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ORDER OF THE COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT
(AUGUST 22, 2018)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT G. THORNTON,

Appellant,

v.

UNITED STATES OF AMERICA and
ROBERT WILKIE, Secretary of the Veterans
Administration in His Official Capacity,

Appellees.

No. 18-5049

1:17-cv-00623-CRC

Before: HENDERSON, SRINIVASAN,
and KATSAS, Circuit Judges

Upon consideration of appellant's brief and appendix and appellees' motion for summary affirmance, the response thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court correctly determined that 38 U.S.C. § 511 precluded it from reviewing appellant's challenge to the Department of Veterans' Affairs adjudication of his individual benefits

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claim. *See Price v. United States*, 228 F.3d 420, 421-22 (D.C. Cir. 2000).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

MEMORANDUM OPINION OF THE DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA
(DECEMBER 11, 2017)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT G. THORNTON,

Plaintiff,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants.

Case No. 17-cv-623 (CRC)

Before: Christopher R. COOPER,
United States District Judge

Pro se Plaintiff Robert Thornton, a Vietnam War veteran, challenges the Department of Veterans Affairs' ("VA") handling of his benefits claim. Thornton receives monthly compensation payments from the VA for post-traumatic stress disorder and hearing loss. Over the last several years, he has attempted to receive additional benefits. Though his complaint is difficult to parse, Thornton appears to allege that VA officials violated his Fifth Amendment due process rights by conspiring to "defraud" him out of the opportunity to have his claim for additional benefits adjudicated. Complaint ¶ 19. Because the Court lacks subject matter jurisdiction to decide Thornton's claim, it will dismiss the case.

I. Background

The VA distributes benefits to veterans of the United States Armed Forces based on a rating system that determines a veteran's level of impairment due to an injury suffered during active duty. 38 U.S.C. §§ 301(b), 1110; 38 C.F.R. § 4.1. Veterans seeking these benefits may first file an "informal claim," followed by a "formal claim." 38 C.F.R. § 3.155(b), (d). If the veteran disagrees with the VA's benefits determination, he can file a Notice of Disagreement. In response to the Notice of Disagreement, the VA can either grant the requested benefit or issue a "Statement of the Case," which explains its reasons for denying the benefit. 38 U.S.C. § 7105(d)(1). The veteran then has 60 days to file a Substantive Appeal to the Board of Veterans Appeals. *Id.* § 7105(d)(3). If a veteran disagrees with the outcome of the administrative process, he can appeal to the Court of Appeals for Veterans Claims ("Veterans Court") within 120 days of the Board's decision. *Id.* § 7266(a). Veterans Court decisions can be appealed to the United States Court of Appeals for the Federal Circuit. *Id.* § 7292.

Thornton's benefit claims have a complicated procedural history. He filed an informal claim for veterans' benefits with the VA in 2007. Later that year, he brought a formal claim seeking benefits for hearing loss, tinnitus (ringing in the ears), and Post Traumatic Stress Disorder ("PTSD"). *Thornton v. McDonald*, 597 F.App'x 641, 642 (Fed. Cir. 2015). The formal claim resulted in a benefits determination that awarded Thornton some PTSD benefits while denying his claims related to hearing loss and tinnitus. *Id.* Between 2008 and 2012, Thornton disputed the VA's determination twice, seeking increased disability

ratings. These disputes ultimately resulted in a 2012 decision that granted Thornton a 100 percent PTSD rating while still denying his hearing loss and tinnitus claims. *Id.* In 2013, Thornton filed another Notice of Disagreement disputing the decision on his hearing loss and seeking an earlier effective date for his PTSD. *Id.*

A few months later, having not received a response from the VA, Thornton filed a petition for a writ of mandamus with the Veterans Court. *Id.* While that petition was pending, the VA issued two decisions: 1) a decision granting Thornton benefits for his hearing loss and an effective date for his PTSD, hearing loss, and tinnitus of March 1, 2007, the date that he had initially requested in his informal claim; and 2) a Statement of the Case denying him an effective date for PTSD earlier than March 1, 2007. Complaint Ex. E. Meanwhile, the Veterans Court denied Thornton's mandamus claim, which he then appealed to the United States Court of Appeals for the Federal Circuit. The Federal Circuit affirmed the Veterans Court's decision. *Thornton*, 597 F. App'x at 643-44.

