

IN THE UNITED STATES COURT OF APPEALS

JAMES M. KERNZ,)	
Appellant,)	
)	
v.)	Vet. App. No. 20-2365
)	
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
Appellee.)	

**THE SECRETARY’S NOTICE IN RESPONSE TO THE
COURT’S JANUARY 20, 2023, ORDER**

Appellee, Denis McDonough, Secretary of Veterans Affairs, respectfully submits the attached declaration in response to the Court’s January 20, 2023, order that outlined various issues for the parties to be prepared to discuss at oral argument. Because that order noted information or data in the possession of the Board of Veterans’ Appeals (Board), the undersigned submits the attached declaration, with exhibits, from the Board to assist the Court and Appellant in addressing the questions outlined in the Court’s order.

WHEREFORE, the Secretary respectfully submits the attached declaration in response to the Court’s January 20, 2023, Order.

Respectfully submitted,

RICHARD J. HIPOLIT
Deputy General Counsel
Veterans Programs

MARY ANN FLYNN
Chief Counsel

/s/ Megan C. Kral

MEGAN C. KRAL

Deputy Chief Counsel

/s/ Nicholas R. Esterman

NICHOLAS R. ESTERMAN

Senior Appellant Counsel

Office of General Counsel (027)

U.S. Department of Veterans Affairs

810 Vermont Avenue, NW

Washington, DC 20420

(202) 632-4322

Counsel for the Secretary

ATTACHMENT

IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

JAMES M. KERNZ,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 20-2365
)	
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

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 a 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 in response to a January 20, 2023, Order of the United States Court of Appeals for Veterans Claims (Court) outlining eight issues which the Secretary is to be prepared to discuss at oral argument before the *en banc* Court. Per a February 27, 2023, Order of the Court, oral argument is currently scheduled for June 15, 2023.
3. The appellant's Board appeal was docketed based on the receipt of the VA Form 10182, Decision Review Request: Board Appeal (Notice of Disagreement) (NOD) on January 17, 2020. *See* Exhibit A. The first six digits of the docket number of a modernized appeal reflect the date the VA Form 10182 was received, using the YYMMDD format. The appellant's Board appeal is assigned docket number 200117-73605 on the Evidence Submission docket, which is based on and reflects the January 17, 2020, date of receipt. *See* Exhibit B.
4. Due to administrative error, the Board's March 24, 2020, timeliness notice letter had included a typographical error indicating the VA Form 10182 had

been received on January 15, 2020. *See* Exhibit C. As confirmed above, the VA Form 10182 was received by the Board on January 17, 2020, and was docketed based on that date.

5. The limitations previously outlined in Vice Chairman Kenneth Arnold's April 20, 2021, declaration regarding the Board's ability to search for potential class members would apply equally to the appellant's April 5, 2022, revised proposed class definition.
6. Since the implementation of the Veterans Appeals Improvement and Modernization Act of 2017 (AMA) on February 19, 2019, the Board has processed approximately 435,600 VA Forms 10182. As outlined in the April 20, 2021, declaration, the Board's systems do not track the required information in a way that can be automatically searched and instead would require manual review of hundreds of thousands of documents related to every VA Form 10182 received, with many of the documents needing to be reviewed more than once in successive steps.
7. A comparison of the number of VA Forms 10182 received with those that were docketed during a specified period would not accurately identify members of the revised proposed class because there are reasons a VA Form 10182 may be received but not result in a docketed appeal other than the Board "denying appellate eligibility/jurisdiction." Some examples include:
 - a. If the Board docketed an appeal based on a VA Form 10182, it will not take action with respect to subsequent VA Forms 10182 that are duplicative of the original. For example, an appellant and/or their representative may submit multiple copies of the same VA Form 10182 to the Board, to include submission by different methods (e.g., by mail, facsimile, and/or digital submission). Further, an appellant or their representative may re-submit the same VA Form 10182 in conjunction with a submission of additional evidence or argument related to the pending appeal.
 - b. Further, regulations require or provide for the submission of a new NOD form in instances other than an initial appeal request. For example, 38 C.F.R. § 20.202(c)(2) requires a modified NOD form to switch Board dockets. For simultaneously contested claims, multiple contesting claimants may submit VA Forms 10182 seeking to appeal the same underlying decision, but the docketed appeal would be based upon the date of receipt for the first form. Contesting claimants may also submit VA Forms

10182 to request a different Board docket. *See* 38 C.F.R. §§ 20.401, 20.404, 20.405. Accordingly, for simultaneously contested claims there may be multiple VA Forms 10182 received, but ultimately only one results in a docketed appeal.

