusal by the Secretary to act."); *see also In re Monroe Commc'ns Corp.*, 840 F.2d 942, 946 (D.C. Cir. 1998) (5-year delay in agency action not so great as to justify mandamus).

With regard to the petitioner's assertion that he faces a 4 year delay in the resolution of his appeal, the assertion is based on mere speculation. Indeed, the alleged 4 year delay (1) reflects the average processing time – i.e., some appeals are processed faster and some slower – rather than an actual delay affecting the petitioner, *see* Petition at 9, and (2) is premised on the regional office's not granting the full benefits sought – a determination that has not yet been made, *see* 38 U.S.C. § 7105(d)(1) (requiring an SOC only if, inter alia, the regional office does not grant the full benefits sought after the filing of an NOD). In sum, the petitioner fails to demonstrate entitlement to a writ. *See Cheney*, *supra*.

As to the claims of other veterans, the petitioner fails to demonstrate that he has standing to seek a writ as to the processing of such claims; indeed, he fails to demonstrate any authorization to represent veterans as a whole. *Cf. Am. Legion v. Nicholson*, 21 Vet.App. 1, 7 (2007) (en banc) (holding that the American Legion lacked standing to bring a petition for extraordinary relief on behalf of aggrieved veterans because "the Court has jurisdiction to issue a writ of mandamus only if granting the petition could lead to a final Board decision *for the petitioner* over which the Court would have jurisdiction" (emphasis added)); *see also Waterhouse v. Principi*, 3 Vet.App. 473, 475 (1992) (standing requires that a party must "'personally ha[ve] suffered some actual or threatened injury as a result of the putative illegal conduct'" (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982))).

With regard to the petitioner's request to "hold unconstitutional" any "statute, regulation, or practice" that leads to delays in processing veterans' appeals, he fails to identify any statute, regulation, or practice that gives rise to an unconstitutional violation. *See Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments."), *rev'd on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order).

Upon consideration of the foregoing, it is

ORDERED that the petition for extraordinary relief in the nature of a writ of mandamus and in the nature of a holding regarding the constitutionality of certain statutes, regulations, or practices is DENIED.

DATED: October 11, 2016

BY THE COURT:

BRUCE E. KASOLD
Judge

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

Designated for electronic publication only
NON-PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2503

HUGH D. MATTHEWS, PETITIONER,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before DAVIS, *Chief Judge,* KASOLD and BARTLEY, *Judges.*

O R D E R

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On October 11, 2016, the Court denied the petitioner's motion for extraordinary relief in the nature of a writ of mandamus. On November 1, 2016, the petitioner filed a motion for reconsideration or, in the alternative, a panel decision pursuant to Rule 35 of the Court's Rules of Practice and Procedure. The motion for decision by a panel will be granted.

Based on review of the pleadings, it is the decision of the panel that the petitioner fails to demonstrate that (1) the single-judge order overlooked or misunderstood a point of law or fact prejudicial to the outcome of the petition, (2) the order conflicts with any precedential decisions of the Court, or (3) that the petition otherwise raises an issue warranting a precedential decision. U.S. VET. APP. R. 35(e); *see also Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

Absent further motion by the parties or order by the Court, judgment will enter on the underlying single-judge order in accordance with Rules 35 and 36 of the Court's Rules of Practice and Procedure.

Upon consideration of the foregoing, it is

ORDERED, by the single judge, that the motion for reconsideration is denied. It is further

ORDERED, by the panel, that the motion for panel decision is granted. It is further

ORDERED, by the panel, that the single-judge order remains the decision of the Court.

DATED: December 12, 2016 PER CURIAM.

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

Not Published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO: 16-2493

BETTY D. SCYPHERS, PETITIONER,

V.

ROBERT D. SNYDER,
ACTING SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

JUDGMENT

The Court has issued a decision in this case, and has acted on a motion under Rule 35 of the Court's Rules of Practice and Procedure.

Under Rule 36, judgment is entered and effective this date.

Dated: February 9, 2017

FOR THE COURT:

GREGORY O. BLOCK
Clerk of the Court

By: /s/ Abie M. Ngala
Deputy Clerk

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2493

BETTY D. SCYPHERS, PETITIONER,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before SCHOELEN, *Judge*.

O R D E R

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On July 21, 2016, the petitioner filed through counsel a petition for extraordinary relief in the nature of a writ of mandamus. The petition alleges that VA has deprived the veteran, the petitioner's deceased husband, and the petitioner due process by failing to provide a copy of the veteran's April 2014 rating decision, refusing to provide a required Statement of the Case (SOC), and refusing to advance consideration of their appeals in light of their advanced age and failing health. Petition (Pet.) at 15. The petitioner states that she faces a 4-year delay in the resolution of her appeal, which is tantamount to a denial of benefits and a violation of the Due Process Clause of the Fifth Amendment of the U.S. Constitution. *Id*. at 6, 18. The petitioner asks the Court to (1) issue a writ of mandamus ordering the Secretary to eliminate delays in processing appeals; (2) hold unconstitutional under the Due Process Clause any statute, regulation, or practice that interferes with prompt and speedy appeals; and (3) direct the Secretary to prepare necessary appellate documents in a fashion that does not deprive veterans of their rights under the Due Process Clause. *Id*. at 19

