

**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 RESPONSE TO THE  
COURT ORDER DATED OCTOBER 18, 2022**

Respondent, Denis McDonough, Secretary of Veterans Affairs (Secretary or Respondent), hereby responds 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). The Secretary hereby responds.

The Secretary submits that his position has not changed from his August 12, 2022, Response to the July 5, 2022, Order. The data provided by Petitioner shows that the Board’s docket order is fluid, balancing a variety of competing statutory, regulatory, and public interests in the exercise of its duty to issue a vast number of decisions to a rising population of *all* veterans and their dependents.

And, although there are some deviations to strict docket order, these deviations comply with the spirit and intent of 38 U.S.C. § 7107 (a)(1) (2018), now 38 U.S.C. § 7107(a)(4) (2021), which is “to afford the Board some flexibility in considering and deciding appeals so that efficiency and fairness in processing appeals is promoted.” *Ramsey v. Nicholson*, 20 Vet.App. 16, 32 (2006).

The Board, in the Declaration of Christopher A. Santoro, addressed the list of 1,043 legacy cases identified by Petitioner. (Attachment, Para. 21). The Board notes that these legacy cases were distributed to Veterans Law Judges (VLJs) either by an electronic case distribution system or by a manual distribution. *Id.* Out of the 292 legacy cases that were distributed by the electronic case distribution system, 241 of them were hearing cases, and therefore attached to a specific VLJ. *Id.*, *see also* 38 U.S.C. §§ 7102, 7107(c) (2018); 38 C.F.R. § 20.707 (2018); 38 C.F.R. § 20.604 (2021); *see also Arneson v. Shinseki*, 24 Vet.App. 379, 385 (2011) (addressing a legacy case and holding that “if a case is assigned to be adjudicated by an individual member of the Board, that member must conduct the hearing.”).

Out of the 751 cases that were distributed manually:

- 161 appeals were withdrawal dismissals,
- 181 were death dismissals,
- 2 were vacaturs,
- 79 were cases decided by the Specialty Case Team (SCT), and

- 164 were part of the One-Touch Program.

(Attachment, Para. 21).

The Board issues dismissal decisions as soon as they are identified. 38 U.S.C. § 7105(d)(5) (2018); 38 U.S.C. § 7105(d) (2012); 38 U.S.C. §§ 20.205 (“An appeal withdrawal is effective when received by the Board.”), 20.903(b) (2021); 38 U.S.C. § 20.204 (b)(3) (2018). This is due to potential jurisdictional issues, particularly for death dismissals, where the potential for substitution is time sensitive. 38 U.S.C. § 5121 (2018), (2021).

Regulations permit legacy vacatur to be processed at any time and are not subject to docket order. 38 C.F.R. § 20.904 (2018) (“An appellate decision may be vacated by the [Board] at any time”); 38 C.F.R. § 20.1000 (2021) (same).

The Special Case Team (SCT) is a team of subject matter experts developed to work appeals “involving complex or rarely seen issues.” (Attachment, Para. 21, 26); *see also* (Attachment at Exhibit K, pg. 21-22). Until September 2022, SCT cases were specially marked and manually distributed to SCT members to work. (Attachment, Para. 26). The Board noted that the manual distribution of SCT cases did, at times, deviate from the median docket order, but this practice of separating SCT has been amended; SCT cases will be distributed by the case distribution system. *Id.* The Secretary notes that the initiative for the SCT was first presented to Congress, and the public, in the 2017 Chairman’s Annual Report. See Department of Veterans Affairs Board of

Veterans' Appeals, Annual Report Fiscal Year (FY) 2017, available at [https://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2017AR.pdf](https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2017AR.pdf), pg. 20 ("The Board will also explore opportunities to streamline decisions to Veterans through specialization of the attorney staff, triaging within the regulations, guidelines, and case review process improvements."); see 38 U.S.C. § 512 (a).

