IN THE UNITED STATES COURT OF APPEALS

FOR VETERANS CLAIMS

Gordon Alexander Graham Petitioner, *Pro Se*	)
v.	)
David J. Shulkin, M.D. Secretary of Veterans Affairs	)
Meghan Flanz Interim General Counsel US Dept. Of Veterans Affairs	)
JACK KAMMERER Director of VR&E US Dept. Of Veterans Affairs	)
PRITZ NAVARATNASINGAM Director, Seattle, WA Regional Office US Dept. Of Veterans Affairs	)
	) Docket No. 17-_____

Respondents

PETITION FOR EXTRAORDINARY RELIEF
IN THE NATURE OF A *WRIT OF MANDAMUS*

Certificate of Service

Appendix

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Petitioner, *Pro Se*

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Certificate of Service

1. I, Gordon A. Graham certify that I have:

2. , Mailed a copy of this *Petition For Writ of Mandamus* with Appendix and Certificate of Service to the clerk of this Court by first class US mail.

3. Prior to doing so, I have served a copy of the document upon the named respondents and Counsel for the respondents by mailing them, postage prepaid, addressed as follows.

The Honorable David J. Shulkin, M.D.

Secretary, US Dept. of Veterans Affairs
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Signed:_____
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Appendix

1. a)Twelve emails between Petitioner and Seattle VR&E personnel.

   b)One attachments to emails

2. Preliminary ILP items requested (list)

3. BVA Decision 13-09 654A granting ILP appeal.

4. Original 21-4138 filing for PCT dated March 30, 1994.

5. Original 21-4138 Notice of Disagreement dated December 7th, 1994

6. SOC dated January 9th, 1995 confirming 38 CFR §3.156(b) evidence had been submitted and was under review.

7. March 5th, 2011 request for equitable tolling of VA 9 PCT suspense date.

8. BVA decision 09-11 035 dated May 17th, 2012 denying equitable tolling of PCT earlier effective date and earlier effective date for Hepatitis C.

9. BVA decision 11-02 889A dated November 21st, 2013 granting earlier effective date of Hepatitis C.

10. October 6th, 2014 CUE revision of earlier effective date for PCT SOC (denial).

11. February 17th, 2015 SSOC of CUE granting original PCT claim effective date to March 31st, 1994 and discussion that the original claims stream appeal is still in contention due to appeal for a higher rating (Respondent's Response).

12. BVA Decision 13-09 654A dated September 4th, 2015 granting 100% rating for PCT from 1994 original claim stream.

13. November 27th 2015 PCT rating for 100% with incorrect effective date of August 14th, 2012.

14 . Current screen shot of rated disabilities on VA's eBenefits web site showing incorrect effective date of PCT due to phlebotomies analogous to 38 CFR§4.115a.

Petition for Extraordinary Relief

Now comes petitioner Gordon Alexander Graham, pursuant to 38 USC § 7261(a)(2), US Vet. App. 21 and 32 and respectfully submits to the U.S. Court of Veterans Appeals (CAVC) his *pro se* petition in the nature of a Writ of Mandamus. In support of this petition, petitioner relies on the Board of Veterans Appeals (BVA) favorable decision Docket No. 13-09 654A, dated September 4th, 2015. Petitioner further relies on Extraordinary Writ of Mandamus Orders dated March 20th, 2015 (CAVC #15-112 Davis presiding) and August 25th, 2016 (CAVC #16-2098 Bartley presiding).

Statement of Relief sought

The petitioner demonstrates below that he has a clear entitlement to relief from this Court in the form of an Extraordinary Writ of Mandamus for the following unresolved benefits claims:

1. Independent Living Program (ILP) entitlement to heated, ADA-compliant greenhouse as stipulated in the BVA Decision13-09 654A dated September 4, 2015.

2. Grant of earlier effective date of March 31st, 1994 for Porphyria Cutanea Tarda rated 100% by BVA decision 14-42 623 dated September 4th, 2015).

