

**J. RONI FREUND AND
MARY S. MATHEWSON,**

V.

Respondent.

¹ The Secretary notes that, in its March 10, 2022, Order, the Court listed Mr. Thomas J. Murphy's title as Acting Under Secretary for Benefits; however, his current title is the Director, Northeast District, Performing the Delegable Duties of the Under Secretary for Benefits, VBA.

many appeals do not show any activity associated with the claims file after the date of closure of the appeal; (3) whether the Department of Veterans Affairs (VA) has sent a notice letter to either or both groups identified in response to Questions 1 and 2 and, if not, why the Secretary contends that the request for class action (RCA) is moot; (4) what is the status of Petitioners' Freedom of Information Act (FOIA) request submitted to VA on December 10, 2020; (5) what programs, procedures, or other actions were taken by VA when it reported that "it '[was] in the process of updating the pre-site visit protocol, to include a review of closed appeals records'" in response to Recommendation #3 of the March 2018 report of the Office of Inspector General (OIG); and (6) whether the Secretary has undertaken any actions, other than those already reported to the Court, to include future remedial measures, to identify legacy appeals that have been improperly closed due to a failure to file a Substantive Appeal and to detail any such actions, and, if not, why the Secretary contends that the RCA is moot.

Attached to this supplemental memorandum is an affidavit executed by Mr. Murphy and the response by the Board of Veterans' Appeals (Board) to Petitioners' December 10, 2020, FOIA request. Exhibit 1; Exhibit 2.

- A. For the period between May 15, 2017, and January 31, 2022, VBA has identified those appeals that were closed in VACOLS for failure to file a Substantive Appeal, has identified those appeals that improperly remain closed despite a timely Substantive Appeal being filed, established a plan to reactivate those appeals, and established a plan to conduct a special review of subsequent closures of appeals in VACOLS for failure to file a Substantive Appeal to ensure accuracy

In response to Question 1 of the Court's Order, for the period between May 15, 2017, and January 31, 2022, VBA has identified 253,913 legacy-appeals records that were closed in VACOLS and remain closed for failure to file a timely Substantive Appeal. Exhibit 1. In response to Question 2 of the Court's Order, VBA has determined that, of the closed legacy-appeals records identified in response to Question 1, 74,291 of those appeals show no subsequent activity in the claims file. *Id.*

In response to Question 3, for those appeals identified in response to Questions 1 and 2, when the Statement of the Case (SOC) is sent to claimants, the accompanying notice letter indicates:

You must file your appeal with this office within 60 days from the date of this letter or within the remainder, if any, of the one-year period from the date of the letter notifying you of the action that you have appealed. **If we do not hear from you within this period, we will close your case.**

Id.; Exhibit 3 (emphasis in original). For the period between May 15, 2017, and January 31, 2022, VA issued approximately 10,000 determinations that a Substantive Appeal was not timely, a determination that is appealable to the Board; however, notice is not provided when an appeal is closed for failure to file a Substantive Appeal, other than the notice provided in the SOC notice letter.

Exhibit 1; 38 C.F.R. §§ 19.32, 19.34. Additionally, while VA does not provide notice when an appeal that was prematurely closed is reactivated, claimants are provided notice of subsequent steps in the appeals process, to include when the appeal is placed on the Board's docket. Exhibit 1.

While VA does not provide notice to claimants when an appeal is closed due to a failure to file a Substantive Appeal beyond the notice provided in the SOC notice letter, the Court should still find the RCA is moot because VBA has undertaken a review of the 253,913 closed appeals identified in response to Question 1 using multiple databases, identified those appeals for which a timely Substantive Appeal was filed but not acknowledged, and has a specific plan to reactivate those appeals over the course of this fiscal year. Exhibit 1. As discussed further below, in response to Question 6, the RCA is moot because VA has undertaken actions to address and resolve the harm identified by Petitioners, *i.e.*, that legacy appeals have been erroneously closed in VACOLS and remain closed despite a timely filed Substantive Appeal. *Id.*; RCA at 7-8. While VA's efforts thus far and the planned future efforts to address the harm identified by Petitioners does not include sending notice to the claimants of the appeals identified in response to Questions 1 and 2, such notice would be superfluous. Rather than sending notices to claimants and soliciting responses from those who believe their appeals were improperly closed, VA has undertaken a review of those appeals identified in response to Questions 1 and 2, determined the appeals that

were improperly closed despite the filing of a timely Substantive Appeal, and established a plan to reactivate such appeals. Exhibit 1.