- c. Similarly, when the Board notifies a claimant their VA Form 10182 is unclear, the claimant clarifies their intent by submitting a new VA Form 10182. *See* 38 C.F.R. § 20.202(f)-(h).
 - d. Finally, the Board has observed that appellants and representatives at times use the VA Form 10182 more generally in order to submit a variety of statements or other matters directed to the Board's attention, but not necessarily in conjunction with an appeal request or pending appeal.
 - e. Accordingly, because there are numerous reasons the Board may not docket an appeal in response to receipt of a VA Form 10182, comparing the number of VA Forms 10182 received with the number of appeals docketed would not determine or estimate members of the revised proposed class.
8. The Board's August 23, 2021, notice of error was provided to Veterans and their representatives in several ways to reach as many Veterans as possible.
- a. On August 23, 2021, the Board published the notice of error on the homepage of the Board's website. From August 23, 2021, through March 1, 2022, there were 105,084 unique pageviews of the homepage.
 - b. On or about September 22, 2022, the Board completed multiple updates to its website. In conjunction with those updates, the August 23, 2021, notice of error was published on the "News from the Board" page, where it remains to date. *See* <https://www.bva.va.gov/news/index.asp> (last visited June 1, 2023).
 - c. A September 1, 2021, VetResources weekly newsletter included notice of, and a link to, the Board's notice of error within the "VA Claims and Appeals" section. *See* <https://content.govdelivery.com/accounts/USVA/bulletins/2ef6882> (last visited June 1, 2023). The newsletter was distributed via email by VA's Veterans Experience Office (VEO) to over 11.3 million people and was opened by over 1.3 million. VEO

reported to the Board that, based on surveys, 90 percent of recipients of the VetResources newsletter self-report as Veterans.

- d. On August 25, 2021, the Board's notice of error was published on the VA Insider website. *See* <https://vaww.insider.va.gov/notice-from-the-board-of-veterans-appeals-some-notice-of-disagreement-mistakenly-rejected/> (last visited June 1, 2023). From August 25, 2021, through March 1, 2022, there were 893 unique pageviews of that webpage.
- e. Information regarding the Board's notice of error was also published via a video and the accompanying video description posted to VA social media accounts. The August 26, 2021, YouTube video has been viewed almost 11,000 times as of June 1, 2023. *See* <https://www.youtube.com/watch?v=nPK82HgouJE> (last visited June 1, 2023). The August 27, 2021, Facebook post has been viewed over 6,500 times as of June 1, 2023. *See* <https://www.facebook.com/VeteransAffairs/videos/378873520465837/> (last visited June 1, 2023).
- f. The August 23, 2021, notice of error was also provided via emails to VA accredited representatives, though the Board is unable to estimate the number of Veterans who may have seen or been exposed via these emails. The notice of error was provided in an August 23, 2021, email to veterans service organizations (VSOs) co-located at VA facilities, including the American Legion, American Red Cross, Blinded Veterans Association, Disabled American Veterans (DAV), Jewish War Veterans, Paralyzed Veterans of America (PVA), Veterans of Foreign Wars (VFW), the Marine Corps League, Vietnam Veterans of America (VVA), the National Veterans Legal Services Program (NVLSP), Wounded Warrior Project (WWP), and the National Organization of Veterans' Advocates (NOVA). The notice was also provided in an August 23, 2021, email to the executive leadership of the above VSOs, as well as Iraq and Afghanistan Veterans of America (IAVA). Finally, the notice was similarly provided via email to all directors of state departments of veterans affairs via the National Association of State Directors of Veterans Affairs (NASDVA), and via a VSO monthly meeting distribution, which included over 500 VSOs, attorneys, and agents across the nation.

9. To my knowledge, no further responses to the August 23, 2021, notice of error have been received than those discussed during the March 29, 2022, oral argument.
10. The March 1, 2022, deadline included in the Board's August 23, 2021, notice of error was intended to encourage responses to the notice. The Board will continue to honor requests for recalculation received after March 1, 2022.
11. Attached is the VA Form 10182 received on January 17, 2020, highlighting the date of receipt by the Board by facsimile (Exhibit A); a printout of the Caseflow Case Details page for docket number 200117-73605 highlighting the docket number assigned to the appeal on the Evidence Submission docket (denoted by the letter "E"), and highlighting in the Case Timeline the date of receipt of the NOD as January 17, 2020 [usernames of Board employees have been redacted] (Exhibit B); and the March 24, 2020, Board timeliness notice letter (Exhibit C).

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 1st day of June 2023.

