

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

JUSTIN D. GRAY,)	
)	
Petitioner,)	
)	
v.)	Vet. App. No. 22-3933
)	
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
)	
Respondent.)	

**RESPONSE TO THE COURT’S OCTOBER 12, 2022, ORDER AND IN
OPPOSITION OF PETITIONER’S MOTION FOR AN ORDER COMPELLING
THE SECRETARY TO RESPOND TO HIS SEPTEMBER 26, 2022,
SUPPLEMENTAL RESPONSE**

Pursuant to U.S. Vet. App. Rule (R.) 27(b) and the Court’s October 12, 2022, Order, Respondent, Denis McDonough, Secretary of Veterans Affairs (Secretary), respectfully submits his opposition to Petitioner’s October 11, 2022, Motion to Compel the Secretary to file a written response to his September 26, 2022, Supplemental Response.

Briefly, on June 30, 2022, Petitioner filed a petition for extraordinary relief in the form of a writ of mandamus compelling the Board of Veterans’ Appeals (Board) to issue a decision on his December 2018 appeal. See Petition (Pet. at 1-14). The Secretary responded to the petition, on August 12, 2022, urging the Court to deny the petitioner’s request for extraordinary relief, in pertinent part, because Petitioner had not demonstrated an indisputable right to the relief he sought and had not demonstrated unreasonable delay pursuant to the factors outlined in *Telecomms. Research & Action Ctr. V. FCC (TRAC)*, 750 F.2d 70

(D.C. Cir. 1984)). See Secretary's Response, 4-15. Thereafter, on August 15, 2022, the Court ordered Petitioner to file a response to the Secretary's August 12, 2022, Response. See Order, dated August 15, 2022. At that time, the Court noted that it was Petitioner's "burden of showing entitlement to a writ of mandamus[.]" and directed Petitioner to respond to the Secretary's August 12, 2022, Response and to specifically address the TRAC factors. *Id.*, citing *Gardner-Dickson v. Wilkie*, 33 Vet.App. 50, 55 (2020). On September 6, 2022, Petitioner submitted his response and, thereafter, a Supplemental Response on September 26, 2022. In the September 26, 2022, Supplemental Response, Petitioner submitted a list of more than 1,000 Board docket numbers, obtained through a Freedom of Information Act (FOIA) request, which he asserts were decided before his appeal despite having a later-in-time docket number. See Petitioner's Supplemental Response (Pet. Supp. Resp.) at 2, Exhibit 2.

The Secretary respectfully requests that the Court deny Petitioner's October 11, 2022, motion to compel a response from the Secretary because it is late in time, speculative, and would involve a waste of both the Secretary's and the Court's finite resources. First, Petitioner's request to compel a response from the Secretary comes less than 30-days prior to oral argument, currently scheduled for November 9, 2022. While the Court's rules do not contemplate a cutoff date for a written submission such as this prior to oral argument¹, to

¹ The Secretary acknowledges that R. 30(b) provides that citations of supplemental authority must be submitted no later than seven days prior to oral argument, unless leave of the Court is sought.

request that the Secretary turn his attention away from preparing for oral argument to draft a written response to Petitioner's late in time motion would unfairly burden the Secretary. The Secretary, just like the Petitioner, must also prepare for oral argument currently scheduled on November 9, 2022. Furthermore, Petitioner could have requested that the Court order a response from the Secretary at the time he filed his Supplemental Response. But he did not do so, and should not be allowed to do so now, with less than 30 days until oral argument.

Not only is Petitioner's late-in-time motion unfair to the Secretary, it also has the effect of shifting the burden from Petitioner to the Secretary of establishing entitlement to the writ sought. In his Supplemental Response, Petitioner submitted a list of Board docket numbers, with docket dates of 2020, 2021, and 2022, which were decided during the year prior to his FOIA request. See Pet. Supp. Resp. at 2. Petitioner asserted that this list suggests that his claim has been delayed because the Board has decided appeals with docket numbers "at a minimum, more than a year more recent" than his. *Id.* But Petitioner's assertions are purely speculative.

Significantly, Petitioner provides no further information or evidence to support his assertion that these appeals were in fact docketed at the Board after his appeal. Petitioner does not attempt to explain whether these appeals all have VA Form 9s dated after his December 24, 2018, VA Form 9. Instead, by filing his motion to compel the Secretary to respond, he is attempting to shift the burden

onto the Secretary to individually research each docket number listed and then explain whether the information gleaned tends to prove or disprove his assertions. And Petitioner makes this request with less than 30-days until oral argument. The burden is on Petitioner, not the Secretary, to demonstrate entitlement to the writ he seeks. See *Gardner-Dickson*, 33 Vet.App. at 55.

Petitioner also appears to concede that a response from the Secretary may not provide any information which would be useful, either to himself or the Court. In his motion, Petitioner states that “[k]nowing whether—and if so, how—the submitted [docket numbers] affects the Secretary’s [position]” may allow Petitioner to prepare his argument in chief. See Petitioner’s October 12, 2022, Motion (Pet. Mot. at 2). Importantly, Petitioner qualifies his statement by use of the word “whether,” and thus implies that the submitted docket numbers may not change the Secretary’s position that Petitioner has not demonstrated entitlement to the writ he seeks. Petitioner’s hesitation may stem from his awareness that the Board docket numbers submitted as part of his Supplemental Response may not demonstrate that the Board has decided appeals with docket dates later in time than his.

Finally, Petitioner does not state with any clarity how compelling the Secretary to file a written response would serve to better inform the Court as to whether entitlement to the writ he seeks is warranted. Instead, Petitioner states that compelling a response from the Secretary would “facilitate [his] preparation of an oral argument-in-chief” and that this ability to prepare a better argument

will, somehow, “effectively assist the Court.” See Pet. Mot. at 1. But Petitioner does not explain how compelling a response from the Secretary, at this late juncture, would serve to benefit the Court. Rather, it seems that Petitioner is the only one who would benefit from an order requiring the Secretary to submit a written response at this time, instead of waiting for the currently scheduled oral argument.

The Court should therefore reject Petitioner’s request to compel a response from the Secretary at this late juncture as it is not clear any written response from the Secretary would serve any useful purpose, and would divert the resources of both the Secretary and the Court with less than 30-days until oral argument.

WHEREFORE, Respondent, Denis McDonough, Secretary of Veterans Affairs, respectfully responds to this Court’s October 12, 2022, Order, opposes Petitioner’s October 11, 2022, motion to compel Respondent to respond to his supplemental response, and requests that the Court deny Petitioner’s October 11th motion.

Respectfully submitted,

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