IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

JOSEPH R. FUNK II,	)	
	)	
Petitioner,	)	
	)	
v.	)	Vet. App. No. 20-1111
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Respondent.	)	

THE SECRETARY'S ANSWER TO PETITION
FOR EXTRAORDINARY RELIEF
AND RESPONSE TO THE COURT'S ORDER

Pursuant to U.S. Vet. App. R. 21(d) and this Court's February 25, 2020, Order, Respondent, Robert L. Wilkie, Secretary of Veterans Affairs, submits this response to the Court's Order and this answer to Petitioner's application for extraordinary relief in the nature of a writ of mandamus, which seeks assistance from the Court regarding the Veteran's claim of entitlement to a total disability due to individual unemployability (TDIU), including on an extraschedular basis, prior to February 7, 2011, and remanded by the Board of Veterans' Appeals (BVA), in April 2018. Counsel for Petitioner noted that he had reached out to VA on more than one occasion but did not receive a satisfactory response. Petition at 1-3.

The undersigned counsel for the Secretary established liaison with the appropriate officials at the Department of Veterans Affairs (VA)

Regional Office (RO), Detroit, MI, who reviewed the relevant entries and documents in the claims files for the Petitioner.

The Supervisory Veteran Service Representative (Coach) for the Detroit RO reviewed the records for Petitioner and provided a declaration addressing the facts and events relevant to his application for relief, as follows. (Exhibit).

1. I am the Supervisory Veteran Service Representative (Coach) at the Detroit Regional Office.

2. In response to the petition for extraordinary relief and the Court's Order, dated February 25, 2020, in U.S. Vet.App. No. 20-1111 regarding Joseph R. Funk, II, I declare the following is based on my personal knowledge:

- On April 19, 2018, the Board of Veterans Appeals (BVA) completed a decision. The Board granted the Petitioner entitlement a rating of 40%, but no higher, from May 31, 2012, forward, for a lumbar spine disability, and a separate 10% disability rating, but no higher, for lumbar radiculopathy of the left lower extremity. Importantly here, the Board remanded entitlement to a TDIU prior to February 7, 2011 under 38 C.F.R. § 4.16(b) to be referred to the appropriate official with VA Compensation Services for extra-schedular consideration.

- On August 8, 2018, a rating decision was completed to implement the evaluation of lumbosacral strain, which is currently 20% disabling, which was increased to 40% effective May 31, 2012. Service connection for left lower extremity radiculopathy was granted with an evaluation of 10% effective May 31, 2012.

- On August 11, 2018, an award to pay retro-active payment was completed.

- On October 5, 2018, the attorney at Goodman Allen and Donnelly was contacted to provide status of the remanded appeal.

- On January 16, 2019, a rating decision was completed to grant the evaluation of unspecified depressive disorder (previously rated as adjustment disorder with depressed mood), which is currently 30% disabling, is increased to 50% effective February 7, 2011.

- On January 17, 2019, the attorney was contacted by phone to provide the status of the decision and subsequent award action.

- On February 9, 2019, an award action was completed to release retroactive payment to the veteran.

- On June 24, 2019, the remanded claim was made ready for decision. On this date, there were 626 remands that were older and required decisions prior to this remand.

- On October 7, 2019, the remand was assigned to an RVSR decision maker for a C&P memo to Compensation Services per the remand instructions.

- On February 19, 2020, the TDIU memo was completed and uploaded in the VBMS as well as an email to Compensation Services to expedite the decision.

3. All required development for the remand issue of entitlement to TDIU, prior to February 7, 2011, has been completed and associated with the electronic claims folder.

Importantly, in this case, the Petitioner had concerns regarding his remanded claim for TDIU, including on an extraschedular basis. The claim has been processed by the agency of original jurisdiction (AOJ) and forwarded for review and action by the Director, Compensation Services. Thus, the matters of concern noted in the writ petition are being addressed by VA at the appropriate levels.

