



decision in related situations where a claimant provided a new address to the Board and where a Board decision was returned as undeliverable from May 1, 2014, to September 30, 2014.

Pursuant to the Court's oral bench order issued following the May 11, 2016, oral argument, on May 24, 2016, the Court memorialized the bench order. The Court specifically requested that the Secretary provide, *inter alia*, information as to the average time that it took the Board to respond to a request to mail a Board decision to a newly received address for a five month period from May 1, 2014, to September 30, 2014.

Pursuant to the Secretary's good faith effort to provide the Court with accurate and thorough information, the Secretary obtained a Declaration from Barbara C. Morton, the Director of the Office of Management, Planning and Analysis of the Board dated June 3, 2016. See Appellee's Response to the Court's May 24, 2016, Order, Exhibit ("Ex.") 1. Ms. Morton explained that based on a review of the Board's internal computerized tracking system, VACOLS, from May 1, 2014, to September 30, 2014, the Board's average response time was 34.6 days. *Id.* at 2. This average was calculated based on 1,349 cases from May 1, 2014, to September 30, 2014, where a claimant requested that the Board resend the decision to a newly received address and where the mail was returned as undeliverable. *Id.*

Appellant argues that the Court should strike the Secretary's response as the average response time of 34.6 days included both situations where the Board resent a decision to a claimant's newly received address as well as situations where mail was returned as undeliverable. He argues that "the Secretary threw in numbers that likely skew the average and gave the Court no way to parse them out," and that "given the acknowledged distinction between the two situations, lumping them together when calculating an average is suspect." Appellant's Motion to Strike the Secretary's Response to the Court's Order at 3. The gravamen of Appellant's argument presumes: 1) that there was a manner in which the two situations could be differentiated in the Board's internal electronic system; and 2) that the two situations, both requiring that the Board resend a copy of its decision, are so distinct so as to render the data provided by the Secretary as irrelevant.

The Secretary will take this opportunity to dispel Appellant's inaccurate factual presumptions. The Secretary provided the best data available based on the Board's internal computerized tracking system, VACOLS. In the July 12, 2016, Declaration of John Z. Jones, the Interim Director of the Office of Management, Planning and Analysis of the Board, Mr. Jones explained that "the only way to track re-mailing of Board decisions is by tracking the VACOLS 'action' taken on mail items." Secretary's Ex. 1. The classification in VACOLS is based on the next

action that the Board needs to take, which in this case was the re-mailing of the Board decision. *Id.* In VACOLS, the re-mailing of the Board decisions, whether due to mail returned as undeliverable or a request to resend a Board decision to a newly received address, are classified based on the Board's mail action history, designated in the category entitled "04 Retailed Decision." *Id.* at 1-2. This classification reflects all cases where the Board decision was re-mailed after the Board's initial decision was issued. *Id.*

Although there is a mail designation for "Returned or Undeliverable Mail" in VACOLS, there is no specific designation for mail items that reflect a request for re-mailing. *Id.* at 2. Therefore, the Board's calculation of the 34.6 day average was based on the 1,349 cases classified under the category "04 Retailed Decision," from May 1, 2014, to September 30, 2014, a category encompassing all cases where the Board re-mailed a decision due to related situations where the claimant requested that the Board resend a decision to a newly received address and situations where the Board decision was returned as undeliverable. *Id.* at 1-3. The Board staff has determined that this statistic is based on an accurate evaluation of data maintained in VACOLS.

The Secretary also provides information to dispel Appellant inference that the 34.6 day average is somehow suspect as "the Secretary threw in numbers that likely skew the average." Appellant's Motion to

Strike the Secretary's Response to the Court's Order at 3. In the July 12, 2016, Declaration of Mr. Jones, he explained that the majority of remailed Board decisions during the relevant time period, i.e., 98%, were handled by a specific employee within the Board's Dispatch branch. Secretary's Ex. 1 at 2. The Secretary relied on Board-wide data in VACOLS to provide the 34.6 average to the Court in the Secretary's June 23, 2016, Response; however, examining the data from one Board employee is revealing for purposes of dispelling Appellant's inference that the 34.6 day average was unfavorably skewed or suspect.