At that point, Thornton attempted to appeal the VA's Statement of the Case denying him an earlier effective PTSD date to the Board of Veterans Appeals. *Thornton v. McDonald*, 626 F. App'x 1007 (Fed. Cir. 2015). However, that appeal was not accepted because it was filed after the 60-day deadline. *Id.* So Thornton filed another writ of mandamus with the Veterans Court seeking an order that would force the Board of Veterans Appeals to hear his appeal. The Veterans Court denied that petition, *Thornton v. McDonald*, 2015 WL 4591675 (Vet. App. July 30, 2015), and the Federal Circuit affirmed. Thornton then filed another motion

in the Veterans Court to reopen the case, which the Court denied and the Federal Circuit again affirmed. *Thornton v. McDonald*, 626 F. App'x at 1007. Finally, Thornton filed suit in this Court, accusing the VA of fraudulently preventing him from appealing his claim to the Board of Veterans Appeals in violation of his Fifth Amendment rights. Complaint ¶¶ 14, 17.

II. Standard of Review

On a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of establishing the Court's subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The Court must accept the plaintiff's factual allegations as true. *United States v. Gaubert*, 499 U.S. 315, 327 (1991). And pro se complaints, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal citation omitted).

III. Analysis

A. This Court Does Not Have Subject Matter Jurisdiction over Plaintiff's Claims

The Veterans' Benefit Act of 1957, as amended by the Veterans Judicial Review Act, precludes this Court from reviewing VA decisions "affecting the provision of veterans' benefits." *Price v. United States*, 228 F.3d 420, 421 (D.C. Cir. 2000). Specifically, 38 U.S.C. § 511 states that the VA's decisions about "... all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits ... shall be final and conclusive and may not be reviewed by any other official or by any court." The exclusive avenue for appeal of a VA benefits deter-

mination is through the Court of Veterans Appeals, and from there to the United States Court of Appeals for the Federal Circuit. *Price*, 228 F.3d at 421.

Article III courts can, however, review some actions of the VA. The key is that the challenged actions cannot raise questions of law or fact “necessary to a decision by the Secretary under a law that affects the provision of benefits.” *Thomas v. Principi*, 394 F.3d 970, 974 (D.C. Cir. 2005). Under this formulation, district courts can hear suits alleging certain torts committed by the VA where the suit does not require first determining whether the VA “acted properly” with respect to a benefits request. *See id.* at 974-75 (allowing Article III court to hear a tort claim based on the VA’s withholding of a schizophrenia diagnosis because no benefits determination “underlies” that allegation). Additionally, some circuits have allowed Article III courts to review certain facial constitutional challenges to the VA’s general claim-review procedures because a “consideration of the constitutionality of the procedures in place . . . is different than a consideration of the decisions that emanate through the course of the presentation of those claims.” *See, e.g., Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1034 (9th Cir. 2012). In other words, the power of an Article III court to review an action of the VA turns on whether the reviewing court would have to evaluate the propriety of an individual veteran’s benefits determination. This distinction turns on the “substance” of a plaintiff’s claim rather than the labels he assigns it. *Thomas*, 394 F.3d at 975.

Here, Thornton alleges that fraud committed by the VA prevented him from appealing his benefits claim to the Board of Veterans Appeals in violation of his

constitutional rights. Complaint ¶ 15. Specifically, Thornton alleges that the VA misconstrued his 2015 Substantive Appeal as a Notice of Disagreement in order to manufacture a timeliness issue with his appeal to the Board. *Id.* ¶¶ 25-26. He also alleges that the VA destroyed evidence relevant to his claim. *Id.* ¶ 27 (allegation that the VA “orchestrated the concealment of missing medical records”). Thornton seeks a declaratory judgment that these actions undertaken by the VA during the adjudication of his benefits claim violated his due process rights.

