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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 22-0119

MARK MATHIS, PETITIONER,

v.

DENIS McDONOUGH,  
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before TOTH, *Judge*.

**ORDER**

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

This Court has authority under the All Writs Act to "compel action of the Secretary unlawfully withheld or unreasonably delayed." *Monk v. Wilkie*, 32 Vet.App. 87, 101 (2019) (en banc) (quoting 38 U.S.C. § 7261(a)(2)). The "drastic" remedy of mandamus cannot be used as a substitute for the standard VA appeals process and will only be granted when the Court is firmly convinced that it is warranted. *Id.* Before this Court can issue a writ, the petition must demonstrate (1) a "lack of adequate alternative means to obtain the desired relief" and (2) "a clear and indisputable right to the writ." *Id.* Furthermore, this "Court must be convinced, given the circumstances, that issuance of the writ is warranted." *Id.*

Veteran Mark Mathis petitions this Court for extraordinary relief in the nature of a writ of mandamus. He contends that he filed a VA Form 9 (Substantive Appeal) in June 2018 and he has yet to receive a Board decision from that appeal. He argues that the Board has unlawfully withheld or unreasonably delayed adjudicating his Substantive Appeal. In response to a Court order, the Secretary provided relevant and useful background information: Mr. Mathis requested a Board hearing in his June 2018 VA Form 9 but withdrew that request three months later, in September 2018; the Board never acknowledged the withdrawal and kept the petitioner's case pending on its hearing docket; the Board has since corrected its docketing error and informed Mr. Mathis of as much on March 16, 2022. Considering this background, the Secretary argues that the petition should be denied because the Board's March 2022 letter informed Mr. Mathis that his appeal was now on the direct review docket and awaiting a decision from a Board member.

Mr. Mathis seeks for this Court to order the Board to issue a decision on his appeal—an action the petitioner argues has been unlawfully withheld or unreasonably delayed. The Court concludes that Mr. Mathis has demonstrated that the Board has unreasonably delayed adjudicating

his 2018 VA Form 9 and that he has a lack of adequate alternative means to obtain a Board decision in a timely manner. Considering these two points, which will be explained further below, the Court finds that Mr. Mathis has demonstrated a clear and undisputable right to the writ he seeks.

At the outset, the Secretary argues that this petition should be denied because the Board informed Mr. Mathis that his appeal is now on the direct review docket and awaiting a decision from a Board member. However, Mr. Mathis didn't ask for a writ of mandamus that directs the Secretary to notify him that his appeal was being processed; he asked for a writ of mandamus directing the Secretary to *decide* the claims listed in his June 2018 appeal.

Here, there is little doubt that Mr. Mathis has shown that he has a right to receive a Board decision in response to his June 2018 Substantive Appeal. *See* 38 U.S.C. §§ 7104(a), 7107. The question is whether he has a right to receive that decision by way of a mandamus order directing the Secretary issue it. To answer that, we look to whether VA has unreasonably delayed in issuing a decision.

When delay is alleged as the basis for a petition, there is no "hard and fast rule with respect to the point at which a delay becomes unreasonable." *Martin v. O'Rourke*, 891 F.3d 1338, 1346 (Fed. Cir. 2018). Instead, the Court considers the following framework (commonly known as the TRAC factors):

- (1) the time an agency takes to make decisions must be governed by a "rule of reason";
- (2) whether Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, which may supply content for this rule of reason;
- (3) delays arguably reasonable in the sphere of economic regulation 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) impropriety or bad faith on the agency's part are not necessary to finding unreasonable delay.

*Id.* at 1344-45 (citations omitted), quoting *Telecommunications Resch. & Action Ctr. v. F.C.C.*, 750 F.2d 70, 79-80 (D.C. Cir. 1984) ("TRAC").

The first and second factors are related—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)). Congress did not provide an explicit timetable in which it expected the Board to issue decisions. And the adjudication of Mr. Mathis's appeal is certainly not a ministerial task. But the Board docketed Mr. Mathis's Substantive Appeal nearly four years ago. Over one year after his appeal was placed on the Board's docket (even though it was kept on the incorrect one after he withdrew his request for a hearing), Mr. Mathis's counsel began filing "Request[s] for Action" on the appeal. Per Mr. Mathis's petition, he filed at least seven "Request[s]

for Action" that VA never responded to—that is, until he filed the current petition. Thus, it has been nearly four years since Mr. Mathis filed his Substantive Appeal and since the Board certified (or docketed) that appeal. This delay in adjudicating a Substantive Appeal cannot be based on a "rule of reason," especially when considering the Board's online appeals data discussed in the next paragraph.

As for the fourth *TRAC* factor, the Secretary asserts that granting a writ would simply place Mr. Mathis ahead of other claimants whose appeals were docketed before his. Secretary's Response at 5. However, the Secretary's concern is unfounded. The Board's website, which includes data on pending appeals up to March 2022, indicates that the Board is taking an average of 1,186 days to adjudicate an original legacy appeal after certification. *Board of Veterans' Appeals, Appeals Metrics*, [https://www.bva.va.gov/Appeals\\_Metrics.asp](https://www.bva.va.gov/Appeals_Metrics.asp). As of the date of this order, Mr. Mathis's appeal was certified to the Board 1,358 days ago—on August 23, 2018. Moreover, the current working legacy docket is "up to September 2019," which means the Board is processing legacy appeals that it received more than one year *after* it received Mr. Mathis's appeal. *Id.* Thus, the Secretary's concerns about line-jumping are not valid.

The third and fifth *TRAC* factors also weigh in favor of the veteran. The third factor asks whether the delay affects health and human welfare, and "[v]eterans' disability claims always involve human health and welfare." *Martin*, 891 F.3d at 1346. Although neither the veteran nor the Secretary provides much in the way of the fifth factor (the nature and extent of the interests prejudiced by delay), this Court weighs this factor in the veteran's favor considering that VA disability claims always involve the veteran's health and human welfare, which would also be the nature of the prejudiced interest.

Finally, the sixth *TRAC* factor does not weigh for or against Mr. Mathis. That factor simply notes that impropriety or bad faith on the agency's part is not necessary to finding unreasonable delay. *Id.* at 1348. Here, the Board kept the veteran's appeal on the wrong docket, a mistake that lended itself to the current delay. But because we need not find impropriety or bad faith to find an unreasonable delay, the Board's error in this regard is of no consequence.

In sum, the "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). Since the *TRAC* factors weigh in favor of Mr. Mathis, the Court concludes that the delay in adjudicating his June 2018 Substantive Appeal has been unreasonable and will order the Board to adjudicate that appeal within 45 days. *See* 38 U.S.C. § 7261(a)(2); *Martin*, 891 F.3d at 1343. If any portion of that decision is adverse to the veteran, he may appeal that decision to this Court.

Therefore, it is

ORDERED that the January 7, 2022, petition is GRANTED. It is further

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

DATED: May 12, 2022

BY THE COURT:

A handwritten signature in blue ink, appearing to read 'Joe Toth', is written over the printed name.

JOSEPH L. TOTH  
Judge

Copies to:

John V. Tucker, Esq.

VA General Counsel (027)