Appeal No. 08-16728

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VETERANS FOR COMMON SENSE and
VETERANS UNITED FOR TRUTH, INC.,

Plaintiffs-Appellants,

vs.

GEN. ERIC K. SHINSEKI, Secretary of Veterans Affairs, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
Northern District of California
District Court No. C-07-3758-SC
The Honorable Samuel Conti

APPELLANTS' REPLY BRIEF

SIDNEY M. WOLINSKY (SBN 33716)
RONALD ELSBERRY (SBN 130880)
KATRINA KASEY CORBIT (SBN 237931)
DISABILITY RIGHTS ADVOCATES
2001 Center Street, Third Floor
Berkeley, California 94704-1204
Telephone: 510.665.8644

GORDON P. ERSPAMER (SBN 83364)
HEATHER A. MOSER (SBN 212686)
RYAN G. HASSANEIN (SBN 221146)
M. NATALIE NAUGLE (SBN 240999)
STACEY M. SPRENKEL (SBN 241689)
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000

Attorneys for Plaintiffs-Appellants
VETERANS FOR COMMON SENSE AND VETERANS UNITED FOR TRUTH, INC.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. THE DISTRICT COURT ERRED IN DENYING RELIEF TO REMEDY BOTH VA'S MENTAL HEALTH CARE DELAYS AND THE LACK OF PROCEDURAL SAFEGUARDS TO CHALLENGE THOSE DELAYS. 3

A. Implementation of VA's Own Mental Health Care Plans Is Not "Wholesale Reform." 4

B. Veterans Do Not Seek to Change How VA Provides Care, But Whether and When That Care Is Provided. 6

C. Substantial Delays in Providing Care Are "Unreasonable" Under the Established *TRAC* Factors and Require Relief Under the APA. 7

D. The Lack of Procedural Safeguards to Challenge Delays in Mental Health Care Violates Due Process. 10

III. THE DISTRICT COURT ERRED IN DENYING RELIEF TO REMEDY THE LENGTHY DELAYS AND INADEQUATE PROCEDURAL SAFEGUARDS IN VA'S ADJUDICATION SYSTEM. 12

A. VA's Overly Broad Construction of the VJRA's Limits on Judicial Review Would Leave No Adequate Remedy for Veterans' Claims. 13

1. VA Overstates the Jurisdictional Reach of § 511. 13

2. VA Concedes § 502 Is Limited to Direct, Facial Challenges to Regulations. 17

B. The Substantial Delays That Continue to Plague VA's Claims Adjudication System Are "Unreasonable" Under the APA. 19

C. The Substantial Delays Also Violate Due Process and the District Court Erred by Failing to Engage in the *Mathews* Analysis. 23

D. The Avoidable Remand Rate Necessitates a Finding That the Lack of Basic Procedural Protections at the Regional Office Level Violates Due Process. 25

IV. STRONG PREJUDICE RESULTED FROM THE DISTRICT COURT'S DISCOVERY RULINGS. 27

V. CONCLUSION 30

CERTIFICATE OF COMPLIANCE 31

APPENDIX - STATUTORY ADDENDUM 32

TABLE OF AUTHORITIES

Page(s)

CASES

Andujar v. Weinberger,
69 F.R.D. 690 (S.D.N.Y. 1976) 29

Bates v. Nicholson,
398 F.3d 1355 (Fed. Cir. 2005) 14

Broudy v. Mather,
460 F.3d 106 (D.C. Cir. 2006) 13, 14

Brower v. Evans,
257 F.3d 1058 (9th Cir. 2001) 7

Citizens to Preserve Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971) 6

Clearly v. Brown,
8 Vet. App. 305 (1995) 17

Crosby v. Soc. Sec. Admin.,
796 F.2d 576 (1st Cir. 1986) 15

Darcoron v. Brown,
4 Vet. App. 115 (1993) 17

Ecology Ctr., Inc. v. Forest Serv.,
192 F.3d 922 (9th Cir. 1999) 5, 6

Forest Guardians v. Babbitt,
174 F.3d 1178 (10th Cir. 1999) 19

Forshey v. Principi,
284 F.3d 1335 (Fed. Cir. 2002) 26

Greater Los Angeles Council on Deafness v. Zolin,
812 F.2d 1103 (9th Cir. 1987) 24, 25

Hall v. U.S. Dep't of Veterans' Affairs,
85 F.3d 532 (11th Cir. 1996) 15

Hanlin v. United States,
214 F.3d 1319 (Fed. Cir. 2000).. 14

Heckler v. Chaney,
470 U.S. 821 (1985)... 6

Heckler v. Day,
467 U.S. 104 (1984)... 21, 22

Independence Mining Co. v. Babbitt,
105 F.3d 502 (9th Cir. 1997).. 7

Johnson v. Robison,
415 U.S. 361 (1974)... 17

Kelly v. R.R. Ret. Bd.,
625 F.2d 486 (3d Cir. 1980)... 24, 29

Laub v. U.S. Dep't of Interior,
342 F.3d 1080 (9th Cir. 2003)... 27, 28

Lujan v. Nat'l Wildlife Fed'n,
497 U.S. 871 (1990)... 9

Mathews v. Eldridge,
424 U.S. 319 (1976)... 11, 24

Nehmer v. U.S. Dep't of Veterans' Affairs,
494 F.3d 846 (9th Cir. 2007)... 17, 18

Norton v. S. Utah Wilderness Alliance,
542 U.S. 55 (2004)... 3, 4, 5

Preminger v. Principi,
422 F.3d 815 (9th Cir. 2005)... 17, 18

Presbyterian Church v. United States,
870 F.2d 518 (9th Cir. 1989)... 16

Soda Mountain Wilderness Council v. Norton,
424 F. Supp. 2d 1241, 1260 (E.D. Cal. 2006)... 5

Telecomms. Research & Action Ctr. v. FCC,
750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*") .... *passim*

Traynor v. Turnage,
485 U.S. 535 (1988) 13

White v. Mathews,
559 F.2d 852 (2d Cir. 1977)... 16

Wright v. Califano,
587 F.2d 345 (7th Cir. 1978).. 23, 24

STATUTES, RULES AND REGULATIONS

5 U.S.C.
§ 701(a)(2).. 6, 7
§ 704 16
§ 706(1) 3, 5, 6, 7

38 U.S.C.
§ 502 .... 14, 17, 19
§ 511 ....*passim*
§ 511(a) 13, 14, 15
§ 1705 .... 3, 7
§ 1710 .... 3, 7
§ 5109B 20, 22
§ 7101(a) 20

Fed. R. Evid. 407 21

38 C.F.R.
§ 20.200 18
§ 20.201 18
§ 20.202 18

sf-2680145

OTHER AUTHORITIES

Board of Veterans' Appeals: Expedited Claims, Adjudication Initiative,
73 Fed. Reg. 20,571 (Apr. 16, 2008) 21