I. BACKGROUND

The petitioner alleges delay with regard to two claims: (1) The veteran's claim for disability compensation relating to alleged exposure to tactical herbicides during his service at Ubon RTAFB in Thailand from February 1970 to February 1971; and (2) her claim for dependency and indemnity compensation (DIC). *See id*. at 5-6, 13-15. As relevant here, the petitioner states that on July 26, 2013, the veteran filed a request to reopen his claim. *Id*. at 13. The Atlanta regional office (RO) sent the veteran's claim to the St. Paul, Minnesota, RO, which denied his claim on July 27, 2014, and purportedly "refused to provide [the veteran with] a copy of the related rating decision dated April

25, 2014." *Id*. at 14. On October 22, 2014, the veteran filed a Notice of Disagreement (NOD). *Id*. Despite the veteran's repeated requests for VA to issue an SOC and a request to expedite his claim as a result of health and advanced age, the veteran died on April 4, 2015, without receiving any response from VA. *Id*.

The petitioner further notes that she filed a request to be substituted to pursue the veteran's claim and filed claims for survivors benefits and DIC. *Id*. The petitioner states that on August 18, 2015, she filed a Substantive Appeal even though she had not received an SOC regarding the veteran's claims, and that on October 8, 2015, she requested that VA expedite consideration of her claims. *Id*. The petitioner notes that she is 76 years old, has undergone triple bypass heart surgery, and has since received 8 heart stents. *Id*. at 14-15. Nearly 1 year later, VA has not responded to the petitioner's request to expedite her claims. *Id*. at 15. Lastly, the petitioner includes general information regarding VA's claims process and statistics about average wait times for pending claims, alleging that the delays inherent in VA's claims adjudication process are unconstitutional.

On September 29, 2016, the Court ordered the Secretary to file a response to the petition. At the outset, the Secretary provided a summary of the pertinent facts, along with documentation substantiating the chronology of the veteran's and the petitioner's claims. Secretary's Response (Resp.) at 1-4. The Secretary states that the veteran's July 2013 claim to reopen was denied in an April 25, 2014, rating decision after the veteran had been afforded compensation and pension examinations on March 18, 2014. *Id*. at 1, Attachments 1-3. VA considered correspondence dated May 5, 2014, as another claim to reopen, and denied the claim on July 27, 2014. Secretary's Resp. at 2, Attachments 4-5. On October 22, 2014, the veteran filed an NOD with both rating decisions and, in December 27, 2014, correspondence, VA asked the veteran whether he would like his appeal to be reviewed by a decision review officer (DRO) or to follow the traditional appeal process. Secretary's Resp. at 2, Attachments 6-7. The December 2014 letter also informed the veteran that *if* the RO did not hear from him within 60 days, his case would be reviewed under the traditional appeal process. Secretary's Resp. at 2, Attachment 7. On January 28, 2015, the veteran's attorney submitted a statement in support of claim *and* requested that the veteran's claims be expedited. Secretary's Resp. at 2, Attachment 8. On March 24, 2015, VA issued an SOC that continued the prior denials, which was mailed to the veteran and his attorney. Secretary's Resp. at 2, Attachment 9. In April 2015, the SOC mailed to the veteran's attorney was returned by the U.S. Postal Service marked "unable to forward." Secretary's Resp. at 2-3, Attachment 10.

With regard to the petitioner's claims, the Secretary states that in May 2015, following the veteran's death on April 4, 2015, the petitioner requested to be substituted to continue the veteran's claims and filed an application for DIC. Secretary's Resp. at 3, Attachments 11-12. In August 2015, the petitioner filed a Substantive Appeal with regard to the veteran's claims, noting that she had not yet received an SOC, and in October 2015, requested her claims be advanced on the Board's docket and at the RO. Secretary's Resp. at 3, Attachments 13-15. In May 2016, the RO issued an April 26, 2016, rating decision that denied the petitioner's DIC claim. Secretary's Resp. at 3, Attachment 16. Later in May, the copy mailed to the petitioner's attorney was returned by the U.S. Postal Service marked "unable to forward." Secretary's Resp. at 3, Attachment 17. Lastly, in October 2016, the RO

informed the petitioner that her appeal of the veteran's claims had been certified to the Board, and the RO re-sent the petitioner's counsel the prior undeliverable correspondence – the March 2015 SOC, the April 2016 rating decision and May 2016 notification letter, and a June 2016 letter pertaining to substitution. Secretary's Resp. at 3-4, Attachments 18-23.

In response to the petitioner's arguments that the RO delayed issuance of an SOC prior to the veteran's death and that VA had refused to provide a copy of the April 2014 rating decision or the SOC, the Secretary asserts that (1) the SOC was issued within 5 months of receipt of the veteran's NOD and within 1 month after the veteran's time to submit a response to the appeal election letter had expired, and (2) the RO has no record of the April 2014 rating decision being returned as undeliverable and that the RO has since provided the petitioner's counsel a copy of the SOC. Secretary's Resp. at 4-7.