Thornton’s claim is, at bottom, a challenge to his benefits determination. In order to adjudicate Thornton’s case, the Court would be forced to examine the propriety of the VA’s actions in administering his benefits claim. Although Thornton attempts to avoid this outcome by arguing that his claim is a challenge to the methods used by the VA in reaching its decision, assessing those methods still implicates Thornton’s individual benefits determination. Pl. Opposition at 11. Unlike a facial challenge to the constitutionality of the VA’s general procedures, Thornton’s claim is a challenge to the VA’s adjudication of his particular benefits. And unlike issues raised in a standard tort claim, the operative questions here—whether Thornton timely filed his appeal and whether the VA destroyed relevant medical records—are ones of “law and fact necessary to a [benefits] decision.” 38 U.S.C. § 511(a). Therefore, under section 511, the Court does not have jurisdiction over Thornton’s claims. *Id.*

B. Section 511(a) as Applied to Plaintiff’s Claims Is Constitutional

Thornton also challenges the constitutionality of section 511(a) as applied to his case on the ground that

precluding review of his claim prevents this Court from adjudicating “instances of actual fraud prior to veteran’s claim reaching the Board of Veterans’ Appeals.” Complaint ¶¶ 16-18. Thornton is mistaken: Section 511(a) is constitutional both facially and as applied to his case.

First, courts have repeatedly upheld the facial constitutionality of section 511. *See, e.g., Peavey v. Holder*, 657 F.Supp.2d 180, 186 (D.D.C. 2009); *Bradley v. Nicholson*, 181 F. App’x 989, 994 (Fed. Cir. 2006). These decisions are supported by the broader principle that Congress may direct judicial review through administrative processes and limit it to specific courts. *See, e.g., Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994).

Second, section 511 is constitutional as applied to Thornton’s case. Even though this Court cannot review Thornton’s claim, he has both administrative and judicial avenues through which to challenge the VA’s actions, including the Federal Circuit. Specifically, Thornton’s allegation that the VA committed fraud with respect to the timeliness of his appeal to the Board of Veterans Affairs is an appealable issue that can be challenged through the administrative process and, to the extent it states a constitutional claim, in the Federal Circuit.¹ 38 C.F.R. § 19.34. Consequently,

¹ To be sure, the Federal Circuit in this case declined to review Thornton’s timeliness claim because it concluded that the issue was “purely factual” rather than constitutional. *Thornton v. McDonald*, 626 F. App’x at 1008. However, for non-constitutional questions, Thornton’s administrative avenues for review are constitutionally adequate. *See Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1939) (“There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States”); *Webster v. Doe*, 108 S. Ct. 2047, 2053 (1988)

this Court's lack of subject matter jurisdiction over Thornton's claim does not pose constitutional concerns. *See e.g., Larrabee by Jones v. Derwinski*, 968 F.2d 1497, 1501 (2d Cir. 1992) ("By providing judicial review in the Federal Circuit, Congress intended to obviate the Supreme Court's reluctance to construe the statute as barring judicial review of substantial statutory and constitutional claims.")

IV. Conclusion

For the foregoing reasons, the Court grants Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction. A separate Order will accompany this Memorandum Opinion.

/s/ Christopher R. Cooper
United States District Judge

Date: December 11, 2017

(assuming validity of a provision withdrawing federal jurisdiction over agency discharge determinations where statute allowed for review of constitutional claims). Additionally, the VA specifically provided Thornton with "instructions regarding how to appeal the untimeliness decision." *Thornton v. McDonald*, 626 F. App'x at 1008.

OPINION OF THE FEDERAL CIRCUIT
(DECEMBER 15, 2015)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROBERT G. THORNTON,

Claimant-Appellant,

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee.

2015-7107

Appeal from the United States Court of Appeals
for Veterans Claims in No. 15-2059,
Judge Coral Wong Pietsch.

Before: MOORE, HUGHES, and
STOLL, Circuit Judges.

PER CURIAM.

Robert G. Thornton appeals the denial of his petition for a writ of mandamus by the United States Court of Appeals for Veterans Claims (“Veterans Court”).

BACKGROUND

Mr. Thornton, an Army veteran, sought service-connected benefits for hearing loss, tinnitus, and a psychiatric condition. In December 2012, a VA Decision Review Officer (“DRO”) issued a rating decision to Mr. Thornton. In response, Mr. Thornton filed a notice of disagreement in November 2013. On June 4, 2014,

the DRO issued a rating decision increasing Mr. Thornton's benefits. On the same day, the DRO issued a Statement of the Case ("SOC") denying entitlement to earlier effective dates for Mr. Thornton's benefits. The SOC informed Mr. Thornton that an appeal "must be filed within 60 days from the date that the [VA] mails the Statement of the Case to the appellant, or within the remainder of the 1-year period from the date of mailing of the notification of the determination being appealed, whichever period ends later." Mr. Thornton filed an appeal on January 28, 2015, requesting the VA regional office to forward his appeal to the Board of Veterans Appeals. Separately, on February 2, 2015, Mr. Thornton filed a Privacy Act request with the Secretary of the VA, seeking specific documents from his claim file.

