NOS. 17-1762, 17-1789, 17-1796, 17-1926

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

EDWARD THOMAS ROSE; TAYLOR DANIELS;
HERBERT MITCHELL MILLER; AND LESLIE PUNT,

Appellants,

v.

DAVID J. SHULKIN, M.D.,

Appellee.

On Appeal from the United States Court of Appeals for Veterans Claims
(Nos. 16-2494, 16-2498, 16-2505, 16-2510)
(Hon. Robert N. Davis, William S. Greenberg, 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 Edward Thomas Rose, Taylor L. Daniels, Herbert Mitchell Miller, and Leslie M. Punt.
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 Edward Thomas Rose, Taylor Daniels, Herbert Mitchell Miller, and Leslie Punt from judgments entered by the United States Court of Appeals for Veterans Claims ("CAVC"). Related cases below that this Court consolidated into case number 17-1747 are *John Martin v. Shulkin* (CAVC No. 16-2502), *Betty D. Scyphers v. Shulkin* (CAVC No. 16-2493), *Sarah Aktepy v. Shulkin* (CAVC No. 16-2495), *Frantz M. Jean v. Shulkin* (CAVC No. 16-2500), *Hugh D. Matthews v. Shulkin* (CAVC No. 16-2503), *Thomas Meissgeier v. Shulkin* (CAVC No. 16-2504), *Eugenia Mote v. Shulkin* (CAVC No. 16-2506), *Marvin Myers v. Shulkin* (CAVC No. 16-2507), and *William Rhodes v. Shulkin* (CAVC No. 16-2511). 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 February 8, 2017 (Punt), February 22, 2017 (Daniels, Rose), and April 3, 2017 (Miller). *See* Appx0005, Appx0010, Appx0001 and Appx0014. Appellants filed timely notices of appeal on February 28, 2017 (Daniels), March 6, 2017 (Punt, Rose), and April 7, 2017 (Miller).

See Appx1074, Appx0877, Appx0467 and Appx1420. The Court consolidated the appeals under No. 17-1762 on April 28, 2017. *Rose v. Shulkin*, 2017-1762, ECF No. 17 (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. Whether the Secretary of the Department of Veterans Affairs ("the Secretary") rendered moot the claims of Appellant Punt by nominally advancing her benefits appeal when the Veterans Administration took preliminary action that fell short of resolving Appellant's appeal or considering her constitutional claims.

2. 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 by holding that the delays in processing, adjudicating, and deciding these appeals do not violate the Due Process Clause?

3. The Court of Appeals for Veterans Claims is required under 38 U.S.C. § 7261 to "compel action of the Secretary . . . unreasonably de-

layed." 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 four veterans who applied for disability benefits. David L. Shulkin, Appellee, is the Secretary of the Department of Veterans Affairs and is responsible for the administration of veterans' benefits. The four 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 thirteen other veterans, Appellants petitioned the Court of Appeals for Veterans Claims (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 Sec-

[1] Of the original seventeen petitions, three were voluntarily dismissed after the Secretary provided them with full relief. Nine other petitioners have been consolidated into case number 17-1747 before this Court.

retary to decide their appeals in a constitutionally acceptable period of time. The Secretary opposed the petitions, arguing 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.

In *Rose*, the CAVC (Davis, J.) held that only a delay so extraordinary as to constitute an arbitrary refusal to act by the Secretary would merit issuing a writ of mandamus; that Mr. Rose's constitutional claim failed for the same reason; and that one of Mr. Rose's requests for relief—a request that the VA issue certain "appellate documents"—was moot because the VA issued those documents after Mr. Rose filed his petition. The CAVC also found that mandamus was not warranted because Mr. Rose could raise his constitutional claim with the VA and then appeal to the CAVC. Appx0003.

In decisions very similar to that in *Rose*, Judge Davis again found mandamus inappropriate in *Miller* and *Daniels* by concluding that the delay was not so extraordinary as to constitute an arbitrarily refuse to act by the Secretary. As in *Rose,* Judge Davis also concluded that the

requests that Mr. Miller and Mr. Daniels had made for the VA to issue appellate documents were moot because the VA issued those documents after Appellants filed their petitions. Also as in *Rose,* the CAVC rejected Appellants' petitions because Appellants had not shown that they could not make their constitutional allegations to the VA and then appeal to the CAVC. Appx0012; Appx0016.[2]

In *Punt*, the CAVC (Greenberg, J.) found that the Secretary had provided Appellant certain documents after her petition was filed in the CAVC, construed her petition for constitutional relief as requesting no more than those documents, and dismissed her petition as moot. Appx0006–0007.

Appellants also 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

[2] Because the VA has now given appellate documents to Messrs. Daniels and Miller in response to their petitions in the CAVC, Messrs. Daniels and Miller were required to take subsequent steps to continue their appeals. Counsel represent Appellants only in the CAVC and Federal Circuit and are inquiring whether those steps have been taken. If not, Counsel will take appropriate steps as to those two Appellants.

that the Secretary was required to assess whether a final decision on their appeals was an unreasonable delay by the Agency under *Telecommunications 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 four Appellants timely appealed the final judgments to this Court. This appeal challenges the CAVC's mootness determinations, its 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 8. 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 justification for the denial. The Secretary on average takes more than a year (419 days)[3] to prepare an SOC.[4] Appx1408. 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:

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[3] 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, Appx1408, and the evidence adduced below indicates that this delay is only getting worse.

[4] 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.