In response to Question 6, following oral argument before the Court on February 10, 2022, on March 18, 2022, VBA began a focused review of legacy appeals that had been closed for failure to file a Substantive Appeal. *Id.* VBA analyzed these appeals by using data mining techniques that compared historic appeals tracking data from VACOLS and the Veterans Benefits Management System (VBMS) with a third source of information in VBMS that tracks document source and timeliness of action in these systems. *Id.* This data mining resulted in a population of approximately 5,500 legacy appeals that showed possible receipt of a timely Substantive Appeal between May 15, 2017, and January 31, 2022. *Id.* VBA conducted a manual quality review of each of these approximately 5,500 appeals identified, resulting in the identification of 3,806 closed appeals for which a timely Substantive Appeal was received. *Id.* For these improperly closed appeals, VBA will reactivate the legacy appeals records in VACOLS and take the appropriate next steps, to include notifying each appellant that their appeal was added to the Board's docket. *Id.* VBA anticipates that these actions will be completed no later than the end of this fiscal year. *Id.*

In addition to the review VBA has already conducted for those appeals closed in VACOLS between May 15, 2017, and January 31, 2022, VBA plans to conduct a special focused review each month of appeals closed in VACOLS to ensure the accuracy of closed appeals for failure to timely file a Substantive

Appeal, beginning May 2022. *Id.* Additionally, in May 2022, VBA will also review closed appeals in VACOLS for the months of February, March, and April 2022. *Id.* The RCA is moot because VA has reviewed all appeals closed between May 15, 2017, and January 31, 2022, for failure to file a Substantive Appeal, identified those appeals that were improperly closed in VACOLS, established plans to reactivate those appeals during this fiscal year, and established plans to conduct monthly, special reviews to ensure the accuracy of legacy appeals records closed in VACOLS for failure to file a timely Substantive Appeal.

B. In response to Recommendation #3 in the March 2018 OIG report, VBA revised its pre-site visit protocol to include information gathering and review with the goal of better ensuring that legacy appeals were not prematurely closed

In response to Question 5, VBA concurred with Recommendation #3 in the March 2018 OIG report and implemented new procedures to prevent appeals from being closed prematurely. *Id.* Part of these new procedures included implementation of a new end-product framework designed to better capture each stage of an appeal, which includes tracking when a Substantive Appeal is received. *Id.* VBA made the tracking of this end-product framework mandatory, whereas previously it was optional in some stages. *Id.* VBA also updated pre-site visit protocols, which are procedures used in preparation for annual site visits at Decision Review Operation Centers (DROC). *Id.* At the site visits, the Office of Administrative Review (OAR) conducts a review of the DROC that includes reviewing and assessing compliance of legacy appeals records in VACOLS. *Id.*

In preparation for the site visits, OAR solicits extensive documentation of workload management and training; reviews sample cases to assess the DROC's compliance with established policies and procedures, including the mandatory tracking of the new end-product framework; and reviews closed appeals records to identify any discrepancies between the appeals processing systems, VBMS and VACOLS, regarding an appeals closed status. *Id.* After a site visit is completed, OAR prepares a report that documents any identified error trends, provides recommendations for improvement, and provides recommendations for remedying identified errors. *Id.*