Document Tampering and Mishandling at the VBA: Hearing Before the Subcomm. on Oversight and Investigations of the H.R. Comm. on Veterans' Affairs, 111th Cong., 1st Sess. (March 3, 2009) 26

The Truth About Veterans' Suicides, Hearing Before the H.R. Comm. on Veterans' Affairs, 110th Cong., 2d Sess. (May 6, 2008) 10

Veterans' Benefits and Programs Improvement Act of 1988,
H.R. Rep. No. 963, 100th Cong., 1st Sess.,
reprinted in 1988 U.S.C.C.A.N. 5782 (Sept. 23, 1988) 13, 14

I. INTRODUCTION

Veterans for Common Sense and Veterans United for Truth's ("Veterans") opening brief establishes that the district court abdicated its duty to remedy the egregious delays it found had become standard operating procedure in the Department of Veterans Affairs' ("VA") provision of statutorily mandated mental health care and disability compensation, in violation of due process and congressional mandates that require timely agency action. Contrary to VA's characterizations, the relief requested by Veterans would not require "wholesale reform" by this Court. Veterans requested limited forms of relief that merely require VA to implement its own already-developed but never fully implemented plans to meet its statutory mandates, including: (1) an order compelling VA to implement its mental health care plans to remedy denials of and lengthy delays in the delivery of that statutorily mandated care; and (2) an order setting due-process-compliant outside time limits for each stage of VA's adjudication process for disability compensation to remedy ever-lengthening delays. VA's own pilot programs demonstrate the feasibility of that relief.

VA never addresses the propriety of relief in light of the district court's delay findings, but rather stalls in its stilted interpretation of inapposite jurisdictional statutes. The expansive interpretations VA advocates to shield its violations of statutory and constitutional law would insulate *any* "VA actions"

from judicial scrutiny. Even the district court refused to adopt that extreme view, which is fundamentally incompatible with the Administrative Procedure Act's ("APA") bedrock principle of subjecting agencies to scrutiny for their failures to comply with statutory duties prescribed by Congress. As the Supreme Court has acknowledged, a court may, under the APA, require that an agency's entire program be changed if the *court itself* is not the architect of that reform, but rather, as here, when the court is simply the instrument for assuring that the agency follows the blueprints drafted by the agency itself, Congress, or the Constitution.

VA relies upon "congressional oversight" as an alternative to judicial enforcement of statutory and constitutional rights. Of the three coordinate branches of government, however, only the judicial branch has the enforcement powers necessary to remedy constitutional violations and compel agency action. Moreover, because Congress has vested Veterans with certain statutory entitlements, the Due Process Clause guarantees Veterans certain procedural rights and Veterans cannot be deprived of a forum in which to effectively vindicate those rights without raising serious constitutional questions.

VA's argument that all discretion is vested in the agency itself and Congress, if adopted by this Court, would write agencies a blank check to trample upon constitutional rights without any judicial recourse. The district court's overly

narrow perception of its own authority to remedy VA's failure to serve this Nation's veterans must be reversed to avoid turning the system on its head.

II. THE DISTRICT COURT ERRED IN DENYING RELIEF TO REMEDY BOTH VA'S MENTAL HEALTH CARE DELAYS AND THE LACK OF PROCEDURAL SAFEGUARDS TO CHALLENGE THOSE DELAYS.

Veterans' statutory entitlement to timely mental health care is undisputed. 38 U.S.C. §§ 1705, 1710. VA has, exercising its discretion and expertise, developed its own detailed plans to comply with these statutory mandates and has committed to implementing those plans. But VA has not implemented critical provisions, involving suicide prevention, required by its own plans. As such, services to which VA acknowledges Veterans are entitled are being unreasonably delayed, in some instances denied entirely because the delay leads to the death by suicide of individual veterans.

To shield itself from judicial remedy for these failures, VA misreads *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) ("*Norton*"), to support its claim of unfettered discretion to ignore its own commitments. On the contrary, the APA unequivocally commands relief to remedy unreasonable agency delay. 5 U.S.C. § 706(1). Moreover, VA admits there is no other procedural mechanism available to Veterans to challenge those unreasonable delays in the provision of mental health care. That violates due process. The district court erred in holding otherwise.

A. Implementation of VA's Own Mental Health Care Plans Is Not "Wholesale Reform."

VA overstates the Supreme Court's holding in *Norton* and ignores critical distinctions made by the Court. The interim land use plan at issue there did not create a legally binding commitment because the language in the plan "guide[d] and constrain[ed] actions, but [did] not . . . prescribe them." 542 U.S. at 71. The Court indicated, however, that an agency's plan *could* create such a legal obligation if "language in the plan itself creates a commitment binding on the agency." *Id.*

In stark contrast to the interim plan in *Norton*, the dictates set forth in VA's Mental Health Strategic Plan ("MHSP") and Feeley Memorandum "prescribe" discrete actions. The MHSP sets forth several suicide-prevention initiatives, some labeled "immediate" and others with implementation deadlines that passed in 2007. ER 2372-2417. The Feeley Memo was explicitly adopted to "reinforce the priorities established by the [MHSP]." ER 1437. Its "requirements" direct, for example, that "[f]ollow-up *must* be completed" for veterans who miss appointments, and that "Emergency Departments *must* have mental health coverage on a 24/7 basis." ER 1437-40 (emphasis added). The Feeley Memo also includes specific deadlines by which these requirements "must" be implemented.

ER 1437-40.[1] These are not simply "preliminary step[s]" but rather "implementation decision[s]," another crucial distinction noted in *Norton*. 542 U.S. at 69-71.

If the specific directives, timetables, and commanding language are insufficient to render the MHSP and Feeley Memo legally binding,[2] certainly VA's repeated commitments to these initiatives before Congress and the district court *are* sufficient to demonstrate VA's intent to bind itself. (Appellants' Op. Br. at 26-28.) Here, as in *Soda Mountain Wilderness Council v. Norton*, VA went "out of its way to make clear it was committing to a certain process." 424 F. Supp. 2d 1241, 1260 (E.D. Cal. 2006); ER 1075 (PIRT 738:3-8). Each of these factors alone, and in combination, is sufficient to subject VA to suit under § 706(1).

Veterans are not attempting to "evade the [APA's] finality requirement with complaints about the sufficiency of an agency action 'dressed up as an agency's failure to act.'" (Appellees' Br. at 27-28 (citing *Ecology Center, Inc. v. Forest*

---

[1] The Feeley Memo emphasized the critical nature of specific mental health initiatives by superseding pre-existing MHSP deadlines with a deadline of August 1, 2007, which had passed at the time of trial in April 2008. ER 1437-39.

[2] VA does not dispute that the Feeley Memo is both discrete and legally required.

Service, 192 F.3d 922 (9th Cir. 1999)).)[3] In fact, Veterans agree that the MHSP and Feeley Memo are appropriate means for VA to carry out its statutory obligations. VA's attempt to mischaracterize Veterans' claims to avoid judicial review must be rejected.

