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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 21-7567

ALBERTO ARROYO-FIGUEROA, PETITIONER,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before BARTLEY, *Chief Judge*.

ORDER

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

On November 12, 2021, self-represented veteran Alberto Arroyo-Figueroa filed a petition for extraordinary relief in the nature of a writ of mandamus. He asserts that, although he filed a VA Form 9 (Substantive Appeal) in January 2019, he has yet to receive a decision on his appeal. Petition at 1. He argues that VA has unlawfully withheld or unreasonably delayed action in his appeal. *Id.*

On December 6, 2021, the Court ordered the Secretary to respond to Mr. Arroyo-Figueroa's petition. *See* U.S. VET. APP. R. 21(d). The Secretary filed a response on January 5, 2022. On January 11, 2022, the Court ordered the Secretary to file a second response, which he filed on February 28, 2022.

In December 2017, a VA regional office (RO) issued a decision that denied 12 claims, Secretary's First Response (Resp.) at 1 & Attachment (Att.) 1, a decision that Mr. Arroyo-Figueroa appealed to the Board of Veterans' Appeals (Board), *id.* at 1 & Att. 2. Following additional procedural steps, the case was certified to the Board in March 2019. *Id.* at 3 & Att. 5-6.

In April 2019, Mr. Arroyo-Figueroa filed a motion to advance his appeal on the Board docket, asserting that he was experiencing a severe economic hardship due to Hurricanes Irma and Maria. *Id.* at Att. 8. In May 2019, a deputy vice chairman (DVC) of the Board denied the motion, stating that the veteran did not demonstrate sufficient cause because he was not 75 years of age and did not submit evidence demonstrating severe illness, severe financial hardship (e.g., pending bankruptcy, home foreclosure, homelessness), or administrative error. *Id.* at Att. 9.

In July 2020, Mr. Arroyo-Figueroa's veterans service organization representative filed an informal brief to the Board. *Id.* at 2 & Att. 10. Since that time, the veteran's case is awaiting a decision by a member of the Board.

In his first response, the Secretary urged the Court to deny the petition because Mr. Arroyo-Figueroa "has failed to demonstrate that any delay [in his case] was so egregious as to warrant the issuance of a writ." *Id.* at 7. In its January 11, 2022, order, the Court directed the Secretary to further explain his position that the Board has not unreasonably delayed action in Mr. Arroyo-Figueroa's case. In particular, the Court noted that the Board may advance appeals on its docket based on weather-related natural disasters, including hurricanes, and that VA has acknowledged the effect of Hurricanes Irma and Maria on Puerto Rico and its residents.

In his second response, the Secretary reaffirmed his position, stating that Mr. Arroyo-Figueroa fails to carry his burden of demonstrating that mandamus is warranted. Secretary's Second Resp. at 5, 9-10. Relying on a declaration from one of the Board's DVCs,¹ the Secretary averred that following Hurricane Maria, appeals for Puerto Rico residents that were pending before the Board were granted advancement on the docket (AOD) through an order of the Chairman. *Id.* at 3 & Ex. 1. However, advancement based on the Chairman's order ended September 30, 2018, before Mr. Arroyo-Figueroa's appeal was docketed at the Board. *Id.* The Secretary further averred that effects "from weather-related natural disasters may qualify as sufficient cause for advancement" and that Mr. Arroyo-Figueroa may submit a second motion to advance his appeal on the Board's docket. *Id.* at 3-4 & Ex. 1.

This Court has authority to issue extraordinary writs in aid of its jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). *Cox v. West*, 149 F.3d 1360, 1363-64 (Fed. Cir. 1998). This includes issuing writs of mandamus to "compel action of the Secretary unlawfully withheld or unreasonably delayed," 38 U.S.C. § 7261(a)(2), including compelling the Board to issue a decision. *Martin v. O'Rourke*, 891 F.3d 1338, 1342-43 (Fed. Cir. 2018); *see Yi v. Principi*, 15 Vet.App. 265, 267 (2001). However, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976). Three conditions must be met before the Court can issue a writ: (1) The petitioner must demonstrate the lack of adequate alternative means to obtain the desired relief, thus ensuring that the writ is not used as a substitute for the appeals process; (2) the petitioner must demonstrate a clear and indisputable right to the writ; and (3) the Court must be convinced, given the circumstances, that issuance of the writ is warranted. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004).

Under a liberal construction of the petition, *see Calma v. Brown*, 9 Vet.App. 11, 15 (1996), Mr. Arroyo-Figueroa seeks that the Court order advancement of his appeal on the Board's docket, that is, an action unlawfully withheld, or order the Board to issue a decision on his appeal, that is, an action unreasonably delayed. Considering both aspects of the petition, the Court concludes that Mr. Arroyo-Figueroa has demonstrated the lack of adequate alternative means to obtain an advancement on the Board's docket and has demonstrated a clear and undisputable right to a writ.