With regard to the petitioner's request for substitution, certification of the appeal to the Board, and the petitioner's DIC claim, the Secretary responds that (1) the petitioner has been substituted and her appeal certified to the Board, (2) the Board has construed the petitioner's motion for advancement on the Board's docket as a motion to expedite her hearing request under 38 C.F.R. § 20.704(f), and (3) the petitioner has not filed an NOD with the decision denying her DIC claim, and therefore, there is no further action for the RO to take. *Id*. at 7-8. The Secretary contends that the RO has effectively remedied the issues presented in the petition and further asserts that the petitioner fails to adequately plead or demonstrate a due process violation based on unreasonable delay or that she has standing to seek a writ on behalf of other veterans. *Id*. at 9-16.

II. ANALYSIS

This Court has the authority to issue extraordinary writs in aid of its jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). *See Cox v. West*, 149 F.3d 1360, 1363-64 (Fed. Cir. 1998). However, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976). Accordingly, three conditions must be met before a court may issue a writ: (1) The petitioner must lack adequate alternative means to attain the desired relief, thus ensuring that the writ is not used as a substitute for an appeal; (2) the petitioner must demonstrate a clear and indisputable right to the writ; and (3) the Court must be convinced, given the circumstances, that the issuance of the writ is warranted. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004).

The instant petition fails to satisfy the requirements for issuance of a writ. Where, as here, the petitioner seeks a writ of mandamus based on alleged delay in the processing of the veteran's and the petitioner's appeals, the delay must be so extraordinary that it is the equivalent to an arbitrary refusal to act. *See Costanza v. West*, 12 Vet.App. 133, 134 (1999) (per curiam order) (holding that a clear and indisputable right to the writ does not exist unless the petitioner demonstrates that the alleged delay is so extraordinary, given the demands on and resources of the Secretary, that it is equivalent to an arbitrary refusal by the Secretary to act). "The delay involved . . . must be unreasonable before a court will inject itself into an administrative agency's adjudicative process"

and "[t]he mere passage of time in reviewing a matter does not necessarily constitute" unreasonable delay. *Bullock v. Brown*, 7 Vet.App. 69, 69 (1994) (per curiam order). The facts in this case fail to support the petitioner's allegation that VA unreasonably delayed issuing an SOC in response to the veteran's NOD. As argued by the Secretary, the RO issued the SOC within 5 months after the veteran filed his NOD and within 1 month after the veteran's time to submit a response to the appeal election letter had expired. Although the RO did not respond to the veteran's January 28, 2015, request to expedite his claim, the Court cannot say, under these circumstances, that such failure lead to unreasonable delay. Indeed, the petitioner had alleged that veterans on average wait more than 1 year for VA to prepare an SOC; yet, the RO issued an SOC within 5 months after the NOD – a vast improvement over the *average* processing time.

The Court acknowledges that the attachments to the Secretary's response substantiate the petitioner's allegations that the veteran and the petitioner informed VA that they had not received the April 2014 rating decision and the March 2015 SOC. However, the record also shows that the petitioner obtained the April 2014 rating decision from another source and that VA has, in October 2016, provided the petitioner's attorney with a copy of the SOC. Although VA might have handled these matters with greater efficiency and attention to detail, and it appears that correspondence to the petitioner's attorney was returned as undeliverable as a result of RO error, the petitioner has been afforded the relief sought. *See Thomas v. Brown*, 9 Vet.App. 269, 270 (1996) (per curiam order) (dismissing cases as moot because the relief sought, the issuance of SOCs, had been accomplished without the need for action by the Court).

Similarly, the Secretary's response indicates that the RO certified the petitioner's appeal to the Board and that her request for a Travel Board hearing is being expedited in accordance with the Secretary's regulations. *See* 38 C.F.R. §§ 20.704(f), 20.900(c) (2016). Because the Board has agreed to expedite the processing of the petitioner's appeal, the petitioner's reliance on the *average* time that veterans wait at each step of the administrative appellate process is not a sufficient basis for issuance of a writ. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (constitutional standing requires that the party bringing the action must have suffered an "injury in fact" – an invasion of a legally protected interest that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical'" (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990))). Additionally, although the RO failed to respond to the petitioner's October 2015 request to expedite her DIC claim, the record demonstrates that the RO denied the claim in an April 2016 rating decision and that the petitioner has not filed an NOD with that decision. Under these circumstances, the petitioner fails to demonstrate a clear and indisputable right to the writ. *See Cheney*, *supra*. The Court trusts that the Secretary will consider that request *if* the petitioner files a timely NOD with the rating decision.

To the extent that the petitioner seeks redress for other veterans with appeals pending before VA, the petitioner fails to demonstrate that she has standing to seek a writ as to the processing of claims by other veterans. Indeed, she fails to demonstrate any authorization to represent veterans as a whole. *See Lujan supra*; *see also Waterhouse v. Principi*, 3 Vet.App. 473, 475 (1992) (standing requires that a party must "'personally ha[ve] suffered some actual or threatened injury as a result of

the putative illegal conduct'" (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982))).

