APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

DIRECT PROCEEDINGS BELOW IN THE FEDERAL CIRCUIT

REHEARING ORDER

RELATED PROCEEDINGS IN THE FEDERAL CIRCUIT

APPENDIX TABLE OF CONTENTS (Cont.)

OTHER DOCUMENTS

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (OCTOBER 17, 2022)

NOTE: This disposition is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROBERT THORNTON,

Claimant-Appellant,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee.

2022-1618

Appeal from the United States Court of Appeals for Veterans Claims in No. 19-7749, Senior Judge Mary J. Schoelen

Before: MOORE, Chief Judge, CHEN and STOLL, Circuit Judges.

PER CURIAM.

Robert Thornton appeals the decision of the Court of Appeals for Veterans Claims (Veterans Court) affirming the decision of the Board of Veterans' Appeals that his appeal was untimely. Because we lack jurisdiction, we dismiss his appeal.

BACKGROUND

Mr. Thornton, an Army veteran, filed for service-connected disability benefits in 2007. This case is Mr. Thornton's fourth appeal arising out of these claims.

After a series of decisions in Mr. Thornton's case, in December 2012, a Veterans Affairs regional office (RO) issued a decision that it "considered a full grant of benefits sought on appeal." SAppx. 2.[1] A letter accompanying this decision informed Mr. Thornton that he had "one year from the date of [the] letter to appeal the decision." *Id.* at 3. Mr. Thornton timely filed his notice of disagreement (NOD) in November 2013 and elected the "[t]raditional appeal process" in December 2013. *Id.* at 46.

In response to Mr. Thornton's November 2013 NOD, on June 4, 2014, the RO issued a decision increasing Mr. Thornton's benefits and granting an earlier effective date for the awards of benefits. On the same day, the RO also mailed a letter enclosing a statement of the case (SOC) and advising Mr. Thornton of his appellate rights and responsibilities: If he wanted to appeal his case to the Board, he needed to "file a formal appeal" with the RO "within 60 days from the date of this letter or within the remainder, if any, of the one-year period from the date of the letter notifying [him] of the action that [he has] appealed," whichever was later. SAppx. 43. The letter emphasized that if he "need[ed] more time to file [his] appeal, [he] should request more time before the time limit . . . expire[d]," and that if the VA did not hear

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[1] "SAppx." refers to the supplemental appendix filed by the Government.

from him within this period, it would close his case. *Id.*

On February 2, 2015, the Board received Mr. Thornton's appeal of the June 2014 RO decision. In June 2015, the RO issued a decision finding Mr. Thornton's appeal untimely because it was received more than 60 days after the date of the June 2014 SOC, explaining that the June 2014 RO decision on Mr. Thornton's claims had become final. Mr. Thornton appealed the June 2015 RO decision to the Board.

In July 2019, the Board issued its decision denying Mr. Thornton's appeal. The Board explained that "because the June 2014 SOC was issued after" the expiration of "the [one]-year appeal period following the date of notification of the December 2012 RO decision," Mr. Thornton's "deadline to file [the a]ppeal was 60 days after June 4, 2014," or August 4, 2014. SAppx. 5. The Board found that Mr. Thornton's appeal was received on February 2, 2015 far more than 60 days after June 4, 2014—and concluded it was untimely. *Id.* The Board also explained that although exceptions to the timeliness requirement for such appeals exist, none of those exceptions applied to Mr. Thornton. *Id.* Mr. Thornton appealed this Board decision to the Veterans Court. *Id.* at 1.

On December 21, 2021, the Veterans Court affirmed the Board's decision. That court explained that it saw no error in the Board's bases for determining that Mr. Thornton's appeal was untimely. Further, the Veterans Court determined that his various claims that the Board and the VA had committed statutory and constitutional violations and fraud were subsidiary to, and thus rose and fell with, his challenge to the Board's finding of untimeliness. SAppx. 6-14.

Mr. Thornton now appeals the Veterans Court's affirmance of the Board's decision.

DISCUSSION

Our jurisdiction over appeals from the Veterans Court is statutorily limited. We may only review challenges to the interpretation or "validity of any statute or regulation." 38 U.S.C. § 7292. Except to the extent that an appeal presents a constitutional issue, we cannot review challenges to underlying factual determinations or application of law to facts. § 7292(d)(2).

Whether an appeal is timely filed is a factual determination that this court may not review. *See Albun v. Brown*, 9 F.3d 1528, 1530 (Fed. Cir. 1993) (holding that we lacked jurisdiction over a claim that a notice of appeal was timely filed because it involved only factual matters). Because the Veterans Court affirmed the dismissal of Mr. Thornton's appeal based on the Board's factual finding that Mr. Thornton did not file his appeal before the filing deadline, we lack jurisdiction to review Mr. Thornton's appeal of the timeliness determination. § 7292(d)(2). Although Mr. Thornton also alleges constitutional violations on appeal, Appellant's Br. 26-28 (asserting that the Board and the Veterans Court violated his Due Process and Equal Protection rights when they denied his appeal as untimely), he provides no further detail or support for his claim other than the determination that the appeal was untimely. Our court lacks jurisdiction over assertions that are "constitutional in name" only. *Helfer v. West*, 174 F.3d 1332, 1335 (Fed. Cir. 1999). Stated another way, labeling the Veterans Court's decision as a constitutional violation does not confer jurisdiction that we otherwise lack. Because the only

issue here involves a challenge to the fact finding that Mr. Thornton's appeal was untimely, we lack jurisdiction. § 7292(d)(2).

CONCLUSION

We have considered Mr. Thornton's remaining arguments and find them unpersuasive. Mr. Thornton's appeal is dismissed for lack of jurisdiction.

DISMISSED

COSTS

No costs.

MEMORANDUM DECISION OF THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS (DECEMBER 21, 2021)

Designated for electronic publication only

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

ROBERT THORNTON,

Appellant,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

No. 19-7749

Before: SCHOELEN, Senior Judge[1].

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

[1] Judge Schoelen is a Senior Judge acting in recall status. *In re Recall of Retired Judge*, U.S. Vet. App. Misc. Order 04-21 (Jan. 4, 2021).

MEMORANDUM DECISION

SCHOELEN, Senior Judge:

The self-represented appellant, Robert Thornton, appeals a July 18, 2019, Board of Veterans' Appeals (Board) decision that denied an appeal of a December 2012 RO decision because the appellant had not submitted a timely Substantive Appeal to the Board. Record (R.) at 2-12. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm the Board's decision. In addition, as explained in further detail below, the Court will deny the appellant's July 23, 2021, and September 7, 2021, motions to recuse Judges Pietsch and Laurer; the December 7, 2020, motion in limine; and the December 7, 2020, and March 15, 2021, requests for judicial notice. Moreover, the Court will construe the appellant's November 29, 2021, *Solze* Notice as a motion to substitute and will hold it in abeyance until further order of this Court.

I. Background

The appellant served honorably in the U.S. Army from October 1965 to July 1968. R. at 908. In the 1970s, he was service connected for a right ear hearing disability and received a noncompensable disability rating, effective August 1970, which the Board affirmed in 1972. *See* R. at 2688-89.

The appellant sought an increased rating for his service-connected right ear hearing loss and disability compensation for left ear hearing loss, tinnitus, and

post-traumatic stress disorder (PTSD) in 2007. R. at 2437, 2340. In a September 2008 rating decision, a VA regional office (RO) awarded disability compensation for PTSD and assigned a 70% disability rating, effective October 17, 2007, and a 50% disability rating, effective July 31, 2008. R. at 1971-78. The RO denied a compensable disability rating for service-connected right ear hearing loss and denied disability compensation for left ear hearing loss and tinnitus. R. at 1971-78.

The appellant disagreed with the assigned ratings and effective dates[2] for the disability compensation award for PTSD, the assigned rating for right ear hearing loss, and with the denials of disability compensation for left ear hearing loss and tinnitus. *See* R. at 1781-890 (Oct. 2008 Notice of Disagreement (NOD)). The RO continued the 50% and noncompensable disability ratings for PTSD and right ear hearing loss, respectively, and continued to deny disability compensation for left ear hearing loss and tinnitus. R. at 1476-97 (July 19, 2010, Statement of the Case (SOC)). The appellant filed a timely Substantive Appeal regarding the RO's denial of a compensable rating for right ear hearing loss, a disability rating greater than 50% for PTSD, and disability compensation for left ear hearing loss and tinnitus. R. at 1454 (July 27, 2010, Substantive Appeal).

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2 On appeal, the parties disagree as to whether the appellant's 2008 NOD included disagreement with the RO's September 2008 effective-date determination for the award of disability compensation for PTSD. *See* Secretary's Br. at 11-12; Informal Reply Br. at 12. For reasons detailed in the Court's analysis below, on de novo review, the Court holds that the 2008 NOD included this disagreement. *Infra* at n.12.

In response to the July 2010 Substantive Appeal, the RO issued a December 2012 decision that it "considered a full grant of benefits sought on appeal." R. at 1184. Specifically, the RO increased the PTSD disability rating to 100%; granted disability compensation for tinnitus and assigned a 10% disability rating; and granted disability compensation for left ear hearing loss and assigned a 20% disability rating for bilateral hearing loss. R. at 1184-90. The RO assigned October 17, 2007, (the date of the appellant's formal claims) as the effective date for these awards. R. at 1185-86. A December 2012 letter from the RO accompanying the decision informed the appellant that, if he disagrees with this decision, he has "one year from the date of [the] letter to appeal the decision." R. at 1179; *see* R. at 1174-81. In November 2013, the appellant disagreed with the effective dates for these awards. R. at 1166-72 (Nov. 2013 NOD).

In response to the November 2013 NOD, on June 4, 2014, a decision review officer (DRO) assigned March 1, 2007, (the date of the appellant's informal claims) as the effective date for the disability compensation awards for PTSD, left ear hearing loss, and tinnitus; and the DRO increased disability ratings for bilateral hearing loss to 40%, effective March 1, 2007, and to 50%, effective May 17, 2010. R. at 1054-60. Also on June 4, 2014, the RO issued an SOC that denied effective dates earlier than March 1, 2007, for PTSD, left ear hearing loss, and tinnitus, and denied entitlement to a rating greater than 40% for bilateral hearing loss. R. at 993-1019. The letter attached to the SOC, also dated June 4, 2014, stated that if the appellant wished to submit a Substantive Appeal, he must do so "within 60 days from the date of this letter or

within the remainder, if any, of the [1]-year period from the date of the letter notifying [him] of the action that [he has] appealed"; that if VA did not hear from him within this period, it would close the appellant's case; and that if the appellant "need[ed] more time to file [his] appeal, [he] should request more time before the time limit . . . expires." R. at 993.[3]

On January 28, 2015, the appellant submitted a Substantive Appeal to the Board, which the Board received on February 2, 2015.[4] R. at 925 (VA Form 9); *see* R. at 915-28. In June 2015, the RO sent the appellant a letter explaining that his February 2, 2015, Substantive Appeal was untimely because the time to submit it had expired 60 days after the date of the June 2014 SOC—in August 2014—and that the decision on his claims was therefore final. R. at 226;[5] *see*

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[3] In July 2014, the Court denied a petition for a writ of mandamus submitted by the appellant, in which he requested, among other things, that the Court order the RO to certify his appeal of the effective dates for the disability awards for tinnitus, hearing loss, and PTSD. R. at 595-98. The Court explained that the RO had issued an SOC addressing these claims, and the appellant may "attain [Board] review simply by submitting [a] VA Form 9." R. at 596.

[4] The appellant does not appear to dispute that his Substantive Appeal was filed on February 2, 2015. *See* Appellant's Informal Br. at 12 ("It is undebatable that . . . [the a]ppellant filed a timely 2-2-15 appeal to the [Board]. . . . Reasonable minds would not disagree that . . . the 1-28-15 VA form 9 [Board] appeal [(]RECEIVED 2-2-15[)] . . . [was] timely filed.").

[5] The RO's June 2015 letter reflects that the SOC and its accompanying letter were dated June 3, 2014. R. at 226. However, this was a typographical error; the SOC and accompanying letter are dated June 4, 2014. R. at 993-1019; *see* R. at 5 (Board finding the SOC and letter dated June 4, 2014).

R. at 226-30. The appellant disagreed with the RO's June 2015 decision regarding the timeliness of his Substantive Appeal. R. at 200-12 (Dec. 2015 NOD). In support of his claim, the appellant submitted the following statement:

> There has never been a decision issued denying earlier effective date on any claim(s). If the SOC . . . issued from the [December] 2012 [RO] decision [was] "a full grant of benefits sought on appeal" then the RO is saying [it] erred. That decision was on a VA [Form] 9 [S]ubstantive [A]ppeal[,] which would require an issuance of a S[upplemental] SOC[,] which does not require a response from the appellant, as it would follow the traditional appeals process. This means it would be certified with a docket number of July 2010[,] as there was an SOC issued [in] July 2010 and a [Substantive Appeal] filed [on] July [27,] 2010.
>
> If it is "considered a full grant" and [I] disagree with the [rating] decision ([from December] 2012), [I] would be required to initiate a new appeal by submitting a[n] [NOD] (which [I] did on [November 7, 2013]) [.] That means the DRO decision of June 4, 2014[,] was a decision on that NOD[. C]onsequently[,] issuing an SOC on that decision would require[e] filing a [VA Form] 9 after receiving a[n] [SOC] (which [I] did)[.] [I was informed that I] must complete and <u>return the VA Form 9 within [1] year from the date of [the] letter denying [me] the benefit ([which I] filed [in] 2015)</u> . . . or within 60 days from

> the date that [the RO] mailed the [SOC] . . . , whichever is later.
>
> [I] submitted a timely VA [F]orm 9 . . . on Jan[uary] 28, 2015.

R. at 202-03. The appellant perfected his appeal in May 2018. *See* R. at 105-28 (VA Form 9 with supporting documents); *see also* R. at 103 (Aug. 2018 VA Form 8 reflecting that the Board received the Substantive Appeal on May 7, 2018), 139-50 (Mar. 2018 SOC).

In the July 2019 decision on appeal, the Board determined that the appellant's February 2, 2015, Substantive Appeal was untimely. R. at 5. The Board explained that "a claimant who fails to file a [S]ubstantive [A]ppeal in a timely manner[] and fails to timely request an extension of time, is statutorily barred from appealing the [RO's rating] decision." R. at 4 (citing *Roy v. Brown*, 5 Vet.App. 554, 556 (1993) and *YT v. Brown*, 9 Vet. App. 195 (1996)).

The Board summarized the relevant procedural history and the appellant's June 2015 assertion that his Substantive Appeal was timely. R. at 5, 8-9. The Board explained that the June 2014 SOC informed the appellant that, to file the Substantive Appeal, he had either 60 days from the date of the SOC or "'within the remainder, if any, of the [1]-year period from the date of the letter notifying you of the action that [he has] appealed'"; that, if he needed more time, he should request it; and that VA would close his case if it did not hear from him during that time. R. at 5, 9 (quoting R. at 993). The Board explained that, here, because the June 2014 SOC was issued after the 1-year appeal period following the date of notification of the December 2012 RO decision that the appellant wished to

appeal, the appellant's deadline to file the Substantive Appeal was 60 days after June 4, 2014, SOC—that is, August 4, 2014. R. at 5, 9. The Board also found that the appellant knew or should have known of the requirements to submit a timely Substantive Appeal, especially because "in October 1971 and August 2010, the [appellant] went through the appeals process and filed timely Substantive Appeals." R. at 9. The Board concluded that because the appellant submitted his Substantive Appeal on February 2, 2015, it was untimely. R. at 5.