¹ The DVC who prepared this declaration is a different DVC than the one who denied Mr. Arroyo-Figueroa's motion. *Compare* Secretary's Second Resp. at Exhibit (Ex.) 1 *with id.* at Ex. H.

Thus, the Court concludes that, based on the circumstances of his case, a writ is warranted. *See Cheney*, 542 U.S. at 380-81.

In April 2019, the Board docketed Mr. Arroyo-Figueroa's appeal and informed him that he could file a motion to advance his appeal on the Board's docket. Secretary's First Resp. at Att. 7. The veteran filed an AOD motion contending that he is in severe economic hardship due to Hurricanes Irma and Maria. *Id.* at Att. 8. In May 2019, a Board DVC denied the motion because it failed to demonstrate sufficient cause. *Id.* at Att. 9. Regarding financial hardship, the Board DVC stated: "Neither is there evidence that demonstrates severe financial hardship such as a pending bankruptcy, home foreclosure, or homelessness. General financial difficulties alone are insufficient. . . . If you submit additional evidence supporting advancement and set forth succinctly the grounds for consideration, I would be willing to consider another motion." *Id.*

The Secretary avers that advancement on the Board's docket may be granted based on weather-related natural disasters including hurricanes. Secretary's Second Resp. at 3. And he avers that, following Hurricane Maria, the Board Chairman advanced, on her own, Board appeals pertaining to claimants residing in Puerto Rico for a period of time prior to Mr. Arroyo-Figueroa's appeal arriving at the Board. Yet the DVC's ruling does not mention that Mr. Arroyo-Figueroa's motion was based on weather-related natural disasters or acknowledge the Board's history of advancing Board appeals based on the effects of Hurricane Maria. *See* Secretary's First Resp. at Att. 9.

In fact, it is unclear to the Court what else Mr. Arroyo-Figueroa needed to do to support his motion. The Board's website states:

Weather-related disasters may qualify as sufficient cause for the [Board] to advance an appeal on the docket[.] . . . Therefore, if you have been impacted by a natural disaster (wild fires, tornadoes, hurricanes, etc.) and you have an appeal pending at the Board, please know that you or your representative may file an AOD motion.

Board of Veterans' Appeals, available at <https://www.bva.va.gov> (last accessed April 26, 2022). The Board's Customer Service website further explains the requirements for an AOD motion and states that a movant must include supporting documentation to factually demonstrate reasons for advancement. *Board of Veterans' Appeals Customer Service*, available at <https://www.bva.va.gov/CustomerService.asp> (last accessed April 26, 2022). As related to natural disasters, a movant "may submit evidence such as newspaper clippings, pictures, FEMA declarations, etc." *Id.*

Although the Board requires specific evidence for AOD motions based on severe financial hardship (bankruptcy petition, home foreclosure notice, or evidence of homelessness), serious illness (physician's statement), and administrative error (evidence demonstrating significant delay in docketing the appeal), the Board does not require claimant-specific evidence to advance an appeal based on natural disasters. *See id.* To the extent that the Board states that a movant "may" submit evidence supporting an AOD motion based on natural disasters, evidence such as newspaper clippings or pictures is not necessarily specific to a particular claimant. As the Board mailed the DVC's ruling to the veteran's address in Yabucoa, Puerto Rico, the Board knew that Mr. Arroyo-Figueroa lived in Puerto Rico and that VA had acknowledged the effect of Hurricanes

Irma and Maria on the residents of Puerto Rico. In fact, Hurricane Maria's center made landfall along "the southeast coast of Puerto Rico near Yabucoa" and "maximum winds at that time were near 135 [knots], just below the threshold of category 5 intensity." *Hurricane Maria, National Hurricane Center, National Oceanic and Atmospheric Administration*, available at https://www.nhc.noaa.gov/data/tcr/AL152017_Maria.pdf (last accessed April 26, 2022). And given the Chairman's previous acknowledgment of the hardship experienced by claimants residing in Puerto Rico, it is unclear what more Mr. Arroyo-Figueroa needed to do to support his AOD motion. To that end, although the Secretary and both DVCs stated that the veteran may file a second AOD motion, *see* Secretary's Second Resp. at 7 & Ex. 1, no one has clearly acknowledged that Mr. Arroyo-Figueroa is entitled to advancement based on the facts that were before the DVC at the time of the initial motion. Given this, the Court is not convinced that any new motion from Mr. Arroyo-Figueroa would garner a different result. Thus, the Court concludes that Mr. Arroyo-Figueroa has demonstrated a clear and undisputable right to a writ and a lack of alternative means for seeking advancement on the Board's docket. *See Cheney*, 542 U.S. at 380-81.