VA's statement that it "[was] in the process of updating the pre-site visit protocol, to include a review of closed appeals records" in response to Recommendation #3 of the March 2018 OIG report refers to the updated information gathering and review procedures undertaken prior to an annual site visit of a DROC. *Id.* As noted above, as part of the pre-site visit procedures, OAR gathers information regarding workload and training, reviews sample cases, and reviews closed appeals to identify inconsistencies regarding their status between appeal processing systems. *Id.* Reviewing closed appeals records to ensure the accuracy of appeal processing systems was made a review goal. *Id.* One of the purposes of the revised pre-site visit protocols was to better ensure that legacy appeals were not prematurely closed and to aid OAR in conducting site visits of DROCs for this purpose. *Id.*

C. On March 21, 2022, the Board issued a response to Petitioners' December 10, 2022, FOIA request

In response to Question 4, on March 21, 2022, the Board issued a response to Petitioners' December 10, 2020, FOIA request.² Exhibit 2. On March 24, 2022, Petitioners filed a notice with this Court pursuant to *Solze v. Shinseki*, 26 Vet.App. 299, 301 (2013) regarding the Board's March 21, 2022, response to the FOIA request (*Solze* notice). In the *Solze* notice, Petitioners indicated that "[t]he FOIA Response contains all thirteen fields of information requested [in the December 10, 2020, FOIA request], for what Petitioners' counsel has no current reason to doubt are all of the appeals that VACOLS identifies as being within the scope of the FOIA request's criteria." *Solze* notice at 2.

WHEREFORE, Respondent, the Secretary of Veterans Affairs, responds to the Court's March 10, 2022, Order.

Respectfully submitted,

RICHARD A. SAUBER
General Counsel

MARY ANN FLYNN
Chief Counsel

² The Secretary notes that in addition to the narrative response issued by the Board, which is attached as Exhibit 2, the Board also sent several thousands of pages of an Excel spreadsheet detailing the information requested in Petitioners' December 10, 2022, FOIA request. The Secretary has not attached this Excel Spreadsheet due to the number of pages involved. However, in Petitioners' March 24, 2022, *Solze* notice, Petitioners indicated that they do not currently dispute the information provided in the Board's March 21, 2022, response. *Solze* notice at 2.

/s/ Drew A. Silow
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/s/ Alexander W. You
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(202) 632-4337

Counsel for the Secretary of
Veterans Affairs

EXHIBIT 1

Declaration of Thomas J. Murphy

I, Thomas J. Murphy, pursuant to 28 U.S.C. § 1746, under penalty of perjury, declare the following:

- I. I am the Director, Northeast District, Performing the Delegable Duties of the Under Secretary for Benefits, Veterans Benefits Administration (VBA)¹ in the Department of Veterans Affairs. This declaration is in response to the U.S. Court of Appeals for Veterans Claims, March 10, 2022, Order in the matter of *Freund v. McDonough*, No. 21-4168. In that Order, the Court instructed the Secretary or other appropriate VA official to file an affidavit addressing the matters set forth. The facts attested to herein are based on my personal knowledge.
- II. The Veterans Appeals Control and Locator System (VACOLS) is used to track appeals filed under the legacy system. For the period of May 15, 2017, to January 31, 2022, approximately 253,913 legacy-appeal records were closed and remained closed in VACOLS for failure to file a timely substantive appeal.
- III. VBA utilizes the Veterans Benefits Management System (VBMS) to manage legacy appeal workload. See *M21-4 4.5.a*. VA establishes specific end products (EP) and claim labels in VBMS to help control and track legacy appeals. See *M21-4 Appendix B and C*. Out of the 253,913 legacy-appeal records identified above, 74,291 of those appeals do not show subsequent activity in the claims file.
- IV. Veterans and representatives are notified in the Statement of the Case that their legacy appeal will be closed if they do not perfect their appeal by filing a VA Form 9, *Appeal to Board of Veterans' Appeals* within 60 days, or one-year of the date of the notification letter of the decision on appeal, whichever is later.
- V. A decision that a substantive appeal was not timely filed is appealable to the Board of Veterans' Appeals. Therefore, VBA is required to provide notification to claimants for all appeals found not timely filed. See *M21-5, 6.B.3.c*. From May 2017 to January 2022, approximately 10,000 determinations were issued notifying claimants that a substantive appeal was filed untimely.
- VI. Should VBA identify that a timely substantive appeal was received and not established in VACOLS prior to the system's automatic closure of the record,