Moreover, the Board determined that, though there are three exceptions to the Substantive Appeal timeliness rule, none apply here. R. at 6-7. First, the Board found no evidence that the appellant requested an extension of the 60-day deadline under 38 C.F.R. § 20.302 or that he submitted any document in lieu of a Substantive Appeal within the 60 days. R. at 6.[6] Second, the Board found that neither the RO nor the Board ever, explicitly or implicitly, waived the requirement to file a timely Substantive Appeal. R. at 6-7 (citing *Percy v. Shinseki*, 23 Vet.App. 37 (2009)).[7] And

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[6] The Board explained that, though the appellant submitted a statement to the Court in July 2014, the Board did not construe this as a Substantive Appeal because (1) the appellant did not express a desire to appeal the RO's denial of an effective date earlier than March 1, 2007, and (2) the Court had stated that the appellant "may attain review from the Board by submitting a VA Form 9." R. at 6; *see* R. at 595-96.

[7] The Board explained that, to the contrary, the RO sent the appellant a letter in June 2015 informing him that his February 5, 2015, Substantive Appeal was untimely and that the Board never took any action that would constitute a waiver of the Substantive Appeal filing deadline. R. at 6-7.

third, the Board determined that equitable tolling did not apply because the evidence did not show that the appellant was incapable of handling his own affairs,[8] the appellant has not "alleged 'extraordinary circumstances' beyond [his] control despite the exercise of due diligence with submission of an appeal," and he "has not asserted that he was unable to file a timely [S]ubstantive [A]ppeal as a result of a misfiling at the [RO] or the Board." R. at 7-9 (citing *Bove v. Shinseki*, 25 Vet.App. 136, 140 (2011) (per curiam order)). The Board concluded that the preponderance of the evidence is against finding the Substantive Appeal timely and the benefit of the doubt does not apply. R. at 9. This appeal followed.

Liberally interpreting the appellant's arguments on appeal, he asserts that the Board erroneously determined that his February 5, 2015, Substantive Appeal was untimely, violated his constitutional rights to due process and to equal protection, that VA and the Board committed fraudulent acts, and that the Court should grant him effective dates of "at least

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[8] Specifically, the Board found that, though the appellant "implied that the time limit for filing his Substantive Appeal should have been tolled because he was incapable of rational thought of deliberate decision making," the appellant "did not specifically indicate" how his mental disability "rendered him incapable of rational[] thought, deliberate decision making, or . . . handling his own affairs," and the evidence did not show that his mental health disability rendered him incapable. R. at 7. The Board explained that the record is devoid of any medical treatment records between December 2010 and March 2015 and that a November 2010 psychological examination supports that the appellant was capable of rational thought, decisionmaking, handling his own affairs, and ability to function in society. R. at 7-8.

1970." Appellant's Informal Br. at 1-30; Informal Reply Br. at 1-14; *see De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992) (explaining that when an appellant is proceeding pro se, the Court will liberally interpret his or her informal brief).

The Secretary counters that the Court should affirm the Board's decision. He argues that the Board's decision is supported by law and the record, the Board provided an adequate statement of reasons or bases for its decision, the appellant has not presented viable constitutional challenges, and the Court lacks jurisdiction over the remaining matters raised by the appellant. Secretary's Br. at 2, 7-19.

II. Analysis

A. Timeliness of the Substantive Appeal

"A Substantive Appeal consists of a properly completed VA Form 9 . . . or correspondence containing the necessary information." 38 C.F.R. § 20.202 (2015). By statute, a claimant "will be afforded a period of sixty days from the date the [SOC] is mailed to file the formal appeal." 38 U.S.C. § 7105(d)(3) (2015). VA promulgated 38 C.F.R. § 20.302, which provides that a Substantive Appeal must be filed either within 60 days of the date on which VA mails the SOC or within 1 year of the date of mailing of the "notification of the determination being appealed," whichever is later. 38 C.F.R. § 20.302(b)(1) (2019).[9] "The agency of original jurisdiction may close the case for failure to respond

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[9] The Court has invalidated that part of § 20.302(b)(1) that created a presumption of the date of mailing of the SOC. *Crumlich v. Wilkie*, 31 Vet.App. 194, 203 (2019).

after receipt of the [SOC], but questions as to timeliness . . . shall be determined by the Board." 38 U.S.C. § 7105(d)(3). The 60-day time limit "is not a jurisdictional bar to the Board's adjudication of a matter" and is subject to either implicit or explicit waiver by VA. *Percy v. Shinseki*, 23 Vet.App. 37, 44-45 (2009). The Court has also held that the deadline for filing the Substantive Appeal may be equitably tolled. *Hunt v. Nicholson*, 20 Vet.App. 519, 524 (2006).

Whether a Substantive Appeal is timely is a factual question that the Court reviews under the "clearly erroneous" standard of review. *See Mason v. Brown*, 8 Vet.App. 44, 56 (1995) (finding that the Board's determination that the appellant had not "completed a timely appeal" from an RO decision was not clearly erroneous). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As with any material issue of fact or law, the Board must provide an adequate statement of reasons or bases for its determination. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). On appeal to this Court, the appellant "always bears the burden of persuasion." *Berger v. Brown*, 10 Vet.App. 166, 169 (1997); *see Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

Here, the Court holds that the Board did not err or provide an inadequate statement of reasons or bases when it determined that the appellant's February

2015 Substantive Appeal was untimely. The Board considered the appellant's June 2015 assertion that his Substantive Appeal was timely and detailed the Substantive Appeal filing requirements and notice provided in the June 4, 2014, letter accompanying the SOC. R. at 5, 8-9.[10] The Board explained that the appellant had only 60 days from June 4, 2014, to submit his Substantive Appeal, because the "[1]-year appeal period following the date of notification of the December 2012 [RO] decision" had already expired when the RO issued the June 4, 2014, SOC. R. at 5, 9. The Board explained that the appellant's February 2, 2015, Substantive Appeal was untimely because the deadline to file it was August 4, 2014 (60 days after June 4, 2014). R. at 5, 9.

The appellant does not dispute the Board's findings that he filed his Substantive Appeal in 2015. Rather, he argues that the Board erroneously found that his February 2, 2015, Substantive Appeal was untimely because he asserts that he filed it within 1 year of the June 4, 2014, SOC, which, he asserts, would make it timely. Appellant's Informal Br. at 4, 9-12 ("Reasonable minds would not disagree that . . . the 1-28-15 VA [F]orm 9 [Board] appeal [RECEIVED 2-2-15] . . . was timely filed." (brackets in original)), 24; Informal Reply Br. at 8, 11 ("[The a]ppellant did not need to request an extension of time within which to

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[10] Though the appellant argues that, in the RO's June 2015 letter, the RO erroneously stated that the SOC and letter attached to it were dated June 3, 2014, *see* Appellant's Informal Br. at 4, 6, 24; Informal Reply Br. at 10, in the decision on appeal, the Board implicitly corrected that error because it found that the SOC and the letter attached to it were dated June 4, 2014, R. at 5. And the appellant does not dispute this finding by the Board.

submit a Substantive Appeal, as the appeal was within [1] year of the decision in the [June 4, 2014, SOC to] deny an earlier effective date earlier than March 1, 2007."); *see De Perez*, 2 Vet.App. at 86.

The appellant's argument is not persuasive. As the Board explained, the appellant received notice on June 4, 2014,[11] that he was required to file his Substantive Appeal within 60 days from the June 4, 2014, SOC or "within the remainder, if any, of the [1]-year period from the date of the letter notifying [him] of the action that [he has] appealed"—here, within the remainder, if any, of the 1-year period from the date of the December 2012 letter notifying him of the RO's effective-date determinations in the December 2012 decision, which he appealed in November 2013. R. at 5 (emphasis added), 993 (June 4, 2014, SOC letter); *see* R. at 1166-72 (Nov. 2013 NOD with RO's Dec. 2012 effective-date determinations), 1174-81 (Dec. 2012 notice letter attached to Dec. 2012 RO decision), 1184-90 (Dec. 2012 RO decision); *see also* 38 C.F.R. § 20.302 (b)(1).

Moreover, the Board found that the appellant knew or should have known of the requirements to file a timely Substantive Appeal because of the notice provided in the June 4, 2014, SOC letter and because the appellant had successfully filed Substantive Appeals in the past. R. at 9. In reaching that finding, the Board considered the appellant's June 2015 statement, which reflects that the appellant recognized that (1) if he disagreed with the December 2012 RO decision, he would have to submit an NOD, which he did in

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11 The appellant does not dispute that he received the June 4, 2014, SOC. Informal Reply Br. at 12; *cf.* Secretary's Br. at 13-14.

November 2013; (2) the DRO's June 4, 2014, decision "was a decision on that NOD"; and (3) an SOC would require that he file a Substantive Appeal, which he did in 2015. R. at 202-03; *see* R. at 8-9. The June 2015 statement also reflects that the appellant thought that he "must complete and return the VA Form 9 within [1] year from the date of [the] letter denying [him] the benefit ([which he] filed [in] 2015) . . . or within 60 days from the date that [the RO] mailed the [SOC] . . . , whichever is later." R. at 202-03 (emphasis added); *see* R. at 8-9.

To the extent that the appellant disputes the Board's finding that he knew of the Substantive Appeal filing requirements because, as his June 2015 statement reflects, he believed he had 1 year from June 4, 2014, to submit the Substantive Appeal, given that he thought that the "letter denying [him] the benefit" was the June 4, 2014, letter attached to the SOC that denied him effective dates earlier than March 1, 2007, for disability compensation awards, R. at 203; *see* Appellant's Informal Br. at 4, 9-12; Informal Reply Br. at 8, 11; *see also De Perez*, 2 Vet.App. at 86, the appellant's understanding of the 1-year deadline is inconsistent with the text of the June 4, 2014, SOC letter in a few ways. First, the letter informed him that, to submit his Substantive Appeal, he (potentially) had 1 year from the date of "the letter notifying [him] of the action that [he has] appealed." R. at 993 (emphasis added); *see* R. at 5. Second, the text of the letter contains a condition that the appellant's argument omits—that the 1-year period may have already expired by the time of the June 4, 2014, SOC letter. *See* R. at 5, 993 ("within the remainder, if any, of the [1]-year period. . . . " (emphasis added)). As

the Board found—and the appellant does not dispute—the 1-year period from the date of the December 2012 notice letter had already expired by the time the RO issued the June 4, 2014, SOC letter. R. at 5, 9. And third, the appellant's argument suggests that he believed that he had either 60 days or 1 year from the date of the SOC, whichever is later, to file his Substantive Appeal, *see* R. at 203, which would render the 60-day period language in the SOC letter superfluous. Thus, the Court does not find error in the Board's finding that the appellant knew of the Substantive Appeal filing requirements. *See Hilkert*, 12 Vet.App. at 151.

In addition, the appellant argues that the Board erroneously found his February 2015 Substantive Appeal untimely. The appellant argues that the Board erred because the Board ignored that he had filed a timely Substantive Appeal in July 2010, which led to the December 2012 RO decision that he disagreed with because it was not a "full grant of benefits sought on appeal" given that the decision did not address entitlement to effective dates as early as the 1970s for PTSD, tinnitus, and hearing loss. Appellant's Informal Br. at 17, 19; *see De Perez*, 2 Vet.App. at 86. Yet, the Board considered the appellant's contention, which was in the appellant's June 2015 statement, and found it to be unpersuasive. R. at 8-9.

The Board explained that, after the RO issued its December 2012 decision, the proper course of action was for the appellant to submit a timely NOD, which he did in November 2013. R. at 8-9. The Board further explained that the subsequent June 2014 SOC informed the appellant that, if he disagreed with the SOC, the next step was to submit a Substantive

Appeal within 1 year of the December 2012 RO decision or within 60 days of the SOC; but because the 1-year period had expired by the time of the June 2014 SOC, the appellant's only option was to submit his Substantive Appeal within 60 days, and he did not. R. at 9. The appellant has not demonstrated that the Board's determination is erroneous or inadequately explained. *See Hilkert*, 12 Vet.App. at 151.

Moreover, as explained in further detail below, the Board's decision to reject the appellant's argument about the timely July 2010 Substantive Appeal is further supported by the procedural history in this case. As the Board summarized, the appellant's timely July 2010 Substantive Appeal was an appeal of the September 2008 RO decision that denied service connection for left ear hearing loss and tinnitus. R. at 5. Thus, as the Secretary argues, the downstream issue of the proper effective dates for the tinnitus and bilateral hearing loss awards—the issue that eventually became the subject of the appellant's appeal—could not yet have been in appellate status at the time of the July 2010 Substantive Appeal because the RO had not yet granted service connection for left ear hearing loss and tinnitus. *See Grantham v. Brown*, 114 F.3d 1156, 1158 (Fed. Cir. 1997) (noting that downstream elements, such as rating and effective dates are not part of appeal of denial of service connection); *Evans v. West*, 12 Vet.App. 396, 399 (1999) (finding that an effective date is a "downstream matter" to be addressed after the benefit as been awarded); Secretary's Br. at 11.

It was not until the December 2012 decision that the RO granted service connection for left ear hearing loss and tinnitus and assigned ratings and effective

dates for the bilateral hearing loss and tinnitus awards. *See* R. at 5. Therefore, as the Secretary argues, the timeliness of the July 2010 Substantive Appeal is immaterial, in part because the downstream issues of the proper effective dates for the bilateral hearing loss and tinnitus awards only became ripe in December 2012. *See* Secretary's Br. at 11.

On the other hand, the issue of the proper effective date for the PTSD award was in appellate status at the time of the July 2010 Substantive Appeal because, as the Board found, the RO had awarded service connection for PTSD and assigned 50% and 70% ratings and effective dates of July 31, 2008, and October 17, 2007, respectively, for those awards in September 2008. R. at 5. The appellant placed the issue of the proper effective dates for the PTSD award into appellate status by virtue of his timely October 2008 NOD (arguing for effective dates as early as the 1970s). *See* R. at 1781-890.[12] As the Board explained, the July 2010 SOC and the timely July 2010 Substantive Appeal followed.

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12 On appeal, the parties dispute whether the appellant's 2008 NOD included disagreement with the RO's September 2008 effective-date determination for the award of disability compensation for PTSD. *See* Secretary's Br. at 11-12 (arguing that the "2008 NOD did not challenge the effective date assigned for the award of service connection for PTSD"); Informal Reply Br. at 12 (arguing that the Secretary's assertion is a "material misstatement of fact" (citing R. at 1838, 1855, 1882-90)). Whether a document constitutes an NOD is a legal question subject to de novo review by the Court. *Palmer v. Nicholson*, 21 Vet.App. 434, 436 (2007); *see Butts v. Brown*, 5 Vet.App. 532, 539 (1993) (en banc) (stating that the Court reviews questions of law de novo, without deference to the Board's findings).

Upon de novo review, the Court holds that, liberally construed, *see Palmer*, 21 Vet.App. at 437 ("'VA has always been, and will

As a result of the timely July 2010 Substantive Appeal, the RO issued the December 2012 decision and assigned the maximum disability rating (100%) for PTSD, effective October 17, 2007, the date of his formal claim. R. at 5. Consistent with the Board's decision, the timeliness of the July 2010 Substantive Appeal was no longer material after the RO issued the December 2012 decision. As the Board explained, the December 2012 RO decision triggered the requirement for a new NOD, which the appellant fulfilled in November 2013. R. at 5, 8-9. The timely NOD prompted the June 4, 2014, DRO decision and SOC, which together afforded the appellant with an effective date of March 1, 2007 (the date of his informal claim) for the PTSD award, but no earlier.[13] R. at 5.