On May 18, 2015, Mr. Thornton petitioned for a writ of mandamus from the Veterans Court to compel: (1) the VA to forward his appeal to the Board of Veterans Appeals and (2) the Secretary to comply with his Privacy Act request. On June 12, 2015, the VA regional office informed Mr. Thornton that his appeal was untimely, and provided instructions regarding how to appeal the untimeliness decision. And on June 15, 2015, the Secretary responded to Mr. Thornton's Privacy Act request by forwarding a copy of his entire claim file, and included instructions on filing a Privacy Act appeal.

DISCUSSION

Our jurisdiction to review decisions of the Veterans Court is limited by statute. We may review legal questions such as those relating to the interpretation of constitutional and statutory provisions. 38 U.S.C. § 7292(c). We may not review factual determinations

or application of law to fact, except to the extent an appeal presents a constitutional issue. *Id.* § 7292(d)(2). These statutory limits on our jurisdiction extend to our review of the Veterans Court's denial of a writ of mandamus. *Beasley v. Shinseki*, 709 F.3d 1154, 1157 (Fed. Cir. 2013). Just as a veteran's "choice to present [a] legal question in a petition for mandamus does not deprive this court of jurisdiction," *id.*, a veteran's choice to present a factual question or the application of law to fact in a petition for mandamus does not expand this court's jurisdiction.

Here, the Veterans Court found that Mr. Thornton failed to demonstrate entitlement to the writ because he did not demonstrate that he lacked adequate alternative means to relief. Specifically, the Veterans Court found that Mr. Thornton had been provided with information on how to appeal both the VA's determination that his January 2015 appeal was untimely and the Secretary's handling of his Privacy Act request, and that both of these alternative avenues were available at the time of the Veterans Court's review.

Because Mr. Thornton's appeal here raises a factual dispute regarding timeliness and fails to allege any legal error with the Veterans Court's denial of the writ, we do not have jurisdiction to review the denial. Mr. Thornton's attempt to frame this factual issue as a due process violation does not change the purely factual nature of his complaint and his allegations of spoliation of evidence also do not raise any legal error with the Veterans Court's denial of the writ. Accordingly, we dismiss the appeal for lack of jurisdiction.

DISMISSED

Costs: No costs.

ORDER OF THE COURT OF APPEALS
FOR VETERANS' CLAIM
(JULY 30, 2015)

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

ROBERT G. THORNTON,

Petitioner,

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

No. 15-2059

Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.

Before: Coral Wong PIETSCH, Judge

On May 18, 2015, the pro se petitioner, Robert G. Thornton, filed a petition for extraordinary relief in the form of a writ of mandamus. He asserted that the Court should compel the Secretary to certify his appeal of a VA regional office (RO) decision and forward his case to the Board of Veterans' Appeals (Board). Petition (Pet.) at 3, 20. He also asserted that the Court should compel the Secretary to comply with his January 2015 submission asking VA to send him certain documents. *Id.* The Secretary responded to the petitioner's arguments on July 13, 2015. On July 20, 2015, the petitioner submitted a reply to the Secretary's response.

The Court has the authority to issue extraordinary writs in aid of its prospective jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). However, “[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.” *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976). Accordingly, three conditions must be met before the Court may issue a writ: (1) the petitioner must lack adequate alternative means to attain the desired relief, thus ensuring that the writ is not used as a substitute for the appeals process, (2) the petitioner must demonstrate a clear and indisputable right to the writ, and (3) the Court must be convinced, given the circumstances, that the issuance of the writ is warranted. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004).

A. Documents Request

The Secretary demonstrated that VA forwarded the petitioner’s entire claims file to him on June 16, 2015. Secretary’s Response at Exhibit A. The Secretary argued that the petitioner has received the relief he requested, and he asserted that the Court should dismiss the portion of his petition addressing his document request as moot. Secretary’s Response at 5-6; *see Mokal v. Derwinski*, 1 Vet.App. 12, 15 (1990).

