

**IN THE UNITED STATES  
COURT OF APPEALS FOR VETERANS CLAIMS**

Veterans Legal Advocacy Group,	)	
Petitioner,	)	
	)	
v.	)	Docket No. 20-2346
	)	
Robert Wilkie,	)	
Secretary of Veterans Affairs,	)	
Respondent.	)	

**Response to the Court’s May 20, 2020 Order**

Veterans Legal Advocacy Group (VetLAG) petitioned the Court to order the VA to stop scheduling in-person exams during the coronavirus pandemic. Before responding, the Secretary assured VetLAG the risky exams stopped. So we moved to have the petition dismissed. But before the Court dismissed, we discovered the VA was still providing risky exams, so it moved to rescind its dismissal motion and to resume litigation. The Court obliged and ordered the Secretary to respond. He responded that the newly discovered exams were one-off mistakes and promised the VA resolved the problem. The Court dismissed the petition as moot based on the Secretary’s representations.<sup>1</sup> But it was not moot.

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<sup>1</sup> April 28, 2020 Order.

We started receiving phone calls from veterans’ attorneys, unrepresented veterans, and its clients that VA was still scheduling veterans for in-person exams. A whistleblower from QTC contacted us with an internal email telling QTC schedulers to “blind schedule” veterans for exams in southern states starting in June. A veteran contacted VetLAG to tell us that he missed an exam during the pandemic, and the VA denied his PTSD claim solely because he missed the in-person exam. VetLAG moved the Court to “reconsider ... because the VA—contrary to what it told this Court on April 27—continues to schedule veterans for in-person exams [and] even denied a veteran’s claim for not showing up to an exam.”<sup>2</sup> In response, the Court ordered VetLAG to “file a supplemental memorandum of law addressing [1] the petitioner’s standing to seek and [2] the Court’s jurisdiction to provide the relief requested in the petition for extraordinary relief.”<sup>3</sup>

### **Veterans Legal Advocacy Group Has Standing**

VetLAG has organizational standing to rectify its injuries, injuries to its members, and injuries to its clients caused by the VA. An organization can establish standing to sue in its own right if the organization has suffered a “concrete and demonstrable injury to the organization’s activities—with [a]

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<sup>2</sup> May 18, 2020 Motion.

<sup>3</sup> May 20, 2020 Order.

consequent drain on the organization's resources – constitut[ing] ... more than simply a setback to the organization's abstract social interests.”<sup>4</sup>

Even if VetLAG itself was not injured, it has standing on behalf of its members.<sup>5</sup> In *Hunt v. Washington State Apple Advertising Commission*, the Supreme Court held an organization has standing when:

- 1) its members would otherwise have standing;
- 2) the interests it seeks to protect are germane to the organization's purpose; and
- 3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.<sup>6</sup>

VetLAG represents its clients as a firm. When a client hires us, she hires “the attorneys of Veterans Legal Advocacy Group ... to represent me in relation to my appeal before the Court of Appeals for Veterans Claims.”<sup>7</sup> VetLAG is five veterans' law attorneys and a paralegal. There are not any stakeholders or other parts of the business that do not represent veteran clients. Veterans Legal Advocacy Group is shorthand for Harold Hoffman, Evan Snipes, Meghan Gentile, Britney Sutton, and Max Farris.

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<sup>4</sup> *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

<sup>5</sup> *United Food and Commercial Workers Union v. Brown Group, Inc.*, 517 U.S. 544, 552 (1996).

<sup>6</sup> 432 U.S. 333, 343 (1977).

<sup>7</sup> See e.g., fee agreements in CAVC docket numbers 20-220, 20-820, 20-308, 19-9098, 19-9091.

We petitioned the Court to protect VetLAG’s and our individual interests in representing veterans and to protect our clients’ interests in getting VA benefits in the fullest amount in the quickest time. The risky exams—and denials when veterans do not show up to risky exams—diverted resources away from those shared goals: We spent time advising clients whether they should attend exams that the VA should never have scheduled and then on appeals for claims the VA should never have denied. We could use those resources to help additional clients.