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continue to be, liberal in determining what constitutes [an NOD].'" (quoting 57 Fed. Reg. 4088, 4093 (Feb. 3, 1992))), the appellant's October 2008 NOD includes a disagreement with the RO's assignment of effective dates for the disability compensation awards for PTSD in its September 2008 rating decision. *See* R. at 1781-890. For example, his NOD reflected that he sought entitlement to "[r]etro[active] [p]ayment" on his PTSD claim from "August 19, 1970," R. at 1838; that he sought "retro[active] pay [f]or disability" and provided a scanned copy of "PTSD Stressor Corroboration Research" document on the same page, R. at 1882; and that he explained that he had reported his PTSD "nearly 40 years ago," R. at 1855. Notably, though the Secretary argues that the NOD did not include such a disagreement, he never details precisely what, in his view, the appellant specifically disagreed with in the NOD. *See* Secretary's Br. at 4 (stating that the "[a]ppellant timely appealed the September 2008 [r]ating [d]ecision" without further detail), 11-12 (presenting argument without record cites). Nevertheless, as discussed below, this does not place the issue of an earlier effective date for PTSD before the Board in a timely fashion.

13 At the time of the June 4, 2014, decision in this case, 38 U.S.C. § 5110, which governs the assignment of an effective date for an

And the SOC triggered the subsequent requirement for a timely Substantive Appeal. As the Board found, the RO explained in the SOC that, if the appellant continued to disagree with the assigned effective date (for example, because he believed he was entitled to an effective date as early as the 1970s, *see* Appellant' Informal Br. at 4, 17, 29), his proper course of action was to file a timely Substantive Appeal. *See* R. at 5, 9; *see also* 38 C.F.R. § 20.302(b)(1). However, because he did not do so, the RO's assignment of a 100% rating for PTSD, effective March 1, 2007, became final. *See* R. at 4-5; *see also* 38 U.S.C. § 7105(d)(3).

Though the appellant argues that the Board decision on appeal "can only be described as fraudulent," Appellant's Informal Br. at 8, his fraud allegation is undeveloped. *See Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) (per curiam) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments."), *vacated*

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award of benefits, provided:

> [T]he effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.

38 U.S.C. § 5110(a) (2012) (emphasis added). The implementing regulation similarly provided that the effective date generally "will be the date of receipt of the claim or the date entitlement arose, whichever is later." 38 C.F.R. § 3.400 (2014). Here, the June 2014 DRO decision and the SOC reflect that March 1, 2007, was the earliest possible effective date because it was the date of the appellant's informal claims for these disabilities. *See* R. at 993-1019 (June 2014 SOC), 1054-60 (June 2014 DRO decision).

on other grounds sub nom. Coker v. Peake, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order); *see also Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court is unable to find error when arguments are undeveloped). Though the Court liberally construes arguments made by pro se appellants, they must raise specific arguments demonstrating perceived Board error. *See Coker*, 19 Vet.App. at 442 (citing *Hernandez v. Starbuck*, 69 F.3d 1089, 1093 (10th Cir. 1995) (holding that the appellant, who comes to the court of appeals as the challenger of the underlying decision, "bears the burden of demonstrating the alleged error and the precise relief sought" and, where the appellant fails to meet this burden, the "court of appeals is not required to manufacture" the appellant's argument)). For these reasons, the appellant has not demonstrated clear error in the Board's determination that his Substantive Appeal is untimely. *Hilkert*, 12 Vet.App. at 151.

B. Other Matters

The appellant argues that, by finding his Substantive Appeal untimely, VA and the Board violated his constitutional right to due process because they disregarded evidence that would support an earlier effective date for his disability compensation claims and deprived him of "a fair and impartial review" of his claims for an earlier effective dates for bilateral hearing loss, tinnitus, and PTSD awards. Appellant's Informal Br. at 1-2, 11; *see De Perez*, 2 Vet.App. at 86.[14] However, this is not persuasive.

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[14] To the extent that the appellant alleges that the Board violated his equal protection rights, *see* Appellant's Informal Br. at 3, 30; Informal Reply Br. at 4, 5, 6, 14, his argument is

For these awards, VA reviewed the evidence before it and adjudicated the effective-date matter in December 2012 and later in June 2014, when the appellant eventually received an effective date of March 1, 2007, but no earlier. *See* R. at 5. Moreover, as explained above, the appellant had the opportunity to dispute the RO's effective-date determination in the June 2014 SOC by submitting a timely Substantive Appeal for the Board to review the merits of the RO's effective-date determination and was warned that his failure to do so would result in the RO closing his case. *See id.* But he did not do so, resulting in the RO closing his case. R. at 5, 226 (June 2015 RO decision); *see also* 38 U.S.C. § 7105(d)(3). Given that the only matter before the Board was the timeliness of the February 2015 Substantive Appeal and that the Board determined that it was untimely, the merits of any effective-date claim were not before the Board. For these reasons, the appellant has not demonstrated that his constitutional due process rights were violated by the either the VA's or the Board's purported failure to review evidence that would allegedly support an earlier effective date for his disability compensation claims. *See, e.g., Cushman v. Shinseki*, 576 F.3d 1290, 1292, 1300 (Fed. Cir. 2009) (holding that a veteran showed in the context of an appeal of the merits of his claim that VA violated the veteran's due process rights when it relied on "an improperly altered document" in the veteran's medical record because the veteran demonstrated that, if VA had not relied on the improper alterations, there was "a reasonable

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undeveloped and he has not met his burden. *See Coker*, 19 Vet.App. at 442; *Locklear*, 20 Vet.App. at 416. Therefore, the Court will not address it.

probability of a different result" in the adjudication of his claim).

Similarly, though the appellant argues that VA and the Secretary have committed fraud, including that the Secretary is operating under an "unlawful extraordinary awards" type of policy, and the appellant challenges the Court's prior final determinations on writs filed by the appellant and disputes the merits of prior RO and DRO decisions, Appellant's Informal Br. at 2-9, 12, 20-26, 29-30; Informal Reply Br. at 3-6, 11-14, these arguments also go to the merits of the underlying claims, which were not before the Board in the decision on appeal. Accordingly, even assuming that the appellant raised these contentions to the Board, *see, e.g.*, R. at 127 (appellant's assertion on May 2018 VA Form 9 that the RO "clearly issued a fraudulent decision . . . by concealing the June 4, 2014[,] DRO [d]ecision"), the Board's failure to address these assertions was not prejudicial to the Board's Substantive Appeal timeliness determination — the only matter before it. *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the harmless-error analysis applies to the Court's review of Board decisions and that the burden is on the appellant to show that he or she suffered prejudice as a result of VA error); *Hilkert*, 12 Vet.App. at 151.

Moreover, though the appellant argued to the Board that VA failed to adjudicate pending informal and formal claims for hearing loss, tinnitus, and a psychiatric condition "going back to 1970," Appellant's Informal Br. at 12, 17, 29; *see* R. at 915-25 (documents attached to Feb. 2015 Substantive Appeal); *De Perez*,

2 Vet.App. at 86, the Board's failure to address this contention is also not prejudicial because the potentially pending claims do not affect whether the February 2015 Substantive Appeal was timely here. *See* 38 U.S.C. § 7261(b)(2); *Sanders*, 556 U.S. at 409; *Hilkert*, 12 Vet.App. at 151. VA should respond to the appellant's assertions of pending unadjudicated claims.[15] Accordingly, the Court will affirm the Board's decision. *See Hilkert*, 12 Vet.App. at 151.

C. Pending Motions

On July 23, 2021, and September 7, 2021, the appellant filed motions to recuse Judges Pietsch and Laurer, respectively, from his case. On September 17, 2021, the Court held these motions in abeyance until the Court assigned the case to a Judge for adjudication on the merits. Because the Court assigned the case to Senior Judge Schoelen for adjudication on the merits, the Court will deny as moot the appellant's motions to recuse Judges Pietsch and Laurer.

Further, the appellant submitted a December 7, 2020, motion in limine in which he moved the Court for "an order instructing issue preclusion and an adverse inference instruction by the suppression of evidence May 2018 VA [F]orm 9 on appeal and the June 4, 2014[,] DRO decision by the [Board] in the [decision on appeal]" because he asserted that VA and the Board violated his due process rights. Motion in

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[15] The Court notes that if VA or the Board fails to respond to the appellant within a reasonable period given the demands on the system, the appellant may file a petition with the Court asking it to compel VA to respond. *See DiCarlo v. Nicholson*, 20 Vet.App. 52, 56-57 (2006), *aff'd sub nom. Dicarlo v. Peake*, 280 F. App'x 988 (Fed. Cir. 2008).

Limine at 6. In support of his motion, the appellant requested that the Court take judicial notice of e-mail correspondence and what appeared to be several previous appeals with the Court. *See* Appellant's Dec. 7, 2020, and Mar. 15, 2021, Requests for Judicial Notice. On April 21, 2021, the Court ordered that this motion and the requests for judicial notice be held in abeyance. Now, the Court finds that the appellant's due process arguments presented in his motion in limine are the same as his due process arguments presented in his informal brief.

Because, as discussed above, the Court finds that the appellant has not demonstrated that VA or the Board violated his due process rights, the Court will now deny the December 7, 2020, motion in limine. Accordingly, the Court will also deny the December 7, 2020, and March 15, 2021, requests for judicial notice as moot.

In addition, after this case was submitted to the Court for a decision, the appellant notified the Court on November 29, 2021, that if he died during the pendency of this appeal, he wishes for his son to be substituted as the appellant and for the Court to "appoint counsel." Appellant's *Solze* Notice at 1. The Court construes this as a motion to substitute the appellant and will order that the motion be held in abeyance until further order of this Court.

III. Conclusion

After consideration of the parties' pleadings and a review of the record, the Board's July 18, 2019, decision is AFFIRMED. The appellant's July 23, 2021, and September 7, 2021, motions to recuse Judges Pietsch and Laurer; the December 7, 2020, motion in limine;

and the December 7, 2020, and March 15, 2021, requests for judicial notice are denied. The appellant's November 29, 2021, motion to substitute is held in abeyance until further order of this Court.

DATED: December 21, 2021

Copies to:

Robert Thornton
VA General Counsel (027)

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (DECEMBER 14, 2022)

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROBERT THORNTON,

Claimant-Appellant,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee.

2022-1618

Appeal from the United States Court of Appeals for Veterans Claims in No. 19-7749, Senior Judge Mary J. Schoelen

ON MOTION

Before: MOORE, Chief Judge, CHEN and STOLL, Circuit Judges.

PER CURIAM.

ORDER

Upon consideration of Robert Thornton's Motion for Judicial Notice of Adjudicated Facts and Opportunity to be Heard-FRE-201 and Appendix [ECF No. 31].

IT IS ORDERED THAT:

The motion is denied.

FOR THE COURT

/s/ Peter R. Marksteiner
Clerk of Court

December 14, 2022
Date

ORDER OF THE BOARD OF VETERANS' APPEALS (JULY 18, 2019)

BOARD OF VETERANS' APPEALS
FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF ROBERT THORNTON

Docket No. 18-22 951A

Before: MICHAEL LANE, Veterans Law Judge
Board of Veterans' Appeals.

ORDER

The appeal as to whether a timely Substantive Appeal or VA Form 9 was filed with respect to a June 3, 2014, Statement of the Case (SOC) is denied.

FINDING OF FACT

VA did not receive a Substantive Appeal within 60 days from the mailing of the SOC on June 4, 2012, or the one-year period from the mailing of the December 2012 rating decision that denied entitlement to service connection for tinnitus, left ear hearing loss, increased rating for right ear hearing loss, and the grant of service connection for PTSD.

CONCLUSION OF LAW

The criteria for submission of a timely substantive appeal have not been met. 38 U.S.C. §§ 5104, 7105;

38 U.S.C. §§ 3.103, 3.156, 19.32, 20.200, 20.300, 20.302, 20.303.

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran served on active duty from October 1965 to July 1968.

In order for the Board to have jurisdiction to review an agency of original jurisdiction (AOJ) denial, there must be a timely substantive appeal. A timely Substantive Appeal initially requires that a written NOD be filed within one year after the date of notice of the AOJ denial. Next, the AOJ must issue a SOC on the matter being appealed. Finally, the appeal must be perfected by the filing of a Substantive Appeal or other written equivalent thereof, indicating an intention to seek appeal to the Board. A timely Substantive Appeal is one filed in writing, within 60 days of the date of notice of the SOC, or within the remainder of the one-year period of the date of notice of the AOJ decision being appealed, whichever is later. The date of mailing of the SOC will be presumed to be the same as the date of the SOC. *See* 38 U.S.C. § 7105; 38 C.F.R. §§ 20.200, 20.201, 20.202, 20.302.

The Board has the authority to determine whether it has jurisdiction to review a case, and may dismiss any case over which it does not have jurisdiction. 38 U.S.C. § 7105(d)(3); 38 C.F.R. § 20.101(d). The AOJ may close the case for failure to respond after receipt of the SOC (*see* 38 C.F.R. § 19.32 (2017)), but a determination as to timeliness or adequacy of any such response for the purposes of appeal is in the province of the Board. 38 U.S.C. § 7105(d); 38 C.F.R. § 20.101(d).

Pursuant to 38 C.F.R. § 3.109, time limits for filing may be extended in some cases on a showing of good cause. However, the United States Court of Appeals for Veterans Claims (Court) has held that there is no legal entitlement to an extension of time, but that 38 C.F.R. § 3.109(b) commits the decision to the sole discretion of the Secretary. *Corry v. Derwinski*, 3 Vet. App. 231 (1992). Specifically, 38 C.F.R. § 3.109(b) requires that, where an extension is requested after expiration of a time limit, the required action must be taken concurrent with or prior to the filing of a request for extension of the time limit, and good cause must be shown as to why the required action could not have been taken during the original time period and could not have been taken sooner. Thus, a claimant who fails to file a substantive appeal in a timely manner, and fails to timely request an extension of time, is statutorily barred from appealing the AOJ decision. *Roy v. Brown*, 5 Vet. App. 554, 556 (1993); *see also YT v. Brown*, 9 Vet. App. 195 (1996).

Analysis

In October 2007, the Veteran filed a claim for service connection for left ear hearing loss and tinnitus and an increase rating for right ear hearing loss. In December 2007, he filed a claim for service connection for PTSD. In a September 2008 rating decision, the AOJ denied service connection for tinnitus and left ear hearing loss and an increased rating for right ear hearing loss. In the same rating decision, the AOJ granted service connection for PTSD and assigned a 70 percent rating effective October 17, 2007, which was reduced to 50 percent effective July 31, 2008. The Veteran filed a timely NOD disagreeing with the denial of service connection, increased rating for right

ear hearing loss, and rating assigned for PTSD. An SOC was issued. In August 2010, the Veteran filed a timely Substantive Appeal. In a December 2012 rating decision, the AOJ granted service connection for tinnitus and bilateral hearing loss and increased the Veteran's PTSD rating to 100 percent. The effective date for the grants was October 17, 2007. As the Veteran was awarded the highest possible rating for his PTSD and service connection was granted for tinnitus and bilateral hearing loss, the claim was granted in full. The Veteran filed a timely NOD disagreeing with the effective date of the awards. On June 4, 2014, the AOJ issued an SOC denying an effective date earlier than March 1, 2007 for the grant of service connection for PTSD, left ear hearing loss, tinnitus, and the assignment of a 40 percent evaluation for bilateral hearing loss.