In his reply, the petitioner asserted that the Secretary did not send him all of the documents that he requested. Petitioner’s Reply at 1-15. He argued that the Court should order the Secretary to fully comply with his document request. *Id.*

In a letter dated June 15, 2015, a VA official informed the petitioner that if he disagrees with the manner in which VA handled his document request, he may appeal VA’s actions to the Office of the General Counsel. Secretary’s Response at Exhibit A, 4-5. The

VA official provided the petitioner with detailed information about how to file his appeal, and it informed him that he must act within 60 days of the date VA took the action he wishes to appeal. *Id.*

Because the petitioner has a right to appeal VA's disposition of his document request, the Court is not convinced that he lacks an adequate alternative means to attain the relief he seeks in his petition. *See Cheney*, 542 U.S. at 580-81. The part of his petition addressing his document request will therefore be denied.

B. Appeal Certification

In a November 2013 letter, the RO informed the petitioner that it had received his Notice of Disagreement with its December 2012 decision and had "accepted on appeal" post-traumatic stress disorder (PTSD) bilateral hearing loss, and tinnitus claims. Pet. at Exhibits 50-51.

On June 4, 2014, a decision review officer granted the petitioner (1) an earlier effective date for entitlement to disability benefits for PTSD; (2) an increased disability rating for his bilateral hearing loss; (3) an earlier effective date for the disability rating assigned to his bilateral hearing loss; and (4) an earlier effective date for entitlement to disability benefits for tinnitus. *Id.* at Exhibits 55-61. On the same date, the RO issued a Statement of the Case denying the petitioner an earlier effective date for entitlement to disability benefits for tinnitus and PTSD and entitlement to a 40% disability rating for bilateral hearing loss. *Id.* at Exhibits 64-88.

On January 28, 2015, the petitioner submitted a VA Form 9 challenging the findings the RO made in the June 2014 Statement of the Case. *Id.* at 114. On

June 12, 2015, the RO informed the petitioner that it would not allow his appeal to continue because he did not timely file his VA Form 9. Secretary's Response at Exhibit B, 31-33. The RO wrote that the petitioner should have submitted his VA Form 9

no later than one year following notification of the adverse decision you are appealing, or 60 days from the date our Statement of the Case was sent to you, whichever is later. In your case, we notified you on December 13, 2012, of the adverse decision. You filed a Notice of Disagreement on November 7, 2013. A Statement of Case was issued to you on June 3, 2014. Therefore you had until August 2, 2014 to submit your substantive appeal.

Id.

The RO wrote that, if the petitioner does not agree with its decision, he can submit a Notice of Disagreement and initiate an appeal. *Id.* He must do so within one year of the date the letter was mailed, it stated. *Id.*

Based on the present status of his case, the petitioner cannot obtain Board review of the effective dates assigned to his disability benefits because the RO has determined that he did not timely submit his VA Form 9. Because the RO's decision legally precludes it from certifying the petitioner's appeal and forwarding it to the Board, the Court cannot order it to do so. *See FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966) (the power to issue writs "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected").

The petitioner may now only obtain Board review of the RO's June 2014 decisions if he successfully challenges the RO's determination that he did not timely file his VA Form 9. As the RO wrote, he may initiate an appeal of that conclusion by submitting a Notice of Disagreement.

Whether the Court agrees with the RO's decision that the petitioner did not submit a timely VA Form 9 is immaterial at this juncture. The Court cannot review the RO's decision until the petitioner appeals it. *See Lamb v. Principi*, 284 F.3d 1378, 1384 (Fed. Cir. 2002) (“[E]xtraordinary writs cannot be used as substitutes for appeals, even though hardship may result from delay and perhaps unnecessary trial.” (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953))).

To reiterate, the petitioner has, in the RO's view, lost his opportunity to appeal its June 2014 decisions because he did not timely submit a VA Form 9. Based on the present posture of this case, the Court cannot order the RO to certify his appeal and forward it to the Board because he does not have an appeal eligible for Board review. The petitioner has adequate means to challenge the RO's June 2015 decision. Extraordinary relief is not warranted. *See Cheney*, 542 U.S. at 380-81.

Upon consideration of the foregoing, it is
ORDERED that petitioner's petition is DENIED.

By the Court:

/s/ Coral Wong Pietsch

Judge

DATED: July 30, 2015

**ORDER OF THE COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT DENYING
PETITION FOR REHEARING
(NOVEMBER 29, 2018)**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT G. THORNTON,

Appellant,

v.

UNITED STATES OF AMERICA and
ROBERT WILKIE, Secretary of the Veterans
Administration in His Official Capacity,

Appellees.