Finally, with regard to the petitioner's request to "hold unconstitutional" any "statute, regulation, or practice" that leads to delays in processing veterans' appeals, she also fails to identify any specific statute, regulation, or practice that gives rise to a constitutional violation. *See Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments."), *rev'd on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order); *see also Helfer v. West*, 174 F.3d 1332, 1335 (Fed. Cir. 1999) (merely characterizing a claim as constitutional is insufficient to raise a constitutional issue). Accordingly, the Court will not entertain this underdeveloped argument. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments).

Upon consideration of the foregoing, it is

ORDERED that the petition for extraordinary relief is DENIED.

DATED: November 22, 2016

BY THE COURT:

MARY J. SCHOELEN
Judge

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

Designated for electronic publication only
NON-PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2493

BETTY D. SCYPHERS, PETITIONER,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before SCHOELEN, PIETSCH and BARTLEY, *Judges.*

O R D E R

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On November 22, 2016, the Court denied the petitioner's motion for extraordinary relief in the nature of a writ of mandamus. On December 13, 2016, the petitioner filed a motion for reconsideration, or in the alternative, a panel decision pursuant to Rule 35 of the Court's Rules of Practice and Procedure. The motion for decision by a panel will be granted.

Based on review of the pleadings, it is the decision of the panel that the petitioner fails to demonstrate that 1) the single-judge order overlooked or misunderstood a fact or point of law prejudicial to the outcome of the petition, 2) there is any conflict with precedential decisions of the Court, or 3) that the petition otherwise raises an issue warranting a precedential decision. U.S. VET. APP. R. 35(e); *see also Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

Absent further motion by the parties or order by the Court, judgment will enter on the underlying single-judge order in accordance with Rules 35 and 36 of the Court's Rules of Practice and Procedure.

Upon consideration of the foregoing, it is

ORDERED, by the single judge, that the motion for reconsideration is denied. It is further

ORDERED, by the panel, that the motion for panel decision is granted. It is further

ORDERED, by the panel, that the single-judge order remains the decision of the Court.

DATED: January 18, 2017 PER CURIAM.

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

Not Published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO: 16-2495

SARAH AKTEPY, PETITIONER,

V.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

JUDGMENT

The Court has issued a decision in this case, and has acted on a motion under Rule 35 of the Court's Rules of Practice and Procedure.

Under Rule 36, judgment is entered and effective this date.

Dated: March 2, 2017

FOR THE COURT:

GREGORY O. BLOCK
Clerk of the Court

By: /s/ Anthony R. Wilson
Deputy Clerk

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

Designated for Electronic Publication

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2495

SARAH AKTEPY, PETITIONER,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before GREENBERG, *Judge*.

O R D E R

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On September 26, 2016, petitioner Sarah Aktepy, through counsel, filed a petition for extraordinary relief in the nature of a writ of mandamus asking the Court to order the Secretary to take action on her claims. According to the petition, on April 9, 2014, the petitioner filed a Substantive Appeal to an October 1, 2013, regional office (RO) decision. However, despite the passage of more than 2 years, VA had yet to act on her appeal. Additionally, the petitioner alleged that "[a] veteran whose disability benefits are denied by [] VA waits, on average, 1448 days from the time []VA denies the veteran's request for benefits to the time that the Board of [Veterans'] Appeals (BVA) rules on the veteran's appeal." Amended Petition at 2. The petitioner alleged that requiring her to wait four years for a Board decision violates her due process rights. On September 30, 2016, the Court ordered the Secretary to respond to the petition.

On October 27, 2016, the Secretary responded, providing evidence that on October 17, 2016, and October 23, 2016, the petitioner had been provided medical examinations for the claims that are relevant to this petition. The Secretary also stated the following:

> The timeframe for a decision on Petitioner's claims is uncertain, however, the Roanoke RO has indicated, and the chronology . . . shows that, they are currently working on Petitioner's case. Since both of the requested VA medical examinations have been completed, Petitioner's claims will be re-adjudicated in due course, but the RO cautioned it is currently processing a backlog of over 600 cases involving pending appeals to the Board, and cannot predict when Petitioner's case will be completed.

Response at 2.

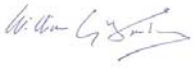
The Court agrees with the Secretary that VA's most recent actions of providing examinations for the petitioner reflect that VA has not arbitrarily refused to take action on her claims, and thus a writ is not warranted here. *See Matter of Cox*, 10 Vet.App. 361, 370 (1997) (quoting *United States v. Black*, 128 U.S. 40, 48 (1888). Although the Court is not satisfied with much of the Secretary's response, especially his acknowledgment that the petitioner's claim had been pending for 898 days, *see* Response, Attachment 6, and will be pending for a good deal longer, the requirements for a writ have simply not been met under these circumstances. Because the Secretary has provided evidence that VA is acting on the petitioner's claim, the Court will not address any due process arguments at this time. The Court notes that a 2-year delay on the part of VA without any communication with a veteran is unreasonable on its face. The petitioner should not hesitate to petition the Court again if she continues to experience delay and a lack of communication on the part of VA.

On consideration of the foregoing, it is

ORDERED that the petitioner's petition is DENIED.