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. Appx1369. Yet the Secretary'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. Appx1408. 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 substantial delays—for Appellants Rose and Punt, more than six 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 related 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." Secretary's Response to Petition for Extraordinary Relief and Court Order, Exhibit 7 at 2, *Martin v. Shulkin* (C.A.V.C. October 27, 2016) (No. 16-2502). 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 Edward Thomas Rose, who advanced his claim through the VA Roanoke Regional Office. In his case before the Regional Office, Mr. Rose obtained 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. Appx0369 ("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. Appx1413. 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

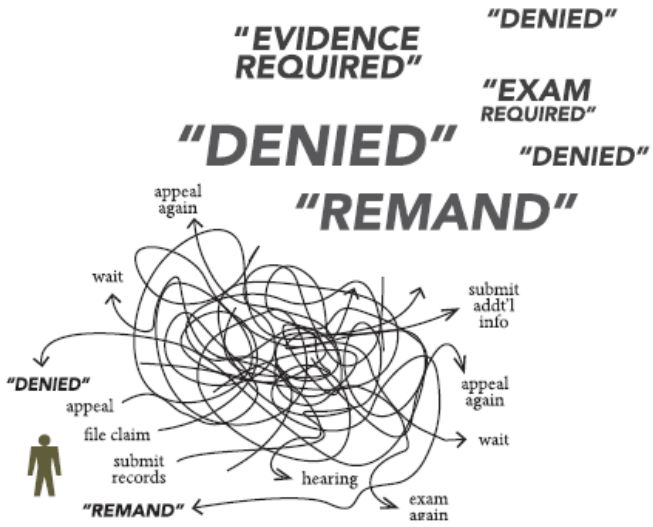
house themselves and their families. Some veterans die while waiting.[5] *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 860 (9th Cir. 2011), *vacated on other grounds*, 678 F.3d 1013 (9th Cir. 2012) (en banc). As demonstrated in Appellant Rhodes' related case, at last estimate, about 20 veterans commit suicide every day. *See* Amended Petition for Writ of Mandamus and Other Relief, Exhibit D at 1, *Rhodes v. Shulkin* (C.A.V.C. November 1, 2016) (No. 16-2511).

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."

[5] 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.

Appx0834; *see also* Appx0841 (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," Appx0838, and, "the length and labor of the process takes a toll on Veterans' lives," Appx0844. The veterans' experience is a crude and embarrassing caricature of the VA's motto.

B. Appellant Edward Thomas Rose

Edward Thomas Rose, the lead Appellant here, is an Army veteran who filed an NOD with the VA in February 2014. In November 2014, the VA and the Army jointly granted Mr. Rose additional partial benefits for certain physical injuries as part of the Army's process of medi-

cally discharging Mr. Rose, but continued to deny Mr. Rose benefits for mental health and unemployability. In February 2015, Mr. Rose appeared before a VA Decision Review Officer (DRO) for a de novo hearing on his claim. Ignoring the substantial evidence before her—including testimony from two experts plus hundreds of pages of medical records attesting to his injuries and inability to hold substantial gainful employment—the DRO again denied the claim and issued Mr. Rose a Statement of the Case on April 28, 2015. In response to that SOC, Mr. Rose timely filed his appeal on June 18, 2015.

Mr. Rose also filed other NODs, one in May 2015 and another in September 2015, that related to separate VA decisions on his claims. Prior to Mr. Rose's July 21, 2016 filing of his petition in the CAVC for mandamus, the VA had not issued SOCs in connection with Mr. Rose's May 2015 and September 2015 NODs. It was only after Mr. Rose filed his July 21, 2016 petition and the CAVC ordered the Secretary to respond to that petition, *see* Appx0064, that the VA started to take action on Mr. Rose's appeal. Just seven days after the CAVC's order, the Secretary issued (1) an SOC dated November 3, 2016, Appx0389–0441; (2) a supplemental SOC also dated November 3, 2016, Appx0371–0380; (3) a letter dated November 4, 2016, purporting to address NODs that the VA had already addressed in part in 2015; (4) a letter certifying Mr.

Rose's June 18, 2015 Form 9 to the VA, Appx0384–0387; and (5) a letter dated November 7, 2016 purporting to initially respond to Mr. Rose's NOD regarding cervicogenic headaches, Appx0443–0452, a claim the VA's SOC already addressed four days earlier. Mr. Rose responded to these actions quickly, filing an additional Form 9 on November 22, 2016.

The Secretary's post-petition actions resolved *some* of the delays on Mr. Rose's claims, but they did not resolve Mr. Rose's appeals, and the Secretary's own statistics demonstrate that Mr. Rose faces a delay of many more months before his appeals are decided. For the claim that is the farthest along (the claim as to which Mr. Rose filed a Form 9 on November 22, 2016), Mr. Rose is likely to wait a substantial additional period of time before he receives a decision from the BVA. Although the BVA convened a hearing on Mr. Rose's claim in July 2017, it still must issue a decision on the appeal, a process that on average takes 270 days and could take even longer. Given that he filed his initial claim for benefits in November 2011, immediately after his return from Iraq, Mr. Rose's total wait time for the benefits he has earned now approaches six years.

C. Appellant Taylor Daniels

Appellant Taylor Daniels is a veteran of the Marine Corps, where he served more than four years in the infantry. Mr. Daniels served three tours of duty in Afghanistan as part of Operation Enduring Freedom, receiving the Combat Action Ribbon for his service. In addition to experiencing the trauma of intense combat during his three separate deployments, Mr. Daniels was injured at least twice by the percussion from IEDs detonating near him, which killed and injured members of his squad.

On July 27, 2015, Mr. Daniels filed claims for disability benefits for hearing loss, tinnitus, orthopedic problems, and traumatic brain injury. In a March 21, 2016 rating decision, the VA recognized service connection for hearing loss but with 0% disability; continued a 10% rating for tinnitus; and denied Mr. Daniels's traumatic brain injury claim. Mr. Daniels filed an NOD on April 18, 2016. The VA took no action on Mr. Daniels' appeal until September 2016 when, spurred by the filing of Mr. Daniels' petition below, the VA issued an SOC continuing to deny benefits. Appx1026–1063.