The June 4, 2014 SOC informed the Veteran that he was required to file an appeal within 60 days from the date of the letter or within the remainder, if any, of the one-year period from the date of the letter notifying him of the action that he had appealed. The letter further stated if the Veteran needed more time to file his appeal, he should request more time before the time limit for filing the appeal expires. If VA did not hear from the Veteran within this period, his case would be closed.

The June 4, 2014 SOC was issued after the one-year appeal period following the date of notification of the December 2012 rating decision. As such, the Veteran needed to file his Substantive Appeal within 60 days from the date the AOJ mailed the SOC. Therefore, the date for timely filing of the Veteran's Substantive Appeal was August 4, 2014. On February

2, 2015, more than 60 days following the issuance of the SOC, VA received the Veteran's Substantive Appeal. As such, a Substantive Appeal was not received by VA within the noted time limits.

There are three possible exceptions to the finality rule. First, the filing limit could be tolled with a timely request for an extension of time to submit a substantive appeal under 38 C.F.R. § 20.302 or an extension of the filing deadline under 38 C.F.R. § 3.109.

However, no timely request for an extension of the filing deadline is of record as the record does not contain a document that was submitted in lieu of a Substantive Appeal. As noted below, in July 2014, the Veteran submitted a statement to the United States Court of Appeals for Veterans Claims (Court); however, the Board does not construe the statement as a Substantive Appeal as the Veteran did not express his desire to appeal the AOJ's denial of an earlier effective date earlier than March 1, 2007. The Board also notes that the Court did not construe the Veteran's June 2014 correspondence as a Substantive Appeal as the Court stated that the Veteran may attain review from the Board by submitting a VA Form 9. As such, the Board finds that the record does not contain evidence that the Veteran ever requested an extension of the 60-day deadline. 38 U.S.C. § 7105(d)(3)(a) substantive "appeal should set out specific allegations of error of fact or law . . . related to specific items in the [SOC]"); 38 C.F.R. § 20.200, 20.202.

Second, the filing of a Substantive Appeal is not a jurisdictional requirement and may be waived either explicitly or implicitly. *Percy v. Shinseki*, 23 Vet. App. 37 (2009). The filing of a timely Substantive Appeal is implicitly waived where VA takes actions indicating

that it has accepted the issues as being on appeal without the filing of a timely Substantive Appeal. *Id.*; *See Gonzalez-Morales v. Principi*, 16 Vet. App. 556, 557 (2003) (holding that a claimant's failure to file a timely substantive appeal from an AOJ decision does not automatically foreclose an appeal, render a claim final, or deprive the Board of jurisdiction unless there was also an indication that the AOJ closed the appeal pursuant to 38 C.F.R. § 19.32).

Here, there has been no explicit or implicit representation by VA, either by the AOJ or the Board, that it was waiving the filing requirement of a timely Substantive Appeal. *Percy*; *supra.* In June 2015, the AOJ sent the Veteran a letter informing him that his Substantive Appeal was not a timely appeal as it was not filed within a year of the December 13, 2012 rating decision nor within 60 days of the June 4, 2014 SOC. The Veteran timely perfected an appeal of that determination. After certification to the Board, the Board has taken no action that would represent a waiver of the time requirement for filing the Substantive Appeal. As such, this exception is not applicable.

Finally, the doctrine of equitable tolling has been considered. Generally, equitable tolling applies only where circumstances preclude a timely filing, despite the exercise of due diligence, such as: (1) a mental illness rendering one incapable of handling one's own affairs or other extraordinary circumstances beyond one's control, (2) reliance on the incorrect statement of a VA official, or (3) a misfiling at the AOJ or the Board. *See Bove v. Shinseki*, 25 Vet. App. 136, 140 (2011) (per curium order).

Here, the Veteran has not asserted that he was unable to file a timely substantive appeal as a result

of a misfiling at the AOJ or the Board. However, in his June 2015 statement, the Veteran implied that the time limit for filing his Substantive Appeal should have been tolled because he was incapable of rational thought or deliberate decision making.

To obtain the benefit of equitable tolling where the obstacle to timely filing is a mental disorder, the Veteran must show that the mental disorder rendered him incapable of "rational thought or deliberate decision making, incapable of handling [his] own affairs," or unable to function in society. *Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2004); *Claiborne v. Nicholson*, 19 Vet.App. 181, 185 (2005); *see also Dixon v. Shinseki*, 741 F.3d 1367, 1376 (Fed. Cir. 2014) (acknowledging that "[m]any veterans seeking equitable tolling suffer from very significant psychiatric and physical disabilities"); *Claiborne v. Nicholson*, 19 Vet. App. 181, 186-87 (2005) (although mental illness may justify equitable tolling, severe impairment resulting from a mental disorder is not sufficient; incapacity in rational thought or the ability to handle affairs is required).

The Veteran did not specifically indicate how his mental disability rendered him incapable of rationale thought, deliberate decision making, or incapable of handling his own affairs. However, the evidence of record does not support or indicate that the Veteran's mental disability rendered him incapable of rationale thought or deliberate decision making, incapable of handling his own affairs, or unable to function in society. The Board notes that there are no medical treatment records between December 2010 and March 2015. However, in increasing the Veteran's PTSD rating to 100 percent, the AOJ utilized, among other

things, a November 2010 psychological examination. The examiner noted that the Veteran's thought process and content were coherent and normal. The Veteran understood and followed all instructions. His attention was somewhat limited; however, he was oriented to year, season, day, date, month, and place. Activities based on immediate attention such as naming, repetition, following commands, and reading comprehension were all normal. His writing and construction abilities were also normal. The Veteran employed a full time maid. His main daily activities included watching TV, tinkering with various projects such as rewiring his electric service, reading, gardening, and monitoring his environment. However, about several time per month, he experienced intense periods of low and sad moods, and during this period, he told his maid not to come to work, and he was unable to answer his phone, read, check emails, garden, and work on projects. The Veteran reported feeling uncomfortable when he went outside, but, he did leave his apartment about two times per week to go to the post office and the grocery store. The examiner stated that the Veteran was capable of managing his own finances and taking care of himself. The Board also notes, in June 2014, the Veteran wrote a well-researched brief to the Court alleging he was deprived access to a fair and impartial review of his claim before an impartial arbitrator. Although the Veteran had periods of low mood where he was unable to perform certain activities, when he did not experience these mood, he was able to, among other things, rewire his electric service, answer the phone and emails, and run errands. Therefore, based on the above, the Board does not find that the Veteran was incapable of rationale thought

or deliberate decision making, handling his own affairs, or unable to function in society.

In his June 2015 statement, the Veteran stated that a decision was never issued denying an earlier effective date on any of his claims. He stated that if the 2012 decision was a full grant of benefits sought, then the AOJ was admitting to an error. That decision would have been covered by the August 2010 Substantive Appeal, and therefore, a Supplemental Statement of the Case, which does not require a response, would have been issued and would follow the tradition appeals process. This meant that it would be certified with a docket number of July 2010 as there was an SOC issued July 2010 and a statement in lieu of VA 9 appeal filed July 2010. He stated that the AOJ notice stated that the grant was considered a full grant. However, if you disagreed with the 2012 decision, you would be required to initiate a new appeal (which the Veteran stated he did on November 7, 2013). He further stated that the June 4, 2014 decision was a decision on that NOD, consequently, issuing an SOC on that decision would require filing a Substantive Appeal (which he did) which he had to complete and "return the VA Form 9 within one year from the date of our letter denying benefits to you" or within 60 days from the date that the SOC was mailed, whichever is later.

As noted above, the SOC stated that he 60 day from the date of the SOC or "within the remainder, if any, of the one-year period from the date of the letter notifying you of the action that you have appealed." As the June 4, 2014 SOC was issued after the one-year appeal period following the date of notification of the December 2012 rating decision, *i.e.*, the decision the

Veteran appealed, the Veteran needed to file his substantive appeal within 60 days from the date the AOJ mailed the SOC. Additionally, the Board notes in October 1971 and August 2010, the Veteran went through the appeals process and filed timely Substantive Appeals. As such, the Board finds that the Veteran knew or should have known of the requirements for filing a timely Substantive Appeal.

The Veteran has not alleged "extraordinary circumstances" beyond the Veteran's control despite the exercise of due diligence with submission of an appeal. *See Bove, supra.* Accordingly, the Board finds no basis for equitable tolling of the filing deadline.

For the foregoing reasons, the Board finds that the Veteran did not file a timely Substantive Appeal as to the June 2012 SOC, and there is no exception to this requirement that applies in his case. Therefore, the appeal is denied. As the preponderance of the evidence is against the claim, the benefit of the doubt doctrine is not applicable. 38 U.S.C. § 5107(b); 38 C.F.R. § 3.102.

/s/ Michael Lane
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board
T. Henry, Associate Counsel

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential, and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DENYING PETITION FOR REHEARING (DECEMBER 6, 2022)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROBERT THORNTON,

Claimant-Appellant,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee.

2022-1618

Appeal from the United States Court of Appeals for Veterans Claims in No. 19-7749, Senior Judge Mary J. Schoelen

Before: MOORE, Chief Judge, NEWMAN, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, Circuit Judges.

PER CURIAM.

ORDER

Robert Thornton filed a petition for rehearing en banc. The petition was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue December 13, 2022.

FOR THE COURT

/s/ Peter R. Marksteiner
Clerk of Court

December 6, 2022
Date

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (NOVEMBER 8, 2016)

NOTE: This disposition is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROBERT G. THORNTON,

Claimant-Appellant,

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee.

2016-2264

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

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

PER CURIAM.

Robert G. Thornton appeals from a decision by the Court of Appeals for Veterans Claims ("Veterans Court") denying his motion to vacate its prior decision. Because we lack jurisdiction over the issues Mr. Thornton raises on appeal, we dismiss.

BACKGROUND

This case is Mr. Thornton's third appeal stemming from a claim he filed for service-connected disability benefits. In 2007, Mr. Thornton, an Army veteran, sought benefits for a psychiatric condition, hearing loss, and tinnitus. After a series of decisions relating to these claims, on June 4, 2014, a Veterans Affairs ("VA") Decision Review Officer ("DRO") awarded Mr. Thornton (1) a 100% disability rating for post-traumatic stress disorder effective March 1, 2007; (2) a 40% rating for bilateral hearing loss effective March 1, 2007 and a 50% rating effective May 17, 2010; and (3) a 10% rating for tinnitus effective March 1, 2007.[1] In a Statement of the Case issued the same day, the DRO denied Mr. Thornton's request for entitlement to effective dates prior to March 1, 2007 for all three conditions.

On January 28, 2015, Mr. Thornton filed an appeal of the June 4, 2014 DRO decision, requesting the VA regional office ("RO") forward his appeal to the Board of Veterans Appeals ("Board"). While that appeal was pending, Mr. Thornton petitioned for a writ of mandamus seeking, in relevant part, that the Veterans Court compel the RO to forward his appeal to the Board. On June 12, 2015, the RO informed Mr. Thornton that his appeal was untimely and provided instructions regarding how to appeal the untimeliness decision. On July 30, 2015, the Veterans Court denied Mr.

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[1] Mr. Thornton's first appeal to this court concerned a petition for a writ of mandamus, filed before the DRO's June 4, 2014 award, alleging delay in granting him benefits. We affirmed the Veterans Court's denial of Mr. Thornton's petition on the basis that mandamus was not the only form of relief available. *Thornton v. McDonald*, 597 F. App'x 641 (Fed. Cir. 2015) ("*Thornton I*").

Thornton's petition for mandamus ("the July 30, 2015 Decision"), reasoning he had adequate alternative means to relief as outlined in the RO's instructions regarding how to appeal the untimeliness determination. Mr. Thornton appealed the July 30, 2015 Decision to our court, which we dismissed for lack of jurisdiction in *Thornton v. McDonald*, 626 F. App'x 1007 (Fed. Cir. 2015) ("*Thornton II*").[2]

Following our dismissal in *Thornton II*, Mr. Thornton filed a Federal Rule of Civil Procedure 60(b) motion in the Veterans Court, requesting that the Veterans Court vacate the July 30, 2015 Decision for fraud on the court. The Veterans Court denied the motion on May 25, 2016. Mr. Thornton timely appealed.

DISCUSSION

Our jurisdiction over appeals from the Veterans Court is statutorily limited. We may review challenges to the "validity of any statute or regulation or any interpretation thereof" and may "interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." 38 U.S.C. § 7292(c). We may not review challenges to factual determinations or to the application of a law or regulation to the facts of a particular case unless the appeal presents a constitutional issue. *Id.* §§ 7292(d)(1)-(2).

Mr. Thornton's appeal asks us to determine whether the Veterans Court properly applied Rule 60 (b) to the facts of his claim, alleging the July 30, 2015

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[2] Mr. Thornton filed a motion to disqualify and recuse the panel of judges in *Thornton II*. We deny the motion as it pertains to the present case.

Decision relied on "fraudulent facts." He does not challenge the validity of any statute or regulation or the Veterans Court's interpretation thereof. Nor does Mr. Thornton's appeal present a constitutional issue. Accordingly, we do not have jurisdiction to review the Veterans Court's denial of Mr. Thornton's Rule 60(b) motion.

CONCLUSION

For the foregoing reasons, Mr. Thornton's appeal is dismissed for lack of jurisdiction.

DISMISSED

COSTS

No costs.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (DECEMBER 15, 2015)

NOTE: This disposition is nonprecedential.

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 UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS (JULY 30, 2015)

NOTE: This disposition is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

ROBERT G. THORNTON,

Petitioner,

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

No. 15-2059

Before: PIETSCH, Judge.

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

ORDER

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. Prinicipi*, 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

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (JANUARY 26, 2015)

NOTE: This disposition is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROBERT G. THORNTON,

Claimant-Appellant,

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee.

2014-7136

Appeal from the United States Court of Appeals for Veterans Claims in No. 14-1601, Judge Coral Wong Pietsch

Before: PROST, Chief Judge, NEWMAN, and REYNA, Circuit Judges.

PER CURIAM.

Robert Thornton appeals the order of the Court of Appeals for Veterans Claims ("Veterans Court") denying his petition for a writ of mandamus based on an alleged delay in granting him benefits. Because the Veterans Court properly denied Mr. Thornton's

petition, on the basis that mandamus was not the only form of relief available, we affirm.

BACKGROUND

Mr. Thornton, an Army veteran, filed an informal claim for veterans' benefits with the Department of Veterans Affairs ("VA") on March 1, 2007. After the VA requested clarification of his claim, Mr. Thornton filed a formal claim on October 17, 2007. In his formal claim, Mr. Thornton sought (1) service connection for (a) hearing loss in his left ear; (b) tinnitus; and (c) a psychiatric disability; and (2) an increased rating for his service-connected hearing loss in his right ear. Pursuant to his claim for psychiatric disability, Mr. Thornton was examined for post-traumatic stress disorder ("PTSD") in July 2008.

On September 12, 2008, the VA issued a rating decision which (1) granted service connection for his PTSD, with a rating of 70 percent from the date of the formal claim until his July 2008 examination, and a 50 percent rating thereafter; (2) denied service connection for the hearing loss in his left ear; and (3) continued the non-compensable rating for the hearing loss in his right ear. Mr. Thornton filed a Notice of Disagreement with the September 12, 2008 decision on October 14, 2008, seeking increased disability ratings, including a rating of 100 percent for his service-connected PTSD.