Facts Relevant to the Petition for Greenhouse and Correction of Records

1. Following the issuance of the August 25th, 2016 order (CAVC #16-2098), Petitioner was able to begin a meaningful colloquy with VR&E Services regarding requirements for the BVA approved greenhouse.

2. The Seattle VR&E director waited until the last day stipulated in 38 CFR 21.98(c) (i.e. 90 days) and the Order issued by the Court to begin negotiations for a jointly agreed upon Individualized Independent Living Program (IILP).

3. After much give and take, on October 14th, 2016 an informal "email" agreement was promulgated which still has yet to be officially incorporated into a VA Form 28- 8872 as required by law. Petitioner at this date is still uncertain *what* the offer entails and the VR&E Officer refuses to supply one despite numerous pleas to commit this mutual verbal understanding into a legally approved, signed agreement orchestrated by all stakeholders.

4. On April 4th, 2017, Seattle VR&E Vocational Counselor Kris Holloway emailed Petitioner a VA Form 28-1905m for "supplies" to sign on page one but not to sign on page 2. Petitioner is not in the habit of signing for VA items as yet not received pertinent to any proposed IILP. Having been hornswoggled at this game for somewhere in excess of six years (May 2011), Petitioner is leery of VR&E personnel bearing invisible or intangible gifts (and promises) requiring confirmatory signatures.

5. **On April 8th, 2017, Mr. Holloway sent Petitioner a new email requesting a complete financial statement of Petitioner and his spouse' net worth.** The email stated VA required "[stating] household income, VA disability, pension, employment, income contribution, spousal income, SSD, SSDI, grants etc.… [I]nformation on monthly expenses, reoccurring debt, mortgage, etc." He further stated "I don't need a W-2 but if later it is an issue for some reason or another or something comes up, you would have to provide documented evidence to collaborate [sic] your figures. I will leave this component out until I hear back from your on this."

6. Petitioner could find no supportive regulation in 38 CFR § Chapter 21(2011) dealing with a financial means test to qualify for the Independent Living Program (ILP) and thus declined to supply requested information. VR&E personnel refuse to illuminate Petitioner as to why this is suddenly a *new* requirement. Petitioner is fearful that refusal to supply this information will result in further delay or outright denial.

5. As of May 10th, 2017 requests and phone calls to Seattle VR&E for illumination continue to go unanswered in spite of numerous attempts to reach out to Mr. Boyd and Mr. Holloway. Based on this, Petitioner returns to Court, hat in hand and requests assistance or clarification in his never-ending odyssey for services promised years ago but never delivered.

Correction of Records

1. On March 31st, 1994 Petitioner filed for Porphyria Cutanea Tarda (hereinafter abbreviated as PCT) as a secondary to Hepatitis, or in the alternative, as a presumptive of herbicides pursuant to 38 CFR §3.309(e).

2. On November 7th, 1994, Petitioner was denied for both claims.

3. On December 7th, 1994 Petitioner dutifully filed a timely NOD with new and material evidence showing two years of service on the land mass of not only the Republic of South Vietnam(RVN) but additional service in Project 404 in the Kingdom of Laos. This was to establish presumptive exposure to herbicides and medical records from an Air America-contracted Hospital showing in-patient status with Hepatitis.

4. On January 5th, 1995, the Seattle RO issued a Statement of the Case (SOC) confirming and continuing the denial but acknowledging the new and material evidence submitted to prove boots on the ground, hepatitis infection and promising a new decision soon. Nothing more transpired and the claim was never adjudicated nor was a Supplemental Statement of the Case (SSOC) subsequently issued.

5. The claim was reopened on February 23, 2007 and granted June 1st, 2008. The PCT portion of the claim was finally granted on September 30th, 2008. Unfortunately, both were granted with an incorrect effective date of February 23, 2007.

6. After a long, substantive appeal the case was docketed before the Court as CAVC #12-1980. A Joint Motion for Partial Remand (JMPR) was issued and the appeal was returned to the Veterans Law Judge to readjudicate under 38 CFR §19.29 based on the vague language of the January 5th, 1995 SOC.