Regarding Mr. Arroyo-Figueroa's allegation of unreasonable delay in adjudicating his appeal, the Court similarly concludes that a writ is warranted. In petitions based on unreasonable delay, the Court must weigh six factors to determine if VA's "delay is so egregious as to warrant mandamus." *Martin*, 891 F.3d at 1344 (quoting *Telecomms. Research & Action Ctr. v. FCC ("TRAC")*, 750 F.2d 70, 79 (D.C. Cir. 1984)). In *TRAC*, the U.S. Court of Appeals for the D.C. Circuit identified those six factors as follows:

- (1) The time agencies take to make decisions must be governed by a "rule of reason," *Potomac Elec. Power Co. v. I.C.C.*, 702 F.2d 1026, 1034 (D.C. Cir. 1983);
- (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also consider 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," *Pub. Citizen Health Rsch. Grp. v. FDA*, 740 F.2d 21, 34 (D.C. Cir. 1984).

750 F.2d at 80 (citations omitted).

Starting with the related first and second *TRAC* factors, a "rule of reason" analysis "must look at the particular agency action because it 'is reasonable that more complex and substantive agency actions take longer than purely ministerial ones.'" *Godsey v. Wilkie*, 31 Vet.App. 207, 226 (2019) (quoting *Martin*, 891 F.3d at 1345-46)). Although there is no specific congressional timetable for VA's adjudication of veterans benefits claims and adjudicating Mr. Arroyo-Figueroa's appeal—which involves 12 claims—is not a ministerial task, the Board docketed his appeal in March 2019, more than 3 years ago and the ensuing delay in adjudicating the appeal cannot be the product of a "rule of reason." As discussed above, despite Mr. Arroyo-Figueroa seeking advancement on the Board's docket due to a natural disaster—the same natural disaster

that supported the Chairman's automatic advancement of Board appeals from similarly situated claimants 7 months prior—and with sufficient evidence for advancement of record before the Board at that time, the DVC denied advancement without any discussion of the basis for the veteran's motion or how the veteran could supplement a new motion with additional evidence.

The third and fifth *TRAC* factors weigh in favor of the veteran, which the Secretary does not dispute. Secretary's Second Resp. at 8-9. Notably, "[v]eterans' disability claims always involve human health and welfare." *Martin*, 891 F.3d at 1346. And the entire thrust of Mr. Arroyo-Figueroa's AOD motion is based on severe financial distress following Hurricanes Irma and Maria. *See id.* at 1347 (noting that "many veterans depend on these disability benefits for basic necessities, such as food, clothing, housing, and medical care").

Relying on the fourth *TRAC* factor, the Secretary asserts that granting a writ would simply place Mr. Arroyo-Figueroa ahead of other claimants whose appeals were docketed before his and bypass Board procedures that require appeals to be heard according to their place on the docket. Secretary's Second Resp. at 9. However, the Court deems that concern minimal in this case. Mr. Arroyo-Figueroa's appeal was certified to the Board on March 19, 2019, Secretary's First Resp. at Att. 6, or 1143 days ago. According to the Board's website, as of March 2022, the Board takes, on average 1186 days to adjudicate an original legacy appeal, 942 days of which are spent pending review by a member of the Board. *Board of Veterans' Appeals, Appeals Metrics*, available at https://www.bva.va.gov/Appeals_Metrics.asp (last accessed April 27, 2022). Moreover, the current working legacy docket is "up to September 2019," that is, the Board is processing legacy appeals that arrived at the Board after Mr. Arroyo-Figueroa's. *Id.* These statistics indicate that any concerns about line-jumping are not applicable here.

Finally, the sixth *TRAC* factor neither weighs for or against the veteran here. There is not a showing nor suggestion of bad faith in the DVC's denial of the veteran's AOD motion or in the Board's failure to act. Nevertheless, "[a] writ may be appropriate under the *TRAC* analysis even where there is no evidence of bad faith." *Martin*, 891 F.3d at 1348.

The Court concludes that the *TRAC* factors weigh in favor of the veteran and that the delay in adjudicating his appeal is unreasonable. Though "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations," *Kerr*, 426 U.S. at 402, for the reasons discussed above, the Court concludes that Mr. Arroyo-Figueroa's petition demonstrates such an extraordinary circumstance. The Court will order the Board to adjudicate Mr. Arroyo-Figueroa's appeal within 45 days; if any portion of that decision is adverse to the veteran, he may appeal that decision to this Court. Thus, it is

ORDERED that Mr. Arroyo-Figueroa's petition is GRANTED to the extent that it requests the Court to compel the Board to advance his appeal on its docket and to compel the Board to adjudicate his appeal. It is further

ORDERED that the Secretary direct the Board to advance Mr. Arroyo-Figueroa's appeal on its docket and to adjudicate the appeal within 45 days after the date of this order.

DATED: May 6, 2022

BY THE COURT:

A handwritten signature in black ink, appearing to read "Margaret Bartley", written in a cursive style.

MARGARET BARTLEY
Chief Judge

Copies to:

Alberto Arroyo-Figueroa

VA General Counsel (027)