B. Veterans Do Not Seek to Change How VA Provides Care, But Whether and When That Care Is Provided.

VA also argues that Veterans' claims are precluded by 5 U.S.C. § 701(a)(2) because decisions regarding the "type" and "quality" of care provided are "committed to agency discretion." (Appellees' Br. at 28-29.) Even assuming that were true,[4] Veterans do not challenge the "type" or "quality" of treatment, but rather, the wholesale denials of care and significant delays veterans face in obtaining that treatment.

---

[3] *Ecology Center* involves a challenge to agency action under § 704, but, because the agency action at issue was not "final," plaintiffs recast their claims as a challenge to the same action under § 706(1). 192 F.3d at 926. This Court rejected that attempt "to evade the finality requirement." *Id.*

[4] The Supreme Court has declared that the exception to judicial review under § 701(a)(2) is "very narrow." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410 (1971). The Court has adopted a general presumption that enforcement action decisions are committed to agency discretion. In *Heckler v. Chaney*, the Court distinguished these decisions from other agency actions, however, because an agency's refusal to undertake enforcement proceedings does not infringe upon individual liberty or property rights. 470 U.S. 821, 832 (1985). In contrast, Veterans challenge deprivations of their property interests in medical care from VA.

For a suicidal veteran, a delay in treatment is tantamount to a denial of all treatment and, VA does not have discretion to provide no treatment. Further, the law is clear that eligible veterans are entitled to timely mental health care from the VA, 38 U.S.C. §§ 1705, 1710, regardless of the type or quality of care that is provided. The exception in § 701(a)(2) does not apply to VA's duty to provide timely care, and thus VA should be enjoined from refusing or delaying treatment VA determined is the appropriate type and quality for suicidal veterans who present at VA facilities.

C. Substantial Delays in Providing Care Are "Unreasonable" Under the Established *TRAC* Factors and Require Relief Under the APA.

The APA declares that courts "shall . . . compel agency action . . . unreasonably delayed." 5 U.S.C. § 706(1). This Circuit measures timeliness under the APA with the *TRAC* factor analysis. *See Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997) (citing *Telecomms. Research & Action Ctr. v. FCC,* 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*")). Once the *TRAC* factors are established, a court *must* compel the unreasonably delayed agency action. "'Shall' means shall." *Brower v. Evans*, 257 F.3d 1058, 1067 n.10 (9th Cir. 2001) (citations omitted).[5]

---

[5] The district court rejected VA's attempt to link the Mandamus Act's discretionary relief standard to Veterans' APA claim. ER 1284 (PIRT 9:10-12)

VA mistakenly asserts that the district court did not rule that the *TRAC* factors favor relief. (Appellees' Br. at 32-33.) At the preliminary injunction hearing, which was merged with the trial on the merits, the district court concluded that the *TRAC* factors favored relief, stating "the *TRAC* factors weigh in favor of granting relief if Plaintiffs are able to demonstrate that the health care being provided by the VA to suicidal veterans is in fact being unreasonably delayed or denied." ER 1284 (PIRT 10-11). Where the district court erred at trial was in applying an undefined "systemic" evidentiary standard. (Appellants' Op. Br. at 67-72.) Had the district court applied an appropriate evidentiary standard, relief would have been mandatory under the *TRAC* factors.

There is uncontroverted evidence in the record that VA is not providing suicidal veterans with timely access to care in violation of its own plans. For example, one veteran committed suicide after calling VA, reporting he was suicidal, and being told he was number 26 on a waiting list for treatment. ER 2027-28. It took another veteran nearly eight weeks to get an appointment, despite having repeatedly told VA he was suicidal. ER 2007. Implementation of the Feeley Memo's requirement that VA provide requesting veterans with "an [immediate] assessment of emergent [mental health] needs . . . within 24 hours" would prevent such problems. ER 1438.

("Thus, the APA relief is mandatory . . . Mandamus Act relief is always discretionary.").

Indeed, a review by Veterans' suicidology expert, Dr. Maris, of the limited subset of suicide incident briefs revealed that delays in conducting suicide risk evaluations and providing mental health treatment resulted in suicide. ER 2583. These problems persist because VA has failed to implement the MHSP and Feeley Memo directives.

An injunction compelling VA to implement its own directives is both appropriate and required. At a minimum, a remand is necessary to remedy the district court's erroneous discovery rulings and "systemic" evidentiary standard. *See* Section IV, *infra*. VA cites to the Supreme Court's decision in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 894 (1990), for the proposition that a court cannot compel "wholesale reform." (Appellees' Br. at 2, 27.) But in that same opinion, the Court held that judicial intervention under the APA "may ultimately have the effect of requiring a regulation, a series of regulations, or *even a whole 'program' to be revised by the agency* in order to avoid the unlawful result that the court discerns." *Lujan*, 497 U.S. at 894 (emphasis added). These two principles are easily reconciled. Under *Lujan*, courts can compel agency action if the court is not the architect of agency reform. Veterans do not seek to substitute the Court's or their own judgment for VA's. Compelling VA to implement its own plans is consistent with the type of agency reform contemplated by the *Lujan* Court.

VA also exaggerates Congress's role, suggesting that "pervasive Congressional oversight of issues relating to mental health care for veterans" supplants judicial review under the APA. (Appellees' Br. at 23.) Congress enacts legislation and conducts hearings, but lacks the power to enjoin VA's failures to act.[6] VA's argument is circular. VA cannot use periodic congressional guidance as a substitute for judicial review, while simultaneously refusing to be bound by commitments made to Congress.

D. The Lack of Procedural Safeguards to Challenge Delays in Mental Health Care Violates Due Process.

VA does not dispute that there is no procedure by which a veteran can challenge delays in or denials of care that are not "clinical" decisions, but rather, made by gatekeepers such as scheduling clerks. ER 1451-60. VA points to the "clinical appeals process," but acknowledges the district court's finding that this process is limited to "clinical decisions" made by doctors, and does not permit a

---

[6] Moreover, only through this litigation did Congress learn "*The Truth About Veterans' Suicides*." *Hearing Before the H.R. Comm. on Veterans Affairs*, 110th Cong., 2d Sess. (May 6, 2008). (RJN I in Support of Appellants' Op. Brief, Ex. D.) Cited by VA as evidence of "pervasive" congressional oversight, the hearing resulted from the discovery in this litigation of an email by Dr. Ira Katz, Deputy Chief of Patient Care Services for VA's Office of Mental Health, in which Katz stated: "Shh! Our suicide prevention coordinators are identifying about 1,000 suicide attempts per month among the veterans we see in our medical facilities. Is this something we should (carefully) address ourselves in some sort of release before someone stumbles on it?" ER 30 (F/F 19); ER 1417-18. That hearing, rather than demonstrating the sufficiency of congressional oversight, is further evidence that such oversight is not a substitute for judicial review.

veteran to "appeal a non-clinical, scheduling decision made by an administrator." (Appellees' Br. at 34 (citing F/F 52)). This distinction is critical, and is tantamount to a due process violation.