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VBA reactivates the record in VACOLS and processes the legacy appeal based on the date the substantive appeal was received by VA. A notification letter is not sent to a claimant upon reactivation. Instead, when the VBA enters the date of receipt of the substantive appeal into VACOLS, VACOLS will reserve a slot on the docket based on the date entered and assign the docket number when the Board receives the appeal. Subsequently, the Board sends a docket notification letter that notifies appellant that their appeal was added to the Board's docket and that all appeals will be considered in docket number order. See M21-5, 7.F.1.a and b.

- VII. In support of VA's appeals modernization initiatives, VBA realigned national appeals policy and operations in 2017 under a single entity, the Director of Appeals Management Office, now Office of Administrative Review (OAR) for consolidated oversight of all appeals modernization and legacy appeals procedures. With this alignment, it also created three decision review operations centers. Further configuration in 2021 consolidated the legacy appeals processing personnel located at the 56 regional offices to a single decision review operations center. OAR continues to oversee all appeals modernization, legacy appeals procedures and oversight for the three decision review operations centers.
- VIII. In response to the March 2018 Office of Inspector General (OIG) recommendations, VBA concurred on their recommendation 3 to implement a plan to amend VBA's procedures for closing appeals records to prevent appeals being closed prematurely. VBA agreed and noted it implemented a new end-product framework for appeals in May 2017 that more efficiently captured each stage of an appeal and distinguished appeals pending in VBA before and after Board review. Furthermore, VBA made the creation and tracking of end products in VBMS mandatory, whereas it was previously optional in some stages. Finally, at the time of response, VBA was in the process of updating the pre-site visit protocol, which is used to gather information in preparation for site visits held at Decision Review Operation Centers (DROC). VBA requested closure of the recommendation, to which OIG concurred and closed the recommendation. As promised, OAR updated its pre-site visit protocols to specifically review and assess compliance of legacy appeals records in VACOLS. Before each annual site visit, OAR requests extensive documentation of workload management and training. Additionally, OAR reviews cases to assess DROC compliance with established policies and procedures. Such cases include closed appeals records to identify any discrepancies between appeal processing systems. After the site visit, OAR issues a site visit report that documents any identified error trends, recommendations for improvement and action items for remediation. In addition, OAR quality assurance reviews legacy appeals for adherence to the processing procedures outlined in M21-5, *Appeals and Reviews*, for systems compliance and processing requirements.

- IX. VBA continues to monitor the effectiveness of system applications to ensure workload is timely controlled and assigned appropriately. The end-product framework implemented in May 2017, assists VBA in efficiently identifying potentially prematurely closed appeals at certain stages. On March 18, 2022, VBA independently initiated a special focus review of legacy appeals that were closed in VACOLS for failure to file a timely substantive appeal after issuance of a SOC. Through data mining techniques, specifically pulling historic appeals tracking data from VACOLS and VBMS and performing a match function to a broader VBMS document tracking source of Veterans' records and timeliness of actions in these systems, VA identified a population of approximately 5,500 legacy appeals showing possible receipt of a timely VA Form 9 from May 15, 2017, to January 31, 2022.

OAR conducted a quality review of these approximately 5,500 cases to determine whether the legacy appeals record was properly closed in VACOLS.