A handwritten signature in black ink, appearing to read "Christopher A. Santoro". The signature is stylized with a large initial "C" and a long horizontal stroke at the end.

CHRISTOPHER A. SANTORO

EXHIBIT A

OMB Approved No. 2900-0674
 Respondent Burden: 30 Minutes
 Expiration Date: Feb. 28, 2022

 Department of Veterans Affairs		DECISION REVIEW REQUEST: BOARD APPEAL (NOTICE OF DISAGREEMENT)	
PART I - PERSONAL INFORMATION			
1. VETERAN'S NAME (First, middle initial, last) James M. Kernz			
2. VETERAN'S SOCIAL SECURITY NUMBER [REDACTED]	3. VETERAN'S VA FILE NUMBER (if different than their SSN) C/CSS - [REDACTED]		4. VETERAN'S DATE OF BIRTH 08/03/1949
5. IF I AM NOT THE VETERAN, MY NAME IS (First, middle initial, last)			6. MY DATE OF BIRTH (If I am not the Veteran)
7. MY PREFERRED MAILING ADDRESS (Number and street or rural route, P.O. Box, City, State, ZIP Code and Country) <input type="checkbox"/> I AM HOMELESS 1730 E. Pacific Ln Inverness, FL 34453			
8. MY PREFERRED TELEPHONE NUMBER (Include Area Code) 352-419-8412	9. MY PREFERRED E-MAIL ADDRESS dkernz@yahoo.com		10. MY REPRESENTATIVE'S NAME Adam Luck
PART II - BOARD REVIEW OPTION (Check only one)			
11. A Veterans Law Judge will consider your appeal in the order in which it is received, depending on which of the following review options you select. (For additional explanation of your options, please see the attached information and instructions.)			
<input type="checkbox"/> 11A. Direct Review by a Veterans Law Judge: I do not want a Board hearing, and will not submit any additional evidence in support of my appeal. (Choosing this option often results in the Board issuing its decision most quickly.)			
<input checked="" type="checkbox"/> 11B. Evidence Submission Reviewed by a Veterans Law Judge: I have additional evidence in support of my appeal that I will provide within the next 90 days, but I do not want a Board hearing. (Choosing this option may add delay to issuance of a Board decision.)			
<input type="checkbox"/> 11C. Hearing with a Veterans Law Judge: I want a Board hearing and the opportunity to submit additional evidence in support of my appeal that I will provide within 90 days after my hearing. (Choosing this option may add delay to issuance of a Board decision.)			
PART III - SPECIFIC ISSUE(S) TO BE APPEALED TO A VETERANS LAW JUDGE AT THE BOARD			
12. Please list each issue decided by VA that you would like to appeal. Please refer to your decision notice(s) for a list of adjudicated issues. For each issue, please identify the date of VA's decision and the area of disagreement.			
<input type="checkbox"/> Check here if you attached additional sheets. Include the Veteran's last name and last 4-digits of the Social Security number. Check the SOC/SSOC Opt in box if any issue listed below is being withdrawn from the legacy appeals process. <input checked="" type="checkbox"/> Opt In from SOC/SSOC			
A. Specific Issue(s)		B. Date of Decision	
Entitlement to compensation under 38 U.S.C. 1151 for aneurysm/stroke		12-18-2019	
Entitlement to compensation under 38 U.S.C. 1151 for depression as secondary to kidney failure.		12-18-2019	
Entitlement to compensation under 38 U.S.C. 1151 for kidney failure		12-18-2019	
Entitlement to compensation under 38 U.S.C. 1151 for stroke		12-18-2019	
PART IV - CERTIFICATION AND SIGNATURE			
I CERTIFY THAT THE STATEMENTS ON THIS FORM ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.			
13. SIGNATURE (Appellant or appointed representative) (Ink signature) 			14. DATE SIGNED 1-17-20

EXHIBIT B



James Kernz

Veteran ID: [REDACTED]

[View all cases](#)

DOCKET

E 200117-73605

VETERAN DOCUMENTS

[View 451 docs](#)

APPEAL STREAM TYPE

Original

Currently active tasks

ASSIGNED ON

08/05/2020

DAYS WAITING: 1029



ASSIGNED TO

Board of Veterans'

Appeals

TASK: Distribution Task

Issues

1. **Benefit type:** Compensation

Issue: Thrombosis of the brain (residuals of stroke) is denied.

Diagnostic code: 8008

2. **Benefit type:** Compensation

Issue: Generalized anxiety disorder (depression) is denied.

