

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 21-4168

J. RONI FREUND AND MARY S. MATHEWSON,

PETITIONERS,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

RESPONDENT.

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

ORDER

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

On June 21, 2021, J. Roni Freund and Mary S. Mathewson jointly petitioned the Court seeking extraordinary relief and class action certification. Petitioners contend that their legacy appeals were inappropriately closed due to an automated function in the Veterans Appeals Control and Locator System (VACOLS). They seek on behalf of themselves and the proposed class that the Court order VA to confer with petitioners as to a method for identifying and notifying claimants with inappropriately closed appeals and reactivating those appeals.¹ The Court submitted the case to a panel on June 29, 2021.

Petitioners both filed a timely VA Form 9 (Substantive Appeal) for their respective legacy appeals² which VACOLS did not capture. Subsequently, their appeals were inappropriately closed in VACOLS due to what the Secretary characterizes as "human error" by which the Substantive Appeals were not "properly identified . . . and entered into [the Veterans Benefits Management System (VBMS)] and VACOLS."³ Petitioners' appeals were reactivated in July 2021.⁴ The

¹ Request for Class Certification and Class Action, at 28-29.

² Ms. Freund filed a Substantive Appeal for her claim for entitlement to service connection for PTSD on March 13, 2020. Petition at 15. Prior to his death, Mrs. Mathewson's late husband filed a Substantive Appeal for his claim for Special Monthly Compensation based on aid and attendance on December 4, 2017, an appeal into which Mrs. Mathewson has been substituted. Petition at 16.

³ Secretary's Response to the Court's November 29, 2021, Order, at 12; *see* Oral Argument (O.A.) at 39:55-40:27, *Freund v. McDonough*, U.S. Vet. App. No. 21-4168 (oral argument held February 10, 2022), <http://www.uscourts.cavc.gov/documents/Freund.MP3>.

⁴ Secretary's Response to Petition at 2-3.

Secretary has asserted that the individual petition, as well as the request for class certification, is moot because VA has provided or is providing the relief sought.⁵

Based on the Secretary's initial responses to the petition and request for class action, it was unclear to the Court what actions the Secretary had taken to identify other cases, aside from petitioners', where legacy appeals were prematurely closed. On November 29, 2021, we ordered the Secretary to provide additional information and a more detailed explanation concerning his alleged identification of cases that were prematurely closed despite a timely Substantive Appeal being filed. We specifically asked the Secretary to explain what he meant when he stated, in his initial response, that he has been "proactively" working to identify such appeals.⁶

In response to the Court's November 2021 order, the Secretary stated that VA "proactively and successfully identifies VA Form 9s and activates appeals in VACOLS if they are prematurely closed" through various procedures implemented within VACOLS and VBMS.⁷ The Secretary explained that since the findings of a March 2018 Office of Inspector General (OIG) report, VA has amended its procedures to improve its identification and tracking of timely filed Substantive Appeals. First, the Secretary laid out the end product framework which he implemented during the investigation that led to the March 2018 OIG report.⁸ This revised framework was effective May 15, 2017.⁹ VA established end product and claim labels schemes to track and monitor Legacy appeals through both VACOLS and VBMS.¹⁰ Second, the Secretary described the initial mail intake process in which VA identifies Substantive Appeals and updates VACOLS and VBMS thereafter,¹¹ noting the different possible reasons an appeal may be improperly closed despite a timely Substantive Appeal submission.¹² Third, and distinct from the initial mail intake process, the Secretary explained that a multiple-review process takes place at certain points of VA claims adjudication: (1) a veterans service representative reviews a claims folder when developing evidence, (2) a rating veterans service representative reviews the claims folder when rendering a decision, and (3) another veterans service representative reviews the claims folder when

⁵ *Id.* at 1; Secretary's Response to Request for Class Action, at 10-11.

