In The
UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Marcel Verdooner, Appellant, v. Peter O'Rourke, Acting Secretary of Veterans Affairs, Appellee.	))))))))	No. 15-2775 **MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FULL COURT REVIEW**

Pursuant to Court's Rule 35(a), Appellant Marcel Verdooner moves the Court for reconsideration or, in the alternative, full Court review of its June 14, 2018, Order, dismissing Appellant's motion to recall mandate. The Court's resources are well invested in such action because the existing panel order:

- overlooked that Mr. Verdooner's due process violation is "a live controversy over which the Court may exercise jurisdiction" because he seeks relief for due process violations;
- did not apply the standard for reviewing claims of delay established in *Martin v. O'Rourke*;
- gives the Board a free pass to ignore Court orders; and;
- allows the Secretary to repeatedly avoid responsibility for even intentional constitutional and statutory violations by performing belated action(s) specifically intended to block this Court's review.

The Federal Circuit decision in *Martin* is relevant.

The Board's failures to comply with the Joint Motion for Remand (JMR) orders in this case directly caused (at least) a one year delay[1] in the resolution of Mr. Verdooner's constitutionally protected benefits claims. The

> Veterans Court will have the opportunity to determine, *under the TRAC standard*, whether the delay in each individual case was unreasonable. . . . If the Veterans Court, *employing the TRAC analysis*, finds a delay unreasonable (or not unreasonable), it need not separately analyze the due process claim based on that same delay.

Martin v. O'Rourke, No. 2017-1747, *et al*, (Fed. Cir. Jun. 7, 2018) at *20 (internal citations omitted). The Court, therefore, cannot properly dismiss Mr. Verdooner's motion to recall mandate until it determines whether the delay he asserted as a basis for the action is "reasonable" or "unreasonable" under the standard established in *Telecomms. Research & Action Ctr. v. FCC* ("TRAC"), 750 F.2d 70 (D.C. Cir. 1984). And, only if it finds the delay "reasonable" can the Court "not separately analyze the due process claim

[1] And counting, because as of the date of this submittal, Mr. Verdooner still awaits action on the remanded claims despite (1) his advanced age; (2) his declining health; and (3) the management attention to this matter. Indeed, Mr. Verdooner reasonably fears that the Secretary will now just ignore the Board's remand order, as the Board ignored the Court's remand order until the Court was poised to review the matter.

based on that same delay." The Court did not make a determination regarding the reasonableness of Mr. Verdooner's assertion of improper delay and, thus, overlooked this recent Federal Circuit precedent.

Moreover, a TRAC analysis fairly leads to the conclusion that the delay suffered by Mr. Verdooner was not reasonable because it caused solely by the Board's refusal to comply with the JMR orders until it faced a reckoning in this Court. Indeed, by the Board awarding Mr. Verdooner service connection in 2018 based on a 2013 medical report[2] the Board's belated May 23, 2018, decision conceded that Mr. Verdooner had a constitutional right to his long denied benefits since at least 2016. "Veteran's disability benefits are nondiscretionary, statutorily mandated benefits," and a veteran is entitled to such benefits if he or she satisfies the eligibility requirements. *Martin* at *5 (citing *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009)). The Board, however, refused to comply with the Court's repeated JMR orders until May 23, 2018: the Board's failure to comply with the Court's JMR orders, therefore, was a prejudicial due process violation.

[2] This medical report was in the record at the time of the initial June 2, 2016, JMR. *See* RBA 253-54.

Moreover, the Board again violated Mr. Verdooner's due process rights by contaminating the record with an April 6, 2017, DTRA dose reconstruction obtained in direct violation of the Court's JMR orders. *See Cushman*, 576 F.3d at 1300 ("improperly altered material evidence has been found to constitute a due process violations"). This violation materially altered the record adversely to Mr. Verdooner and resulted in the Board again remanding the matter for further development, which the Secretary had already conceded was futile, and which reasonably would have again resulted in a wrongful denial except for the Board's "miraculous" intervention in May 2018 under threat of Court action. As discussed below, Mr. Verdooner suffered a diminution of his benefits because of these violations.

Mr. Verdooner has standing to litigate his due process claim.