VA argues the risk of erroneous deprivation is low by assuming, contrary to the record, that all "veterans who present at a VA medical facility with emergency health issues are seen immediately." (Appellees' Br. at 35.) The Feeley Memo requires that veterans presenting at VA facilities with mental health issues be evaluated within 24 hours. ER 35 (F/F 35). However, VA does not know whether this critical directive has been implemented, and "has not implemented effective mechanisms to ensure scheduling procedures are followed." ER 35-36 (F/F 35-36); ER 37-38 (F/F 40-43.) The record contains unrebutted evidence that suicidal veterans have been refused timely evaluations after the MHSP and Feeley Memo were purportedly in effect. ER 1364-1411; ER 2007, 2010-11, 2033, 2020-21, 2025, 2027-28. The risk of erroneous deprivation of timely mental health care is, at a minimum, uncertain, and at worst, dangerously high. ER 2027-28; ER 2037-38; ER 2020-21; ER 2057-60; ER 2582-83; ER 643-44 (RT 294:18-296:22). Regardless, for the veteran who takes his own life after being turned away from VA, the consequences of erroneous deprivation are fatal.

All three prongs of the *Mathews* balancing test weigh in favor of relief. *See Mathews v. Eldridge*, 424 U.S. 319 (1976); (Appellants' Op. Br. at 36-40). The

interest of veterans in receiving timely mental health care could not be greater, and the consequences of erroneous deprivation are devastating. VA offered no evidence of any burden associated with providing additional procedural safeguards to appeal non-clinical denials of and delays in care that would justify depriving veterans of such procedures. The district court's decision to the contrary should be reversed.

III. THE DISTRICT COURT ERRED IN DENYING RELIEF TO REMEDY THE LENGTHY DELAYS AND INADEQUATE PROCEDURAL SAFEGUARDS IN VA'S ADJUDICATION SYSTEM.

The district court's findings of fact compel the conclusion that the protracted delays plaguing VA's system for adjudicating veterans' compensation claims violate the Due Process Clause and require relief under the APA. In addition, the adjudication system itself is constitutionally inadequate because veterans are not afforded basic procedural rights. The district court erred in holding otherwise. The district court also erred in holding that two provisions of the Veterans Judicial Review Act ("VJRA") deprived it of jurisdiction over Veterans' claims. This Court should not accept any construction of the VJRA that would preclude a forum for Veteran's adjudication-delay claims.

A. VA's Overly Broad Construction of the VJRA's Limits on Judicial Review Would Leave No Adequate Remedy for Veterans' Claims.

1. VA Overstates the Jurisdictional Reach of § 511.

VA advocates an expansive over-reading of 38 U.S.C. § 511, which would "preclude[] review of systemic claims seeking to challenge the manner and pace by which VA processes *all* benefits claims." (Appellees' Br. 39-40 (emphasis in original).) However, every court to reach the issue, including the district court, has declined to read the plain language of § 511 as a grant of exclusive jurisdiction to VA.

Section 511(a) "does not give the VA *exclusive* jurisdiction to construe laws affecting the provision of veterans benefits or to consider all issues that might somehow touch upon whether someone receives veterans benefits." *Broudy v. Mather*, 460 F.3d 106, 112 (D.C. Cir. 2006) (emphasis in original).[7] Section

[7] VA overstates § 511's preclusive effect by selectively quoting legislative history regarding the Supreme Court's decision in *Traynor v. Turnage*, 485 U.S. 535 (1988). (Appellees' Br. at 37-38.) The complete legislative history of § 511, however, *supports* Veterans' reading of the plain language of § 511 as limiting only district court review of *individual benefits decisions*: "*Traynor* and its companion cases did involve an individual's application for benefits, and the Administrator's refusal to grant such benefits under laws providing benefits to veterans. . . . Thus, by allowing *Traynor*-type cases to proceed . . . [t]he Supreme Court has endorsed judicial scrutiny of individual benefit determinations whenever an allegation is made that a decision implicates a constitutional principle or construction of a statute not codified in title 38." H.R. Rep. No. 100-963 at 21. Congress notably distinguished "*Traynor*-type" individual cases from other

511(a) applies only where there has been a "decision by the Secretary" involving "questions of law and fact necessary" to a formal decision regarding an individual veteran's benefits. *Hanlin v. United States*, 214 F.3d 1319, 1321 (Fed. Cir. 2000); *see also Bates v. Nicholson*, 398 F.3d 1355, 1365 (Fed. Cir. 2005). The statute does not "require the Secretary, and only the Secretary, to make all decisions related to laws affecting the provision of benefits. Rather, once the Secretary has been asked to make a decision in a particular case (e.g., through the filing of a claim with the VA), 38 U.S.C. § 511(a) imposes a duty on the Secretary to decide all questions of fact and law necessary to a decision in that case." *Hanlin*, 214 F.3d at 1321; *see also* H.R. Rep. No. 963, 100th Cong., 1st Sess., at 27, *reprinted in* 1988 U.S.C.C.A.N. 5782. As a result, "district courts have jurisdiction to consider questions arising under laws that affect the provision of benefits as long as the Secretary has not actually decided them in the course of a benefits proceeding." *Broudy*, 460 F.3d at 114.[8] The district court correctly held

---

challenges that do not involve review of individual benefits determinations. *Id.* at 19-22.

[8] VA attempts to distinguish *Broudy* on the factual ground that VA was prevented from "actually deciding *any* issues related to those claims." (Appellees' Br. at 41, n.10 (emphasis altered from original).) But VA *actually decided* six individual benefits claims. Because the Secretary had not explicitly considered two specific questions in denying six veterans' individual claims, § 511 was not implicated. 460 F.3d at 110, 114.

that "§ 511 does not provide the extremely broad preclusive effect advocated by Defendants." ER 23-24 (Op. at 12:26-13:1).[9]

VA further concludes that § 511 "precludes review of individual benefits decisions" and that the "assessment of whether delay is reasonable depends upon a case-specific inquiry." (Appellees' Br. at 39-40.)[10] It was not necessary, however, for the district court to look beyond the averages. VA admitted that the appellate delays, for instance, are national in scope, attributable to VA focusing resources on initial RO claims adjudication, and thus, unrelated to individual veterans' issues. ER 483 (RT 1020:1-1021:9). Delays in ministerial adjudicative steps are divorced from "questions of law and fact necessary to a decision by the Secretary." 38 U.S.C. § 511(a). For example, the district court found that some of the longest delays are related to purely ministerial and scheduling tasks wholly unrelated to the merits, complexity, or any other aspect of an individual veteran's claim. ER 53-54 (F/F 93 (finding average delays of 320 days to certify an appeal to the Board of

---

[9] No court has applied VA's statutes-versus-"actions" distinction as the correct § 511 litmus test, not even VA's sole citation, a case affirming dismissal based on § 502, not § 511. *See Hall v. U.S. Dep't Veterans' Affairs*, 85 F.3d 532, 535 (11th Cir. 1996).