Mr. Jones stated that one Board employee remailed 98% of the Board decisions from May 1, 2014, to September 30, 2014. Secretary's Ex. 1 at 2. Based on these statistics, the employee remailed 14 Board decisions that were prompted by requests for remailing. *Id.* This employee also remailed 1,309 Board decisions prompted by mail returned as undeliverable. *Id.* at 2. In respect to the 14 cases in which Board decisions were remailed when prompted by a request for remailing, the average response time to resend the decision was 60.9 days. *Id.* at 3. In respect to the 1,309 Board decisions prompted by mail returned as undeliverable, the average response time to resend the decision was 34.9 days.

Consequently, based on data from 98% of the cases where a Board decision was remailed during the relevant time period, in situations where

there was a request to remail the Board decision, it took an average of 60.9 days. *Id.* at 2. Indeed, based on these statistics, the average response time was substantially longer when the Board decision was not returned as undeliverable. This evidence is much less favorable to Appellant's case, and any inference that the Secretary did not make a good faith attempt to provide accurate data to the Court or that the information provided was "suspect" or skewed in an unfavorable manner to Appellant's case, is entirely unfounded.

It should be underscored that the Secretary relied upon Board-wide data from VACOLS in providing the Court with the average response time of 34.6 days. *See generally* Secretary's Ex. 1. Moreover, to the extent that Appellant argues that including cases in which mail is returned as undeliverable to calculate the 34.6 day average renders the data provided by the Secretary as irrelevant, this contention is unavailing. The data derived from 1,349 cases provides the Court with a relevant point of reference to evaluate the Board's average response times from May 1, 2014, to September 30, 2014, in cases where the Board decision was remailed. Significantly, based on the Declaration of Mr. Jones, the inclusion of data in situations where the mail was returned as undeliverable likely resulted in an average that was more favorable in Appellant's case. *Id.* The Board's classification system in VACOLS categorizes cases based on the next action that the Board needs to take, and the Board has

indicated that the calculated average of 34.6 days represents the best information available in VACOLS. Given the Board's thorough compilation of data in this case, Appellant's argument that the Court should not consider or address this relevant evidence lacks merit.

To the extent that Appellant argues the Court should strike the Secretary's negative responses as irrelevant in respect to whether VA had regulations, rules, policies, procedures, or a target response time in place regarding the specific situation where a claimant requests the remailing of the Board decision to a new address, this assertion is unpersuasive. Simply put, any negative responses are relevant to the extent that they provide the Court with comprehensive information to facilitate its decision-making process.

In sum, the Secretary notes that whether a situation warrants equitable tolling is a matter to be decided on a case-by-case basis. See *Sneed*, 737 F. 3d at 726. The Secretary has made painstaking efforts to provide the Court with information, and he has provided the Court with no less than four detailed Declarations from Board staff to facilitate the Court's decision-making process. See Secretary's January 20, 2015, Response to Court's November 3, 2014, Order; Secretary's April 23, 2015, Response to Court's April 10, 2015, Order; Secretary's June 23, 2016, Response to Court's May 24, 2016, Order; and Secretary's July 14, 2016, Response to Appellant's Motion to Strike.

The Secretary's June 23, 2016, Response to the Court's Order was based on the best available information in the classification system in VACOLS. The information provided the Court with a relevant point of reference to evaluate the Board's average response time to resend the Board decision in related situations where a claimant requested a copy of the Board decision and provided a new address and where a Board decision was returned as undeliverable from May 1, 2014, to September 30, 2014. Appellant's Motion to Strike the Secretary's Response to the Court's May 24, 2016, Order should be denied.

**WHEREFORE**, Appellee, the Secretary of Veterans Affairs, respectfully requests that the Court deny Appellant's Motion to Strike the Secretary's June 23, 2016, Response to the Court's May 24, 2016, Order.

Respectfully submitted,

**LEIGH A. BRADLEY**  
General Counsel

**MARY A. FLYNN**  
Chief Counsel

/s/ James B. Cowden  
**JAMES B. COWDEN**  
Deputy Chief Counsel

/s/ Kristen D. King-Holland

**KRISTEN D. KING-HOLLAND**

Appellate Attorney

Office of the General Counsel (027K)

U.S. Department of Veterans Affairs

811 Vermont Avenue, N.W.

Washington, D.C. 20420

(202) 632-6945

Attorneys for Appellee Secretary  
of Veterans Affairs

# EXHIBIT 1

IN THE UNITED STATES COURT  
OF APPEALS FOR VETERANS CLAIMS

RICARTE A. SOLIBEN	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 14-3240
	)	
ROBERT A. MCDONALD,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