7. In the previous decision denying an earlier effective date for Hepatitis C (see BVA Decision 09-11 035 dated May 17th, 2012), the Veterans Law Judge declined to extend equitable tolling to Petitioner's PCT claim for earlier effective date in spite of his documented one-year in-patient status at the Seattle VAMC including during the 60-day suspense date window of the SOC.

8. The JMPR in CAVC #12-1980 granted the earlier effective date for Hepatitis C, and, unarguably, all secondary claims filed on March 31, 1994. Upon docketing of the JMPR for readjudication, the Veterans Law Judge pointedly ignored the equitable tolling entitlement to an earlier effective date for PCT (see BVA Decision 11-02 889A dated November 21st, 2013).

9. After waiting over a year, Petitioner filed an Extraordinary Writ of Mandamus (see CAVC #15-112, Davis presiding). Respondent's answer sub silentio corrected the CUE defect and a 60% rating based on DC 7700 (1994) was retroactively applied to correct the Veterans Law Judge's 2011 clear and unmistakable error failing to extend equitable tolling. Petitioner subsequently filed his VA Form 9 in a timely manner and completed the substantive appeal seeking the highest award possible (AB v. Brown, 6 Vet. App. 35 (1993).

10. On February 16th, 2016 Petitioner filed a Notice of Disagreement with the newly stipulated August 14, 2012 effective date based on the original filing which began the claim on March 31, 1994. Petitioner has assiduously and steadfastly pursued this single claim stream without surcease since its inception in 1994.

11. The Veterans Law Judge advanced the PCT appeal on the docket (see BVA Decision 14-42 623) for several reasons-one of which was the *extreme age* of the appeal. This new BVA decision has now aged for two years with no correction of the effective date. As of May 10th, 2017, the new substantive appeal, taken from this original decision, seeking –yet again-the same correct effective date is now approaching over ten years since its reopening with no resolution in sight.

12. Seattle VA's Assistant Regional Officer, Mr. Cesar Romero, reached out to Petitioner early in February of the current year offering his services and phone number to resolve any problems Petitioner might be having with the Appeals Team on matters regarding another Veteran's claim. Petitioner mentioned his problem with the effective date for PCT and Mr. Romero promised to resolve same promptly. Repeated follow-on requests for resolving this effective date issue have met with no response whatsoever to date. Petitioner is mystified as to what it entails to permanently effect a previously established, mutually acknowledged date of claim and its concomitant twenty year protection.

Petitioner's Argument for the right to Extraordinary Relief in the form of a Writ of Mandamus

A. The Petitioner lacks the alternative means to attain the desired relief.

The first rule for Extraordinary Writs is that the petitioner must be without alternate means to obtain the desired relief thus ensuring the Writ is not used as a substitute for the appeals process. Petitioner submits that he has patiently appealed the Independent Living Program (ILP) request continuously since May 2011 and complied with all suspense dates. Further, petitioner has prevailed at the Board of Veterans Appeals in his claim after over four years with substantially the same evidence used to deny the claim all those years. In no way, shape or form has the petitioner failed to follow the prescribed rules of appeal. Petitioner sees no way to force the VA Secretary or his assigns to timely comply with the BVA decisions and the Seattle VA's VR&E Officer and staff steadfastly refuse to answer petitioner's inquiries for a meaningful time frame.

In the matter of the earlier effective date for PCT, 38 CFR §20.900(c)(1) -Grounds for Advancement, the regulation permits advancement on the docket if "other sufficient cause is shown." Other sufficient cause shall include, but is not limited to, **administrative error resulting in a significant delay in docketing the case.** (emphasis Petitioner's).

Petitioner points to the Veterans Law Judge's' grant of advancement on the docket based on the Seattle Travel Board Hearing conducted in April 2015. Judge Clemente rendered his decision three months later on September 4th, 2015 in concert with his simultaneous decision on the greenhouse for Petitioner's ILP. Somehow, in both decisions, the word 'expedite' was omitted or lost in the subsequent transmittal to the Seattle Regional Office.