DATED: November 22, 2016

BY THE COURT:



WILLIAM S. GREENBERG
Judge

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2495

SARAH AKTEPY, PETITIONER,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before SCHOELEN, BARTLEY, and GREENBERG, *Judges.*

O R D E R

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

In a single-judge order dated November 22, 2016, the Court denied the petitioner's petition for extraordinary relief in the nature of a writ of mandamus. On December 13, 2016, the petitioner, through counsel, timely filed a motion for reconsideration by the single judge, and, in the alternative, a motion for a panel decision. The motion for decision by a panel will be granted.

Based on review of the pleadings, it is the decision of the panel that the petitioner fails to demonstrate that 1) the single-judge order overlooked or misunderstood a fact or point of law prejudicial to the outcome of the petition, 2) there is any conflict with precedential decisions of the Court, or 3) the petition otherwise raises an issue warranting a precedential decision. U.S. VET. APP. R. 35(e); *see also Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

Absent further motion by the parties or order by the Court, judgment will enter on the underlying single-judge order in accordance with Rules 35 and 36 of the Court's Rules of Practice and Procedure.

Upon consideration of the foregoing, it is

ORDERED, by the single judge, that the motion for reconsideration is denied. It is further

ORDERED, by the panel, that the motion for panel decision is granted. It is further

ORDERED, by the panel, that the single-judge order remains the decision of the Court.

DATED: February 8, 2017 PER CURIAM.

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

Not Published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO: 16-2500

FRANTZ M. JEAN, PETITIONER,

V.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

JUDGMENT

The Court has issued a decision in this case, and has acted on a motion under Rule 35 of the Court's Rules of Practice and Procedure.

Under Rule 36, judgment is entered and effective this date.

Dated: March 16, 2017

FOR THE COURT:

GREGORY O. BLOCK
Clerk of the Court

By: /s/ Sharon Marshall
Deputy Clerk

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2500

FRANTZ M. JEAN, PETITIONER,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before PIETSCH, *Judge*.

O R D E R

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On July 21, 2016, the petitioner, Frantz Merino Jean, filed through counsel a petition for extraordinary relief in the nature of a writ of mandamus asserting that VA violated his due process rights under the Fifth Amendment by failing to adjudicate his claim in a timely manner. On July 27, 2016, he filed an opposed motion to consolidate his petition with several other pending petitions filed by the same counsel. His motion was denied by this Court on September 14, 2016.

On September 26, 2016, Mr. Jean filed an amended petition, in which he referred to claims for VA benefits for nerve damage in his right hand, degenerative joint disease in his right hand, bilateral hallux valgus, bilateral tinnitus, and bilateral hearing loss. He stated that VA "denied many of his claims." Amended Petition at 5. He also stated that he filed a Notice of Disagreement (NOD) in March 2015.[1] He asserted that he has not received a Statement of the Case and that, based on the current VA operating procedure, he faces a four-year delay in the resolution of his appeal.

On October 7, 2016, the Court asked the Secretary to respond to Mr. Jean's petition. In a November 7, 2016, response, the Secretary asserts that VA has continuously taken action on Mr. Jean's claims. In support, the Secretary attached numerous exhibits demonstrating that VA has communicated with Mr. Jean since the filing of his NOD.

[1]The exhibits attached to the Secretary's response to Mr. Jean's petition indicate that an NOD with respect to some of these claims was filed in August 2014. A March 2015 NOD pertained to other claims filed by Mr. Jean.

This Court has the authority to issue extraordinary writs in aid of its jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). Before the Court may issue a writ, three conditions must be satisfied: (1) the petitioner must demonstrate a lack of adequate alternative means to obtain the desired relief, thus ensuring that the writ is not used as a substitute for the appeals process; (2) the petitioner must demonstrate a clear and indisputable right to the writ; and (3) the Court must be convinced, given the circumstances, that the issuance of the writ is warranted. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004).

When delay is alleged as the basis for a petition, a clear and indisputable right to the writ does not exist unless the petitioner demonstrates that the alleged delay is so extraordinary, given the demands on and resources of the Secretary, that it is equivalent to an arbitrary refusal by the Secretary to act. *Costanza v. West*, 12 Vet.App. 133, 134 (1999) (per curiam order).

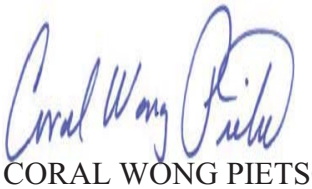
Here, the Court is not convinced that the issuance of a writ is warranted. The Secretary's response and exhibits demonstrate that VA is continuing to work on Mr. Jean's claims, including processing his August 2014 NOD and related August 2016 supplemental memorandum in support of that NOD. In light of this evidence, the Court finds that Mr. Jean has not demonstrated that any delay in this matter is "so extraordinary . . . that it is equivalent to an arbitrary refusal by the Secretary to act." *Id*. Instead, Mr. Jeans seems to argue that he may be hurt by the possibility of a four-year delay in deciding his appeal—a delay that has not yet occurred. The Court holds that the potential for further delay is not a sufficient justification for the issuance of a writ. Therefore, the Court will deny his petition.

Accordingly, it is

ORDERED that Mr. Jean's petition is DENIED.

DATED: December 20, 2016

BY THE COURT:



CORAL WONG PIETSCH
Judge

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2500

FRANTZ M. JEAN, PETITIONER,

V.