The results of the review are as follows:

Review Action	Number	Percentage of Total
Timely Receipt of VA Form 9s Not Acknowledged	3806	69.8%
No VA Form 9 of Record	585	10.7%
VA Form 9s Acknowledged	542	9.9%
VA Form 9s Untimely Filed	523	9.6%
Grand Total	5456	100.0%

Based on the results of the review, VBA will take the following remediation action:


- For the category "Timely Receipt of VA Form 9s Not Acknowledged," VBA will reactivate the legacy appeals record in VACOLS and take appropriate next steps.
- For the category "No VA Form 9 of Record," no further action is needed by VA as a legacy appeal was not perfected.
- For the category "VA Form 9s Acknowledged," VBA will take no additional action as these appeals were processed correctly.
- For the category "VA Form 9s Untimely Filed," a notification letter will be issued with appeal rights informing the claimant of VBA's determination of timeliness if appropriate notification was not previously sent.

VA anticipates that all these actions will be completed by no later than the end of fiscal year 2022.

- X. Starting May 2022, VBA will conduct a special focused review each month to ensure VACOLS compliance and accuracy of closed legacy records for failure to timely file a substantive appeal. The May 2022 review will cover the remaining period from February 1, 2022 to present and will be overseen by OAR.
- XI. I certify, under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on April 7, 2022.

Murphy,
Thomas,
VBASTL

 Digitally signed by
Murphy, Thomas, VBASTL
Date: 2022.04.07 14:51:06
-05'00'

Thomas J. Murphy
Director, Northeast District, Performing the Delegable Duties of the Under
Secretary for Benefits
Veterans Benefits Administration

EXHIBIT 2



U.S. Department
of Veterans Affairs

Board of Veterans' Appeals

Washington, DC 20420

www.bva.va.gov

In Reply Refer To: 01C1

21-01811-F

March 21, 2022

Mr. John D. Niles
Carpenter Chartered Law Offices
P.O. Box 2099
1525 SW Topeka Blvd., Suite D
Topeka, KS 66601

Sent via email to:

john@carpenterchartered.com

Dear Mr. Niles:

This is in response to your Freedom of Information Act (FOIA) request dated December 10, 2020, and received on December 11, 2020. You requested records from the Board of Veterans' Appeals (BVA) Veterans Appeals and Control Locator System (VACOLS) concerning appeals with a status of "History"/"HIS".

I have enclosed the requested record.

If you are unsatisfied with this response, you may contact either the Office of Government Information Services (OGIS) or the VA FOIA Public Liaison for mediation services. Both will assist in resolving disputes between FOIA requesters and VA as a non-exclusive alternative to litigation. Using OGIS or the VA FOIA Public Liaison does not affect your right to pursue litigation. You may contact OGIS or the VA Public Liaison in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road, Room 2510
College Park, MD 20740-6001

E-mail: ogis@nara.gov
Telephone: 1-877-684-6448
Facsimile: 202-741-5769

VA FOIA Public Liaison
John Buck, Director, VA FOIA Service
810 Vermont Avenue, NW (005R1C)
Washington, DC 20420

E-mail: vacofoiaservice@va.gov
Telephone: 1-877-750-3642
Facsimile: 202-632-7581

Page 2.

John Niles Carpenter Chartered

You may appeal this determination by writing to the VA Office of General Counsel (024), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, or email your request to: OGCFOIAAppeals@va.gov. Your appeal must be received within 90 calendar days of the date of this letter. Please state clearly why you disagree with the determination of this office.

Sincerely,

A handwritten signature in cursive script that reads "Kary D. Charlebois".

Kary D. Charlebois
FOIA/Privacy Officer

Enclosures:

Carpenter_FTR_data_March2022 (red).xlsx

EXHIBIT 3



DEPARTMENT OF VETERANS AFFAIRS
Evidence Intake Center
PO Box 4444
Janesville WI 53547-4444

August 30, 2021

4 L RD
GROVE PA 19390

In Reply Refer To:
317DROC/L
C

Dear Mr. Akings:

You have filed a Notice of Disagreement with our action. This is the first step in appealing to the Board of Veterans' Appeals (BVA). This letter and enclosures contain very important information concerning your appeal.

Statement of the Case

We have enclosed a Statement of the Case, a summary of the law and evidence concerning your claim. This summary will help you to make the best argument to the BVA on why you think our decision should be changed.