The harm is not limited to wasted time. Veterans lose benefits because—under the AMA—a new exam to make up for a missed exam would be under a supplemental claim with a later effective date, causing the veteran to lose benefits between her original claim and her supplemental claim. And VetLAG would lose fees, and we would have reduced salary.

VetLAG’s mission to “ensure that veterans and their family members receive the Veterans Affairs benefits they are entitled to by offering affordable legal representation in front of the Department of Veterans Affairs and the United States Courts” is unattainable if the VA forces our clients to choose between their safety and benefits. A dead veteran does not get the benefits she is entitled to.

Finally, the petition to stop the VA from scheduling risky exams and denying benefits when a veteran decides not to risk her health for an in-person exam does

not require any of VetLAG’s attorneys to participate individually. The facts, injuries, and redress between the attorneys and their clients are the same.

VetLAG is injured. It stands in the place of its attorneys who share in the injury. And it stands in the place of its attorneys that are asserting their clients’ rights because we are best suited to protect our clients’ interests.

**I. VetLAG has third-party standing because it is in a better position to assert its injured clients’ rights.**

This Court recently held in *Rosinski v. Wilkie*<sup>8</sup> that attorneys can have third-party standing for their clients. The Supreme Court in *Lujan v. Defenders of Wildlife*<sup>9</sup> provided a three-part test for direct standing:

- 1) The plaintiff must have suffered an actual and concrete “injury in fact.”
- 2) There must be a causal connection between the injury and the conduct.
- 3) It must be “likely” that the injury will be “redressed by a favorable decision.”

VetLAG’s clients have direct standing. At least one veteran who approached us—and whom VetLAG discussed in its motion to reconsider—was injured in fact when the VA denied his claim.<sup>10</sup> His injury was concrete and particularized; caused by the VA’s refusal to stop scheduling in-person exams and denying claims

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<sup>8</sup> 31 Vet. App. 1 (2019).

<sup>9</sup> 504 U.S. 555, 560 (1992).

<sup>10</sup> See *Lujan*, 504 U.S. at 560.

despite its assurances, and this Court’s action would redress the veteran’s injury.<sup>11</sup> Because the VA has continued to schedule risky exams for benefits—and because more veterans have contacted us with the same problem—there are likely many others.

In addition to direct standing, a third party will have standing in the place of the injured party “where it is necessary to grant a third-party standing to assert the rights of another.”<sup>12</sup> Third-party standing exists where: 1) “The party asserting the right [must have] a ‘close’ relationship with the person who possesses the right”; and 2) the party asserting the right must show there is a ‘hindrance’ to the possessor’s ability to protect his own interests.”<sup>13</sup>

As attorneys, we have close relationships with the veterans it serves whose benefits are at stake and currently threatened by the VA’s practices.<sup>14</sup> The fact that VetLAG brought this petition as a third party instead of in the names of the veterans whom the VA has injured has no bearing on standing. In *Rosinski*, this Court held that “[i]t is of no moment that the petitioner has not identified a *specific* client. Indeed, the fact that he is asserting third-party standing on behalf

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<sup>11</sup> *Id.*

<sup>12</sup> *Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004).

<sup>13</sup> *Rosinski*, 31 Vet. App. at 6, citing *Kowalski* at 130.

<sup>14</sup> *See Rosinski*, 31 Vet. App. at 10 (“[B]ecause the restrictions placed on the petitioner by the Secretary’s policy affect the rights of his clients, and because the petitioner has existing attorney-client relationships with those clients, the Court holds he has a sufficiently close relationship to warrant third-party standing”).

of his clients in the aggregate does not change the fact that those clients are real, not hypothetical, and that they possess rights at stake in this dispute.”<sup>15</sup>

We are in a better place to assert its clients’ rights than our clients. Not only is VetLAG comprised of practiced attorneys in the field of veterans’ rights, but it has access to more information about the VA’s practices than its clients. For example, because of the email we received from a QTC whistleblower about its new “blind scheduling” procedures for in-person exams, some clients do not know their benefits are at risk. But VetLAG’s attorneys are in touch with VA employees, a QTC employee, reporters, other attorneys, and many veterans. VetLAG is in a better position to assert its clients’ rights because it knows about threats to those rights before its clients do and it is too late. Plus, we are not susceptible to the VA’s and exam schedulers’ coercive tactics to get a veteran to attend a risky exam.