Mr. Daniels now faces the longest part of the delay in the appeals process: The Secretary must still certify his case and transmit his appeal to the BVA, whereupon the BVA must distribute the case and ac-

tually decide it. Based on the average delay that the Secretary has admitted is now occurring in the VA and BVA, Mr. Daniels can expect a further delay of more than two years (759 days) from the date his SOC was issued.

D. Appellant Herbert Mitchell Miller

Appellant Herbert Mitchell Miller served as a Navy frogman (the predecessors to the Navy SEALs) during World War II. He is 93 years old. On September 3, 2003, Mr. Miller filed a claim for service-connected disability stemming from a knee injury he suffered on Okinawa. The Secretary found Mr. Miller's knee injury and related shoulder injuries to be service-connected, but granted him benefits only from December 2015 forward, not from 2003, when he applied for benefits. Mr. Miller filed an NOD on March 8, 2016. Mr. Miller received a Statement of the Case on October 27, 2016 (the same day the CAVC ordered the Secretary to respond to Mr. Miller's Amended Petition). Appx1304–1326. The VA's average delay statistics show that Mr. Miller faces additional delay of more than two years from the date his SOC was issued.

E. Appellant Leslie Punt

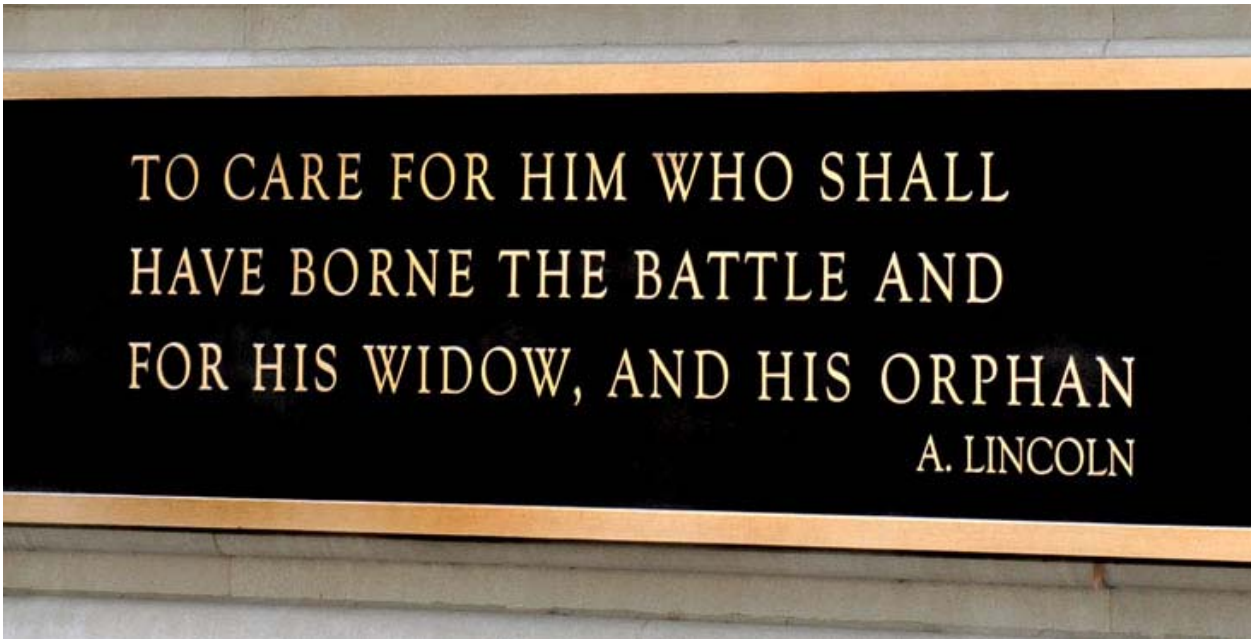
Appellant Leslie Punt served her country for more than twenty years in the Air Force and the Air National Guard, including active du-

ty service on several occasions. On October 8, 2009, Ms. Punt filed a claim for disability benefits for PTSD, neck and shoulder injuries, gastrointestinal issues, neurological symptoms related to the anthrax vaccine, and sleep apnea. On January 12, 2011, the VA largely denied Ms. Punt's claims. The Secretary invited Ms. Punt to submit additional evidence on her claims within one year of the date of denial. On April 5, 2011, Ms. Punt submitted the requested evidence, along with an NOD.

The Secretary did not provide Ms. Punt with an SOC until September 28, 2016, more than five years after she filed her NOD and only after Ms. Punt filed her petition for mandamus relief. Appx0672–0702. In the SOC the Secretary increased Ms. Punt's disability rating on her PTSD claim but denied her four other claims.

In his response to Ms. Punt's amended petition, the Secretary admitted the more than five-year lapse in providing Ms. Punt an SOC and further admitted that, for three of those years, the VA did nothing to develop Ms. Punt's claims. Appx0561. Based on average delay statistics, Ms. Punt can expect to wait more than two more years from the date of her SOC until she receives a BVA decision on her 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 four 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 four 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 Mootness Argument: The CAVC determined that Appellant Punt's "petition specifically pertaining to her claims" was moot based on the inaccurate premise that "the desired relief of the petition had been obtained" because the Secretary had increased Ms. Punt's disability rating on her PTSD claim to 70 percent effective June

8, 2016, and had finally (after more than five years) given Ms. Punt Statements of the Case (SOCs) on her other claims.[6] Appx0006–0007. These actions by the Secretary, however, did not resolve Ms. Punt's claims in her favor. The disability rating was less than the 100 percent rating Ms. Punt requested and was effective later than Ms. Punt had requested. And, as the order itself acknowledges, the SOCs that were issued "continued the *denial* of service connection for sleep apnea, a neck condition, a shoulder condition, an unexplained neurological condition dating to anthrax immunization and gastroesophageal reflux disease." Appx0006 (emphasis added). In addition, Ms. Punt's petition asked for a finding that the delay she endured violated the Due Process Clause. The CAVC denied (but not as moot) her constitutional claims. Thus, Ms. Punt has not received the "desired relief" she requested in her petition.