What You Need To Do

To complete your appeal, you must file a formal appeal. We have enclosed VA Form 9, Appeal to the Board of Veterans' Appeals, which you may use to complete your appeal. We will gladly explain the form if you have questions. Your appeal should address:

- the benefit you want
- the facts in the Statement of the Case with which you disagree; and
- the errors that you believe we made in applying the law.

When You Need To Do It

You must file your appeal with this office within 60 days from the date of this letter or within the remainder, if any, of the one-year period from the date of the letter notifying you of the action that you have appealed. **If we do not hear from you within this period, we will close your case.** If you need more time to file your appeal, you should request more time before the time limit for filing your appeal expires. See item 5 of the instructions in VA Form 9, Appeal to Board of Veterans' Appeals.

Hearings

You may have a hearing before we send your case to the BVA. If you tell us that you want a hearing, we will arrange a time and a place for the hearing. VA will provide the hearing room, the hearing official, and a transcript of the hearing for the record. VA cannot pay any other expenses of the hearing. You may **also** have a hearing before the BVA, as noted on the enclosed VA Form 9, Appeal to the Board of Veterans' Appeals. **Do not delay filing your appeal if you request a hearing. Your request for a hearing does not extend the time to file your appeal.**

Representation

If you do not have a representative, it is not too late to choose one. An accredited representative of a recognized service organization may represent you in your claim for VA benefits without charge. An accredited attorney or an accredited agent may also represent you before VA, and may charge you a fee for services performed after the filing of a notice of disagreement. In certain cases, VA will pay your accredited agent or attorney directly from your past due benefits. For more information on the accreditation process and fee agreements (including filing requirements), you and/or your representative should review 38 U.S.C. § 5904 and 38 C.F.R. § 14.636 and VA's website at <http://www.va.gov/ogc/accreditation.asp>. You can find the necessary power of attorney forms on this website, or if you ask us, we can send you the forms. You can also find the names of accredited attorneys, agents and service organization representatives on this website.

What We Will Do

After we receive your appeal, we will send your case to the BVA in Washington, DC for a decision. The BVA will base its decision on an independent review of the entire record, including the transcript of the hearing, if you have a hearing.

On August 23, 2017, the President signed into law the Veterans Appeals Improvement and Modernization Act of 2017 (Appeals Modernization Act), creating a modernized review system for claims and appeals. The modernized appeals system took effect on February 19, 2019, and provides streamlined choices for seeking review of your VA claim decision. You are eligible to opt-in to this new process based on your receipt of this Statement of the Case or Supplemental Statement of the Case. If you continue to disagree with our decision, please refer to the enclosed fact sheet for a more thorough explanation of your decision review options and submission deadlines should you decide to opt-in. If you wish to remain in the legacy process, please follow the instructions above regarding actions required to request further review of your appeal.

If You Have Questions or Need Assistance

If you have any questions, you may contact us by telephone, e-mail, or letter.

If you	Here is what to do.
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Telephone	Call us at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the Federal number is 711.
Use the Internet	Send electronic inquiries through the Internet at https://iris.va.gov .
Write	VA now uses a centralized mail system. For all written communications, put your full name and VA file number on the letter. Please mail or fax all written correspondence to the appropriate address listed on the attached <i>Where to Send Your Written Correspondence</i> .

In all cases, be sure to refer to your VA file number .

If you are looking for general information about benefits and eligibility, you should visit our web site at <https://www.va.gov> or search the Frequently Asked Questions (FAQs) at <https://iris.custhelp.com/>.

We sent a copy of this letter to because you appointed her as your representative. If you have questions or need assistance, you can also contact them.
Thank you for your service,

Thank you for your service,

Regional Office Director

Regional Office Director

Enclosures: Where to Send Your Written Correspondence.
VA Form 9
VA Modernized Decision Review System SOC/SSOC Opt-in Fact Sheet
VA Form 20-0998, Your Rights to Seek Further Review of Our Decision