ROBERT D. SNYDER,
ACTING SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before DAVIS, *Chief Judge,* and PIETSCH and GREENBERG, *Judges.*

O R D E R

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On December 20, 2016, the Court denied the petitioner's motion for extraordinary relief in the nature of a writ of mandamus. On January 10, 2017, the petitioner filed a motion for reconsideration or, in the alternative, a panel decision pursuant to Rule 35 of the Court's Rules of Practice and Procedure. The motion for decision by a panel will be granted.

Based on review of the pleadings, it is the decision of the panel that the petitioner fails to demonstrate that 1) the single-judge order overlooked or misunderstood a fact or point of law prejudicial to the outcome of the petition, 2) there is any conflict with precedential decisions of the Court, or 3) that the petition otherwise raises an issue warranting a precedential decision. U.S. VET. APP. R. 35(e); *see also Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

Absent further motion by the parties or order by the Court, judgment will enter on the underlying single-judge order in accordance with Rules 35 and 36 of the Court's Rules of Practice and Procedure.

Upon consideration of the foregoing, it is

ORDERED, by the single judge, that the motion for reconsideration is denied. It is further

ORDERED, by the panel, that the motion for panel decision is granted. It is further

ORDERED, by the panel, that the single-judge order remains the decision of the Court.

DATED: February 22, 2017 PER CURIAM.

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

Not Published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO: 16-2507

MARVIN MYERS, PETITIONER,

V.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

JUDGMENT

The Court has issued a decision in this case, and has acted on a motion under Rule 35 of the Court's Rules of Practice and Procedure.

Under Rule 36, judgment is entered and effective this date.

Dated: April 6, 2017

FOR THE COURT:

GREGORY O. BLOCK
Clerk of the Court

By: /s/ Michael V. Leonard
Deputy Clerk

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2507

MARVIN MYERS, PETITIONER,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before BARTLEY, *Judge*.

O R D E R

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On July 21, 2016, veteran Marvin Myers filed through counsel a petition for extraordinary relief in the nature of a writ of mandamus. On July 27, 2016, he filed an opposed motion to consolidate his petition with 16 other pending petitions. On September 14, 2016, the Court denied the motion to consolidate. On September 16, 2016, he filed notice of intent to amend his petition; the amended petition was filed on September 26, 2016.

Therein, Mr. Myers alleged the following facts. He is currently 80 years old. In May 2012, he filed a claim for benefits under 38 U.S.C. § 1151, alleging damage to his eyesight resulting from VA treatment. VA denied the claim and, on December 2, 2014, the veteran filed a presumably timely Notice of Disagreement (NOD) as to that decision. As of the date of his petition filing, Mr. Myers had yet to receive a Statement of the Case (SOC) or notice of other VA action in response to his NOD. Furthermore, VA had not acted on or responded to either a July 1, 2015, request for expedited VA consideration or an October 5, 2015, motion for advancement on the Board of Veterans' Appeals (Board) docket due to age and health status. *See* Amended Petition at 5-6. In addition to these facts, Mr. Myers alleged that he and other claimants face unconscionable delays in the processing and adjudication of VA appeals that amount to a violation of constitutional due process. *See id.* at 6-18. He asked the Court, inter alia, to issue a writ of mandamus ordering the Secretary to eliminate delays in processing appeals and to prepare necessary appellate documents in a fashion that does not deprive him or other veterans of constitutional due process. *Id.* at 18. He also asked the Court to hold unconstitutional as violative of due process "any statute, regulation or practice that interferes with prompt and speedy appeals" and to provide any other relief deemed appropriate. *Id.*

On September 28, 2016, the Court ordered the Secretary to respond to the allegations in the veteran's petition. *See* U.S. VET. APP. R. 21(d). The Secretary filed his response on October 19, 2016. In his response, the Secretary averred and provided documentary support that, on May 18, 2016, the Atlanta VA regional office (RO) responded to the first of Mr. Myers's requests, advising him that he did not meet any criteria for expedited processing. *See* Secretary's Response at 2 & Exhibit (Exh.) 5. The Secretary further averred that, on October 3, 2016, the RO issued an SOC continuing to deny section 1151 benefits based on left eye blindness. *Id.* at 3 & Exh. 2. Finally, the Secretary represented that he advised the veteran and his counsel that the veteran had 60 days from the date of the SOC to file a Substantive Appeal to the Board—whereupon the RO would immediately certify the appeal to the Board—and that the veteran could then request advancement on the Board's docket. *Id.* at 3. In a declaration submitted with the Secretary's response, the assistant Veterans Service Center manager at the Atlanta RO acknowledged that VA's handling of Mr. Myers's appeal "has certainly not been as timely as [VA] should deliver" but stated that "the volume of the appeals workload has impacted VA's ability to provide decisions in a more expedited fashion." *Id.*, Exh. 1 at 2. The Secretary urged the Court to deny the petition because Mr. Myers has received the relief he sought and because he has failed to identify specific or concrete sources of delay that he wishes the Court to remedy. *Id.* at 3-9.