[10] To support its position, VA relies exclusively upon *Crosby v. Social Security Administration*, 796 F.2d 576 (1st Cir. 1986). (Appellees' Br. at 42.) *Crosby* addresses class-wide relief under the Social Security Act and is inapposite to the central question of whether the district court had to transgress § 511 to assess the reasonableness of the delays in VA's adjudication system.

Veterans Appeals ("BVA") even when the veteran submits no additional evidence); ER 54 (F/F 94 (finding average delays of 455 days to receive a BVA hearing requested by the veteran)). Assessing delay in administrative steps does "not affect the merits of . . . whether claimants are entitled to benefits" and thus does not implicate questions of law or fact decided by the Secretary. *White v. Mathews*, 559 F.2d 852, 856 (2d Cir. 1977).[11]

Furthermore, the district court's conclusion that the "VA benefits system is not an adequate alternate forum for [Veterans'] systemic and facial constitutional challenges" underscores the point. ER 64-65 (C/L 10).[12] The Court of Appeals for Veterans Claims ("CAVC") and the Federal Circuit lack jurisdiction to "oversee the ongoing adjudication process which results in a BVA decision," and, as a result, lack "the power to provide a remedy" to Veterans' delay claims. ER 62-63

---

[11] To the extent that VA can demonstrate that the delay is caused by the veteran, the court, in fashioning relief, may consider whether and when it would be appropriate to excuse VA from compliance with mandatory time limits. *See, e.g.*, *White v. Mathews*, 434 F. Supp. 1252, 1262 (D. Conn. 1976), *aff'd*, 559 F.2d 852, 858 (2d Cir. 1977) (imposing mandatory time limits on Social Security Administration but excluding delays caused by applicants). Contrary to VA's assertion that Veterans "cite no decision holding that 'average delays' in a claims-adjudication system are 'unreasonable,' and we know of no such decision," (Appellees' Br. at 43), Veterans in fact cited *White*, which held that *average* delays were "unreasonable." 434 F. Supp. at 1261. (Appellants' Op. Br. at 54, 57.)

[12] Although it ruled in Veterans' favor, the district court erred as a matter of law in applying the requirements of 5 U.S.C. § 704 to Veterans' constitutional claims. *See Presbyterian Church v. United States*, 870 F.2d 518, 525 (9th Cir. 1989). (Appellants' Op. Br. at 37.)

(C/L 7, 8 (quoting *Clearly v. Brown*, 8 Vet. App. 305, 308 (1995))). Even the CAVC recognizes the "jurisdiction of the district courts for constitutional claims." ER 63-64 (C/L 9 (citing *Darcoron v. Brown*, 4 Vet. App. 115, 119 (1993))). Under VA's interpretation of the statutory framework, however, Veterans would be unable to bring their constitutional claims in any forum (ER 64-65 (C/L 10)), "rais[ing] serious questions concerning the constitutionality" of § 511. *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974). Accordingly, § 511 should be construed consistently with its plain language to permit Veterans' delay claims. *See id.* ("[I]t is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the (constitutional) question(s) may be avoided.") (citation omitted).

2. VA Concedes § 502 Is Limited to Direct, Facial Challenges to Regulations.

VA quietly sidesteps the district court's erroneous legal conclusion that 38 U.S.C. § 502 stripped it of jurisdiction because the remedy sought by Veterans "implicate[s]" VA regulations. ER 75 (C/L 34). VA properly concedes that the correct standard in this Circuit is that § 502 only applies to direct, facial challenges to VA regulations. (Appellees' Br. at 38-39 (citing *Preminger v. Principi*, 422 F.3d 815, 821 (9th Cir. 2005))). *See also Nehmer v. U.S. Dept. of Veterans Affairs*, 494 F.3d 846, 857 (9th Cir. 2007) (noting only "direct challenge[s] to [a

regulation's] validity must be brought in the Federal Circuit"). On this basis alone, Conclusion of Law 34 must be reversed.

VA summarily concludes that Veterans' benefits claims constitute "facial" challenges. (Appellees' Br. at 43.) But, in limiting the reach of § 502, this Circuit narrowly defined "facial challenges" as challenges "either [to] the merits of the VA's regulation or [to] the VA's rulemaking authority." *Nehmer*, 494 F.3d at 857-58. That definition is directly linked to the limited policy at stake: to confer jurisdiction over direct challenges to "an action by the Secretary that requires notice and publication" to the Federal Circuit. *Preminger*, 422 F.3d at 821. Veterans' claims challenging delays in VA's adjudication system do neither.

Veterans do not directly challenge VA regulations. VA does not cite, nor could it cite, a single regulation that imposes time limits on VA during any step of the appeals process. ER 52 (F/F 86). Instead, VA cites three regulations establishing basic appellate procedural steps. *See* 38 C.F.R. § 20.200 ("An appeal consists of a timely filed Notice of Disagreement in writing and, after a Statement of the Case has been furnished, a timely filed Substantive Appeal."); 38 C.F.R. § 20.201 (defining Notice of Disagreement); 38 C.F.R. § 20.202 (defining Substantive Appeal and outlining its requirements). Veterans' request for due-process-compliant time limits would not affect procedures currently in place for appeals. Nor would time limits affect claims-processing regulations related to VA

Regional Offices ("ROs"). At trial, VA submitted evidence that its own internal goal of 125 days for RO claims adjudication takes into account the procedures in these regulations. ER 1012; ER 468 (RT 962:8-23). Therefore, even according to VA, it is feasible for ROs to expedite claims at least to 125 days, and the handful of regulations that VA asserts would be "alter[ed]" or "overrul[ed]" if VA were ordered to expedite its benefit claims processing would, thus, be unaffected. (Appellees' Br. at 43.) Therefore, the district court erred in concluding that § 502 precluded Veterans' claim.

B. The Substantial Delays That Continue to Plague VA's Claims Adjudication System Are "Unreasonable" Under the APA.

The egregious nearly five-year delays in adjudicating compensation claims—including the initial decision and an appeal to BVA—are "unreasonable" under the APA. As set forth in Section II.C, *supra*, the six *TRAC* factors measure whether delays are "unreasonable."

VA misunderstands the first and second *TRAC* factors. Relying on the absence of any statutory time limits for claims adjudication, VA contends that "it would be improper for a court to impose its own deadlines." (Appellees' Br. at 48.) The *TRAC* analysis, however, only applies in the *absence* of a mandatory deadline. *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1191 n.19 (10th Cir. 1999). Whether delay is "unreasonable" under the APA is judged by a "rule of reason." *TRAC*, 750 F.2d at 80. The second *TRAC* factor looks to congressional

expectations of timeliness to inform the rule of reason. *Id*. The purpose of the first and second *TRAC* factors is to establish a standard to judge the reasonableness of the alleged delay, not to "divine[] expectations . . . [of] specific deadlines," as VA contends. (Appellees' Br. at 46.)