B. Petitioner demonstrates a clear and indisputable right to the Writ.

The second requirement of Extraordinary Writs of Mandamus posits the petitioner must demonstrate a clear and indisputable right to the Writ. Petitioner relies here on the clear and unmistakable grants of the BVA judge on September 4th, 2015 contained in BVA decisions 13-09 654A and 14-42 623. Nowhere in the decisions is there room for multiple interpretations of what was granted nor when. The VA's current ILP obfuscation and continuing delay seem to stem from a brand new entitlement requirement involving a financial means test and incomplete cryptic declarations as to what Petitioner does (or does not)possess.

Petitioner is baffled by the Veterans Administration's perceived moving of the goalposts when justice is finally in sight. A Veterans Law Judge's positive decision is inviolate and unappealable. Likewise, a continuously appealed claim for a higher rating for a service connected disease or injury can only have one effective date, generally the date on when entitlement arose (38 CFR § 3.151). VA continues to assign a rating for 38 CFR §4.117 Diagnostic Code 7700 Anemia (1994) at 60%, effective March 31, 1994 but nevertheless ignores the date assigned by the BVA of the appeal it stems from-the selfsame one all parties mutually acknowledge was filed in 1994. The dichotomy of the rationale is appalling but apparently nothing short of a Writ will correct the twenty three year old error.

C. Under the circumstances of this petition, the Court must conclude that a Writ is warranted.

The third codicil states the Court must be convinced, given the petitioner's unique circumstances, that the issuance of the Writ is warranted. Petitioner need point no further than the two year-old BVA decisions and the continued parade of excuses and promises encountered to date. VA has been in constructive possession of the BVA decisions since September 15th, 2015.

Petitioner submits he has bargained in good faith and the defect discovered in CAVC #16-2098 (i.e. 38 CFR §21.98(c)(1)) was rectified as of October 14th, 2016. In spite of overcoming this deficit, VA continues to prevaricate and add an endless parade of new documents and requirements that Petitioner can find nowhere in 38 USC §3120 or any other pertinent regulations or manuals.

D. Extensive and unwarranted delay as addressed by the Court on numerous occasions.

When delay is alleged as the basis for a petition, the Court has held that a clear and indisputable right to the Writ does not exist unless the petitioner demonstrates that the alleged delay is so extraordinary, given the demands on, and resources of the Secretary, that it is an arbitrary refusal by the Secretary to act. See Erspamer v. Derwinski 1 Vet. App. 3, 10 (1990).

There has always been animated discussion in petitions for an Extraordinary Writ of Mandamus before the Court of Appeals for Veterans Affairs vis-à-vis the Secretary's proclivity to occasionally dawdle until prodded by an Extraordinary Writ to act. Whether it is a legal perception by marked frequent occurrence or an incredible coincidence is immaterial. Once filed, the *perceived* refusal to act on the matter evaporates instantly and the refusal essentially becomes a moot point after. Granted, petitioners of all stripes generally view this propensity myopically regardless of *what* invariably transpires shortly after filing.

As a matter of first impression, Petitioner wishes to draw the Court's attention to the extreme age of the Erspamer decision and the recent developments of the new Veterans Benefits Management System (VBMS) instituted in 2012. Judge Farley opined in 1990:

"While there is no absolute definition of what is [a] reasonable [amount of] time, we know that it may encompass months, occasionally a year or two, but not several years or a decade." Erspamer v. Derwinski, supra

In the intervening years, the Secretary has taken this 'reasonable' definition of the Court to mean he has latitude to delay action-often for up to three years before suffering the displeasure of the Court.

With Judge Farley's twenty seven year old sage observation also comes a new paradigm- the Fully Developed Claim (FDC) and its progeny. The whole of the Veterans Benefits Administration, by virtue of conversion to an electronic format, has dramatically shortened the time needed to adjudicate claims *and* appeals. Petitioner begs the Court to take notice of these recent developments and revisit Judge Farley's dated assessment of what constitutes "a reasonable amount of time".

Here, in the instant case, Petitioner points to an interminable two-year delay just to induce the Secretary to agree to *build* a greenhouse *already granted by law* and a Justice of the Court (Bartley)having to excoriate the Secretary to comply with an Extraordinary Writ to that effect. Surely, in the new electronic world of zooming electrons, Judge Farley's "reasonable amount of time" standard has shrunken appreciably?