The VA issued a Statement of the Case on July 19, 2010. Eight days later, the VA accepted a statement from Mr. Thornton in lieu of a VA Form 9, effectively initiating his appeal. Because Mr. Thornton sought an increased rating for his PTSD, the VA scheduled Mr. Thornton for another examination. On December 11,

2012, a VA Decision Review Officer ("DRO") issued a rating decision, increasing Mr. Thornton's PSTD rating to 100 percent, effective from the date of his formal claim, October 17, 2007.

Mr. Thornton filed a Notice of Disagreement with the DRO's rating decision in November 2013. After some delay, Mr. Thornton filed a petition for a writ of mandamus on May 23, 2014. He sought certification of his appeal of the effective dates of his disabilities and forwarding of his claims to the Board of Veterans' Appeals ("Board"), expedited consideration of his appeal, an order that the VA abide by various statutes, an order requiring the VA to stipulate it unlawfully withheld or unreasonably delayed Mr. Thornton's benefits, and the grant of the benefits sought.

On June 4, 2014, the VA issued a rating decision granting an earlier effective date of March 1, 2007 (the date of the informal claim) for Mr. Thornton's PTSD, his hearing loss, and tinnitus, as well as a higher rating for the hearing loss. In a July 31, 2014 order, the Veterans Court denied Mr. Thornton's mandamus petition. The Veterans Court denied the request for an order of a public apology by the VA as it would be an improper use of mandamus authority. The Veterans Court also refused to grant the benefits sought or certify his appeal because Mr. Thornton had an alternative remedy in the form of an appeal from the June 4, 2014 decision and because any delay on the VA's part did not constitute an arbitrary refusal to act.

Mr. Thornton appeals the Veterans Court's denial of his petition for a writ of mandamus. Mr. Thornton contends that a supposed failure by the VA to consider a CD with copies of relevant records in support of his

mandamus petition and an informal Notice of Disagreement from 1989 amounts to suppression of evidence that violates his due process rights.

DISCUSSION

Our jurisdiction over appeals from the Veterans Court is statutorily limited. Congress has authorized this court to "review . . . any challenge to the validity of any statute or regulation or any interpretation thereof" and to "interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." 38 U.S.C. § 7292(c). We may not review challenges to factual determinations or to laws or regulations as applied to the facts of a particular case, except to the extent that the appeal presents a constitutional issue. *Id.* § 7292(d)(2). These restrictions apply to our review of a decision by the Veterans Court on a mandamus petition. *Lamb v. Principi*, 284 F.3d 1378, 1381 (Fed. Cir. 2002).

While we cannot review the merits of a veteran-petitioner's claim, we can review a determination of whether the petitioner has satisfied the legal requirements for a writ of mandamus to issue. *Beasley v. Shinseki*, 709 F.3d 1154, 1158 (Fed. Cir. 2013). For a court to grant the writ, three requirements must be satisfied: (1) the petitioner must have no other adequate means to attain the desired relief; (2) the petitioner must show that the right to the relief is clear and indisputable; and (3) exercising its discretion, the issuing court must decide that the remedy is appropriate under the circumstances. *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380-81 (citations and quotations omitted). Indeed, the bar for mandamus relief is very high because the mandamus remedy is a

drastic one, only to be granted in extraordinary circumstances. *Kerr v. United States Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 402 (1976).

Here, as the Veterans Court found, Mr. Thornton is not able to meet all the requirements for mandamus relief. First, Mr. Thornton does not satisfy the requirement that he have no other means of relief available. The VA issued a decision on June 4, 2014 that addressed the benefits Mr. Thornton was seeking and substantially increased his ratings. If Mr. Thornton is not satisfied with the VA's decision, he may appeal it to the Board. In light of the ability to appeal the VA's decision, Mr. Thornton is unable to meet the requirement that he have no other adequate means besides a writ of mandamus to obtain the relief he desires.

Second, the Veterans Court properly found that mandamus relief was not justifiable under these circumstances merely because the VA's decision was delayed. To this point, the Veterans Court found that though Mr. Thornton's claim could have been processed more quickly, the VA's delay did not amount to an arbitrary refusal to act. Mandamus relief would be improper simply to correct past delays or prevent future ones. We have explained that a petition for a writ of mandamus is not the appropriate vehicle for circumventing the appeals process "even though hardship may result from delay and perhaps unnecessary trial." *Lamb*, 284 F.3d at 1384. The circumstantial delay in processing Mr. Thornton's claim is insufficient to justify mandamus relief.

CONCLUSION

Mr. Thornton is unable to meet the requirements for the issuance of a writ of mandamus. Because he has another means to attain his desired relief and mandamus is not justified under these circumstances, we affirm the Veterans Court's denial of his petition for a writ of mandamus.

AFFIRMED

COSTS

Each party shall bear its own costs.

INFORMAL BRIEF OF APPELLANT (22-1618)
(MAY 31, 2022)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Case Number: 2022-1618

Short Case Caption: Thornton v. McDonough

Name of Appellant: Robert G. Thornton

Instructions: Read the Guide for Unrepresented Parties before completing this form. Answer the questions as best as you can. Attach additional pages as needed to answer the questions. This form and continuation pages may not exceed 30 pages.

Attach a copy of the opinion, order, and/or judgment of the Court of Appeals for Veterans Claims. You may also attach other record material as an appendix. Any attached material should be referenced in answer to the below questions. Please redact (erase, cover, or otherwise make unreadable) social security numbers or comparable private personal identifiers that appear in any attachments you submit.

1. Have you ever had another case in this court?

   ☑ Yes

   If yes, state the name and number of each case.

   Thornton v McDonald Fed. Cir. No. 14-7136,
   Thornton v McDonald Fed. Cir. No. 15-7107,
   Thornton v McDonald Fed. Cir. No. 16-2264.
   Continued on pg. 1-9

2. Did the Court of Appeals for Veterans Claims decision involve the validity or interpretation of a statute or regulation?

   ☑ Yes

   If yes, what are your arguments concerning those issues?

   Board and the Veterans Court misinterpreted the governing statutes, applied an Incorrect judicial evidential standard in denying his appeal as Untimely. § 7261(d) shall review only questions. Continued on pg. 9-13

3. Did the Court of Appeals for Veterans Claims decide constitutional issues?

   ☑ Yes

   If yes, what are your arguments concerning those issues?

   (MD) P. 13 (Appx. 065) 19-7749 MEM-DEC 1-15. Accordingly, even assuming that the appellant raised these contentions to the Board, see, e.g., R. at 127 (appellant's assertion on May 2018 VA Form 9, by concealing the June 4, 2014 [,] DRO [d]ecision") See, e.g., Cushman v. Shinseki, 576 F.3d 1290, 1292, 1300 (Fed. Cir. 2009) Violation due process. Continued on Pg. 9-19

4. Did the Court of Appeals for Veterans Claims fail to decide any other issue correctly?

   ☑ Yes

   If yes, how?

   FRE 201(c) notes that judicial notice may be permissive or mandatory. Under the wording of

the rule, judicial notice is permissive if the court takes such notice on its own but mandatory if a party requests it and the court is supplied with the necessary information. Appellant wishes to notice this court of judicial notices requested in CAVC No. 19-7749 in December 7, 2020 and March 15, 2021. (MD) P. 14- (Appx. 066) 19-7749 MEM-DEC Continued on Pg. 1-9

5. Are there other arguments you wish to make?

☑ Yes

If yes, what are the arguments?

The record shows that the CAVC's affirmance of the Board's decision has no plausible basis in fact. The CAVC created its own new president by its Panel affirming the single judge's decision which was in direct opposition to Gibson (supra.) (CAVC has jurisdiction to hear the merits of the appellant's argument of May 2018 Form V9 submission; legal error. Gibson v. Peake, 22Vet. App. 11 (2007) Continued on Pg. 12-19

6. What action do you want this court to take in this case?

1. As a matter of law, Appellant's procedural Due Process and Equal Protection rights under the Fifth Amendment have been violated by the Secretary, the Board and the CAVC in the context of this appeal. Continued on Pg. 26-28

Signature: /s/Robert G Thornton
Name: Robert G Thornton

Date: 05/30/2022

[. . .]

STATEMENT OF THE CASE

I. Nature of The Case

Mr. Thornton has had a Protracted History with the [VBA] Veterans Benefits Administration1, beginning in August 19, 1970 when the appellant filed his claim for benefits VA Form 21-526 (R. at 2722- 25), The Report of Medical Examination for Disability Evaluation of May 10, 1971 [VA form 21-2545] (R. at 2733-36), The Jul 28, 1971(NOD) (R. at 2706), and the January 19, 1972 (BVA) Board decision (R. at 2686-89) the pending and un-adjudicated claims. See . . . IV. Procedural Defects and Suppression of Favorable Evidence in the pending un-adjudicated claims.

II. Appellant has had (3) three previous cases before the Federal Circuit:

(The following three case are hereby incorporated by reference in their entirety here at.)

Answer the questions CAFC Form 13-No. 1 [Pages 1-9]

1a. No. 14-1601 Secretary's Response dated 7th day of July, 2014:

The *relevant events* described below are based on the information provided by the appropriate VARO personnel, who reviewed the writ petition and the Petitioner's records and claims file. *Attached are copies of relevant documents* regarding Petitioner's *pending and adjudicated claims*. (Exhibits 1-81). (Appx. 001)

A VA rating decision, dated December 11, 2012, addressed the claims for PTSD, tinnitus, bilateral hearing loss, and for Dependents' Educational Assistance (DEA) benefits. (Exhibits 25-30). (Appx. 003)

Petitioner *filed three NODs*, dated *November 5, 2013*, (Exhibits 37-41), dated *November 9, 2013*, (Exhibits 45-47), and dated *November 15, 2013*. (Exhibit 42). (Appx. 002-003, 008), R. at 1166-69. P. 1155, P. 1141)

On *June 4, 2014, the DRO issued a decision* that addressed the PTSD, bilateral hearing loss, tinnitus claims, and those for an earlier effective date for DEA benefits, and special monthly compensation (SMC) for housebound status. (Exhibits 48-54). (Appx. 003)

Also, on *June 4, 2014, a Statement of the Case* (SOC), addressing claims concerning Petitioner's service-connected PTSD, bilateral hearing loss, and tinnitus, and *advising him of his appellate rights*, was provided to Petitioner. (Exhibits 55-81). (Appx. 003)

1b. No. 14-7136 Fed. Cir. Appellee's Brief (Appx. 015) dated 27th day of Oct, 2014:

Mr. Thornton appeals the denial by the United States Court of Appeals for Veterans Claims (Veterans Court) of his petition for extraordinary relief in the nature of a writ of mandamus.

On March 1, 2007, The Department of Veterans Affairs (VA) received an informal claim from Mr. Thornton. SA15. VA thereafter construed Mr. Thornton's March 1, 2007, submission to include

claims for (1) service connection for (a) an acquired psychiatric disorder; (b) left ear hearing loss; and (c) tinnitus; and (2) an increased evaluation for service-connected right ear hearing loss.

Mr. Thornton filed a Notice of Disagreement (NOD) with this decision on October 14, 2008. SA15. VA issued a Statement of the Case (SOC) on July 19, 2010. SA49. On July 27, 2010, VA accepted Mr. Thornton's substantive appeal, i.e., his statement in lieu of VA Form 9 ("Appeal to Board of Veterans' Appeals"). See SA48-49.

In a decision dated December 11, 2012, the VA Decision Review Officer (DRO) increased Mr. Thornton's initial PTSD evaluation to 100%, 2007. [2 footnote] effective October 17, SA48-50. *VA construed this to be a full grant of benefits sought, which rendered certification to the board unnecessary*. SA48. On November 7, 2013, Mr. Thornton filed an NOD regarding the DRO decision of December 11, 2012. (Appx. 016-017)

[2 footnote; In that same decision, VA also granted service connection for left ear hearing loss; an evaluation for bilateral hearing loss of 0 percent effective August 19, 1970, and 20 percent evaluation effective October 17, 2007; and granted service connection for tinnitus with a 10 percent evaluation effective October 17, 2007. SA48-50.

On June 2, 2014, Mr. Thornton supplemented his writ petition and asked the Veterans Court to grant him the benefits he seeks. SA1.

On *June 4, 2014, the RO issued a DRO decision* granting the following benefits: (1) *earlier effective dates*

(March 1, 2007, rather than October 17, 2007) for the initial ratings for PTSD, bilateral hearing loss, and tinnitus; (2) a higher initial rating (40 percent) for bilateral hearing loss; and (3) an increased rating for bilateral hearing loss of 50 percent effective May 17, 2010. SA14-20. (Appx. 018)

The *RO also issued an SOC denying an effective date earlier than March 1, 2007*, for all three of his service-connected conditions, SA21-47.

The DRO denied Mr. Thornton's request for an effective date of July 1968, when he separated from service, for service connection for PTSD, on the basis that there was nothing on record that could be construed as a claim for service connection for PTSD *prior to March 1, 2007*. SA44. (R. at 2733-36, 2689, 2686-89) (Appx. 018)

Similarly, to the extent Mr. Thornton requested an effective date of March 7, 1989, for the initial 40 percent evaluation for hearing loss and the initial 10 percent evaluation for tinnitus, VA specifically noted that Mr. Thornton did not file an NOD regarding a Hearing Officer's Decision denying that claim dated February 12, 1990, rendering the claim final. SA46. (Appx. 018-019)

To the extent Mr. Thornton *argues that VA's failure to certify his appeal to the board following the issuance of the December 11, 2012, DRO decision amounts to an arbitrary refusal to act*, this assertion is contrary to law. In the December 11, 2012, DRO decision. VA expressly stated that the decision "is considered a full grant of benefits sought on appeal." SA48.

As a result, Mr. Thornton's case *was no longer in appellate status. AB v. Brown*, 6 Vet. App. 35, 38 (1993) (citation omitted). To *return his case to appellate status*, it was necessary that *he file a new NOD, which he did on November 7, 2013*. (Appx. 019-021), (R. at. 1166-69. P. 1155, P. 1141, 3247)

1c. 14-7136 Fed Cir –decision– Jan 26, 2015 (Appx. 009):

The VA issued a Statement of the Case on July 19, 2010. Eight days later, the VA accepted a statement from Mr. Thornton in lieu of a VA Form 9, effectively initiating his appeal. Because Mr. Thornton sought an increased rating for his PTSD, the VA scheduled Mr. Thornton for another examination. On *December 11, 2012*, a VA *Decision Review Officer* ("DRO") *issued a rating decision*, increasing Mr. Thornton's PSTD rating to 100 percent, *effective* from the date of his formal claim, *October 17, 2007*.

Mr. Thornton filed a *Notice of Disagreement with the DRO's rating decision in November 2013*. After some delay, Mr. Thornton filed a petition for a writ of mandamus on May 23, 2014.

On *June 4, 2014*, the VA *issued a rating decision granting* an *earlier effective date of March 1, 2007* (the date of the informal claim) for Mr. Thornton's PTSD, his hearing loss, and tinnitus, as well as a higher rating for the hearing loss.

The Veterans Court also refused to grant the benefits sought or certify his appeal because Mr. Thornton had an alternative remedy in the form of an

appeal from the June 4, 2014 decision. (Appx. 010-013)

First, Mr. Thornton does not satisfy the requirement that he have no other means of relief available. The *VA issued a decision on June 4, 2014 that addressed the benefits Mr. Thornton was seeking* and substantially increased his ratings. If Mr. Thornton *is not satisfied with the VA's decision, he may appeal it to the Board*. In light of the ability to appeal the VA's decision, Mr. Thornton is unable to meet the requirement that he have no other adequate means besides a writ of mandamus to obtain the relief he desires.