On October 26, 2016, the Court granted Mr. Myers's opposed motion to file a response to the Secretary's response, which he ultimately filed on November 9, 2016. Therein, Mr. Myers reiterated that more than four years have elapsed since he filed his section 1151 claim and that he has not yet received a Board decision, although he does not dispute that he received an RO rating decision a year and seven months after filing the claim; he renews his request that the Court find that VA's processing of appeals violates constitutional due process. He contends that his petition is not moot and that he meets the requirements for obtaining extraordinary relief in the nature of a writ of mandamus. *See generally* Petitioner's Response.

This Court is authorized to issue writs pursuant to the All Writs Act to the extent that it is in aid of its "prospective jurisdiction." *Yi v. Principi*, 15 Vet.App. 265, 267 (2001) (per curiam order). However, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976). Three conditions must be met before the Court can issue a writ: (1) The petitioner must demonstrate the lack of adequate alternative means to obtain the desired relief, thus ensuring that the writ is not used as a substitute for the appeals process; (2) the petitioner must demonstrate a clear and indisputable right to the writ; and (3) the Court must be convinced, given the circumstances, that issuance of the writ is warranted. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004).

This Court adheres to the case-or-controversy jurisdictional requirements imposed by Article III of the U.S. Constitution. *See Cardona v. Shinseki*, 26 Vet.App. 472, 474 (2014) (per curiam order); *Mokal v. Derwinski*, 1 Vet.App. 12, 13-15 (1990). When the relief requested in a petition has been obtained, the appropriate course of action is usually for the Court to dismiss the petition as moot. *See Thomas v. Brown*, 9 Vet.App. 269, 270-71 (1996) (per curiam order); *see also Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992) (per curiam order) ("When there is no case or controversy, or when a once live case or controversy becomes moot, the Court lacks jurisdiction."). Here, the

Secretary has advised that the RO issued an October 3, 2016, SOC continuing to deny section 1151 benefits based on left eye blindness and that Mr. Myers may now file a Substantive Appeal, which will be certified to the Board, after which the veteran may seek advancement on the Board's docket based on his age.[1] Were this the only relief sought by the veteran, the Court would dismiss the petition for a writ of mandamus as moot.

However, Mr. Myers's request for relief is broader. He asks the Court to hold that previous and anticipated future delay in VA's processing of his appeal violates his and other claimants' constitutional due process rights; to strike down on such basis any statute, regulation, or practice that interferes with prompt processing of appeals; and to order the Secretary to eliminate delays in appeals processing. *See* Amended Petition at 18; Petitioner's Response at 4-20. For the following reasons, the Court concludes that Mr. Myers has not demonstrated entitlement to the writ and that his petition must be denied.

This Court has the authority to "compel action of the Secretary unlawfully withheld or unreasonably delayed." 38 U.S.C. § 7261(a)(2). When delay is alleged as the basis for a petition, this Court has held that a clear and indisputable right to the writ does not exist unless the petitioner demonstrates that the alleged delay is so extraordinary, given the demands on and resources of the Secretary, that it is equivalent to an arbitrary refusal by the Secretary to act. *Costanza v. West*, 12 Vet.App. 133, 134 (1999) (per curiam order); *see also Stratford v. Peake*, 22 Vet.App. 313, 314 (2008) (per curiam order). As this Court has explained, the delay "must be unreasonable before a court will inject itself into an administrative agency's adjudicative process." *Bullock v. Brown*, 7 Vet.App. 69, 69 (1994) (per curiam order).

In the present case, the Court observes that 671 days elapsed between the veteran's filing of his December 2, 2014, NOD and VA's issuance of the October 3, 2016, SOC and further observes that this is much longer than the 419 days cited by the veteran as the average interval between submission of an NOD and issuance of an SOC. *See* Amended Petition at 9. But as reflected in the declaration submitted with the Secretary's response, the delay in processing Mr. Myers's appeal resulted from the volume of appeals received by the Atlanta RO. *See* Secretary's Response, Exh. 1 at 2. The Secretary advised that the RO responded in May 2016 to the veteran's request for expedited processing and informed the veteran that he did not meet the criteria for such treatment. *See supra* note 1. In light of this information, the Court cannot conclude that the delay in VA's processing of the veteran's appeal amounts to an arbitrary refusal to act or is so unreasonable as to warrant the Court's intrusion into the administrative process. *Cf. Erspamer v. Derwinski*, 1 Vet.App. 3, 10 (1990) ("While there is no absolute definition of what is [a] reasonable [amount of] time, we know that it may encompass months, occasionally a year or two, but not several years or a decade." (internal quotation marks omitted)). Thus, he has not demonstrated an indisputable right to the writ on such grounds. *See Cheney*, 542 U.S. at 380-81.

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[1] The Court observes that, although the RO requires that a claimant be 85 years of age or older to justify expedited processing, *see* VA ADJUDICATIONS PROCEDURES MANUAL REWRITE (M21-1MR), pt. III, sbpt. ii., ch. 1, sec. D, the Board defines "advanced age" for purposes of advancement on its docket as 75 years of age or older, *see* 38 C.F.R. § 20.900(c)(1) (2016).