No. 18-5049

1:17-cv-00623-CRC

Before: GARLAND, Chief Judge, and
HENDERSON, ROGERS, TATEL, GRIFFITH,
SRINIVASAN, MILLETT, PILLARD,
WILKINS, and KATSAS, Circuit Judges

Upon consideration of the petition for rehearing
en banc and the supplement thereto, and the absence
of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

For the Court:

Mark J. Langer, Clerk

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By: /s/ Ken Meadows
Deputy Clerk

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**DOCKET REPORT DENYING
PETITION FOR WRIT OF MANDAMUS
(OCTOBER 3, 2016)**

No. 16-164

Title: In Re Robert G. Thornton, Petitioner

Docketed: August 4, 2016

Aug 1 2016

Petition for a writ of mandamus filed. (Response due September 6, 2016)

Aug 19 2016

Waiver of right of respondent United States to respond filed.

Aug 24 2016

DISTRIBUTED for Conference of September 26, 2016.

Oct 3 2016

Petition DENIED.

RELEVANT STATUTORY PROVISIONS

TITLE 38—VETERANS' BENEFITS

Part I—General Provisions

Chapter 5—Authority and duties of the Secretary

Subchapter I—General Authorities

§ 511. Decisions of the Secretary; Finality

(a) The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

(b) The second sentence of subsection (a) does not apply to—

- (1) matters subject to section 502 of this title;
- (2) matters covered by sections 1975 and 1984 of this title;
- (3) matters arising under chapter 37 of this title; and
- (4) matters covered by chapter 72 of this title.

Part V—Boards, Administrations, and Services

Chapter 71—Board of Veterans' Appeals

§ 7104. Jurisdiction of the Board

(a) All questions in a matter which under section 511(a) of this title is subject to decision by the Secretary shall be subject to one review on

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appeal to the Secretary. Final decisions on such appeals shall be made by the Board. Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.

(b) Except as provided in section 5108 of this title, when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered.

(c) The Board shall be bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department.

(d) Each decision of the Board shall include—

- (1) a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record; and
- (2) an order granting appropriate relief or denying relief.

(e)

- (1) After reaching a decision on a case, the Board shall promptly mail a copy of its written decision to the claimant at the last known address of the claimant.
- (2) If the claimant has an authorized representative, the Board shall—
 - (A) mail a copy of its written decision to the authorized representative at the last

known address of the authorized representative; or

- (B) send a copy of its written decision to the authorized representative by any means reasonably likely to provide the authorized representative with a copy of the decision within the same time a copy would be expected to reach the authorized representative if sent by first-class mail.

**Chapter 72—United States
Court of Appeals for Veterans Claims
Subchapter I—Organization and Jurisdiction**

§ 7252. Jurisdiction; Finality of Decisions

(a) The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

(b) Review in the Court shall be on the record of proceedings before the Secretary and the Board. The extent of the review shall be limited to the scope provided in section 7261 of this title. The Court may not review the schedule of ratings for disabilities adopted under section 1155 of this title or any action of the Secretary in adopting or revising that schedule.

(c) Decisions by the Court are subject to review as provided in section 7292 of this title.

Subchapter II—Procedure

§ 7261. Scope of Review

- (a) In any action brought under this chapter, the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall—
 - (1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary;
 - (2) compel action of the Secretary unlawfully withheld or unreasonably delayed;
 - (3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations issued or adopted by the Secretary, the Board of Veterans' Appeals, or the Chairman of the Board found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or
 - (D) without observance of procedure required by law; and
 - (4) in the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department with

respect to benefits under laws administered by the Secretary, hold unlawful and set aside or reverse such finding if the finding is clearly erroneous.

(b) In making the determinations under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals pursuant to section 7252(b) of this title and shall—

- (1) take due account of the Secretary's application of section 5107(b) of this title; and
- (2) take due account of the rule of prejudicial error.

(c) In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court.

(d) When a final decision of the Board of Veterans' Appeals is adverse to a party and the sole stated basis for such decision is the failure of the party to comply with any applicable regulation prescribed by the Secretary, the Court shall review only questions raised as to compliance with and the validity of the regulation.

Subchapter III—Miscellaneous Provisions

§ 7292. Review by United States Court of Appeals for the Federal Circuit

(a) After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation (other than a refusal to review the schedule of ratings for disabilities adopted

under section 1155 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal with the Court of Appeals for Veterans Claims within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts.