⁶ *See, e.g.*, Secretary's Response to Petition for Extraordinary Relief and Court Order Dated July 6, 2021, at 19 ("the Secretary has been proactively and successfully working to identify cases where an appeal was prematurely closed despite a timely VA Form 9 having been filed, and to reactive those appeals"); *see also* Secretary's Response to Request for Class Action, at 10 ("the Secretary already has an established process in place for proactively and successfully identifying prematurely closed appeals and reactivating those appeals"), 13 ("the Secretary has been proactive in correcting each case where an appeal was prematurely closed").

⁷ Secretary's Response to the Court's November 29, 2021, Order, at 12.

⁸ *Id.* at 7.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 8-9.

¹² *See id.* at 9-10. The Secretary asserts that delays in processing a timely Form 9 may be due to: submission of the Form 9 close to the 60-day expiration period for perfecting an appeal, delays in the physical mailing of a timely post-marked Form 9s, VA Form 9 being sent to the wrong VA office before being rerouted to the correct VA office, and human error.

authorizing an award.¹³ Finally, the Secretary explained that VA routinely administers monthly and annual national-level quality control reviews of a sample size of claims to identify errors within those individual claims.¹⁴ The Secretary stated that these procedures constitute the steps VA has taken to "proactively and successfully [identify] VA Form 9s and [reactivate] appeals in VACOLS if they are prematurely closed."¹⁵

The Court held oral argument on February 10, 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. We will briefly catalog these points from oral argument to put this order into context.

First, the Court asked the Secretary's counsel to clarify VA's "proactive" actions concerning identification of inappropriately closed Substantive Appeals.¹⁶ He stated that "the term 'proactively' in [his] initial response" refers to "VA's normal operating procedures" to identify Substantive Appeals that were previously filed with which a prematurely closed appeal is associated.¹⁷ Then, the Secretary's counsel answered in the affirmative that VA was doing something independent of addressing this petition to identify cases in which claimants had their appeals inappropriately closed.¹⁸ However, when asked again whether VA has been investigating whether other appeals were inappropriately closed and had not been reactivated, the Secretary's counsel responded that VA does not have procedures "for the sole purpose of identifying, if in a claims file, a missed VA Form 9 is present."¹⁹ The Secretary's counsel stated that VA's intake procedures are designed to ensure that appeals are not deactivated in error and that the Agency reactivates appeals on an ongoing basis when it comes to VA's attention that an appeal has been inappropriately closed.²⁰ After all of this, however, it is still unclear whether the Secretary is currently doing or plans to do anything with respect to the reactivation of prematurely closed appeals that could legitimately be termed "proactive."²¹

Next, during oral argument, the Court referenced a statement in the March 2018 OIG report concerning VA's anticipated future actions concerning the issues the OIG had identified. Specifically, the Court asked the Secretary's counsel to explain, with respect to VA's response to a recommendation by the OIG concerning error reduction in closing VACOLS records, what VA meant by the language "[VA] [was] in the process of updating the pre-site visit protocol to include

¹³ *Id.* at 11.

¹⁴ *Id.* at 12.

¹⁵ *Id.*

¹⁶ O.A. at 43:37-45:40.

¹⁷ O.A. at 47:47-48:19.

¹⁸ O.A. at 48:59-50:19.

¹⁹ O.A. at 52:54-53:22.

²⁰ O.A. at 59:26-59:49.

²¹ "Proactive" is "acting in anticipation of future problems, needs, or changes." MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/proactive> (last visited March 1, 2022).

a review of closed appeals."²² The Secretary's counsel forthrightly responded that he did not know what the quoted statement referred to,²³ but he offered to provide a supplemental response to explain VA's efforts concerning this portion of the March 2018 OIG report.²⁴ Relatedly, when asked whether VA has done any research to determine the potential number of people whose appeals were erroneously closed, the Secretary's counsel responded that VA has not done so.²⁵

Finally, the Secretary's counsel asserted that the "vast majority" of closed legacy appeals are properly closed because a Substantive Appeal was not received.²⁶ Counsel did not explain the bases for this statement given that VA has not attempted to identify the appeals that have been closed.²⁷ The Court is unsure how VA can assuredly say that the vast majority of closed legacy appeals is due to a lack of filing a Substantive Appeal if, combined with VA's lack of monitoring missed Substantive Appeals, VA has not determined the quantity or scope of appeals that were improperly closed and remain closed.²⁸