In 2018, the Board rolled out a new One Touch program with the purpose to "expedite the processing of legacy hearing cases with clear dispositions." See Department of Veterans Affairs Board of Veterans' Appeals, Annual Report Fiscal Year (FY) 2018, available at [https://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2018AR.pdf](https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2018AR.pdf), pg. 17; see also (Attachment, Exhibit N); see 38 U.S.C. § 512 (a). In the 2018 Annual Report, Congress and the public were informed that under the One Touch program, "when a VLJ holds a hearing on a case that is within the Board's current working docket range and the outcome of the appeal is immediately clear, the VLJ can activate the case for adjudication." FY 2018 Annual Report, pg. 17. The Board further explained that "[p]reviously, these cases were returned to the case storage queue pending assignment to a VLJ, a process that could add months to the adjudication of that Veteran's appeal." *Id.* Because it was brought to the Board's attention that "a limited number of" One Touch cases were being distributed, and therefore, decided out of docket order, the program has

ended and the Standard Operating Procedure for it has been rescinded. (Attachment at para. 27).

Of the 1,043 cases identified by Petitioner, 197 cases do not fall into one of the above identified categories (33 from the electronic case distribution and 164 from the manual distribution). However, this Court in *Ramsey* addressed the potential for cases to be worked out of docket order and did not find such to be a violation of section 7107(a)(1) (2018).<sup>1</sup> *Ramsey*, 20 Vet.App.at 31-32. In *Ramsey*, the petitioners supplied the Court with two Board decisions that had docket numbers beginning in “04,” where petitioners’ appeals had dockets beginning in “03.” *Id.* at 31. These “04” dockets had been decided before petitioners’ appeals. *Id.* The Court noted that those decisions had been issued “out of regular docket order,” but found no violation of section 7107. In fact, the Court stated, “[w]e doubt that these two decisions, cited by petitioners, represent a departure from regularly followed, longstanding, and sensible Board processes.” *Id.* at 31-32.

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<sup>1</sup> Notably, the language between the pre-Appeals Modernization Act (AMA) version of section 7107(a)(1) (2018) and the post-AMA version of section 7107(a)(4), is not substantially different so as to render the holding in *Ramsey* obsolete. Compare 38 U.S.C. § 7107(a)(1)(2018) (“each case received pursuant to application for review on appeal shall be considered and decided in regular order according to its place upon the docket”) with 38 U.S.C. § 7017(a)(4) (2021) (“each case before the Board will be decided in regular order according to its respective place on the docket to which it is assigned by the Board”).

That the Court in *Ramsey* considered the possibility of just two appeals worked out of docket order does not make the holding in that case any less relevant here, especially where, as here, Petitioner has also failed to establish that the Board has departed from any “regularly followed, longstanding, and sensible Board processes.” *Ramsey*, 20 Vet.App. at 32. Nor does the list of cases provided by Petitioner exhibit that the purpose and intent of section 7107 was violated. *Id.* at 34 (“The limited legislative history that is available states a concern only that veterans and their families receive fair, efficient, and timely adjudication of their benefits claims and that there be fairness in adjudications among and between veterans.”). Here, while Petitioner asserts the dockets provided to the Court are of those “similarly situation veterans,” he has provided no evidence to support this allegation. (Motion at 1).

As stated previously, the Secretary maintains that *Ramsey* controls the instant matter, and that the Board, in the exercise of its administrative functions is permitted flexibility to adjudicate appeals and issue decisions without adhering to a strict chronological docket order. See *Ramsey*, 20 Vet.App. at 36 (“it is not the role of the Court to dictate how most effectively to administer the VA benefits system to ensure timeliness and fairness”); see also *id.* at 32 (“section 7107 must be read so as to afford the Board some flexibility in considering and deciding appeals so that efficiency and fairness in processing appeals is promoted and that, therefore section 7107 cannot be read as a mandated, exclusive set of rules

by which the Board must consider and decide cases”); *Groves v. McDonough*, 33 Vet.App. 368, 378 (2021) (confirming the holding of *Ramsey*).

**WHEREFORE**, the Secretary respectfully responds to the Court’s October 18, 2022, Order.

Respectfully submitted,

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