To the extent that Mr. Myers argues that extraordinary relief is necessary to prevent future delay in the processing of his appeal, such argument is speculative. The veteran indicates, and the Secretary does not dispute, that the average time between the filing of an NOD and the issuance of a Board decision is four years. Petitioner's Response at 2 n.1; *see also* Amended Petition at 9-10. Based on such statistics, Mr. Myers asserts that he will continue to face unreasonable delay. Petitioner's Response at 4-5. But it is not clear to the Court that the veteran's appeal will continue to face the average delay he alleges. As already noted, Mr. Myers's age qualifies him for advancement on the Board's docket, *see* 38 C.F.R. § 20.900(c)(1), and the Secretary represents that any motion seeking such advancement will be promptly acted upon once Mr. Myers's appeal has been certified to the Board, *see* Secretary's Response at 3. Thus, the Court is not persuaded by the veteran's contention that extraordinary relief is warranted based on his predictions of future delay. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (noting that constitutional standing to seek judicial relief requires that the party bringing the action must have suffered an "injury in fact"—an invasion of a legally protected interest that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical'" (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990))).

To the extent that Mr. Myers seeks relief on behalf of other veterans and VA claimants, he does not have standing to do so under current case law. This Court has previously held that it does not have jurisdiction to entertain class actions. *See Lefkowitz v. Derwinski*, 1 Vet.App. 439, 440 (1991) (en banc) (declining to adopt a class action procedure); *see also Am. Legion v. Nicholson*, 21 Vet.App. 1, 3-4 (2007) (en banc) ("Congress has expressly limited our jurisdiction to addressing only appeals and petitions brought by individual claimants."). Nor may Mr. Myers vindicate the rights of other VA claimants purportedly harmed by unconstitutional delay. *See Waterhouse v. Principi*, 3 Vet.App. 473, 475 (1992) (standing requires that a party must "personally ha[ve] suffered some actual or threatened injury as a result of the putative illegal conduct" (internal quotation marks omitted); *see also Am. Legion*, 21 Vet.App. at 8-9 (rejecting the associational standing of a veterans service organization based on this Court's limited jurisdiction). In other words, "one can not have standing in federal court by asserting injury to someone else." *Vietnam Veterans of Am. & Veterans of Modern Warfare v. Shinseki*, 599 F.3d 654, 662 (D.C. Cir. 2010). Accordingly, even if statistics indicate that most VA claimants will face long delay in the processing of their appeals, Mr. Myers does not have standing to seek redress of their behalf.

In addition to failing to show that the delay in this case amounted to an arbitrary and unreasonable failure to act, that predictions of future delay are non-speculative, and that he has standing to vindicate the rights of other VA claimants, Mr. Myers has not plead his allegation of VA error with sufficient particularity to permit this Court to review and assess the validity of his arguments. *See Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006), *rev'd on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order). Although the veteran contends that, under the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976),[2]

[2] Under *Mathews*, the assessment of whether there has been a constitutional due process violation generally requires consideration of three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional

VA has violated his constitutional due process right to timely processing of his appeal, he has not offered the Court any guidance in how to remedy this purported violation. Rather, he broadly asks the Court to "hold unconstitutional . . . any statute, regulation or practice that interferes with prompt and speedy appeals" and order the Secretary "to eliminate delays in processing appeals." Amended Petition at 18. Having failed to identify any specific law or policy giving rise to the purported unconstitutional delay in his case, Mr. Myers has not articulated a developed argument demonstrating an indisputable right to the writ. *See Cheney*, 542 U.S. at 380-81; *see also Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain arguments that are "far too terse to warrant detailed analysis by this Court").

Upon consideration of the foregoing, it is

ORDERED that Mr. Myers's amended petition for extraordinary relief in the nature of a writ of mandamus is DENIED.

DATED: December 22, 2016

BY THE COURT:

MARGARET BARTLEY
Judge

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

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or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335.

Designated for electronic publication only
NONPRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2507

MARVIN MYERS, PETITIONER,

V.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before DAVIS, *Chief Judge*, and PIETSCH and BARTLEY, *Judges*.

O R D E R

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On July 21, 2016, the petitioner filed through counsel a petition for extraordinary relief in the nature of a writ of mandamus. The petition was denied on December 22, 2016, and the petitioner timely moved for reconsideration or, in the alternative, for panel decision, on January 12, 2017. Reconsideration will be denied by the single judge, and the motion for decision by a panel will be granted.

Based on review of the pleadings, it is the decision of the panel that the petitioner fails to demonstrate that (1) the single-judge order overlooked or misunderstood a fact or point of law prejudicial to the outcome of the petition, (2) there is any conflict with precedential decisions of the Court, or (3) the petition otherwise raises an issue warranting a precedential decision. U.S. VET. APP. R. 35(e); *see also Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

Absent further motion by the parties or order by the Court, judgment will enter on the underlying single-judge decision in accordance with Rules 35 and 36 of the Court's Rules of Practice and Procedure.

Upon consideration of the foregoing, it is

ORDERED, by the single judge, that the motion for reconsideration is denied. It is further

ORDERED, by the panel, that the motion for panel decision is granted. It is further

ORDERED, by the panel, that the single-judge order remains the decision of the Court.

DATED: March 15, 2017 PER CURIAM.

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)