While the Court may view a two-year delay in the awarding of a grant as minor or inconsequential and hardly meeting the definition of "arbitrary refusal", petitioner would beg to point out this is a confirmed award and not a request for a legal pronouncement such as a SOC. The awards have been decided in the petitioner's favor for nigh on two years. Delay is inexplicable and the rationale for it continues to metamorphose from one month to the next. Either the GSA contractor has been hired or he has not. Either the contract for services has been let or it has not. Continually asking for patience and tacking on a new financial disclosure form to garner even *more* time must eventually be seen for what it is-an arbitrary failure to act. To implement a program that has been in existence for well over three decades cannot be so incomprehensible. While it can be said the project is more complicated than some is fair but saying the construction of a greenhouse takes three quarters of a year *just* to hire the contractor is ludicrous on its face. At this 'reasonable rate', it may well be several more years before the power and lights are turned on.

As for the simple stroke of a typewriter key to correct an earlier effective date of a twenty three year-old claim, again, the indifference and refusal to timely act after offering to do so by VARO personnel begins to resonate with the oft-recited Veterans mantra of "delay, deny-until we die."

While Petitioner certainly regrets squandering scarce judicial resources and pestering the Court over such mundane matters as the above enumerated ones, the 2017 definition of a "reasonable amount of time" now certainly seems ripe for reconsideration as a matter of first impression. If the VBA can now adjudicate a claim in 125 days or less with a *claimed* 98% accuracy rate, why is it three years-or even twenty three years- are still needed to insure accuracy? What is it about the simple construction of a greenhouse that requires two years of study and preparation? The Independent Living Program has been in existence now for almost 36 years.

Conclusion

Having witnessed the *perceived* phenomenon of refusal to act firsthand in several CAVC Extraordinary Writs (#15-112 and #16-2098) until suitably prodded by the Court, Petitioner has noticed a disturbing trend. The VBA is presumed to be competent in all their actions based on the Presumption of Regularity espoused in precedential decisions too numerous to mention. Nevertheless, a common thread to this day espoused as the reason for a denial or dismissal of case or controversy surrounding the rationale for filing an Extraordinary Writ continues to be that the Respondent has resolved the problem within the 30 days requested by the Court to respond-ergo there is no case or controversy. Were this behavior the exception rather than the rule, most Extraordinary Writs might be considered favorably. Petitioner leaves it to the Court to ascertain the bona fides of delay due to backlog versus an arbitrary refusal to act until forced to.

And while Judge Farley intoned the following statement regarding the exceptional delay **in reviewing** Mrs. Jean Erspamer's case, it must be pointed out that Petitioner's circumstances differ markedly in that he has been granted the relief in both matters but has no lever to enforce it. As such, Petitioner begs the indulgence of the Court this time to retain jurisdiction of the matter until documented proof of completion is accomplished.

"This Court has made clear that the "mere passage of time in ***reviewing a matter*** does not necessarily constitute the extraordinary circumstances requiring this Court to invoke its mandamus power." Erspamer supra (emphasis Petitioner's)

What Petitioner feels may be unfairly overlooked is the predicate for the dismissal or denial of the Writ. Absent the filing, the deficiency could possibly continue for far more than a "reasonable amount of time" until, or unless, Petitioner, or his counsel (if he is lucky enough to have same), provokes progress in the matter via litigation.

Wherefore, Petitioner begs the Court for relief in the form of an Extraordinary Writ of Mandamus ordering the Secretary to timely install a greenhouse without further delay and grant an effective date for his 1994 claims commensurate with that certain date already adjudicated and provided for by statute and law. Petitioner is loath to embrace the All Writs Act to obtain relief as it is a judicial tool to be wielded in only the most extraordinary of circumstances. Petitioner submits these unique circumstances qualify. Petitioner asks for no more and no less than "reasonable" timely justice after twenty three years- mostly spent adjudicating his own earlier effective dates.