

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Betty Scyphers	NO. 16-2493
Edward Thomas Rose	NO. 16-2494
Sarah Aktepy	NO. 16-2495
David Blakely	NO. 16-2496
Bettie Curry	NO. 16-2497
Taylor Daniels	NO. 16-2498
Dewey Herman Hall	NO. 16-2499
Frantz Merino Jean	NO. 16-2500
Jonathan Keefe	NO. 16-2501
John Martin	NO. 16-2502
Hugh Matthews	NO. 16-2503
Thomas Meissgeier	NO. 16-2504
Herbert Mitchell Miller	NO. 16-2505
Gina Mote	NO. 16-2506
Marvin Myers	NO. 16-2507
Leslie Punt	NO. 16-2510
William Rhodes	NO. 16-2511

Petitioners,

v.

Robert A. McDonald,
Secretary of Veterans Affairs,

Respondent.

**PETITIONERS' REPLY IN FURTHER SUPPORT OF
MOTION TO CONSOLIDATE**

The fundamental considerations on a motion to consolidate are judicial economy and the efficient administration of justice. The Secretary's arguments against consolidation ignore these considerations, relying instead on the wrong legal standard and irrelevant factual distinctions regarding the merits of the above-captioned petitions.

Petitioners' motion to consolidate should be granted.

First, the Secretary asserts that consolidation under the present circumstances “is not contemplated by the Court’s rules governing consolidation” because the petitions do not involve a single decision by the Department of Veterans Affairs. *Opp.* at 2. But the Secretary cites the wrong rule in support of that assertion—Rule of Practice and Procedure 3(d)—which concerns the filing of “joint appeals,” not consolidated petitions.

Under the correct standard, set forth in Rule 21(c), the Court may grant requests for consolidation based on considerations of efficiency and judicial economy. *See Mot.* at 3.¹ Petitioners explained in their motion why consolidation is appropriate for these 17 petitions, all of which raise the same fundamental question of Due Process. The Secretary does not even attempt to argue that consolidation would not result in the more efficient administration of justice. Indeed, despite insisting that each petition must be addressed individually, the Secretary has filed 17 nearly-identical oppositions raising the same objections to consolidating the petitions. Rather than refute the need for consolidation, the Secretary’s oppositions, in fact, underscore how consolidation will conserve the Court’s and the parties’ resources.

Second, the Secretary contends that consolidation is unwarranted due to the differing facts of each Petitioner’s case, such as the Regional Office handling the claim or the amount and type of benefits sought. *See Opp.* at 2. The Secretary’s focus on irrelevant factual differences between the petitions ignores the common and critical

¹ This is the same standard as the one set forth in Rule 3(e), for “consolidated” appeals.

feature that unites the Petitioners: As a result of failures by the Secretary and the Department, each Petitioner, no matter his or her individual circumstances, will be subjected to a guaranteed delay in the appeals process. This inexcusable, systemic delay violates the Due Process Clause of the Constitution under any conceivable set of facts.²

Finally, the Secretary's argument that some petitions may be subject to dismissal or denial if, for example, the Petitioner has not "demonstrate[d] entitlement to the writ," Opp. at 4, provides no reason not to save party and judicial resources now. Consolidation will in no way hinder the Secretary's ability to raise arguments directed at individual petitioners.

The Secretary's opposition to consolidation puts inefficiency ahead of the efficient administration of justice. Rule 21(c) permits the Court to reject that approach in favor of efficiency and judicial economy. Petitioners respectfully request that the Court consolidate the above-captioned actions for all purposes.

² For example, the Secretary claims that the delay underlying each of the petitions may be "beyond the control of the Secretary" because of delays in acquiring medical records or the "time between issuance of a rating decision and receipt of a notice of disagreement." Opp. at 2–3. But every petitioner has already at least reached the stage of filing a Notice of Disagreement, *see, e.g., Scyphers v. McDonald*, No. 16-2493, Petition ¶ 12, and as set forth in the petitions, the Secretary conceded in 2014 that such veterans face a delay approaching four years once they file a Notice of Disagreement, *id.* ¶ 35.

This 15th day of August, 2016.

/s/ John A. Chandler

John A. Chandler
Elizabeth V. Tanis
KING & SPALDING LLP
1180 Peachtree Street, NE
Atlanta, GA 30309-3521
Telephone: (404) 572-4600
jchandler@kslaw.com
etanis@kslaw.com

/s/ Stephen D. Raber

Stephen D. Raber
Thomas G. Hentoff
Liam J. Montgomery
Charles L. McCloud
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
Telephone (202) 434-5000
sraber@wc.com
thentoff@wc.com
lmontgomery@wc.com
lmcloud@wc.com

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of August, 2016, the foregoing materials will be filed with the Court and sent to all parties of record by operation of the Court's electronic filing system

/s/ Charles L. McCloud

Charles L. McCloud