In *Monk v. Shulkin,* this Court found, when addressing another veteran's claim based on delay in disability benefit appeals, that the veteran was "likely" to experience the delay veterans on average suffered when pursuing these kinds of appeals. 855 F.3d at 1318. Based on the

[6] The CAVC found that the other Appellants request for documents was moot because they received them. The CAVC went on to consider and reject their other claims.

average delay statistics now being experienced by veterans, Ms. Punt still faces more than two years delay before she receives a BVA decision on her appeals. Ms. Punt's claims are not moot and the Court's decision was erroneous.

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 government 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. Appx1413. 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 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 Punt's case, after erroneously concluding that Ms. Punt had already obtained "the desired relief of the petition," Appx0006, the CAVC stated that Ms. Punt had "broadly alleged delay on the part of the VA in the adjudication of all of its matters." Appx0006–0007. As to those allegations, the CAVC denied mandamus based solely on this statement: "[T]he Court does not believe the facts presented here warrant the issuance of an all-encompassing writ that would have arguable results if applied broadly to VA. Although the Court does not question the facts presented by the petitioner regarding the realities of the VA benefits system, the Court will not insert itself further into the process of the VA at this time." Appx0007.

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. Punt's petition—facts showing that the average delay veterans experience in having their appeals of disability benefit denials decided is nearly four years and that Ms. Punt 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 Punt's for a writ of mandamus.

In the other three 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." Appx0003, Appx0012, Appx0016**.** 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 two of these cases, *Miller* and *Daniels*, the CAVC provided no explanation for the conclusion that the delay was not an arbitrary refusal by the Secretary to act. Appx0016, Appx0012. And in *Rose,* the CAVC stated that Mr. Rose had not proved that the Secretary's delay was due to an "arbitrary refusal to act" and "at most" had proved that the Secretary's "delays are the product of a burdened system," Appx0003, even though Mr. Rose had made no such allegation and the Secretary, in responding to Mr. Rose's petition, offered no such proof.

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.

In *Miller, Daniels* and *Rose*, the CAVC further made mandamus relief impossible in delay cases by concluding that, because the Secretary's actions were not an "arbitrary refusal to act," the Appellants could present their allegations to the VA and ultimately appeal them to

the CAVC. On this basis, the CAVC concluded that Appellants had failed to demonstrate that they "lack[] adequate alternative means to obtain [their] desired relief." Appx0003, Appx0011, Appx0016. This conclusion eviscerates the CAVC's enabling statute's mandate that the CAVC compel agency action "unreasonably delayed," the very purpose of which is to *prevent* veterans from having to seek that relief first from the VA. The CAVC's conclusion is also directly contrary to its own ruling in *Erspamer,* 1 Vet. App. at 9-10, in which the CAVC recognized (as have many other courts), that "a claim for 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).

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 decisions 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 should also 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 Holding that Appellant Punt's Claim are Moot.

The CAVC held that Appellant Punt's petition was moot in its entirety because the Secretary increased her disability rating for PTSD to 70%, and issued an SOC continuing the denial of her other disability claims, conduct the CAVC said granted Ms. Punt the "desired relief of the petition." Appx0006. This mootness ruling was wrong.[7]

The relief Ms. Punt sought in her petition was relief from the delay that she faces in getting her disability benefits appeal decided. Appx0473. She has not gotten that relief or that decision. All that she has received since filing her petition is a grossly belated SOC (received

[7] In the other Appellants' cases, the CAVC found that one of the Appellants' requests for relief, a request seeking certain appellate documents from the VA, was moot because the VA had provided those documents after Appellants filed their petitions. *See supra* at 13–17. Unlike in Appellant Punt's case, however, the CAVC did not find that these other Appellants' claims were moot in their entirety. Appellants do not disagree that, insofar as Appellants Rose, Miller, and Daniels asked for appellate documents and those documents were provided, that aspect of their requests for relief are moot. Appellants, however, still have other requests for relief that were not addressed by the provision of appellate documents and Appellants still face years of delay before they obtain decisions on their appeals.

more than five years after she filed her NOD) that *denied* several of her disability claims and a ruling granting her partial disability benefits for her PTSD.[8] Neither action by the VA resolves her appeal, and neither relieves her of additional delay in finally getting a decision on her appeal. Before Ms. Punt gets a decision on her appeal, the VA must "certify the appeal" to the BVA, a purely ministerial act that takes about 2.6 hours to complete, Appx1408, but that the Secretary on average takes 537 days to complete, *id*. And once the Secretary issues the SOC and certifies the appeal to the BVA, veterans face more an average of nine months for the BVA to render its decision. *See Id*. Using the average delay statistics as a measurement, Ms. Punt can expect to wait two more years from the date she received her SOC before she gets a decision on her appeal.

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[8] In this respect, Ms. Punt's situation is very different from that of three other petitioners—not Appellants here or in the related *Martin* case—who also filed petitions on July 21, 2016 and whose claims were subsequently determined to be moot. In those cases, the Secretary granted the petitioners' disability benefit claims in their entirety. *See David Blakely v. McDonald* (CAVC No. 16-2496); *Bettie Currie v. McDonald* (CAVC No. 16-2497); *Dewey Herman Hall v. McDonald* (CAVC No. 16-2499). Having obtained full relief on their disability benefit claims, those petitioners (represented by the same counsel as Appellants here) dismissed their claims voluntarily. Ms. Punt, by contrast, has not been granted full relief on her disability benefit claims.

