

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 22-3933

JUSTIN D. GRAY,

PETITIONER,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

RESPONDENT.

Before MEREDITH, FALVEY, and LAURER, *Judges*.

ORDER

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

On June 30, 2022, the petitioner, Justin D. Gray, through counsel filed a petition for extraordinary relief in the form of a writ of mandamus compelling the Board of Veterans' Appeals (Board) to issue a decision on his December 2018 Substantive Appeal within 45 days after the date of the Court's order. He averred that the factors for assessing unreasonable delay weigh in his favor and asserted in part that the delay cannot be based on a "rule of reason," especially because the Board's website appeared to reflect that it had adjudicated legacy appeals up to a September 2019 docket date; that is, 8 months after Mr. Gray filed his Substantive Appeal. Petition at 8-12 (quoting *Martin v. O'Rourke*, 891 F.3d 1338, 1345 (Fed. Cir. 2018)). The Court referred this matter to a panel on September 19, 2022, and held oral argument on November 9, 2022. During oral argument, the Court posed several questions to the Secretary's counsel for which counsel either did not have a response or the responses were unclear.

Accordingly, the Court will order the Secretary to obtain a declaration from Deputy Vice Chairman Christopher A. Santoro, or another appropriate Board official, addressing the following questions:

1. The Freedom of Information Act response produced by the petitioner lists only those cases from August 2021 to August 2022 that were not advanced on the docket or remanded by the Court and were decided with a docket number *after* Mr. Gray's. Since December 2018, how many other cases, excluding withdrawal/death dismissals and vacatur, with VA Form 9s filed *after* December 24, 2018, were decided ahead of Mr. Gray, even though they were not advanced on the docket or remanded by the Court? In response, include the number and nature of the cases distributed ahead of Mr. Gray.
2. Provide the number of legacy appeals pending before the Board as of the close of business on November 21, 2022, December 2, 2022, and December 16, 2022.

3. When did VA receive the Substantive Appeal for the oldest case awaiting an original decision by the Board?
4. How many legacy appeals pending at the Board would be considered to be "ahead" of Mr. Gray in the queue?
 - a. In that regard, provide what number Mr. Gray is in the queue at the close of business on November 21, 2022, December 2, 2022, and December 16, 2022.
 - b. For each date, provide the number of cases ahead of Mr. Gray that are (1) advanced on the docket, (2) Court remands, (3) returned remands from the agency of original jurisdiction, and (4) original appeals.
5. Provide the number of original appeals distributed (assigned) to a Board member for the months of October and November 2022.
 - a. For each month, on what date did VA receive the oldest VA Form 9 and the latest VA Form 9?
 - b. Define "working docket range" and provide the range for each month.
6. Under the newly revised case distribution system, what percentage of cases distributed to a Board member are legacy appeals versus Appeals Modernization Act (AMA) appeals? In providing an answer, indicate the percentage of priority and nonpriority cases for each appeals system.
7. At oral argument, the Secretary stressed that he could not estimate when Mr. Gray will receive a decision on his appeal because, at any time, higher priority cases might be added to the queue in front of him. What steps, if any, does the Board take to ensure that nonpriority legacy appeals will not perpetually be prevented from receiving a decision as a result of higher priority cases?

Upon consideration of the foregoing, it is

ORDERED that, no later than December 21, 2022, the Secretary file with the Court a declaration or declarations addressing the matters set forth above.

DATED: November 18, 2022

PER CURIAM.

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)