II. b. Appellant-Thornton appeals the Veterans Court Decision No. 15-2059 (Vet. App. Jul. 30, 2015), Fed. Cir. No. 15-7107. (Appx. 025)

1b. 15-2059- July 13, 2015 Response by Respondent to Petition for Extraordinary Relief: (Appx. 026)

Petitioner asserts that the RO refuses to process his January 2015 Substantive Appeal to a June 2014 Statement of the Case (SOC).

In July 2014, the Secretary responded reporting, *inter alia*, *that on June 4, 2014*, the RO issued an *(SOC) that, inter alia, denied Petitioner's claims of* entitlement to an *effective date prior to March 1, 2007, for his PTSD, hearing loss, and tinnitus*. *Id.*

In February 2015, the RO in Pittsburgh, Pennsylvania received Petitioner's Substantive Appeal dated January 28, 2015. *See* Secretary's Exhibit B at 1, 29.

In June 2015 a Decision Review Officer (DRO) determined that the Appeal was untimely. *Id.* at 1, 31-34. Petitioner was notified of that determination and was provided his appellate rights. *Id.* at 6. (Appx. 026-027)

Petitioner asserts that the RO refuses to certify to the Board his appeal of claims for earlier effective dates involving his PTSD, tinnitus, and bilateral hearing loss. *See* Petition.

The *Secretary submits* those matters are *currently pending appellate action*. Therefore, the Court's issuance of a writ is not warranted. *See Cheney*, 367 U.S. at 380-81. (Appx. 026-027)

As noted, the RO issued an *SOC in June 2014 regarding Petitioner's claims*. The *SOC informed* Petitioner that he should submit a *Substantive Appeal either "within 60 days from the date of this letter or within the remainder, if any, of the one-year period from the date of the letter notifying [Petitioner] of the action that you have appealed*." *See* Secretary's Exhibit B at 3.

The RO received Petitioner's Substantive Appeal in February 2015. *Id.* at 2, 30. In June 2015, the DRO determined that Petitioner's Substantive Appeal was untimely. *See id.* at 2, 30-34. Petitioner was notified of that determination and was provided his appellate rights. *Id.* at 2, 33.

The *timeliness of a Substantive Appeal is an appealable issue*. *See* C.F.R. § 19.34 (providing that "[w]hether a Notice of Disagreement or Substantive Appeal has been filed on time is an appealable issue."). (Appx. 028)

Petitioner may appeal this matter to the Board through the normal appeals process and then the Court in the event of an unfavorable determination. *See* 38 C.F.R. § 20.101(c). . . (Appx. 028)

(c) Appeals as to jurisdiction. All claimants have the right to appeal a determination made by the agency of original jurisdiction that the Board does not have jurisdictional authority to review a particular case.

Jurisdictional questions which a claimant *may appeal, include, but are not limited to, questions relating to the timely filing* and adequacy of the Notice of Disagreement and the Substantive Appeal. (R. at 116-28, 105- 115, 103)

[There will be a continuation in the discussion of the procedural defects below in III. Procedural Defects and Suppression of Favorable Evidence]

2b. 15-7107- RESPONSE BRIEF W-SUP APX-09-18-2015: (Appx. 033)

Mr. Thornton again filed an NOD concerning the decision review officer's rating decision, which resulted in an earlier effective date of March 1, 2007 for Mr. Thornton's PTSD, his hearing loss and tinnitus, as well as a higher rating for the hearing loss. SA14, 15. (R. at. 1166-69. P. 1155, P. 1141)

RO issued a statement of the case *(SOC) denying entitlement to an effective date earlier than March 1, 2007* for Mr. Thornton's service-connected disorders. SA20. (Appx. 034-036)

The Veterans Court stated that, because the RO had issued an SOC addressing his tinnitus, hearing loss, and PTSD, Mr. Thornton could perfect his appeal of those matters by submitting a VA Form 9. *Id.* *Instructions for completing his appeal were detailed in a letter from the VA accompanying the SOC*. SA16-17. (Appx. 036)

On January 28, 2015, Mr. Thornton *submitted a VA Form 9*, which is used to perfect an appeal to the board, *challenging the findings made in the June 2014 SOC*. SA4.

On June 12, 2015, in response to Mr. Thornton's January 28, 2015 VA Form 9, the *RO informed* Mr. Thornton that his *VA Form 9 was untimely* and, therefore, his appeal could not continue. SA24. The RO stated that Mr. Thornton should have submitted his VA Form 9 no later than one year following the *December 2012 RO decision he was appealing*, or 60 days following the June 2014 SOC, whichever was later. *Id.* Therefore, he had until August 2, 2014 to submit his VA. Form 9. (Appx. 037)

The RO further stated that, if Mr. Thornton *did not agree with this decision*, he could *submit an NOD and initiate an appeal of the timeliness decision* within one year of the date on which the decision letter was mailed. SA24-26. (Appx. 037) (R. at 210-212, 209-200, 192)

Mr. Thornton complains that he was *denied a fair adjudication of his claims because the Secretary allegedly (1) suppressed and spoliated evidence relevant to his benefits claims*, and (2) improperly refused to certify and forward his VA Form 9 to

the board. As demonstrated further below, these are issues that he could have raised in a direct appeal of his benefits determination to the board, the Veterans Court, and this Court.

Moreover, these due process issues could be raised in relation to his direct appeal of the VA's handling of his Privacy Act request or the RO's timeliness decision regarding his late-submitted VA Form 9. (App. Br.) at 2-8, 12-26)

Mr. Thornton's VA Form 9 challenging the findings the RO made in the June 2014 SOC was not received until February 2, 2015. SA24. (Appx. 038)

On June 12, 2015, the RO informed Mr. Thornton that it was not forwarding the appeal to the board because Mr. Thornton did not timely file his VA Form 9.

Because the Veterans Court correctly concluded that Mr. Thornton had adequate alternative remedies for challenging the VA's actions and the RO's decision, this Court should affirm the Veterans Court's decision.

Mr. Thornton also has the opportunity to appeal the June 12, 2015 RO decision in which the RO determined that Mr. Thornton had not timely submitted a VA Form 9. (App. Br.) at 2-8, 12-26) (Appx. 038-039)

3b. Fed. Cir. No. 15-7107 Decision, December 15, 2015: (Appx. 029)

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.*" (Appx. 030) (R. at. 1166-69. P. 1155, P. 1141)

Mr. Thornton filed an appeal on January 28, 2015, requesting the VA regional office to forward his appeal to the Board of Veterans Appeals.

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. (Appx. 030)

Specifically, the Veterans Court found that Mr. Thornton had been provided with information on how to appeal both the VA's determination that his January2015 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. (Appx. 031-032)

II. c. Appellant-Thornton appeals the Veterans Court Decision No. 15-2059 motions to vacate, and a petition for rehearing *en banc,* Fed. Cir. No. 16- 2264.

1c. 16-2264- RESPONSE BRIEF 16-2264 W-SUP APX-8-11-2016: (Appx. 045)

Mr. Thornton has filed a series of appeals, petitions for writ of mandamus, motions to vacate, and a petition for rehearing en banc in this Court and the court of Appeals for Veterans Claims (Veterans Court).1 Mr. Thornton's latest appeal is an apparent attempt to re-litigate earlier decisions of the Veterans Court and this Court. (Appx. 045)

This case has a long procedural history that stems from Mr. Thornton's claims for disability benefits, and disagreement with the VA regarding the ratings decisions and effective dates related to those benefits. (Appx. 046)

Mr. Thornton is an Army veteran, who first filed an informal claim for disability benefits with the VA in March 2007. SAppx 37. Mr. Thornton later filed a formal claim in October 2007, after receiving a request for clarification of his claim. *Id.* Mr. Thornton's claims included service connection for post- traumatic stress disorder (PTSD), hearing loss in his left ear, and tinnitus. SAppx38-40. (R. at 2772-75, 2733-36, 2689, 2686-89)

Mr. Thornton again filed a notice of disagreement concerning the rating decision of the decision review officer, which <u>*resulted in*</u> an earlier

effective date of *March 1, 2007* for Mr. Thornton's PTSD, hearing loss, and tinnitus, as well as a higher rating for the hearing loss. SAppx35-36. (R. at. 1166-69, 1155, 1141) (Appx. 047)

Less than two weeks later, the VA regional office issued a statement of the case denying entitlement to an effective date *earlier than March 1, 2007*, for Mr. Thornton's service-connected disorders. (Appx. 048)

Veterans Court denied Mr. Thornton's petition, finding that he did not lack alternative means to attain the board's review of his appeal. SAppx9.

The court stated that, because the VA regional office had *issued a statement of the case* addressing his tinnitus, hearing loss, and PTSD, Mr. Thornton could *perfect his appeal of those matters by submitting a VA Form 9*. (Appx. 048)

After this Court's decision, Mr. Thornton *submitted a VA Form 9*, which is used to perfect an appeal to the board, *challenging the findings* made in the *June 2014 statement of the case*. *See* SAppx41.

The following month, in *response to Mr. Thornton's VA Form 9 submission*, the VA regional office informed Mr. Thornton that *his appeal could not continue because his VA Form 9 was untimely*. SAppx41

Mr. Thornton filed a motion with this Court to vacate this Court's February 24, 2016 order denying his petition for rehearing, again *alleging fraud on the part of VA*. SAppx50. (Appx. 049-052)

On May 19, 2016, Mr. Thornton filed a motion in the Veterans Court to vacate its July 30, 2015 judgment (the decision that had been appealed to

and dismissed by this Court), asserting, yet again, that its decision "*was procured through fraud on the [c]ourt" committed by VA's General Counsel*. SAppx3; SAppx12-30. In the May 25, 2016 decision now on appeal, the Veterans Court denied Mr. Thornton's motion. SAppx4.

2c. 16-2264 DECISION- November 8, 2016 (Appx. 041)

After a series of decisions relating to these claims, on *June 4, 2014, a Veterans Affairs ("VA") Decision Review Officer ("DRO") awarded* Mr. Thornton (1) a 100% disability rating for post-traumatic stress disorder *effective March 1, 2007*; (2) a 40% rating for bilateral hearing loss effective March 1, 2007 and a 50% rating effective May 17, 2010; and (3) a 10% rating for tinnitus *effective March 1, 2007*. 1 In a *Statement of the Case issued the same day,* the DRO *denied Mr. Thornton's* request for entitlement to *effective dates prior to March 1, 2007 for all three conditions*. (Appx. 042)

On January 28, 2015, Mr. Thornton filed an appeal of the June 4, 2014 DRO decision, requesting the VA regional office ("RO") forward his appeal to the Board of Veterans Appeals ("Board").

On June 12, 2015, the RO informed Mr. Thornton that his appeal was untimely and provided instructions regarding how to appeal the untimeliness decision.

On July 30, 2015, the Veterans Court denied Mr. Thornton's petition for mandamus ("the July 30, 2015 Decision"), reasoning he had adequate alternative means to relief as outlined in the RO's

instructions regarding how to appeal the untimeliness determination.

Following our dismissal in *Thornton II*, Mr. Thornton filed a Federal Rule of Civil Procedure 60(b) motion in the Veterans Court, requesting that the Veterans Court vacate the July 30, 2015 Decision for fraud on the court. The Veterans Court denied the motion on May 25, 2016. Mr. Thornton timely appealed. (Appx. 043-044)

Clearly, the Secretary citied and supported with the evidence from the record and the Court's *Adjudicative Facts stated* that the June 4, 2014 SOC was in response to the June 4, 2014 DRO decision granting an EED of March 1, 2007. In the responses from Secretary to the courts orders of June 20, 2014, Oct 27, 2014, June 3, 2015, Sept 18, 2015 and Aug 11, 2016, that the AOJ issued the Following:

"On *June 4, 2014, a Veterans Affairs ("VA") Decision Review Officer ("DRO") awarded* Mr. Thornton (1) a 100% disability rating for post-traumatic stress disorder *effective March 1, 2007*; (2) a 40% rating for bilateral hearing loss effective March 1, 2007 and a 50% rating effective May 17, 2010; and (3) a 10% rating for tinnitus *effective March 1, 2007*.

In a *Statement of the Case issued the same day,* the DRO *denied Mr. Thornton's* request for entitlement to *effective dates prior to March 1, 2007 for all three conditions*".

The record doesn't support the false June 12, 2015 untimely decision. (R at 226-30, 276, 929- 986-992, 99 - 9

Judicial notice in the Federal Rules of Evidence- Rule 201. FRE 201 [Rule 201 *Judicial Notice of Adjudicative Facts* (C) Taking Notice (2) must take judicial notice.]

Appellant now request this court to take judicial notice of the above cited cases to include the secretary's responses. Appellant wishes to notice this court of judicial notices requested in CAVC No. 19-7749 in December 7, 2020 and March 15, 2021.

(MD) P. 14- (Appx. 066)

C. Pending Motions:

On April 21, 2021, the Court ordered that this motion and the requests for judicial notice be held in abeyance. Now, the Court finds that the appellant's due process arguments presented in his motion in limine are the same as his due process arguments presented in his informal brief. Because, as discussed above, the Court finds that the appellant has not that VA or the Board violated his due process rights, the Court will now deny the December 7, 2020, motion in limine. Accordingly, the Court will also deny the December 7, 2020, and March 15, 2021, requests for judicial notice as moot.

Answer to the questions CAFC Form 13 No. 2-3 [Pages 9-19]

III. January 19, 2022, panel decision is granted:

In a December 21, 2021, (Appx. 068-069) memorandum decision, the Court affirmed the *Board of Veterans' Appeals July 18, 2019, decision that denied an appeal of a December 2012 VA regional office*

decision because the *appellant had not submitted a timely Substantive Appeal*. On January 4, 2022, the appellant filed a timely motion for a panel decision. The motion for decision by a panel will be granted.

Upon consideration of the foregoing, it is ORDERED, by the panel, that the motion for panel decision is granted. It is further ORDERED, by the panel, that *the single-judge decision remains the decision of the Court*. DATED: January 19, 2022. (Appx. 068-069)

The Veterans Court by statue is required to "take due account of the rule of prejudicial error." See; Mayfield v. Nicholson, 20 Vet.App. 537, 543 (2006) (Mayfield III) *aff'd*, 499 F.3d 1317 (Fed. Cir. 2007) ("*Mayfield IV*") 38 U.S.C. § 7261(c)) . . . 38 U.S.C. § 7261(b)(2) take due account of the rule of prejudicial error.

The veterans' court ignored prejudicial error rule;

1. as part of its clear error review, must review the Board's weighing of the evidence.
2. we will give no deference to a Board finding regarding the application of the doctrine of harmless error . . . Accordingly, the Court will review Board determinations of prejudicial error de novo, in other words, without any deference to the Board. *aff'd*, 499 F.3d 1317 (Fed. Cir. 2007) ("*Mayfield IV*"),

(BVA) Board Decision Jul 18, 2019 (R. at 4):

1. The appeal as to whether a timely Substantive Appeal or VA Form 9 was filed With respect to a

June 3, 2014, Statement of the Case (SOC) is denied.

1a. there has never been a Jun 3, 2014 SOC, which the Board cited and (Appx. 055) court agrees does not exist, citing typographical error.

(Appx.) at footnote 5

[5] The RO's June 2015 letter reflects that the SOC and its accompanying letter were dated June 3, 2014. R. at 226. However, this was a typographical error; the SOC and accompanying letter are dated June 4, 2014. R. at 993-1019; see R. at 5 (Board finding the SOC and letter dated June 4, 2014)).