This Court's recent decision in *Monk v. Shulkin*, confirms that Appellant Punt's petition is not moot. In *Monk,* the appellant had brought a class action challenging (as do Appellants) on Due Process grounds the delay in processing and adjudicated denials of veterans' disability claims. The CAVC denied class certification. 855 F.3d at 1314–15. Monk appealed but, while his appeal was pending, the Secretary granted him a 100% disability rating and then argued that the appeal was moot. *Id*. at 1315–16. This Court agreed that Monk's individual claim for benefits was moot in light of the Secretary's grant of full relief, *id*. at 1316, but held that the appeal of the class certification decision was not moot because the putative class members still faced a four-year delay in the appeals process. *Id*. at 1317–18 ("veterans face, on average, about four years of delay between filing an NOD and receiving a final Board decision."). This Court observed that, based on those average delay statistics, Monk himself, in connection with a separate appeal of the denial of other disability benefits, would "likely be subject to the same average delay." *Id*. at 1318.

Just like the putative class members in *Monk*, it is a virtual certainty that Appellant Punt will be subject to the delays in the appeals process. Even after her appeal is decided by the BVA, the more-than-80% error rate in initial ratings decisions means the BVA will in all likeli-

hood remand her case to the regional office, where the waiting game will begin all over again. Appx0819.

II. 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.[9]

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.* at 335. That analysis remains the law today. *See, e.g., Nelson v. Colo-*

[9] 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.

rado, 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 circuit [including this Court] to address the question . . . has concluded that *applicants* for benefits, *no less than* current 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) (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 failure 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 Krae-*

bel 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 compensate 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 suicide." Serota & Singer, *supra*, at 414. Recent statistics show that, on average, 20 veterans commit suicide every day. *See supra* note 4. 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. Appx1413. The remaining decisions were remands (47.1%),[10] outright 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.").

[10] 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 of a two-page form), it would find many fewer changes in the health of veterans.

The extremely high error rate in disability benefit denials—an error rate reported by the BVA and not disputed by the Secretary—demonstrates that the 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 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." Appx0024–0025. 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. In fact, in none of Appellants' 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 pro-

cessing 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 effort 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.

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 *Punt*, the CAVC did not even mention that Appellant had challenged the delay on Due Process grounds, much less consider her Due

Process claim under *Mathews*. The Court ignored its statutory duty in doing so.

In the remaining Appellants' cases, the CAVC sidestepped the Due Process claims altogether by concluding that, because Appellants had not met the CAVC's "arbitrary refusal to act" standard for mandamus, Appellants could raise their constitutional allegations to the VA and then appeal them to the CAVC. Appx0003; Appx0012; Appx0016. This analysis is not a Due Process analysis, but rather is a mandamus analysis, and an erroneous one at that. *See infra* pages 42–47.

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.

III. 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

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

claims no matter how clear and egregious those Due Process violations are.

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

In three of Appellants' cases—*Rose, Miller* and *Daniels*—the CAVC applied an "arbitrary refusal to act" standard to Appellants' request for a writ of mandamus. Appx0016; Appx0003; Appx0012. The "arbitrary refusal to act" standard (like the CAVC's "belief" in Punt) 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 "unrea-

sonable" 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.

[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).

The CAVC also erred by denying relief to these three Appellants because they had "not show[n]" that they "lack[] alternative means to attain [their] desired relief." Appx0003; Appx0012; Appx0016. The CAVC stated that Appellants could bring their constitutional claims to the VA and then appeal them to the CAVC.

Under this reasoning, veterans would have to challenge the delay in their disability benefits claims rather than prevent that delay through a writ of mandamus. This means that veterans would have to suffer the delay. But the whole point of the CAVC enabling statute's mandate for the CAVC to "compel" Secretary action unreasonably delayed is for veterans to be able to *avoid* that delay. Indeed, if veterans did as the CAVC said in *Rose, Miller* and *Daniels* they could (and apparently should) do—suffer the delay by challenging it in the VA action— any claim for relief from the delay would be moot.

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, in which the CAVC 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*, 750 F.2d at 85).

The CAVC's decision in Appellant Punt's case is also erroneous. Once again completely ignoring its statutory mandate to compel Secretary action "unreasonably delayed," the CAVC in *Punt* never even mentioned the word "unreasonable." It denied Ms. Punt's petition purely because the CAVC did "not believe the facts presented here warrant the issuance of the all-encompassing writ that would have arguable results if applied broadly to VA." Appx0007**.** The CAVC went on to say that "[a]lthough the Court does not question the facts presented by the petitioner regarding the realities of the VA benefits system, the Court will not insert itself further into the processes of VA at this time." *Id.* In so ruling, the CAVC did not uphold its responsibility under Section 7261.

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 nowhere 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 pre-

cisely 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 different 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 essentially ruled that "anything goes" at the VA. The court summarily declared—without analysis—that "the Secretary's delay in deciding these claims was not so extraordinary that it amounted to an arbitrary refusal to act." Appx0003; Appx0012; Appx0016. With nothing to go on but the CAVC's *ipse dixit*, Appellants are left to wonder how they could ever meet the court's standard.[13]

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 13; (2) the VA's other admissions and public acknowledgements of

[13] In *Rose*, the CAVC said that "[a]t most, Mr. Rose has shown that the Secretary's delays are the product of a burdened system." Appx0003. The Secretary, however, provided no evidence that the VA system was overburdened, and the Ninth Circuit in *Veterans for Common Sense* emphasized that lack of VA resources was not the reason for the delay. *See Veterans for Common Sense*, 644 F.3d at 885.

average delays that Appellants proffered to the CAVC, *see supra* at 12–13; and (3) the undisputed evidence of the delays already experienced by Appellants here, *see supra* at 13–18.