VA argues that Veterans "cite[d] no evidence" that Congress and VA expect timely claims adjudication. However, Veterans not only cited statutory codification of congressional expectations, e.g., 38 U.S.C. §§ 7101(a), 5109B, Veterans also elicited VA admissions that those expectations are not being met. Former Under Secretary Cooper testified that VA does not process remands in an "expeditious manner," as required by 38 U.S.C. § 5109B. ER 805 (Ex. 1258 at 188:21-189:8). Indeed, in regard to the egregious appellate delays, Under Secretary Walcoff testified that VA has "got to do something" and trumpeted VA's hastily concocted plan to shorten them. ER 483-84 (RT 1019:2-1025:5); ER 421-22 (RT 1172:19-1173:23). Now, on appeal, VA claims that its post-filing efforts to shorten appellate delays are "subsequent remedial measures," and should not be used to prove liability. VA cannot have it both ways.

VA's efforts to shorten the delays show that it is feasible for VA to adjudicate claims within a specific time period.[13] For example, as part of VA's pilot program for the expedited resolution of benefit claims, VA agrees to certify an appeal to BVA "no later than 60 days from receipt of the Substantive Appeal" if the veteran waives the right to have the RO consider evidence submitted after the substantive appeal is filed. 73 Fed. Reg. 20,571 at 20,574 (Apr. 16, 2008). The submission of additional evidence, however, is not the source of the significant delays because it still takes, on average, 320 days (and sometimes as long as 624 days) for ROs to complete the ministerial step of certifying appeals to BVA when no additional evidence is submitted. ER 54 (F/F 93); ER 966 (Ex. 1320 at VA 322-00002598). If VA can certify appeals to BVA in 60 days when a veteran expressly agrees not to submit additional evidence, VA can certify appeals to BVA in 60 days when a veteran does not, in fact, submit additional evidence. The district court should have used the pilot program's 60-day time limit to inform its "rule of reason" under *TRAC*.

VA also relies heavily on *Heckler v. Day*, 467 U.S. 104 (1984), for the proposition that court-imposed time limits are improper. (Appellees' Br. at 46.) In *Heckler*, the district court issued an injunction imposing a mandatory time limit to

---

[13] Even if Federal Rule of Evidence 407 is applicable, which it is not, it "does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving . . . feasibility." Fed. R. Evid. 407.

remedy unreasonable delays. 467 U.S. at 108-10. After an extensive review of congressional hearings, reports, and legislative history, the Court vacated the injunction based on Congress's explicit and repeated consideration and rejection of time limits almost annually for nearly a decade. *Id.* at 111-15.

The extensive congressional findings analyzed in *Heckler* are wholly absent here. Notably, VA does not cite a single instance of the Senate, the House of Representatives, or their respective VA oversight committees expressing concern over mandatory time limits, much less "repeatedly" voting down proposed legislation seeking to impose such limits on VA. Instead, VA cites another recent pilot program, requiring ROs to adjudicate claims in 90 days when the veteran certifies that no additional evidence is needed to decide the claim, as proof of "Congress's ongoing awareness of this issue." (Appellees' Br. at 47.) This pilot program negates any suggestion that Congress has repeatedly rejected the imposition of time limits, and provides additional content to the "rule of reason" under *TRAC*.

Moreover, this case highlights the limitations of congressional oversight. VA admits, for instance, that it is violating its statutory duty to resolve BVA remands in an "expeditious" fashion. 38 U.S.C. § 5109B; ER 805 (Ex. 1258 at 188:21-189:8). The authority to remedy statutory violations lies solely with the judicial branch, not Congress. Additionally, VA offers no evidence that Congress

is aware that it takes, on average, 1,419 days for BVA to issue a decision after a veteran files a notice of disagreement. ER 54-55 (F/F 95). BVA Chairman Terry, who routinely appears before Congress's standing committees on VA, (e.g., ER 594 (RT 535:12-536:9)), was surprised that VA's appellate delays were so long when confronted with delay numbers at trial. ER 602-03 (RT 569:4-573:25). Thus, "Congress's ongoing awareness of this issue" is far from obvious.

Finally, with respect to *TRAC* factor four (i.e., competing agency priorities), VA argues, without any support in the record, that shortening appellate delay would shift resources away from initial RO claims adjudication. (Appellees' Br. at 48.) On the contrary, VA concedes that it has sufficient resources and intends to use them to shorten the appellate delay. (Appellants' Op. Br. at 53.) An order remedying appellate delays would be consistent with, rather than compete with, "agency priorities," and would ensure that VA lives up to its commitments. The district court's dispositive treatment of Veterans' claim based on *TRAC* factor four requires reversal.

C. The Substantial Delays Also Violate Due Process and the District Court Erred by Failing to Engage in the *Mathews* Analysis.

VA, like the district court, dodges the merits of Veterans' due process delay claim in favor of a single citation to *Wright v. Califano*, 587 F.2d 345 (7th Cir. 1978), for the proposition that "judicial intervention to compel faster adjudication of benefits claims by an agency is almost never warranted." (Appellees' Br. at 49.)

Even assuming that proposition were true, the facts of this case are exceptional and warrant exceptional results. As the Seventh Circuit noted, "judicial intervention may be required at some point." *Id*. at 356. Veterans submit that that point is now. In a similar fact pattern, the Third Circuit held that "[a]lthough there is no magic length of time after which due process requirements are violated, we are certain that three years, nine months, is well past any reasonable time limit, when no valid reason for the delay is given. . . . Four years is totally out of phase with the requirements of fairness." *Kelly v. R.R. Ret. Bd.*, 625 F.2d 486, 490-91 (3d Cir. 1980).

The district court's discretion regarding whether to issue injunctive relief did not excuse it from performing the required balancing test under *Mathews v. Eldridge*, 424 U.S. 319 (1976). After all, Veterans also seek a declaratory judgment that their due process rights are violated by unconstitutional delays in VA's adjudication system.[14] Although the district court acknowledged Veterans' request for declaratory relief (ER 14 (Op. at 3:6-16)), it failed to rule on the matter. Declaratory relief is often afforded in cases where litigants seek a declaration of constitutional rights. *See, e.g., Greater Los Angeles Council on Deafness v. Zolin*,

---

[14] Veterans devoted a section of their opening brief to the propriety of injunctive and declaratory relief to remedy the delays enumerated in the findings of fact. (Appellants' Op. Br. 66-77.) VA conspicuously omits any discussion of these issues. Thus, Veterans assume that VA concedes them.

812 F.2d 1103, 1113 (9th Cir. 1987) (remanding district court's denial of declaratory relief for violation of due process rights). The district court was required to perform the analysis under *Mathews* to assess whether such declaratory relief was warranted, if for no other reason. *Id*. at 1112.

D. The Avoidable Remand Rate Necessitates a Finding That the Lack of Basic Procedural Protections at the Regional Office Level Violates Due Process.

The procedural inadequacies at the RO level (Appellants' Op. Br. at 62-66) also violate Veterans' due process rights under *Mathews*, because the rate of error for such an important statutory entitlement under the current procedures is so large.