FINDING OF FACT:

2. VA did not receive a Substantive Appeal within 60 days from the mailing of the SOC on June 4, 2012, or the one-year period from the mailing of the (2a.) *December 2012 rating decision that denied entitlement to service connection for tinnitus, left ear hearing loss, increased rating for right ear hearing loss,* and (2b.) *the grant of service connection for PTSD*.

2a. December 2012 rating decision, the AOJ granted service connection for tinnitus and bilateral hearing loss and increased the Veteran's PTSD rating to 100 percent. (R. at 1184-88)

2b. the grant of service connection for PTSD was granted in the Sept 12, 2008 rating decision. (R. at 1971-78)

The Jul 18, 2019 Board decision is clearly erroneous, furthermore, the Board decision cites; "In a December 2012 rating decision . . . The Veteran filed a timely NOD disagreeing with the effective date of the awards." (R. at 5) 38 U.S. Code § 7105 –Filing of appeal (a) Appellate review shall be initiated by the filing of a notice of disagreement, (2)(A) Notices of disagreement shall be in writing, shall identify the specific determination with which the claimant disagrees . . . (R. at 5, 1166-69. P. 1155, P. 1141)

Appellate initiated his appeal by submission of the (NOD) of Nov 2013 disagreeing with the assigned effective dates of Oct 2007 awarded in the 12-11-12 DRO-decision. On June 4, 2014 the AOJ-DRO issued a new decision:

June 4, 2014 DRO decision (R. at 986-992) granting earlier effective date of March 1, 2007 on all three disabilities, furthermore, the Evidence cited Reviewed in granting EED: (2) *Notices of Disagreement* received 10-14-08 and 11-7-13 and *VA rating decisions* dated 9-12-08 and 12-11-12 (R. at 987)

In a Statement of the Case issued the same day, the DRO denied Mr. Thornton's request for entitlement to effective dates prior to March 1, 2007 for all three conditions".

Furthermore, Evidence cited Reviewed in denying earlier effective date earlier than March 1, 2007:

(2) *Notices of Disagreement* received 10-14-08 and 11-7-13 and *VA rating decisions* dated 5-23-89, 9-12-08, 12-11-12 and 6-4-14 (R. at 995-96)

In re Edwards 582 F.3d 1351 _ (Fed. Cir. 2009)" [i]nvokes due process, this court reviews the factual determinations but only to the extent necessary to ensure compliance with due process. Appellants Brief 19 7749 [App. Br. at 2-11, 13-28)

CAVC in its review based on the "clearly erroneous" standard raises a legal question as to whether or not the CAVC applied the proper and lawful scope of review over which it had jurisdiction to review. (38 U.S.C. 7261), further narrowed by 38 U.S.C. 7252 and 7266 which limits its review to BVA final decisions, however this limitation does not necessarily extend to arguments raised in the first instance to the CAVC (see Maggitt v. West, 202 F.3d 1370, 1377-78 Fed. Cir. 2000) (holding that the CAVC has scope of review to address range are question of pure law, including interpretation of the meaning of the law; which are reviewed under a de novo standard. (38 U.S.C. 7261(a)(1); see Smith v. Gober, 14 Vet. App. 227, 230 (2000) Here, the record is undeniable.—

The Court of Appeals for Veterans Claims, as part of its clear error review, must review the Board's weighing of the evidence; it may not weigh any evidence itself. As we have recognized, the statute prohibits the court from making factual findings in the first instance. Andre v. Principi, 301 F.3d 1354, 1362 (Fed.Cir.2002) (quoting 38 U.S.C. § 7261(c)) . . . 38 U.S.C. § 7261(b)(2) take due account of the rule of prejudicial error.

Mayfield v. Nicholson, 20 Vet.App. 537, 543 (2006) (Mayfield III) . . . The question then becomes, what standard does the Court employ in reviewing the Board's determination of whether an error by the Secretary constitutes prejudicial

> error? As explained below, we will give no deference to a Board finding regarding the application of the doctrine of harmless error . . . Accordingly, the Court will review Board determinations of prejudicial error de novo, in other words, without any deference to the Board. *aff'd*, 499 F.3d 1317 (Fed. Cir. 2007) ("*Mayfield IV*"),

(MD) P. 2 (Appx. 054)

I. BACKGROUND

> "received a noncompensable disability rating, effective August 1970, which the Board affirmed in 1972. *See* R. at 2688-89."
>
> The Veterans Court cites the 1972 Board decision of which was ignored and not listed as evidence reviewed by the AOJ-DRO June 4, 2014 decision or adjudication in June 4, 2014 SOC and the court ignored the findings of the Board decision as to issues not address by the AOJ, prejudicial error. See; VAOPGCPREC 9-1999, VAOPGCPREC 16-92.

(Appx. 054) MD P. 2

"The appellant filed a timely Substantive Appeal regarding the RO's denial of A compensable rating for right ear hearing loss, a disability rating greater than 50% for PTSD, and disability compensation for left ear hearing loss and tinnitus. R. at 1454 (July 27, 2010, Substantive Appeal)." (Appx. 054)

The court made a material misstatement of fact, stating appellants' Substantive Appeal of Jul 27, 2010 "statement in lieu of" R. at 1454, See; Board cited:

In August 2010, the Veteran filed a timely Substantive Appeal (R. at 5). Appellant submitted a VA form 9 dated Aug 1, 2010 challenging the EED for PTSD and citing evidence submitted with-in one year of the 4-14-08 VCAA Notice and the AOJ Sept. 08 decision 38 CFR 3.156(b)(c) [Appe. Br. at 17] (R. at 1372-75, 1327- 58, 1376, 79). The court appears to shown Bias to the AOJ in support of the erroneous DRO-CG "De Novo Review "of Dec 11, 2012 stating "full grant of benefits sought on appeal" (R. at 1184-86, 1189-90), Appellant requested congressional help in March 2010, the AOJ-Director responded to that inquiry which provided an overview of appellant's status in the congressional inquiry. Which stated the appellant had filed a VA form 9 dated Aug 1, 2010 received Aug 17, 2010 [App. Br. at 18] (R. at 1260-62)

The court on (2) two separate findings (MD) P. 3, 11. Stated: The timely NOD prompted the June 4, 2014, DRO decision and SOC, which together afforded the appellant with an effective date of March 1, 2007. However, the court ignored these findings in order to find the Board decision plausible in violation of 38 U.S.C. § 7261(b)(2) take due account of the rule of prejudicial error.

(MD) P. 3 (Appx. 055)

1. "In response to the November 2013 NOD, on June 4, 2014, a decision review officer (DRO) assigned March 1, 2007 . . . (the date of the appellant's informal claims) R. at 1054-60. Also on June 4, 2014, the RO issued an SOC that denied effective dates earlier than March 1, 2007 . . . R. at 993- 1019. The letter attached to the SOC, also dated June 4, 2014 . . . R. at 993.

(MD) P. 11 (Appx. 063)

> As the Board explained, the December 2012 RO decision triggered the requirement for a new NOD, which the appellant fulfilled in November 2013. R. at 5, 8-9. The timely NOD prompted the June 4, 2014, DRO decision and SOC, which together afforded the appellant with an effective date of March 1, 2007 . . . 38 U.S.C. § 5110(a) (2012) (emphasis added). The implementing regulation similarly provided that the effective date generally "will be the date of receipt of the claim or the date entitlement arose, whichever is later." 38 C.F.R. § 3.400 (2014).

Here, the June 2014 DRO decision and the SOC reflect that March 1, 2007, was the earliest possible effective date because it was the date of the appellant's informal claims for these disabilities. See R. at 993-1019 (June 2014 SOC), 1054-60 (June 2014 DRO decision).

(MD) P. 5 (Appx. 057)

The Board explained that, here, because the June 2014 SOC was issued after the 1- year appeal period following the date of notification of the December 2012 RO decision that the appellant wished to appeal, the appellant's deadline to file the Substantive Appeal was 60 days after June 4, 2014, SOC—that is, August 4, 2014. R. at 5, 9.

(Appx. 063) MD 5 [footnote 6]

6 The Board explained that, though the appellant submitted a statement to the Court in July 2014, the Board did not construe this as a Substantive Appeal because (1) the appellant did not express

a desire to appeal the RO's denial of an effective date earlier than March 1, 2007.

(38 CFR § 19.22 –*or correspondence containing the necessary information*.)

Whether a document constitutes an NOD is a legal question subject to de novo review by the Court. *Palmer v. Nicholson*, 21 Vet.App. 434, 436 (2007); *see Butts v. Brown*, 5 Vet.App. 532, 539 (1993) (en banc) (stating that the Court reviews questions of law de novo, without deference to the Board's findings).

§ 19.28–Whether a Notice of Disagreement is adequate is an appealable issue. Notice of Disagreement, the claimant will be furnished a Statement of the Case. (Authority: 38 U.S.C. 7105 (2016))

Appellant submitted the (1) NOD in response to the June 12, 2015 "untimely Decision" (2) AOJ-DRO on March 22, 2018 issued SOC continuing the false untimely decision and (3) May 2018 appellant submitted the VA form 9 to the Board [RECEIVED MAY 7, 2018] See: 38 U S C § 7261(d) 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 [App. Br. at 9-10] (R. at 127-28, 116-26, 66-67, 13)

(MD) P. at 4 (Appx. 056) MD 4

The appellant disagreed with the RO's June 2015 decision *regarding the timeliness of his Substantive Appeal*. R. at 200-12 (Dec. 2015

NOD). In support of his claim, the appellant submitted the following statement: . . .

The appellant *perfected his appeal in May 2018*. See R. at 105-28 (VA Form 9 *With supporting documents*); see also R. at 103 (Aug. 2018 VA Form 8 reflecting that the Board received the Substantive Appeal on May 7, 2018), 139-50 (Mar. 2018 SOC).

38 U.S.C. 7105-a) Appellate review will be initiated by a notice of disagreement and completed by a substantive appeal *after a statement of the case* is furnished as prescribed in this section.

Appellant in mid-June 2018 discovered that the AOJ-DRO On May 31, 2018 made a false entry into the VACOLS system stating the 05-07-18 VA form 9 [Adv Failure to Respond], only after the appellant "due diligence" by filing on 08-04-18 a FOIA request to the Board discover this "covert act" of the AOJ-DRO, this being the (2) second time the VBA-AOJ cited false evidence to stop this appellant's appeal going forward. (R. at 105-115), Appellant's May 2018 VA form 9 w/attachments (R. at 127-28, 116-26) was filed in response to the March 22, 2018 SOC issued in Dec 2015 (NOD) of the 06-12-15 untimely decision (R. at 212-200) and the March 2018 SOC (R. at 151-162) continued the false untimely decision of June 12, 2015, what was [is] on appeal to the board.

7-2-19, Deputy Vice Chairman Decision Management, (Osborne) wherein she states:

The *issue on appeal before the Board* is whether a *timely substantive appeal* was received in response to the *VA's Statement of Case issued June 4, 2014*. In support of your Motion, you

submitted several documents from your claims file . . . *Board records*, your current appeal was docketed following *the receipt of your May 2018 VA Form 9 substantive appeal*, in compliance with Board practice . . . P 13, P 14-67 [App. Br. at 9-10]

[. . .]

PRO SE INFORMAL PETITION FOR REHEARING EN BANC (OCTOBER 31, 2022)

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ROBERT G. THORNTON,

Claimant-Appellant,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee.

No. 2022-1618

ISSUES PRESENTED ON REHEARING *EN BANC*

Involvement of a question of exceptional importance:

1. Does FRE Rule 201(c)(2) mandate Federal Circuit to comply with adjudicative Facts Request?
2. Did the Panel violate Appellant's Due Process rights to a fair adjudication in the face of this Court violating FRE Rule 201(c)(2) by not ruling on this Veteran's request for Judicial Notice of adjudicated facts?

The following statues mandates and the rule of law requires the procedures that addresses what is mandated for a fair and impartial review of claim before an impartial arbiter by the Board, Veterans Court and the Federal Circuit, as it is require and imperative under the law to follow the "Rule of Law to include:" 38 USC § 7104(a), § 7105(d)(3), FRE-Rule 201, § 7261(d) § 7292(a)(b)(2). *See . . . FEDERAL CITCUIT JURISDICTION 38 USC 7292(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.
>
> (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.

The material facts are not in dispute:

> *"The Secretary "BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS 19-7749" Page 18 . . . Veterans Court (19-7749) MEMORANDUM DECISION (MD) Page 4.*

As explained below:

> after Appellant was notified by the RO that his February 2015 Substantive Appeal was untimely, *Appellant appealed that decision to the Board. See [R. at 200-11 (December 2015 Notice of Disagreement)]. The RO subsequently issued an SOC and Appellant perfected his appeal as to the timeliness of the February 2015 substantive appeal to the Board, without requesting a hearing to give testimony. [R. at 139-62 (March 2018 Statement of the Case), 127 (May 2018 VA Form 9), 103 (August 2018 VA Form 8)] . . . (MD) Page 4- The appellant disagreed with the RO's June 2015 decision regarding the timeliness of his Substantive Appeal. R. at 200-12 (Dec. 2015 NOD) . . . The appellant perfected his appeal in May 2018. See R. at 105-28 (VA Form 9 with supporting documents); see also R. at 103 (Aug. 2018 VA Form 8 reflecting that the Board received the Substantive Appeal on May 7, 2018), 139-50 (Mar. 2018 SOC).*

The Board rendered its Decision of July 18, 2019 in response to Appellant's (19-4732- July 12, 2019, Petitioner submitted a motion for Extraordinary relief in the nature of mandamus.) Mandamus, this was for the purpose of mooting the Writ. At the time of the filing of the mandamus the controlling law was Martin v. O'Rourke, No. 17-1747 (Fed. Cir. 2018). The Veterans Court failed to follow the law by not applying "TRAC standard", then dismissing the Writ as moot.

The Deputy Vice Chairman on 7-2-19 denied appellant's motion to advance his Appeal, then the VLJ vigorously in a response to the Writ issuing a decision, "the Secretary reported it was completed six days after the Petition was filed and one day after it was docketed". The Board violated the statues and Court Overlooked or Misapprehended the statue 38 U.S.C. § 7104(a), 38 U.S.C. § 7105 (d)(3) and 38 U.S.C. § 7261(d).

The Board of Veterans Appeals ALJ failed to apply the law 38 U.S.C. § 7104 (a), 38 U.S.C. § 7105 (d)(3) by failing to recognizing appellants timely filed 2018 appeal of the untimeliness of the AOJ June 12, 2015 "Erroneous Decision".