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 more than 519 days (93-year-old WWII veteran Miller), 759 days (Daniels), 2,190 days (Rose), and 2,318 days (Punt), and face years more delay before their appeals are decided. 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.

The decisions below render any hope of relief illusory 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 Telecomms. Corp. v. FCC*, 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." 625 F.2d at 490. The CAVC itself long ago noted that, although 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 35–38.

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 24–25.

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.

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 fore-

closed 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. The decisions below render any hope of relief illusory, and in the process render 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).

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 12,328 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: 16-2494

EDWARD THOMAS ROSE, PETITIONER,

V.

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

JUDGMENT

The Court has issued a decision in this case. The time allowed for motions under Rule 35 of the Court's Rules of Practice and Procedure has expired.

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

Dated: February 22, 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)

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2494

EDWARD THOMAS ROSE, PETITIONER,

V.

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

Before DAVIS, *Chief 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, petitioner Edward Thomas Rose, through counsel, filed a petition for extraordinary relief in the nature of a writ of mandamus. In the petition, Mr. Rose asked that the Court compel VA to prepare appellate documents related to his appeal. He also requested that the Court order VA to eliminate delays in processing appeals, find VA's delays in processing appeals violate the Due Process Clause of the Fifth Amendment to the U.S. Constitution, and otherwise find unconstitutional any statute, regulation, or practice that has resulted in the untimely handling of appeals. On October 27, 2016, the Court ordered the Secretary to respond to the allegations in Mr. Rose's petition. After the Secretary's response was submitted, Mr. Rose filed an opposed motion for leave to file a response to the Secretary.

In response to the Court's order, the Secretary contends that a writ of mandamus is not warranted. The Secretary states that on November 3, 2016, after Mr. Rose's petition was filed, VA issued a Supplemental Statement of the Case with respect to Mr. Rose's claims based on patellofemoral syndrome of the right knee, cervical strain, an acquired psychiatric disorder, and a total disability rating based on individual unemployability. On the same date, VA issued a Statement of the Case related to radiculopathy, cervicogenic headaches, and left knee tingling, as well as a rating decision with respect to part of Mr. Rose's cervicogenic headaches claim. The Secretary's response indicates that Mr. Rose filed his claims as early as 2011 and that VA has periodically communicated with Mr. Rose and issued decisions related to these claims. In March and April of 2016, Mr. Rose contacted VA to request information regarding the status of his appeals, and he was informed that VA was working diligently on a backlog of appeals.

The Court has the authority to issue extraordinary writs in aid of its prospective jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). However, "[t]he remedy of mandamus is a

drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 402 (1976); *see also Youngman v. Peake,* 22 Vet.App. 152, 154 (2008). Three conditions must be satisfied before the Court issues a writ of mandamus: (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 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 for D.C.*, 542 U.S. 367, 380-81 (2004) (citing *Kerr,* 426 U.S. at 403); *see also Youngman,* 22 Vet.App. at 154. When delay is the basis for a petition, the petitioner must demonstrate that the delay is "so extraordinary, given the demands and resources of the Secretary, that [it] amounts to an arbitrary refusal to act, and [is] not the product of a burdened system." *Costanza v. West*, 12 Vet.App. 133, 134 (1999) (per curiam order). Furthermore, when the relief sought by a petition has been accomplished, the appropriate course of action is for the Court to dismiss the matter as moot. *See Thomas v. Brown*, 9 Vet.App. 269 (1996); *Mokal v. Derwinski*, 1 Vet.App. 12, 15 (1990) (dismissing portion of petition seeking mandamus relief because controversy surrounding petition was moot).

Mr. Rose has not demonstrated that issuance of a writ of mandamus is warranted. The part of the petition that is based on VA's failure to issue appellate documents is moot as the Secretary has now issued the appellate documents. *See Mokal*, *supra*. Furthermore, the Secretary's delay in deciding these claims was not so extraordinary that it amounted to an arbitrary refusal to act. *See Costanza*, *supra.* At most, Mr. Rose has shown that the Secretary's delays are the product of a burdened system. *See id*. With regard to the assertions of constitutional error specific to his claims, Mr. Rose does not show that he lacks alternative means to attain his desired relief. *See Cheney*, *supra*. Given that the Secretary's delays on his claim do not amount to an arbitrary refusal to act, Mr. Rose may present his allegations to VA and ultimately appeal them to the Court. Finally, assuming for the sake of argument that Mr. Rose has standing to bring a claim on behalf of numerous unnamed veterans whose claims may have been delayed pending VA adjudication, he presents no compelling reason why he may not raise this matter to VA and then appeal the matter to the Court. He therefore fails to demonstrate that he lacks adequate alternative means to obtain his desired relief. *See id.*

The Court also determines that it is not necessary for Mr. Rose to submit a response to the Secretary. The Court's rules do not contemplate a response to the Secretary's response to a petition for writ of mandamus, and the Court does not otherwise believe such a response would aid in deciding the matters at issue here. Therefore the Court will deny the motion.

On consideration of the foregoing, it is

ORDERED that the petitioner's motion for leave to file a response is denied. It is further

ORDERED that the petition is DISMISSED.

DATED: January 31, 2017

BY THE COURT:

ROBERT N. DAVIS
Chief Judge

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

Not Published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO: 16-2510

LESLIE PUNT, 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)

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2510

LESLIE PUNT, 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, Leslie Punt, 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 January 12, 2011, VA issued a decision on claims for post-traumatic stress disorder (PTSD), neck and shoulder injuries, gastrointestinal issues, neurological symptoms related to the anthrax vaccine, and sleep apnea. VA also instructed the petitioner that she had one year from the date of the January 2011 decision to submit additional evidence for her claims. On April 5, 2011, the petitioner submitted additional evidence on her claims and VA apparently acknowledged receipt of the evidence. However, despite the passage of more than 5 years, no decision had been issued on her claims. 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.