The parties agree that the statutory "duty to assist" veterans with evidence-gathering at the initial stage of the application and adjudication process and was supposed to create a non-adversarial system. However, VA's "avoidable" remand rate, which measures errors in the VA's handling of a entitlement claim that require remanding an application for further processing, demonstrates that VA routinely violates its "duty to assist" veterans and commits "due process" violations and thus indicates that the adjudication system has become *de facto* adversarial. ER 56 (F/F 102); ER 599 (RT 556:2-24); ER 420 (RT 1166:14-20); ER 962-63.[15]

---

[15] VA also heralds the theoretical presumption that claims should be granted where the evidence is evenly balanced. (Appellees' Br. at 52.) But the procedural

The adversarial nature of the adjudication system is further evidenced by VA's recent discovery of a nationwide document-shredding epidemic. During a routine audit, VA's Office of Inspector General ("OIG") discovered 132 claim-related documents, needed to support and facilitate the processing of claims, which RO personnel inappropriately discarded in shredding bins at four ROs. Request for Judicial Notice in Support of Appellants' Reply Brief ("RJN II") filed herewith, Ex. A (*Document Tampering and Mishandling at the VBA: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on VA*, 111th Cong., 1st Sess. (March 3, 2009) at p. 23). After OIG informed VA, VA found 474 additional claim-related documents inappropriately discarded in 41 of the 58 ROs. (RJN II, Ex. A.) If a single audit found such pervasive document destruction, one can only assume the gravity and scope of the problem.

VA mistakenly claims that the district court found that the adjudication system "remains non-adversarial." (Appellees' Br. at 50.) The district court simply cited *Forshey v. Principi*, 284 F.3d 1335, 1355 (Fed. Cir. 2002), concluding that "according to the Federal Circuit, the process at the RO level remains non-adversarial." ER 82-83 (C/L 43). However, the Federal Circuit could not have been aware of VA's recent avoidable remand rate or other evidence before the

---

inadequacies Veterans highlight relate to the gathering of evidence, such that the evidence necessary to invoke VA's presumption is lacking.

district court because veterans are not permitted to take discovery of VA during the adjudication process, where appeals to the Federal Circuit originate.

Regardless of the label placed on the system, the critical fact remains that the system is highly error prone. Additional procedures, identified by Veterans, could reduce the error rate, and thus reduce the number of appeals and corresponding delays, without impinging on VA's interests. Denying Veterans these procedures based on an idealized view of what the system should be, but plainly is not in practice, deprives Veterans of due process. Accordingly, the procedural straightjacket imposed on Veterans should be removed.

Meanwhile, the persistent veteran who successfully adjudicates a claim with VA for more than *eight years* is subjected to the "Extraordinary Awards Procedure." ER 59 (F/F 112). The procedure allows a veteran's benefit award to be reduced without any notice or opportunity to be heard–the cornerstones of due process–by officials within VA's central office who have had no interaction with the veteran or other witnesses at RO hearings and who are not empowered to adjudicate claims. ER 59-60 (F/F 111-13).

IV. STRONG PREJUDICE RESULTED FROM THE DISTRICT COURT'S DISCOVERY RULINGS.

To successfully challenge the district court's discovery rulings, Veterans only need to show that "there is a reasonable probability that the outcome would have been different had discovery been allowed." *Laub v. U.S. Dep't of Interior*,

342 F.3d 1080, 1093 (9th Cir. 2003). Veterans have made that showing here. Adhering to the severely expedited six-week discovery schedule, the district court erroneously denied Veterans discovery of VA's suicide incident briefs and average PTSD claims processing times at the RO level.

VA's "suicide incident briefs" and underlying root cause analyses are central to Veterans' health care claims. Deputy Under Secretary Feeley, charged with agency compliance with the MHSP and his self-titled Feeley Memo, testified that VA uses suicide incident briefs as "learning events" to evaluate problems with care resulting in veteran suicides. ER 830 (RT 285:4-286:5). Deputy Under Secretary Cross similarly testified to their importance in assessing policy compliance. ER 1330 (PIRT 194:2-10). Even the small subset VA produced evidences a pattern of VA failing to abide by its own policies regarding suicide assessment, appointment scheduling, and timely mental health treatment for suicidal veterans. ER 2582-83; ER 643-44 (RT 294:18-296:22). Veterans were prejudiced by the district court's conclusion that Veterans failed to provide evidence of "systemic" delays or denials of mental health care while simultaneously denying Veterans access to the very documents VA uses to evaluate its delivery of care. ER 13. That application of an erroneous "systemic" standard (Appellants' Op. Br. at 67-72), coupled with the denial of necessary discovery, left Veterans in an impossible predicament. Based on conclusions from the small subset, there is more than a reasonable probability

that the outcome would have been different had Veterans been afforded this crucial discovery. Accordingly, the case should be remanded.

The district court further abused its discretion by denying Veterans discovery regarding the average processing time of PTSD claims at ROs. VA represented to the district court and again represents to this Court that the requested information is "not available." (Appellees' Br. at 55.) However, VA never explains why two separate VA witnesses testified that VA can easily generate this information. ER 515; ER 479 (RT 1005:2-1006:11). Instead, VA argues that "[e]ven if the average time for processing PTSD claims were longer than the average for processing SCDDC claims overall, this would prove nothing." (Appellees' Br. at 55.) VA's position ignores the core issue, which is exactly how much longer those processing times are for PTSD claims. Long-standing due process precedent establishes that the length of the delay itself can violate due process. *See*, *e.g.*, *Kelly*, 625 F.2d at 490-91 (holding three-year, nine-month delay violates due process violation); *Andujar v. Weinberger*, 69 F.R.D. 690, 694 (S.D.N.Y. 1976) (holding delays alone may establish a due process violation). The district court's refusal to compel production of the average processing time for PTSD claims was therefore an abuse of discretion, and a remand is necessary.

V. CONCLUSION

Veterans respectfully request that the district court's judgment be reversed and that injunctive and declaratory relief be entered in favor of Veterans.

Dated: May 1, 2009

MORRISON & FOERSTER LLP
DISABILITY RIGHTS ADVOCATES

By: /s/ Gordon P. Erspamer
Gordon P. Erspamer

Attorneys for Plaintiffs-Appellants
Veterans for Common Sense and
Veterans United for Truth, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204, subdivision (c)(1), I certify that the attached brief was produced on a computer and, according to the word count of the computer program used to prepare the brief, contains 6,989 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 1st day of May, 2009, at San Francisco, California.

MORRISON & FOERSTER LLP
DISABILITY RIGHTS ADVOCATES

By: /s/ Gordon P. Erspamer
Gordon P. Erspamer

Attorneys for Plaintiffs-Appellants
Veterans for Common Sense and
Veterans United for Truth, Inc.