Diagnostic code: 9400

3. **Benefit type:** Compensation

Issue: Chronic nephritis (kidney failure) is denied.

Diagnostic code: 7502

4. **Benefit type:** Compensation

Issue: Entitlement to compensation under 38 U.S.C. 1151 for aneurysm is denied.

Diagnostic code: 8011

Appellant's Power of Attorney

To retrieve the latest POA information, please click the "Refresh POA" button.

*POA last refreshed on
06/01/2023*

[Refresh POA](#)

Attorney: ADAM R LUCK

Address: Adam R Luck

1700 Pacific Ave

Suite 2220

Dallas, TX 75201

Email Address: adam@gloverluck.com

Power of Attorney (POA) data comes from VBMS. To update the POA information stored in VBMS, please send a task to the VLJ support management branch.

About the Veteran

Name: James M Kernz

Gender: Male

Date of birth: 8/3/1949


Mailing Address: 1730 E PACIFIC LN

INVERNESS, FL 34453


Email Address: dkernz@yahoo.com


Veteran information comes from VBMS. To update the veteran's information, please send a request to the VLJ support staff.


Case Timeline


[View notifications sent to appellant](#) 


Below is the history of this case.

-  Dispatch from BVA pending
- COMPLETED ON:
08/05/2020

 DistributionTask completed
ASSIGNED TO:
Board of Veterans' Appeals
- COMPLETED ON:
08/05/2020

 SpecialCaseMovementTask completed
ASSIGNED TO: VACO [REDACTED]
ASSIGNED BY: [REDACTED]
[View task instructions](#)
- COMPLETED ON
05/07/2020

 EvidenceSubmissionWindowTask completed
ASSIGNED TO: Mail
- 01/17/2020

 Notice of disagreement received

[Send feedback](#)

EXHIBIT C



DEPARTMENT OF VETERANS AFFAIRS
Board of Veterans' Appeals
Washington DC

In Reply Refer To: 014CSB606

SS: [REDACTED]

Date: March 24, 2020

JAMES M KERNZ
1730 E PACIFIC LANE
INVERNESS, FL 34453

Dear JAMES M KERNZ:
:

The Board of Veterans' Appeals received your January 15, 2020 Board Appeal request (VA Form 10182). However, your request identified issues that are no longer eligible for appeal in the modernized review system created by the Appeals Modernization Act (AMA).

For the issues identified in your January 15, 2020 Board Appeal request (VA Form 10182), you received a December 12, 2019 Statement of the Case (SOC). Because this SOC was issued on or after February 19, 2019, you had the ability to opt-in to the modernized review system:

- within 60 days of the date on the SOC letter; or
- within one year of the date of the VA decision you are appealing, whichever is later.

More than 60 days has passed since the date on the SOC letter or more than one year has passed since the date of the VA decision you are appealing for the issues of [dental injury]. Because the time limit has passed, the Board cannot process your appeal of those issues in the modernized system.

What if I disagree with this letter?

The Board may extend the time to submit a Board Appeal request (VA Form 10182) when good cause has been demonstrated. If you believe that there is good cause to grant a time extension to submit your Board Appeal request (VA Form 10182) you may request a time extension from the Board. To do so, you must submit your extension request in writing to the Board with an explanation as to why you believe there is good cause. The written extension request must be submitted to the Board by mail or fax as follows:

Board of Veterans' Appeals
P.O. Box 27063

2.

JAMES M KERNZ VA FILE NUMBER [REDACTED]

Washington, DC 20038
Fax: 1-844-678-8979

Additionally, the time limit to continue your appeal in the legacy (non-modernized) review system by filing a VA Form 9 "Appeal to Board of Veterans' Appeals" with the VA office that issued the SOC has also passed. However, the timeliness of a submitted VA Form 9 can be separately appealed in the legacy (non-modernized) review system. If you have submitted a VA Form 9 that was rejected as untimely, or you submitted an extension request to file a VA Form 9 that was denied, and you disagree with that decision, please refer to the appellate rights attached to that decision. If you would like to file a request for an extension of time to file a VA Form 9 based on "good cause" you may submit this request to the VA office that issued the SOC.

What if I have questions?

If you have questions or would like more information, please contact your representative (if you have one) or visit <https://www.va.gov/decision-reviews/get-help-with-review-request/>. You may also check the status of your appeal by visiting <https://www.va.gov/claim-or-appeal-status/>.

Sincerely,

A handwritten signature in dark ink, appearing to read "K. Arnold", is positioned above the typed name.

Kenneth A. Arnold
Vice Chairman
Board of Veterans' Appeals

cc: ADAM R LUCK