In light of the above, the Court requires supplemental action from the Secretary. The Secretary must obtain an affidavit or affidavit executed by the appropriate VA official(s): the VA General Counsel, Mr. Richard A. Sauber and/or the Acting Under Secretary for Benefits, Mr. Thomas J. Murphy, addressing these matters:

1. Other than the estimates the Secretary provided in his previous briefing,²⁹ what is the number of appeals, as of January 31, 2022, that remained closed in VACOLS and that had been closed since May 15, 2017, (i.e., the effective date in which VA revised its procedures by implementing a new end product structure according to the March 2018 OIG report) due to the alleged failure to file a Substantive Appeal, regardless of whether such an appeal ultimately is determined to be appropriately or inappropriately closed?
2. Of the appeals identified in response to Question 1 above, how many of those appeals do not show *any* activity associated with the claims file after the date of closure of the appeal?
3. Has VA sent a notice letter to either or both groups identified in response to Questions 1 and 2 above? If not, why is the Secretary contending that the request for class action is

²² O.A. at 53:22-53:50. *See* Secretary's Response to the Court's November 29, 2021, Order, Exhibit 1 (March 2018 OIG report), at 37 ("[OIG's] Recommendation 3: . . . implement a plan to amend Veterans Benefits Administration's procedures for closing appeals records to prevent appeals being closed prematurely").

²³ O.A. at 53:51-53:56.

²⁴ O.A. at 55:00-55:12.

²⁵ O.A. at 55:46-56:22.

²⁶ O.A. at 1:01:34-1:01:42.

²⁷ O.A. at 1:00:27-1:00:48.

²⁸ O.A. at 55:47-56:22.

²⁹ Secretary's Response to Request for Class Action, at 17 (the Secretary estimates that the number of "remaining prematurely closed appeals . . . [is] declining to zero or near zero").

moot if VA has not taken steps to notify claimants that their appeals may have been prematurely closed?

4. What is the status of petitioners' Freedom of Information Act requests submitted to VA on December 10, 2020, concerning the calculation of the proposed class size?
5. In reference to Recommendation #3 of the March 2018 OIG report, VA explicitly stated that, with respect to error reduction in prematurely closed appeals through VACOLS, it "[was] in the process of updating the pre-site visit protocol, to include a review of closed appeals records."³⁰ Other than the end product framework referenced in VA's response to Recommendation #3 and the procedures the Secretary previously provided in his briefings,³¹ precisely what programs, procedures, or other actions has VA implemented regarding reviewing closed appeals records based on VA's response to Recommendation #3 in the March 2018 OIG report? The response to this question must specifically address what is referred to as "a review of closed appeals records" in the OIG report.
6. In light of the petition and given the Secretary's knowledge of the appeals closure errors in this case,³² has the Secretary undertaken any actions, other than the procedures the Secretary provided previously in both his initial and supplemental briefings, to identify legacy appeals that have been inappropriately closed due to the failure to file a Substantive Appeal? Describe those actions in detail, including whether they were implemented before or after oral argument in this matter. If the Secretary has undertaken no actions to identify such appeals, explain why he is contending that the request for class action is moot.³³ If he has undertaken any action to identify such appeals, what remedial plans does the Secretary have to address the issue concerning the inappropriately closed appeals of the identified claimants?

Upon consideration of the foregoing, it is

ORDERED that, no later than 30 days after the date of this order, the Secretary file with the Court an affidavit or affidavits addressing the matters set forth above.

DATED: March 10, 2022

PER CURIAM.

Copies to:

John D. Niles, Esq.

VA General Counsel (027)

³⁰ Secretary's Response to the Court's November 29, 2021, Order, Exhibit 1 (March 2018 OIG report), at 37.

³¹ See *supra* notes 9-13.

³² O.A. at 1:01:45-1:02:47.

³³ Secretary's Response to Petition, at 1; Secretary's Response to Class Request for Class Action at 3, 5-7, 9, 11; O.A. at 39:30-39:39.