APPENDIX
CIRCUIT RULE 28-2.7 STATUTORY ADDENDUM

Table of Contents

Federal Rules of Evidence, R. 407 33

Board of Veterans' Appeals: Expedited Claims, Adjudication Initiative,
73 Fed. Reg. 20,571 (Apr. 16, 2008) 34

FEDERAL RULES OF EVIDENCE
ARTICLE IV. RELEVANCY AND ITS LIMITS

USCS Federal Rules of Evidence, Rule 407

Rule 407. Subsequent Remedial Measures

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

FEDERAL REGISTER
Vol. 73, No. 074

Proposed Rules
DEPARTMENT OF VETERANS AFFAIRS (VA)
38 CFR Parts 3 and 20

Board of Veterans' Appeals: Expedited Claims Adjudication Initiative--Pilot Program
73 FR 20571

DATE: Wednesday, April 16, 2008

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to launch an initiative for accelerated claims and appeals processing at four VA facilities, based on volunteer participation by eligible claimants. The purposes of this proposed initiative are to provide a model to streamline the VA claims adjudication and appeals process systemwide and to obtain resolution of individual claims and appeals at the earliest time possible in order to provide final decisions to veterans and their families with regard to their claims for benefits. If this initiative is successful at the four trial sites,
the data obtained from this initiative may provide a basis for expanding some, or all, of the program nationwide, and ultimately help accelerate the processing of all claims and appeals.

Period To File Substantive Appeal

Under current laws and regulations, claimants have 60 days from the date of mailing of the Statement of the Case (SOC) in which to file a Substantive Appeal, or the remainder of the one-year period in which to file the NOD, whichever period is longer. 38 U.S.C. 7105(d)(3); 38 CFR 20.303(b). ECA participants under this proposed rule would agree that if they continue to pursue an appeal in their case, they will waive the right to this time period, and instead file a Substantive Appeal within the 30-day period prescribed in proposed § 20.1504(a)(5). If an ECA participant did not file a Substantive Appeal during this 30-day period, but later decided within the remaining time available under 38 U.S.C. 7105(d)(3) and 38 CFR 20.303(b) to do so, he or she could still file a timely Substantive Appeal.

However, the claimant's filing of a Substantive Appeal after the 30-day period would constitute an implied revocation of participation in the ECA Initiative under proposed § 20.1509(c). In that case, the appeal would then proceed in accordance with established laws and regulations, as if ECA participation had not been elected. Alternatively, under proposed § 20.1509(e), an ECA participant may file a motion for extension of the 30-day period, based on good cause. Such motion must be filed with VA *prior* to the expiration of the 30-day period. Provided that the motion is granted, the participant will remain in the Initiative.

Certification of Appeal to the Board

Proposed § 20.1504(b) would provide that upon receipt of a timely Substantive Appeal, the participating VA regional office would certify covered claims and transfer the appellate record to the Board within 30 days of receipt of the Substantive Appeal or within 30 days of the receipt of any additional submissions following the Substantive Appeal, but no later than 60 days from receipt of the Substantive A

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system:

APPELLANTS' REPLY BRIEF

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by UPS Overnight, postage prepaid, to the following non-CM/ECF participants:

DANIEL BENSING
JAMES J. SCHWARTZ
KYLE R. FREENY
RONALD J. WILTSIE II
U.S. DEPARTMENT OF JUSTICE
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
20 MASSACHUSETTS AVE., NW
WASHINGTON DC 20001

CHARLES SCARBOROUGH
WILLIAM KANTER
U.S. DEPARTMENT OF JUSTICE
CIVIL DIVISION, APPELLATE STAFF
950 PENNSYLVANIA AVE., N.W., RM 7244
WASHINGTON DC 20530-0001

MICHAEL DAUGHERTY (022G2)
DEPARTMENT OF VETERANS AFFAIRS
OFFICE OF THE GENERAL COUNSEL
810 VERMONT AVE., NW
WASHINGTON DC 20420

/s/ Carol J. Peplinski
Carol J. Peplinski

Beaudoin, Kathy E.

From: ca9_ecfnoticing@ca9.uscourts.gov
Sent: Friday, May 01, 2009 6:37 PM
To: Beaudoin, Kathy E.
Subject: 08-16728 Veterans for Common Sense, et al v. James Peake, et al "Submit Brief for Review by the Court"

*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing.**

United States Court of Appeals for the Ninth Circuit

Notice of Docket Activity

The following transaction was entered on 05/01/2009 at 6:36:57 PM PDT and filed on 05/01/2009

Case Name:	Veterans for Common Sense, et al v. James Peake, et al
Case Number:	08-16728
Document(s):	Document(s)

Docket Text:
Submitted (ECF) Reply brief for review. Submitted by Appellants Veterans United for Truth, Inc. and Veterans for Common Sense. Date of service: 05/01/2009. [6906330] (GPE)

The following document(s) are associated with this transaction:
Document Description: Appellants' Reply Brief
Original Filename: Appellants' Reply Brief.pdf
Electronic Document Stamp:
[STAMP acecfStamp_ID=1106763461 [Date=05/01/2009] [FileNumber=6906330-0]
[5d28b144e0cc41e468ee49d0c500a1721ad2eb274c4eca32a08850f3f6c756b53178dc4373685ab2c410ffe

Notice will be electronically mailed to:

Mr. Scarborough, Charles W.
Sir Alderman, William F., Attorney
Ms. Moser, Heather Alyson, Counsel
Mr. Kanter, William
Mr. Gonzalez, Arturo Jorge, Attorney
Erspamer, Gordon P., Senior Counsel
Mr. Hassanein, Ryan George, Attorney
Miss Sprenkel, Stacey Michelle, I
Miss Naugle, Natalie, Counsel
Elsberry, Ronald
Ms. Corbit, Katrina Kasey, Attorney

Notice will be mailed to:

Wolinsky, Sidney M., Attorney
Disability Rights Advocates
2001 Center Street
Berkeley, CA 94704

Gold, Judith Z., Attorney
HELLER EHRMAN, LLP
Suite 3000
333 Bush St.
San Francisco, CA 94104-2878

Schwartz, James J., Attorney
DOJ - U.S. DEPARTMENT OF JUSTICE
Civil Division
P.O. Box 883
Washington, DC 20044

Bensing, Daniel E., Attorney
DOJ - U.S. DEPARTMENT OF JUSTICE
Civil Division
P.O. Box 883
Washington, DC 20044

Loran, Thomas V., III, Attorney
PILLSBURY WINTHROP SHAW PITTMAN, LLP
5th Floor
50 Fremont Street
San Francisco, CA 94105

Wiltsie, Ronald J., II
DOJ - U.S. DEPARTMENT OF JUSTICE
Civil Division
P.O. Box 883
Washington, DC 20044

Freeny, Kyle R.
DOJ - U.S. DEPARTMENT OF JUSTICE
Civil Division
P.O. Box 883
Washington, DC 20044

The following information is for the use of court personnel:

DOCKET ENTRY ID: 6906330
RELIEF(S) DOCKETED:
DOCKET PART(S) ADDED: 6262519, 6262520