ARGUMENT

VA has taken appropriate action on Petitioner's remanded claim and, as such, Petitioner has not demonstrated a clear and indisputable right to the writ of mandamus he seeks. The Court has authority to issue extraordinary writs in aid of its jurisdiction pursuant to 28 U.S.C. § 1651(a). "The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Vargas-Gonzalez v. Principi*, 15 Vet.App. 222, 224-25 (2001) (per curiam).

Three conditions must be met before the Court can issue a writ: (1) The petitioner must demonstrate the lack of adequate alternative means to obtain the desired relief, thus ensuring that the writ is not used as a substitute for the appeals process; (2) the petitioner must demonstrate a clear and indisputable right to the writ; and (3) the Court must be convinced, given the circumstances, that issuance of the writ is warranted.

See Cheney v. U.S. Dist. Court, 542 U.S. 367, 380-81, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004).

Where, as here, when the basis of a petition is an allegation of unreasonable agency delay in processing an appeal, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has provided new guidance as to the criteria that the Court must consider in determining whether to issue a writ based on that alleged delay. The six factors are:

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find "any impropriety lurking behind agency lassitude" in order to hold that agency action is unreasonably delayed.

Martin v. O'Rourke, 891 F.3d 1338, 1344-45 (Fed. Cir. 2018) (quoting *Telecomms. Research & Action Ctr. v. FCC* ("*TRAC*"), 750 F.2d 70, 80 (D.C. Cir. 1984). Here, those factors cumulatively militate in favor of denying the petition.

As to the first factor, "rule of reason," VA's actions have not been unreasonable. Petitioner's claim for TDIU benefits, including on an

extraschedular basis, have been developed and processed by AOJ to the Director, Compensation Services, for consideration and a determination.

Addressing and developing those matters for adjudication are not ministerial acts. Rather, they require VA to assess the claims in response to Petitioner's allegations and contentions and to examine the evidence developed, secured, and submitted. While there has been some delay in processing of Petitioner's claims, as the Federal Circuit explained, "[i]t is reasonable that more complex and substantive agency actions take longer than purely ministerial ones." *Martin*, at 1345-46. Given the actions by VA in this case, this is not a situation of "complete inaction by [] VA," something the Federal Circuit has indicated is important in assessing the "rule of reason." *Id.*

The second factor, congressional timeliness, also strongly militates against the issuance of a writ. Congress has not provided a schedule for agency adjudication. In addition, Congress has created a system in which multiple steps, such as development through the duty to notify and assist, as well as preparation and issuance of a rating decision and SOC, are required. *See* 38 U.S.C. §§ 5103, 5103A, 7105. The fact that Congress has designed an adjudicatory system with such features supports a finding under *TRAC* that VA's actions are within the rule of reason and that the right to a writ has not been established.

Both the third and fifth *TRAC* factors focus on the interests of Petitioner and those interest are significant and weigh in his favor. While there has been some delay in processing Petitioner's claims, VA has acted on the pending issues.

When considering the fourth factor, the effect of granting a writ on other agency activities, it weighs against issuing a writ. If the Court were to grant the writ, Petitioner would essentially jump to the head of the line. *See Ebanks v. Shulkin*, 877 F.3d 10367, 1040 (Fed. Cir. 2017) (explaining that in certain circumstances granting individual relief to petitioners claiming unreasonable delay in "VA's first-come-first served queue. . . may result in no more than line-jumping without resolving the underlying problem of overall delay").

Petitioner's writ petition should not be construed in such a way as to bypass RO or Board procedures, in favor of a direct appeal to this Court. The All Writs Act is not a substitute for an administrative appeal. *See Bankers Life & Casualty Co.*, 346 U.S. at 384. As noted above, VA is acting to process his claims, and the effect of granting Petitioner's writ would have, on "other applicants who have filed claims for benefits", unintended consequences. *See Martin*, at 1347.

While the Court need not find impropriety behind agency delay in order to find any such delay unreasonable under the sixth factor, Petitioner

has failed to demonstrate that any delay here was so egregious as to warrant the issuance of a writ. Rather, the delay Petitioner experienced appears to be the product of an overburdened system, which does not justify the issuance of a writ. *Martin*, *Id*.