On September 30, 2016, the Court ordered the Secretary to respond to the petition. On October 28, 2016, the Secretary responded and provided evidence that in a September 28, 2016, decision review officer decision, sent to the petitioner on October 7, 2016, VA increased the appellant's disability rating for PTSD to 70%, effective June 8, 2016. Response, Exhibit 20. Additionally, the Secretary has provided the Court with September 28, 2016, and October 3, 2016 Statements of the Case that continued the denial of service connection for sleep apnea, a neck condition, a shoulder condition, an unexplained neurological condition dating to anthrax immunization and gastroesophageal reflux disease. Response, Exhibits 21-22. Additionally, on October 3, 2016, the petitioner was informed that she could request a hearing before her case was sent to the Board. Response, Exhibit 22 at 2.

The Court is satisfied that desired relief of the petition has been obtained. Although the

petitioner has broadly alleged delay on the part of VA in the adjudication of all of its matters, the Court does not believe the facts presented here warrant the issuance of an all- encompassing writ that would have arguable results if applied broadly to VA. Although the Court does not question the facts presented by the petitioner regarding the realities of the VA benefits system, the Court will not insert itself further into the processes of VA at this time.

On consideration of the foregoing, it is

ORDERED that that part of the petitioner's petition specifically pertaining to her claims is DISMISSED as moot. It is further

ORDERED that the remaining portion of the petition is DENIED.

DATED: November 22, 20216

BY THE COURT:

WILLIAM S. GREENBERG
Judge

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

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NON-PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2510

LESLIE PUNT, PETITIONER,

V.

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

Before PIETSCH, 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.

On November 22, 2016, the Court issued an order dismissing the petitioner's petition for extraordinary relief in the nature of a writ of mandamus specifically pertaining to her claims and denying the remaining portion of the petition. 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 appeal, 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)

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO: 16-2498

TAYLOR DANIELS, PETITIONER,

V.

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

JUDGMENT

The Court has issued a decision in this case. The time allowed for motions under Rule 35 of the Court's Rules of Practice and Procedure has expired.

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

Dated: February 22, 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)

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2498

TAYLOR DANIELS, PETITIONER,

V.

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

Before DAVIS, *Chief 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 October 19, 2016, petitioner Taylor Daniels filed through counsel an amended petition for extraordinary relief in the nature of a writ of mandamus. In the amended petition, Mr. Daniels requested that the Court compel VA to prepare appellate documents related to his appeal. He also requested that the Court order VA to eliminate delays in processing appeals, find VA's delays in processing appeals violate the Due Process Clause of the Fifth Amendment to the U.S. Constitution, and otherwise find unconstitutional any statute, regulation, or practice that has resulted in the untimely handling of appeals. On October 27, 2016, the Court ordered the Secretary to respond to the allegations in Mr. Daniels's petition. After the Secretary's response was submitted, Mr. Daniels filed an opposed motion for leave to file a response to the Secretary.

In response to the Court's order, the Secretary asserts that a writ of mandamus is not warranted. The Secretary states that Mr. Daniels's claims for compensation based on hearing loss, tinnitus, orthopedic problems, and traumatic brain injury, filed on July 27, 2015, were addressed in a March 21, 2016, decision. Mr. Daniels filed a Notice of Disagreement with respect to some of these issues and VA issued a Statement of the Case on September 13, 2016. In addition, Mr. Daniels notes that he filed a claim for benefits based on post-traumatic stress disorder on April 25, 2016; VA denied this claim in a June 15, 2016, rating decision.

The Court has the authority to issue extraordinary writs in aid of its prospective jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). However, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 402 (1976); *see also Youngman v. Peake,* 22 Vet.App. 152, 154 (2008). Three conditions must be satisfied before the Court issues a writ of mandamus: (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 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 for D.C.*, 542 U.S. 367, 380-81 (2004) (citing *Kerr,* 426 U.S. at 403); *see also Youngman,* 22 Vet.App. at 154. When delay is the basis for a petition, the petitioner must demonstrate that the delay is "so extraordinary, given the demands and resources of the Secretary, that [it] amounts to an arbitrary refusal to act, and [is] not the product of a burdened system." *Costanza v. West*, 12 Vet.App. 133, 134 (1999) (per curiam order). Furthermore, when the relief sought by a petition has been accomplished, the appropriate course of action is for the Court to dismiss the matter as moot. *See Thomas v. Brown*, 9 Vet.App. 269 (1996); *Mokal v. Derwinski*, 1 Vet.App. 12, 15 (1990) (dismissing portion of petition seeking mandamus relief because controversy surrounding petition was moot).

Mr. Daniels has not demonstrated that issuance of a writ of mandamus is warranted. The part of the petition that is based on VA's failure to issue appellate documents is moot as the Secretary has issued rating decisions and a Statement of the Case with respect to his claims and Mr. Daniels has not demonstrated that he has sought to appeal these matters or that any additional matters remain unaddressed by VA. *See Mokal*, *supra*. Furthermore, the Secretary's delay in deciding these claims was not so extraordinary that it amounted to an arbitrary refusal to act. *See Costanza*, *supra.* With regard to the assertions of constitutional error specific to his claims, Mr. Daniels does not show that he lacks alternative means to attain his desired relief. *See Cheney*, *supra*. Given that the Secretary's delays on his claim do not amount to an arbitrary refusal to act, Mr. Daniels may present his allegations to VA and ultimately appeal them to the Court. Finally, assuming for the sake of argument that Mr. Daniels has standing to bring a claim on behalf of numerous additional veterans whose claims may have been delayed pending VA adjudication, he presents no compelling reason why he may not appeal this matter to the Court and therefore fails to demonstrate that he lacks adequate alternative means to obtain his desired relief. *See id.*

The Court also determines that it is not necessary for Mr. Daniels to submit a response to the Secretary. The Court's rules do not contemplate a response to the Secretary's response to a petition for writ of mandamus, and the Court does not otherwise believe such a response would aid in deciding the matters at issue here. Therefore, the Court will deny the motion.

