

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

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

**THE SECRETARY’S SUPPLEMENTAL RESPONSE TO THE  
COURT ORDER DATED OCTOBER 18, 2022**

Respondent, Denis McDonough, Secretary of Veterans Affairs (Secretary or Respondent), hereby provides a supplemental response to the order of this Court, dated October 18, 2022, which granted Petitioner’s October 11, 2022, motion to compel and directed the Secretary to “respond to data obtained through the [Freedom of Information Act (FOIA)] request” executed by Petitioner and responded to by the Board of Veterans’ Appeals (Board). (Order at 1).

In the original response, the Secretary noted that “[o]f the 1,043 cases identified by Petitioner, 197 do not fall into any of the [ ] identified categories.” Nov. 1, 2022, Response at 5; *see also Id.* at Attachment, para. 35. Since the November 1, 2022, filing, the Board has continued to review these cases and is able to supplement its response related to these 197 cases. Attached is a supplemental declaration of Christopher A. Santoro that explains that of the 197

cases, 164 of those cases were distributed manually, and 33 were distributed by the case distribution system. Attachment, para. 4. Out of the 164 cases distributed manually,

- 66 were determined to be One-Touch appeals,
- 41 were determined to be hearing cases for retiring Veterans Law Judges (VLJ), requiring compliance with 38 C.F.R. § 20.604,
- 14 were legacy appeals decided concurrently with an appeal governed by the modernized review system,
- 12 appeals were determined “to be cases in which a legacy appeal for the appellant with an earlier docket number had been distributed based on its place on the docket,”
- 4 appeals fell under *Hall v. McDonough* and 38 C.F.R § 20.904(c) to remedy procedural defects,
- 3 were assigned to the Specialty Case Team (SCT), and
- 3 were vacatur decisions.

Attachment, para. 5-12.

As such, the supplemental declaration of Mr. Santoro provides additional information relevant to the Court’s October 18, 2022, Order.

**WHEREFORE**, the Secretary respectfully submits this supplemental response to the Court’s October 18, 2022, Order.

Respectfully submitted,

**CATHERINE C. MITRANO**

Acting General Counsel

**MARY ANN FLYNN**

Chief Counsel

/s/ Megan C. Kral

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Veterans Affairs

ATTACHMENT

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DENIS MCDONOUGH,	)	
Secretary of Veterans Affairs,	)	
	)	
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SUPPLEMENTAL DECLARATION OF CHRISTOPHER A. SANTORO

I, Christopher A. Santoro, pursuant to 28 U.S.C. § 1746, declare under the penalty of perjury the following:

1. I am Deputy Vice Chairman of the Board of Veterans' Appeals (Board), in the Department of Veterans Affairs (VA) and, as such, I am among those responsible for the control and supervision of the administrative appeals operations at the Board.
2. This declaration is provided to supplement the Board's October 31, 2022, declaration, provided in response to the October 18, 2022, Order of the United States Court of Appeals for Veterans Claims (Court) directing the Secretary to file a response to the Petition. This declaration adopts the responses provided in the October 31, 2022, declaration by reference.
3. Paragraph 25 of the October 31, 2022, declaration indicated that 197 appeals were distributed ahead of the Petitioner's for reasons that were not immediately apparent. Board personnel conducted further inquiry into the history of those appeals. The information contained in this declaration has been provided to me by that research team, and the Board now provides more information as to the circumstances of some of those appeals.
4. Of the 197 appeals, it was determined that 164 were distributed manually and 33 were distributed by the Board's case distribution system.

5. Of the 164 appeals distributed manually, 66 were determined to be One-Touch appeals (appeals where the Veterans Law Judge (VLJ) determined the case could be decided immediately following the hearing without waiting for the transcript), but for which the VLJ had failed to mark it in VACOLS as a One-Touch appeal.
6. Forty-one appeals were determined to be cases for which the VLJ who presided over the hearing was retiring from the Board. As a matter of efficiency for the Agency and the affected appellants, and to ensure compliance with 38 C.F.R. § 20.604, these appeals were distributed to allow for adjudication by the VLJs who presided over the hearing prior to their retirement. This prevented unnecessary delay in not only those appeals but also other appeals awaiting distribution; judicial resources were not spent offering and potentially holding a second hearing or conducting a second review of that appeal, but on other pending hearings and appeals.
7. Fourteen appeals were determined to be cases for which the VLJ had been assigned an appeal governed by the modernized review system (AMA) for the same appellant, and the VLJ decided to review and adjudicate the pending legacy appeal concurrently. In these circumstances, the legacy appeal was manually moved because reviewing the file once was more efficient, but the appeals could not be merged or adjudicated in the same Board decision as they involved the application of different legal systems.
8. Twelve appeals were determined to have been distributed as withdrawal or death dismissals. However, it was subsequently determined that the appellant had not requested to withdraw all the issues on appeal or that the agency of original jurisdiction had granted a request to substitute for the deceased appellant. Accordingly, the Board could not issue a full dismissal and had to address at least some issues on the merits.
9. Four appeals were determined to be cases in which a legacy appeal for the appellant with an earlier docket number had been distributed based on its place on the docket but merger and adjudication of all issues in a single decision was not appropriate. Therefore, as a matter of efficiency, the appeals were adjudicated concurrently and two Board decisions were issued under the different docket numbers.
10. Four appeals were determined to be cases in which the VLJ had been assigned an appeal governed by the modernized review system, but the VLJ identified a procedural defect in that the notice of disagreement was submitted regarding a legacy claim and, accordingly, a legacy appeal stream was docketed for the purposes of remanding for the issuance of a

statement of the case. *See Hall v. McDonough*, 34 Vet. App. 329 (2021); 38 C.F.R. § 20.904(c).

11. Three appeals were determined to be Specialty Case Team (SCT) appeals (appeals involving complex or rarely seen issues worked by subject matter experts), for which the issue(s) identifying the appeal as an SCT appeal had been mislabeled in VACOLS.
12. Three decisions were determined to be related to motions to vacate. Vacate and *de novo* VACOLS records are post-decisional records created and assigned to a VLJ when the VLJ is ruling on a motion to vacate a prior Board decision. The vacatur decision is issued under the vacate record, and the appeal may be readjudicated in a separate decision under the *de novo* record once the identified due process concern has been addressed, such as an extension request.
13. At this time, the reasons for the distribution of the remaining 50 appeals, the other 17 distributed manually and the 33 appeals distributed by the Board's case distribution system, have not been determined.

I certify under the penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on the 6th day of November 2022.

A handwritten signature in black ink, appearing to read "Christopher A. Santoro", with a stylized flourish at the end.

CHRISTOPHER A. SANTORO