

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

WALTER P. JONES,
Appellant,

v.

No. 22 - 1216

DENIS McDONOUGH,
Secretary of Veterans Affairs,
Appellee.

REPLY TO SECRETARY’S RESPONSE TO PETITION FOR WRIT OF MANDAMUS.

Attached to this reply is *Exhibit A*, the statement of Walter Jones.¹ Mr. Jones’s entitlement to the writ in this case boils down to the weighing of the parties’ interest in the immediate adjudication of a 2011 claim, in which the BVA (in January 2021) and this Court (in April 2020) both ordered expedited adjudication.

Walter Jones’ interest in an immediate adjudication of this claim is his ability to remain alive. Walter is an 81-year old Black man, living in Florida,² who has no money to buy or rent a home with drinkable water.³ Threats to sue the landlord, even if he had money to do so, would lead to eviction and homelessness. Immediate adjudication of the 2011 claim would allow Walter to either receive the benefits he has continuously pursued since 2011 or appeal yet another VA denial. Until then, Walter gets nauseous every time he smells the brown water trickling from his house’s pipes.⁴ The water stains his sink and tub brown and yellow.⁵ Each day, this 81-year old combat veteran hobbles on a cane for a quarter-mile to

¹ *Exhibit A*.

² *Appendix*, page 93.

³ *Appendix*, page 1 – 2; *Exhibit A*.

⁴ *Exhibit A*.

⁵ *Id.*

draw 3 gallons of “somewhat clear” sulfur water for drinking, bathing, cleaning, hygiene, etc.⁶ If he doesn’t “stay ahead of the weather” he may not drink water that day, or risk serious injury walking to and from the well in the dark or during storms.⁷

On the other side of the scale are the VA’s interests. The Secretary identified no interest in *denying* immediate adjudication of the 2011 claim. He did describe a bureaucratic traffic-jam, backed up for more than a year while he tries to verify herbicide exposure at “Korat RTAFB in Thailand” due to “...the ongoing COVID-19 pandemic[.]”⁸ But delays are not interests. Moreover, the Secretary did not tell the Court if he was even considering Mr. Jones’s claim of exposure to herbicides in Cambodia. Instead, he shrugs off any delay on the grounds that he is “actively attempting to complete the actions required by the Board’s January 2021 remand” by checking on the case once a month.⁹

1. Mr. Jones is entitled to issuance of the writ of mandamus.

Neither party disputes the first *Cheney* element supports issuance of the writ, as Mr. Jones lacks adequate alternative means to obtain adjudication of his 2011 claim – he cannot appeal what the VA does not adjudicate.¹⁰ Nor is there factual or legal support for denying the writ based on the third *Cheney* element, an element “intended more as a final check on granting the writ than as an amorphously discretionary means of denying it, without consulting the other two factors.”¹¹ As to the second *Cheney* element, Mr. Jones’ indisputable

⁶ *Id.*

⁷ *Exhibit A.*

⁸ *Secretary’s Response to Petition for Writ of Mandamus*, at page 3.

⁹ *Id.*, at page 4.

¹⁰ *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 – 381 (2004).

¹¹ *Mote v. Wilkie*, 976 F.3d 1337, 1343 (Fed. Cir. 2020); *see Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 – 381 (2004).

right to the writ rests on the Secretary's delay violating a "rule of reason," which Mr. Jones has established by showing that all six TRAC factors support issuance of the writ.¹²

2. Mr. Jones' interest in staying alive outweighs the Secretary's unstated interests in denying immediate adjudication. (TRAC Factors 1, 3, & 5).

The VA identified no interest that precludes issuance of the writ. While the VA focuses only on the "next step" of adjudicating the claim – outreach to MRRC – the Court must contemplate "whether the entire *delay* has been reasonable."¹³ The Secretary did not present any defense to the reasonableness of his delay throughout the life of this 2011 claim. Because the severity of Mr. Jones's health emergency is the only interest articulated to the Court by the parties, TRAC factors 1, 3, and 5 weigh in favor of the issuance of the writ.