On consideration of the foregoing, it is

ORDERED that the petitioner's motion for leave to file a response is denied. It is further

ORDERED that the petition is DISMISSED.

DATED: January 31, 2017

BY THE COURT:

ROBERT N. DAVIS
Chief Judge

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

Not Published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO: 16-2505

HERBERT MITCHELL MILLER, 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 3, 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. 16-2505

HERBERT M. MILLER, PETITIONER,

V.

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

Before DAVIS, *Chief 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, petitioner Herbert M. Miller filed through counsel a petition for extraordinary relief in the nature of a writ of mandamus. On October 19, 2016, Mr. Miller amended his petition. In the amended petition, Mr. Miller asked that the Court compel VA to prepare appellate documents related to his appeal. He also requested that the Court order VA to eliminate delays in processing appeals, find VA's delays in processing appeals violate the Due Process Clause of the Fifth Amendment to the Constitution, and otherwise find unconstitutional any statute, regulation, or practice that has resulted in the untimely handling of appeals. On October 27, 2016, the Court ordered the Secretary to respond to the allegations in Mr. Miller's petition. After the Secretary's response was submitted, Mr. Miller filed an opposed motion for leave to file a response to the Secretary.

In response to the Court's order, the Secretary contends that a writ of mandamus is not warranted. The Secretary states that Mr. Miller's claims for compensation based on right and left shoulder conditions were submitted on May 4, 2016, and granted 2 months later, on July 9, 2016, and Mr. Miller has not appealed those decisions. Mr. Miller's claim based on a left knee condition most recently was granted on October 27, 2016, and a Statement of the Case issued the same day. Mr. Miller has not yet appealed this decision to the Board. The Secretary notes that there was a 10-year delay in the adjudication of Mr. Miller's left knee condition claim, but observes that this delay resulted from Mr. Miller's failure to pursue the claim as VA issued a rating decision in 2005 and Mr. Miller next contacted VA regarding the claim in 2015.

The Court has the authority to issue extraordinary writs in aid of its prospective jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). However, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court for N. Dist. of*

Cal., 426 U.S. 394, 402 (1976); *see also Youngman v. Peake,* 22 Vet.App. 152, 154 (2008). Three conditions must be satisfied before the Court issues a writ of mandamus: (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 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 for D.C.*, 542 U.S. 367, 380-81 (2004) (citing *Kerr,* 426 U.S. at 403); *see also Youngman,* 22 Vet.App. at 154. When delay is the basis for a petition, the petitioner must demonstrate that the delay is "so extraordinary, given the demands and resources of the Secretary, that [it] amounts to an arbitrary refusal to act, and [is] not the product of a burdened system." *Constanza v. West*, 12 Vet.App. 133, 134 (1999) (per curiam order). Furthermore, when the relief sought by a petition has been accomplished, the appropriate course of action is for the Court to dismiss the matter as moot. *See Thomas v. Brown*, 9 Vet.App. 269 (1996); *Mokal v. Derwinski*, 1 Vet.App. 12, 15 (1990) (dismissing portion of petition seeking mandamus relief because controversy surrounding petition was moot).

Mr. Miller has not demonstrated that issuance of a writ of mandamus is warranted. The part of the petition that is based on VA's failure to issue appellate documents is moot as the Secretary has issued a Statement of the Case regarding his left knee claim and attached a notice of appellate rights to the rating decision granting benefits for his other conditions, and Mr. Miller has not demonstrated that he has sought to appeal either matter. *See Mokal*, *supra*. Furthermore, the Secretary's delay in deciding these claims was not so extraordinary that it amounted to an arbitrary refusal to act. *See Costanza*, *supra*. With regard to the assertions of constitutional error specific to his claims, Mr. Miller does not show that he lacks alternative means to attain his desired relief. *See Cheney*, *supra*. Given that the Secretary's delays on his claim do not amount to an arbitrary refusal to act, Mr. Miller may present his allegations to VA and ultimately appeal them to the Court. Finally, assuming for the sake of argument that Mr. Miller has standing to bring a claim on behalf of numerous additional, unnamed veterans whose claims may have been delayed pending VA adjudication, he presents no compelling reason why he could not appeal this matter to the Court and therefore fails to demonstrate that he lacks adequate alternative means to obtain his desired relief. *See id.*

The Court also determines that it is not necessary for Mr. Miller to submit a response to the Secretary. The Court's rules do not contemplate a response to the Secretary's response to a petition for writ of mandamus, and the Court does not otherwise believe such a response would aid in deciding the matters at issue here.

On consideration of the foregoing, it is

ORDERED that the petitioner's motion for leave to file a response is DENIED. It is further

ORDERED that the petition is DISMISSED.

DATED: January 4, 2017

BY THE COURT:

ROBERT N. DAVIS
Chief Judge

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)

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NON-PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-2505

HERBERT MITCHELL MILLER, PETITIONER,

V.

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

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

ORDER

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

On January 4, 2017, the Court dismissed the petitioner's petition for extraordinary relief in the nature of a writ of mandamus. On January 25, 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 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: March 8, 2017

PER CURIAM.

Copies to:

John A. Chandler, Esq.

VA General Counsel (027)