(b)

- (1) When a judge or panel of the Court of Appeals for Veterans Claims, in making an order not otherwise appealable under this section, determines that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that there is in fact a disagreement between the appellant and the Secretary with respect to that question of law and that the ultimate termination of the case may be materially advanced by the immediate consideration of that question, the judge or panel shall notify the chief judge of that determination. Upon receiving such a notification, the chief judge shall certify that such a question is presented, and any party to the case may then petition the Court of Appeals for the Federal Circuit to decide the question. That court may permit an interlocutory appeal to be taken on that question if such a petition is filed with it within 10 days after the certification by the chief judge of the Court of Appeals for Veterans Claims. Neither the application for,

nor the granting of, an appeal under this paragraph shall stay proceedings in the Court of Appeals for Veterans Claims, unless a stay is ordered by a judge of the Court of Appeals for Veterans Claims or by the Court of Appeals for the Federal Circuit.

(2) For purposes of subsections (d) and (e) of this section, an order described in this paragraph shall be treated as a decision of the Court of Appeals for Veterans Claims.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision. The judgment of such court shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of title 28.

(d)

(1) The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Appeals for Veterans Claims that the Court of Appeals for the Federal Circuit finds to be—

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- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or
 - (D) without observance of procedure required by law.
- (2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case:
- (e)
- (1) Upon such review, the Court of Appeals for the Federal Circuit shall have power to affirm or, if the decision of the Court of Appeals for Veterans Claims is not in accordance with law, to modify or reverse the decision of the Court of Appeals for Veterans Claims or to remand the matter, as appropriate.
 - (2) Rules for review of decisions of the Court of Appeals for Veterans Claims shall be those prescribed by the Supreme Court under section 2072 of title 28.

POINTS AND AUTHORITIES
RELEVANT EXCERPTS

THE COURT HAS THE POWER TO
VACATE THE JUDGMENT THAT WAS
ENTERED AGAINST THE DEFENDANT
FOR FRAUD ON THE COURT.

1. Federal Rule of Civil Procedure 60(d)(3) (FRCP) states in pertinent part that nothing in Rule 60 limits a court's power to set aside a judgment for fraud on the court. Defendant contends that the General Counsel, attorney for the VA, committed fraud on the court by the following actions and deliberate omissions that harmed the integrity of the judicial process. The fraud against the court standard was articulated in (*Demjanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir. 1993)) which stated the requirements for independent action based on the FRCP 60(b)(3) to wit:

1. On the part of an officer of the court; 2. That is directed to the judicial machinery itself; 3. That is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth; 4. That is a positive averment or is concealment when one is under a duty to disclose; 5. That deceives the court. (*Ibid.* 338, 348)

FRAUD UPON THE COURT OCCURS
WHEN AN OFFICER OF THE COURT
PERPETRATES FRAUD AFFECTING THE
ABILITY OF THE COURT TO IMPAR-
TIALY JUDGE A CASE

When an "officer of the court. (*See In re Inter-
magnetics America, Inc.*, 926 F.2d 912, 916 (9th Cir.

1991); *see also Alexander v. Robertson*, 882 F.2d 421, 424 (9th Cir. 1989).

[F]RAUD UPON THE COURT INCLUDES BOTH ATTEMPTS TO SUBVERT THE INTEGRITY OF THE COURT AND FRAUD BY AN OFFICER OF THE COURT. (*Inter-magnetics*, 926 F.2d at 916) (emphasis added)

The Ninth Circuit has also stated that fraud on the court is “an unconscionable plan or scheme which is designed to improperly influence the court in its decision.” *Abatti v. Commissioner*, 859 F.2d 115, 118 (9th Cir. 1988) (internal quotation omitted).

The United States Supreme Court has stated that lawyers are an officer of the Court. *See In re Snyder*, 472 U.S. 634, 643 (1985) (courts have inherent authority to discipline lawyers which “derives from lawyer’s role as an officer of the court which granted admission.”

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[Paragraphs 1-3]

Fundamental duty of federal employees to put “loyalty to the highest moral principles and to country above loyalty to persons, party or Government departments.”

Review as a prerequisite to find a “reasonable belief” of wrongdoing. It must begin with the “presumption that public officers perform their duties correctly, fairly, in good faith and in accordance with the law . . . this presumption stands unless there is “irrefragable” proof to the contrary.

**Additional material
from this filing is
available in the
Clerk's Office.**