The AOJ has taken reasonable steps to process the claim for TDIU benefits and to forward the Petitioner's appeal for consideration. "The mere passage of time in reviewing a matter does not necessarily constitute the extraordinary circumstances requiring the Court to invoke its mandamus power. The delay involved, although frustrating to Petitioner, must be unreasonable before a Court will inject itself into an administrative agency's process." *Bullock v. Brown*, 7 Vet.App. 69 (1994); *Erspamer v. Derwinski*, 1 Vet.App. 3, 10 (1990) (noting that a reasonable delay may include delay of months or "occasionally a year or two," and that a delay of more than a decade was unreasonable).

To the extent that Petitioner may disagree with recent or future decisions regarding these claims, he will be provided with his appellate rights. Given the specific facts in this case and based on the information in VBMS and/or provided by officials at the AOJ, there is no indication that the potential jurisdiction of the Court will be frustrated. *United States v. Black,* 128 U.S. 40, 48 (1888) (The Court should refuse to invoke extraordinary powers where it is not shown that an official has refused to

act at all). Therefore, the Secretary contends that Petitioner has not demonstrated a clear and indisputable right to the writ. *See Cheney, supra.* The petition should be denied.

WHEREFORE, in this case, Petitioner had concerns which are now being actively addressed by VA at the appropriate levels. Thus, Petitioner has not demonstrated a compelling basis for the issuance of an extraordinary writ presently and, therefore, the Secretary respectfully asserts that the application for relief should be dismissed or denied.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Edward V. Cassidy, Jr.
EDWARD V. CASSIDY, JR.
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Counsel for Respondent

Department of Veterans Affairs

Memorandum

DECLARATION OF ATHERIAL MOORE

I, Atherial Moore, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury the following:

1. I am the Supervisory Veteran Service Representative (Coach) at the Detroit Regional Office.

2. In response to the petition for extraordinary relief and the Court's Order, dated February 25, 2020, in U.S. Vet.App. No. 20-1111 regarding Joseph R. Funk, II, I declare the following is based on my personal knowledge:

   a. On April 19, 2018, the Board of Veterans Appeals (BVA) completed a decision. The Board granted the Petitioner entitlement a rating of 40%, but no higher, from May 31, 2012, forward, for a lumbar spine disability, and a separate 10% disability rating, but no higher, for lumbar radiculopathy of the left lower extremity. Importantly here, the Board remanded entitlement to a TDIU prior to February 7, 2011 under 38 C.F.R. § 4.16(b) to be referred to the appropriate official with VA Compensation Services for extra-schedular consideration.

   b. On August 8, 2018, a rating decision was completed to implement the evaluation of lumbosacral strain, which is currently 20% disabling, which was increased to 40% effective May 31, 2012. Service connection for left lower extremity radiculopathy was granted with an evaluation of 10% effective May 31, 2012.

   c. On August 11, 2018, an award to pay retro-active payment was completed.

   d. On October 5, 2018, the attorney at Goodman Allen and Donnelly was contacted to provide status of the remanded appeal.

   e. On January 16, 2019, a rating decision was completed to grant the evaluation of unspecified depressive disorder (previously rated as adjustment disorder with depressed mood), which is currently 30% disabling, is increased to 50% effective February 7, 2011.

f. On January 17, 2019, the attorney was contacted by phone to provide the status of the decision and subsequent award action.

g. On February 9, 2019, an award action was completed to release retroactive payment to the veteran.

h. On June 24, 2019, the remanded claim was made ready for decision. On this date, there were 626 remands that were older and required decisions prior to this remand.

i. On October 7, 2019, the remand was assigned to an RVSR decision maker for a C&P memo to Compensation Services per the remand instructions.

j. On February 19, 2020, the TDIU memo was completed and uploaded in the VBMS as well as an email to Compensation Services to expedite the decision.

3. All required development for the remand issue of entitlement to TDIU, prior to February 7, 2011, has been completed and associated with the electronic claims folder.

I certify, under penalty of perjury under the laws of the United States, that the foregoing is true and correct.

Executed on February 26, 2020

Moore, Atherial D.

Digitally signed by Moore, Atherial D.
Date: 2020.02.26 09:41:51 -05'00'