DECLARATION OF JOHN Z. JONES

I, John Z. Jones, pursuant to 28 U.S.C. § 1746, declare under the penalty of perjury the following:

1. I am the Interim Director of the Office of Management, Planning and Analysis of the Board of Veterans' Appeals (Board), in the Department of Veterans Affairs (VA) and, as such, I am responsible for the control and supervision of the administrative operations at the Board. The information contained in this declaration is based on my knowledge, unless otherwise indicated.
2. This declaration is provided in response to Appellant's Motion to Strike, dated June 30, 2016.
3. Based on my knowledge of the Veterans Appeals Control and Locator System (VACOLS) (the Board's computerized tracking system), I can affirm that the only way to track re-mailing of Board decisions is by tracking the VACOLS "action" taken on mail items. The "04 Remailed Decision" action is used in VACOLS to designate that a Board decision was re-mailed. See screenshot, at the top of the following page, reflecting "04 Remailed Decision" action taken on a VACOLS mail item.

Source: M - Mail

Correspondence Type: 05 Evidence or Argument

BVA Recv Date: 08/04/14

Due: 08/18/14

Controlled Correspondence: Yes ( ), No (x)

Closed: 09/15/14

Currently Assigned to: [ ]

Action: [ ]

Action Completed: 00/00/00

Pages: PWFOIA

Secondary Action Due: 00/00/00

Action	Assignee	Comp date
04 Remaild Decision or other documents	TTURNER	9/15/2014
02 Forwarded for Employee/Team Action	MJWRIGHT	8/8/2014

Notes: The veteran is requesting a complete copy of the decision made by the Board of Veterans' Appeals regarding his claim for benefits

Autotext: [ ]

4. VACOLS has a specific designation for mail items that are returned or undeliverable mail, but it does not have a specific designation for mail items that are requests for re-mailing. In VACOLS, requests for re-mailing are classified as other types of correspondence (such as “Evidence or Argument” or “Status Inquiry”). See screenshot, immediately below, reflecting a mail designation for a “Returned or Undeliverable Mail” item in VACOLS. See also screenshot, immediately above, reflecting a request for re-mailing that was classified as “Evidence or Argument.”

Source: M - Mail

Correspondence Type: 12 Returned or Undeliverable Mail

5. The majority of re-mailed Board decisions are handled by a specific employee within the Board’s Dispatch branch. I can affirm that, from May 1, 2014, to September 30, 2014, this employee re-mailed a total of 1,323 Board decisions, representing 98 percent of all re-mailed decisions during this time period. This employee re-mailed 1,309 Board decisions prompted by returned or undeliverable Board decisions. This employee re-mailed 14 Board decisions prompted by requests for re-mailing (classified in VACOLS as “Evidence or Argument,” “Status Inquiry,” or “Change of Address”; I have reviewed each appeal in VACOLS and confirmed that all 14 mail items were requests for re-mailing). I can further affirm that, from May 1, 2014, to September 30, 2014, it took this employee an average of 34.9 days to re-mail a Board decision when prompted by a returned or undeliverable Board decision, and an average of 60.9 days to re-mail a Board decision when prompted by a request for re-mailing.

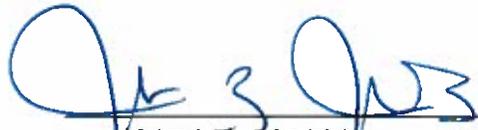
6. Further based on my review of the information available in VACOLS, I can affirm that, from May 1, 2014, to September 30, 2014, the average response time described in paragraph five (5) varied based on whether the mail item that

prompted the re-mailing was received within 120 days from initial dispatch. From May 1, 2014, to September 30, 2014, this employee took an average of:

- 35 days to re-mail a Board decision based on a Board decision returned as undeliverable that was received within 120 days of the initial dispatch;
- 30.8 days to re-mail a Board decision based on a Board decision returned as undeliverable that was received outside of 120 days of the initial dispatch;
- 67.6 days to re-mail a Board decision based on a request for re-mailing that was received within 120 days of the initial dispatch; and
- 36 days to re-mail a Board decision based on a request for re-mailing that was received outside of 120 days of the initial dispatch.

7. I certify under the penalty of perjury that the foregoing is true and correct.

Executed on the 12 day of July 2016.

  
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JOHN Z. JONES