**II. VetLAG has direct standing because it now has to work more for the same fees by now fighting over exam rescheduling and claims denied when a client does not show for an exam.**

VetLAG and its attorneys have a right under 38 U.S.C. § 5904(a) to represent clients throughout the claims process.<sup>16</sup> VetLAG’s attorneys earn fees under 38 C.F.R. § 14.636 for agency work and 28 U.S.C. § 2412 for successful appeals in the U.S. courts. We have spent more than 100 hours advising, litigating, and

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<sup>15</sup> *Rosinski*, 31 Vet. App. at 10.

<sup>16</sup> *Rosinski*, 31 Vet. App. at 8.

appearing in media to protect our clients from the VA's contractors. Most of the time we spent was on tasks outside of VetLAG's ordinary practices. Because of the work put in to protect its clients' interests, VetLAG has accepted at least five fewer clients so far. That cost VetLAG approximately \$20,621. The harm is real.

### **The Veterans Court Has Jurisdiction to Provide the Relief Requested**

This Court may issue a writ only to aid its jurisdiction when it would have jurisdiction on direct appeal.<sup>17</sup> The Court has jurisdiction to review Board decisions,<sup>18</sup> which can cover “all questions in a manner which under section 511(a) of this title is subject to decision by the Secretary.”<sup>19</sup> “The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans.”<sup>20</sup> The Court has jurisdiction to review Board decisions the deny disability benefits under 38 U.S.C. §§ 511A, 5104B, 5104C, 7104 and 7105.<sup>21</sup> And the Court has jurisdiction to compel VA to pay attorney fees.<sup>22</sup>

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<sup>17</sup> 28 U.S.C. § 1651(a); *Bates v. Nicholson*, 398 F.3d 1355, 1359 (Fed. Cir. 2005); *see also Cox v. West*, 149 F.3d 1360, 1363 (Fed. Cir. 1998).

<sup>18</sup> 38 U.S.C. § 7252(a).

<sup>19</sup> 38 U.S.C. § 7104(a).

<sup>20</sup> 38 U.S.C. § 511(a).

<sup>21</sup> 38 U.S.C. § 7252.

<sup>22</sup> 38 U.S.C. § 5904(d); 38 C.F.R. § 14.636; *Cox*, 149 F.3d at 1364–65.



The VA's actions directly affect our clients' benefits because benefits must be denied under 38 C.F.R. §§ 3.327 and 3.655 when clients miss an exam. The VA has denied at least one client's claim for missing an exam during the pandemic. His rating decision is appealable to the Board under 38 U.S.C. § 7105. The Board's decision would be appealable to this Court under 38 U.S.C. § 7252.

The Court also has jurisdiction because the Board has jurisdiction over VA decisions on attorney fees. This Court has held it has jurisdiction to issue a writ when the VA's acts affect attorney fees.<sup>23</sup> Here they are. Under the AMA, when the VA denies our clients claim for missing an exam, the client can only choose the supplemental claim lane because there is no duty to assist violation. So a rescheduled exam will be new evidence that will set the effective date.

### **Conclusion**

VetLAG has direct and third-party standing because the VA's practices directly injure VetLAG, its members, and its clients in distinct but concrete ways. This Court has jurisdiction over VetLAG's petition. The VA's practices affect this Court's potential jurisdiction and frustrate the Court's ability to exercise its jurisdiction in the future because many veterans whose claims the VA will deny

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<sup>23</sup> *Cox*, 149 F.3d at 1364–65; *Rosinski*, 31 Vet. App. at 6.

will lose their effective dates and have no right to appeal if they die before their appeal reaches the Board.

Most importantly, the VA is endangering veterans and has broken its promise to stop. This Court should order VA to stop scheduling in-person exams—directly or through its contractors—and stop denying claims based on no-shows at in-person exams.

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Submitted

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