3. The VA waived any dispute that its delay is reasonable (TRAC Factor 2).

The parties agree there is no statutory timeline for the VA to act.¹⁴ However, the Secretary did not dispute Mr. Jones' contention that his claim has been pending 32 times longer than the average contemporaneous veteran's claim;¹⁵ 2.5 times longer than the average legacy claim in which a veteran filed a NOD; ¹⁶1.5 times longer than the average legacy claim in which a veteran was issued a Statement of Case;¹⁷ 2.6 times longer than the average legacy claim in which a veteran had to file a substantive appeal;¹⁸ 1.4 times longer than the average legacy claim in which the BVA issued a remand.¹⁹

¹² See *Monk v. Wilkie*, 32 Vet. App. 87, 104 (2019).

¹³ *Mote v. Wilkie*, 976 F.3d 1337, 1345 (Fed. Cir. 2020) (emphasis in original).

¹⁴ *Secretary's Response to Petition for Writ of Mandamus*, at page 7.

¹⁵ *Appellant's Petition for Writ of Mandamus*, at pages 10 – 11.

¹⁶ *Appellant's Petition for Writ of Mandamus*, at page 11.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

Moreover, the Secretary's request to the MRRC may just be a "wild goose chase." The MRRC will not research Mr. Jones's exposure to herbicides in Cambodia, absent a specific request for that location, noting that the VA should instead decide the claim "based upon the evidence of record."²⁰ If the Secretary made separate requests for corroboration of distinct exposures in Cambodia and Thailand, as the MRRC requires, he would have said so in his response. He said nothing. Indeed, he appears to be avoiding the Cambodian exposure portion of the claim altogether as he mentions it nowhere in his response.²¹ Because the VA did not make a proper request to the MRRC to corroborate the alleged exposure in Cambodia, the MRRC will direct the VA to do what Mr. Jones is asking to be done now: immediately "decide[the claim] based upon the evidence of record."²² Because the Secretary did not dispute Mr. Jones's argument that his claim is delayed far longer than similarly situated veterans, and because the VA's current efforts appear dilatory and/or pointless, TRAC Factor 2 supports issuance of the writ.

4. The Secretary waived any argument that expediting Mr. Jones's claim would have any effect on "agency activities of a higher or competing priority." (TRAC Factor 4).

The Secretary did not mention or identify any "agency activities of a higher or competing priority" that would be affected. Therefore, he has waived any argument that expediting Mr. Jones remand would somehow have an effect on any "agency activities of a higher or competing priority."²³ TRAC Factor 4 weighs in favor of the issuance of the writ.

²⁰ *Secretary's Exhibit 2*, page 45.

²¹ See *Declaration of Rodrick L. Hamilton*, page 1 at ¶IV, V, VIII, IX.

²² *Secretary's Exhibit 2*, at pages 26 – 28.

²³ See *Martin v. O'Rourke*, 891 F.3d 1338 (Fed. Cir. 2018); *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir.1984); see *MacWhorter v. Derwinski*, 2 Vet. App. 133, 136

5. Agency action is unreasonably delayed even absent “impropriety” by the VA. (TRAC Factor 6).

The Court need not find bad motive by the VA to issue the writ. As such, TRAC Factor 6 does not preclude issuance of the writ.

6. Relief Sought.

Mr. Jones requests the Court issue the writ of mandamus and an enforceable order specifying the date-certain by which the Secretary must adjudicate his 2011 claim. Should the Court find some reason the writ should not yet issue, Mr. Jones asks the Court to “fashion the appropriate relief”²⁴ it determines is equitable, including but not limited to ordering the Secretary, with notice of potential sanctions for non-compliance, to:

- 1) Produce a copy of every MRRC request(s) to the Court and Mr. Jones;
- 2) Provide contact information for the MRRC research officer, so Mr. Jones may contact this individual for updates on the status of the request;
- 3) Provide weekly substantive progress reports to Mr. Jones and the Court, describing the actions VA employees take in adjudicating the 2011 claim;
- 4) Provide a date certain by which he will complete adjudication of the 2011 claim;
- 5) Retain jurisdiction to enforce the order.

Respectfully Submitted,
ATTIG | CURRAN | STEEL, PLLC

BY: /s/ Chris Attig
CHRIS ATTIG, ATTORNEY

(1992) (internal quotation marks omitted); *see also Brewer v. West*, 11 Vet. App. 228 (1998); *Locklear v. Nicholson*, 20 Vet. App. 410, 416 (2006); *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991).

²⁴ *See Mote v. Wilkie*, 976 F.3d 1337, 1344 – 1345 (Fed. Cir. 2020), citing *Hecht Co. v. Bowles*, 321 U.S. 321 (1944) (“The essence of equity jurisdiction has been the power . . . to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.”).