Mr. Verdooner's financial harm from the Board's denial of due process fairly provides a basis for the Court's continued jurisdiction. The Board's refusal to act on the "unique circumstances" of this case from June 2, 2016 (first JMR), until May 23, 2018 (Board's third remand decision) caused Mr. Verdooner to suffer the cost of living depreciation of his funds. This deprivation of tangible property is an injury-in-fact for which relief can and

should be awarded. *See, e.g., Rosinski v. Shulkin*, 29 Vet. App 183, 190 (2018) (expounding on the "irreducible constitutional minimum of standing").

The panel decision subverts *Cushman*.

The timing and substance of the May 23, 2018, Board order exposes that the Board's action was solely to avoid this Court's review of a due process violation. The Board's reasons and bases that service connection was appropriate "[b]ased on the unique circumstances of this case" is inscrutable evasion. BVA Dec. at 4. In any event, the Board did not identify any overlooked evidence or reconsidered legal analysis which underpinned the reversal of repeated contrary conclusions. Indeed, the only "new" information before the Board was the (third) repeated dose reconstruction which was, although highly questionable, was facially *adverse* to the claims.

Moreover, the Board's discussion substantively conceded that it had previously ignored the Court's JMR order. *Compare* BVA Order at 4 ("The Board finds consideration of the unique circumstances of the Veteran's exposure to ionizing radiation in service combined with *resolving any reasonable doubt in favor of the Veteran*" supports an award of service connection." (emphasis added)), *with* Jun. 2, 2016, JMR at 4 ("On remand, the Board should reconcile its [previous] . . . *appropriately applying the*

benefit of the doubt under 38 U.S.C. section 5107(b)."). The Board had failed to perform this same analysis on two separate earlier occasions, despite two JMRs, a motion for reconsideration, and several additional submittals by Mr. Verdooner to the Board. Yet, there was no explanation for why the 2018 decision – based on the record before the Board since at least 2013 – suddenly appeared mere days before oral argument and silence is not fairly viewed as anything other than concession given the record in this matter.

The Secretary lacks authority to veto claims of constitutional violation.

Mr. Verdooner respectfully submits that an award of "full benefits" of which the veteran was eligible all along, but which was wrongly delayed by the deprivation of due process, cannot fairly be characterized as relief for the violation itself. The panel's decision leaves *Cushman* little more than an historical marker on an abandoned building. As it now stands, a veteran's only means to obtain relief for even repeated, open, and notorious violations of due process is to "wait for a case in which [he or she] has a live controversy." Order at 2. Yet, no such live controversy will *ever* survive because the Secretary can – and has repeatedly shown the he will – kill any controversy, including claims of constitutional deprivation, by awarding the benefits sought before adjudication of the claim. This indistinguishable from

a "veto" over both the veteran's rights and the Court's jurisdiction. Veterans deserve more.

Indeed, *Cushman* requires more, much more. "Due process of law has been interpreted to include notice and a *fair* opportunity to be heard." *Cushman*, 576 F.3d at 1296 (emphasis added). It is antithetical to a "fair" opportunity to be heard on constitutional insults when the Secretary possesses an unreviewable veto over such claims. Thus, giving the Court's imprimatur to such behavior erects an insurmountable barrier to challenging even the most egregious violations of a veteran's due process rights. Therefore, to the extent that the panel's reading of precedent, Order at 1, n.3, prevents Mr. Verdooner from a fair opportunity to be heard on his due process claims because the Secretary can squash Court review of such a controversy, that reading or that precedent is inconsistent with the Due Process Clause and *Cushman*.

This conclusion is supported by recent analyses in which the Federal Circuit and judges of this Court have decried the Secretary's last minute shenanigans as enabling issues "to evade[] review" by mooting the underlying actions the "great majority of the time." *See, e.g., Cushman*, 855 F.3d at 1320-21 and n.5 (identifying cases). Again, to the extent that existing

precedent enables the Secretary or Board to insulate their behavior from Court review, Mr. Verdooner submits that such precedent is properly reviewed in light of subsequent developments.[3]

At the very least, Mr. Verdooner respectfully submits the Court to identify at least one means (e.g., petition?) for him to assert his constitutional claims as a "live" controversy under the standards in the Court's order, if not in the substantive appeal.

Respectfully submitted,

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[3] Such a revisiting could review the Secretary's well-documented history of repeatedly "mooting" likely unfavorable outcomes to determine if the exception to the mootness doctrine for actions that are capable of repetition yet evade review applies to this evasion strategy. *See, e.g., Ebanks v. Shulkin*, 877 F.3d 1037, 1038-39 (2017).