See: 7-2-19, Deputy Vice Chairman Decision Management, (Osborne) Wherein she states:

> The issue on appeal before the Board is whether a timely substantive appeal was received in response to the VA's Statement of Case issued June 4, 2014. In support of your Motion, you submitted several documents from your claims file . . . Board records, your current appeal was docketed following the receipt of your May 2018 VA Form 9 substantive appeal, in compliance with Board practice . . . P 13, P 14-67 (See; R. at 5, 993-996)

The (CAVC) Veterans Court misapprehended the law citing, Court reviews under "clearly erroneous" standard of review, however, the statues § 7104(a), § 7105(d)(3) rules applies, thus, failing to recognizing appellants statutory right under 38 U.S.C. § 7104(a) rule of Law on a substantive procedure of his timely

filed appeal of the untimeliness of June 12, 2015 "Erroneous Decision" MD- P. at 13 stating;

> "Given that the only matter before the Board was the timeliness of the February 2015 Substantive Appeal and that the Board determined that it was untimely, . . the appellant has not demonstrated that his constitutional due process rights were violated by the either the VA's or the Board's purported failure to review evidence that would allegedly support an earlier effective date for his disability compensation claims. See, e.g., Cushman v. Shinseki, 576 F.3d 1290, 1292, 1300 (Fed. Cir. 2009) (holding that a veteran showed in the context of an appeal of the merits of his claim that VA violated the veteran's due process rights when it relied on . . . there was "a reasonable probability of a different result" in the adjudication of his claim) . . . Similarly, though the appellant argues that VA and the Secretary have committed fraud, including that the Secretary is operating under an "unlawful extraordinary awards" type of policy, . . .
>
> Accordingly, even assuming that the appellant raised these contentions to the Board, *see, e.g.*, R. at 127 (appellant's assertion on May 2018 VA Form 9 that the RO "clearly issued a fraudulent decision . . . by concealing the June 4, 2014[,] DRO [d]ecision"), the Board's failure to address these assertions was not prejudicial to the Board's Substantive Appeal timeliness determination — the only matter before it. See 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); Shinseki v. Sanders, 556 U.S. 396, 409 (2009)

THORNTON v. MCDONOUGH (Fed. Cir. 2022) 22-1618-Page 3

> In June 2015, the RO issued a decision finding Mr. Thornton's appeal untimely because it was received more than 60 days after the date of the June 2014 SOC, explaining that the June 2014 RO decision on Mr. Thornton's claims had become final. Mr. Thornton appealed the June 2015 RO decision to the Board.

The Panel 22-1618 for the Federal Circuit found that appellant-Thornton appealed the (erroneous) untimely decision of June 12, 2015 to the Board, however, under the Statues § 7104(a) the appellant shall be subject to one review on appeal to the Secretary . . . 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 and § 7105(d)(3) . . . but questions as to timeliness or adequacy of response shall be determined by the Board of Veterans' Appeals.

> *Bailey v. Principi,* 351 F.3d 1381, 1384 (Fed.Cir.2003) ("[W]hen the material facts are not in dispute and the adoption of a particular legal standard would dictate the outcome of the . . . claim, this court has treated the question . . . as a matter of law that we are authorized by statute to address."); *Texas Instruments, Inc. v. United States,* 922 F.2d 810, 815 (Fed.Cir.1990) (explaining that there is no need to remand a case to determine an issue "which legally [could] be decided in only one way" (citations and internal quotation marks omitted))

As explained supra, the material facts are not in dispute:

The Board of Veterans Appeals ALJ failed to apply the law 38 U.S.C. *§ 7104(a), 38 U.S.C. § 7105(d)(3)* by failing to recognizing appellants timely filed 2018 appeal of the untimeliness June 12, 2015 [Erroneous Decision.]

POINTS OF LAW

1. Rule 201. Judicial Notice of Adjudicative Facts . . . (a) SCOPE. This rule governs judicial notice of an adjudicative fact only, not a legislative fact. (c) TAKING NOTICE. The court: (2) must take judicial notice if a party requests it and the court is supplied with the necessary information. (d) TIMING. The court may take judicial notice at any stage of the proceeding. (e) OPPORTUNITY TO BE HEARD. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed.

   Subdivision (a). This is the only evidence rule on the subject of judicial notice. It deals only with judicial notice of "adjudicative" facts . . . The terminology was coined by Professor Kenneth Davis in his article An Approach to Problems of Evidence in the Administrative Process, 55 Harv.L.Rev. 364, 404--407 (1942). The following discussion draws extensively upon his writings In addition, see the same author's Judicial Notice, 55 Colum.L. Rev. 945 (1955); Administrative Law Treatise, ch. 15 (1958); A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69 (1964) . . . In view of these

considerations, the regulation of judicial notice of facts by the present rule extends only to adjudicative facts . . .

What, then, are "adjudicative" facts? Davis refers to them as those "which relate to the parties," or more fully: "When a court or an agency finds facts concerning the immediate parties-who did what, where, when, how, and with what motive or intent-the court or agency is performing an adjudicative function, and the * * * facts are conveniently called adjudicative facts. "Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication . . . Subdivision (f). In accord with the usual view, judicial notice may be taken at any stage of the proceedings whether in the trial court or on appeal.

Although the Federal Rules of Evidence are not generally applicable to the Veterans Court, the Veterans Court has relied on Fed.R.Civ.P. 201 in the past as justification for its consideration of extra-record materials. See, e.g., D'Aries v. Peake, 22 Vet.App. 97, 105 (2008) (relying on Fed.R.Evid. 201(b). See; Tyrues v. Shinseki, 26 Vet. App. 31, 33 n.3 (2012) (en banc) (noting that the Court may take judicial notice of pleadings filed in another case), aff'd, 732 F.3d 1351 (Fed. Cir. 2013). 38 USC § 7292(b)(2) Review by United States Court of Appeals for FED. CIR.

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.

(e)(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 See . . . 28 U.S. Code § 2072 - Rules of procedure and evidence i.e. FRCP [Federal Rules of Civil Procedure] -FRE 201[Federal Rules of Evidence] Rule 201. Judicial Notice of Adjudicative Facts

2. 38 U.S. Code § 7401 - Jurisdiction of the Board; decisions (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 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 . . .

   (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.

3. 38 U.S. Code § 7105(d)(3) - Filing of appeal

   The agency of original jurisdiction may close the case for failure to respond after receipt of the statement of the case, but questions as to timeliness or adequacy of response shall be determined by the Board of Veterans' Appeals.

4. § 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 . . .

(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.

5. 38 U.S. Code § 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; (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 . . .

38 U.S. Code § 7261

> (c) 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.

On October 17, 2022 the panel of Justices issued this opinion, PER CURIAM.

> Robert Thornton appeals the decision of the Court of Appeals for Veterans Claims (Veterans Court) affirming the decision of the Board of Veterans' Appeals that his appeal was untimely. Because we lack jurisdiction, we dis-miss his appeal. Page 1.

This Court has "rule of law" jurisdiction, as provided by 38 U.S.C. § 7292(a), it unquestionably has jurisdiction over a claim in which the Veterans Court failed to correctly apply a rule of law. *Willsey v. Peake*, 535 F.3d 1368, 1370 (Fed. Cir. 2008).

It is necessary to bring to the attention of the court, that, (2) [Two] of the Justices in the October 17, 2022 panel 22-1618 decision were also on previous

Panels decisions addressing the "inextricably intertwined" issues of the timely filing of the 2015 appeal in 15-7107 and 16-2264. . . Citing; FRE-Rule 201(c)(2)(d)

The appellant Opening Brief 22-1618 specifically, requested the court to take Judicial Notice of Adjudicative Facts (FRE Rule 201) in 14-7136, 15-7107, 16- 2264, *the request provides evidence that directly addresses a matter in dispute, i.e. material evidence of the timely filing of 2015 appeal and under the law the taking of judicial notice of Adjudicative Facts is mandatory, under subdivision (c)(d), only when a party requests it and the necessary information is supplied.*

14-7136–Adjudicative Facts . . . Decided:

01/26/2015 Page: 2-3, 4-5: Before PROST, Chief Judge, NEWMAN, and REYNA, Circuit Judges

> On December 11, 2012, a VA Decision Review Officer ("DRO") issued a rating decision, increasing Mr. Thornton's PSTD rating to 100 percent, effective from the date of his formal claim, October 17, 2007 . . .
>
> Mr. Thornton filed a Notice of Disagreement with the DRO's rating decision in November 2013. After some delay, Mr. Thornton filed a petition for a writ of mandamus on May 23, 2014 . . .
>
> On June 4, 2014, the VA issued a rating decision granting an earlier effective date of March 1, 2007 (the date of the informal claim) for Mr. Thornton's PTSD, his hearing loss, and tinnitus, as well as a higher rating for the hearing loss . . .
>
> The Veterans Court also refused to grant the benefits sought or certify his appeal because Mr. Thornton had an alternative remedy in the form of an appeal from the June 4, 2014 decision . . .

> First, Mr. Thornton does not satisfy the requirement that he have no other means of relief available. *The VA issued a decision on June 4, 2014* that addressed the benefits Mr. Thornton was seeking and substantially increased his ratings. If Mr. Thornton *is not satisfied with the VA's decision*, he may appeal it to the Board. In light of the ability to appeal the VA's decision, Mr. Thornton is unable to meet the requirement that he have no other adequate means besides a writ of mandamus to obtain the relief he desires . . .
>
> Mr. Thornton is unable to meet the requirements for the issuance of a writ of mandamus. Because he has another means to attain his desired relief and mandamus is not justified under these circumstances, we affirm . . . (Pg. 2-5)

15-7107- Adjudicative Facts . . . Decided: December 15, 2015 [Page 2]:

> 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 60days 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 . . .
>
> On June 12, 2015, the VA regional office in formed Mr. Thornton that his appeal was untimely, and provided instructions regarding how to appeal the untimeliness decision . . . DISCUSSION [Page 3]
>
> 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.

16-2264- Adjudicative Facts . . . Decided: November 8, 2016 [Page 2]:

BACKGROUND

> After a series of decisions relating to these claims, on June 4, 2014, a Veterans Affairs ("VA") Decision Review Officer ("DRO") awarded Mr. Thornton (1) a 100% disability rating for post-traumatic stress disorder effective March 1, 2007; (2) a 40% rating for bilateral hearing loss effective March 1, 2007 and a 50% rating effective May 17, 2010; and (3) a 10% rating for tinnitus

effective March 1, 2007. In a *Statement of the Case issued the same day, the DRO denied Mr. Thornton's request for entitlement to effective dates prior to March 1, 2007 for all three conditions* . . .

On January 28, 2015, Mr. Thornton filed an appeal of the June 4, 2014 DRO decision, requesting the VA regional office ("RO") forward his appeal to the Board of Veterans Appeals ("Board").

On June 12, 2015, the RO informed Mr. Thornton that his appeal was untimely and *provided instructions regarding how to appeal the untimeliness decision.* On July 30, 2015, the Veterans Court denied Mr. Thornton's petition for mandamus ("the July 30, 2015 Decision"), reasoning he had adequate alternative means to relief as *outlined in the RO's instructions regarding how to appeal the untimeliness determination.*

DISCUSSION [Footnote [2] Page3]

Mr. Thornton filed a motion to disqualify and recuse the panel of judges in Thornton II. We deny the motion as it pertains to the present case.

The material facts are not in dispute, the (CAVC) Veterans Court (MD) 19- 7749) MEMORANDUM DECISION Page 4.

'*The appellant disagreed with the ROIs June 2015 decision regarding the timeliness of his Substantive Appeal. R. at 200-12 (Dec. 2015 NOD)* . . . *The appellant perfected his appeal in May 2018. See R. at 105-28 (VA Form 9 with*

supporting documents); *see also R. at 103 (Aug. 2018 VA Form 8 reflecting that the Board received the Substantive Appeal on May 7, 2018), 139-50 (Mar. 2018 SOC).*" . . . *First, the letter informed him that, to submit his Substantive Appeal, he (potentially) had 1 year from the date of "the letter notifying [him] of the action that [he has] appealed." R. at 993 (emphasis added); see R. at 5.* See; R. at 5, 995, 929-33

22-1618-Panel Decision Decided: October 17, 2022

22-1618_PER CURIAM. Page 3

In June 2015, the RO issued a decision finding Mr. Thornton's appeal untimely because it was received more than 60 days after the date of the June 2014 SOC, explaining that the June 2014 RO decision on Mr. Thornton's claims had become final. *Mr. Thornton appealed the June 2015 RO decision to the Board* . . .

On December 21, 2021, the Veterans Court affirmed the Board's decision. That court explained that it saw *no error in the Board's bases for determining that Mr. Thornton's appeal was untimely.* Further, the Veterans Court determined that his *various claims that the Board and the VA had committed statutory and constitutional violations and fraud were subsidiary to,* and thus *rose and fell with, his challenge to the Board's finding of untimeliness.* SAppx. 6–14.

As explained supra, the petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or

misapprehended and must argue in support of the petition.

See; 38 U.S.C. § 7104(a), 38 U.S.C. § 7105(d)(3) and 38 U.S.C. § 7261(d).

Argument:

The appellant in June 2014 received the SOC denying an earlier effective date earlier than March 1, 2007 (R. at 993-94, SAppx043-069), as instructed in the 6-4 14 Notice to Appeal appellant filed within the remainder, if any, of the one-year period from the date *of the letter notifying you of the action that you have appealed*. Appellant received the Notice of the Decision dated October 23, 2014 "*date of the letter notifying you of the action that you have appealed*" (R. at 929 33). January 28, 2015 appellant file his VA 9 appeal to the Board (Received 2-2-15) (R. at 916-28).

This Court has "rule of law" jurisdiction, as provided by 38 U.S.C. § 7292(a), it unquestionably has jurisdiction over a claim in which the Veterans Court failed to correctly apply a rule of law. *Willsey v. Peake*, 535 F.3d 1368, 1370 (Fed. Cir. 2008).

The following provisions were *not considered* and *discussed* in the Board's decision, as was then required by applicable law and precedent. *See, e.g., Weaver, supra. Ledford v. West,* 136 F.3d 776, 779 (Fed.Cir.1998) (explaining that this Court's jurisdiction "is premised on and defined by the Board's decision concerning the matter being appealed").

June 12, 2015 the AOJ- DRO-CG (R. at 238-Form 21 6189 E) erroneously determined the VA 9 of 2-2-15 was untimely and based on M21-1MR- Manual did not have jurisdiction [Part I, Chapter 5, Section C June

19, 2006]: DRO Jurisdiction and Authority . . . a. DRO Jurisdiction over Appellant Issues—No jurisdiction over an appeal on a rating decision made by the DRO him/herself . . .] as DRO-CG issued the rating decision of 12-11-12. (SAppx070-075). Appellant on January 2015 file his VA 9 appeal in response to the 06-04-14 SOC for earlier effective dates for this service-connected disabilities.

The court has overlooked [SAppx045], the 1st Page of the SOC of June 4, 2014 that cited the evidence reviewed in support of the SOC Decision: EVIDENCE: *(2) Notices of Disagreement received 10-14-08 and 11-7-13* and *VA rating decisions dated 5-23-89, 9-12-08, 12-11-12, and 6-4-14*, therefore, the SOC on its face contradicts the Board and the (CAVC) 19-7749 Decision that the June 4, 2014 SOC was issued in response to the Dec. 2012 Decision. Appellant timely appealed that decision in May 2018, see below:

> The material facts are not in dispute, the (CAVC) Veterans Court (MD) 19- 7749) MEMORANDUM DECISION Decided Dec. 21, 2021 Page 4.
>
> *'The appellant disagreed with the RO's June 2015 decision regarding the timeliness of his Substantive Appeal. R. at 200-12 (Dec. 2015 NOD) . . . The appellant perfected his appeal in May 2018. See R. at 105-28 (VA Form 9 with supporting documents); see also R. at 103 (Aug. 2018 VA Form 8 reflecting that the Board received the Substantive Appeal on May 7, 2018), 139-50 (Mar. 2018 SOC)." . . . First, the letter informed him that, to submit his Substantive Appeal, he (potentially) had 1 year from the date of "the letter notifying [him] of the action that [he has]*

appealed." R. at 993 (emphasis added); see R. at 5. See; R. at 5, 995, 929-33

The 22-1618 Panel Decision overlooked or misapprehended the 38 USC 7104(a) that appellant timely appealed the June 12, 2015 untimely decision and therefore the issue before the Board was the timely 2018 VA 9 [rebuttal] appeal and under the law [Statue] 7104(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 appeal to the Secretary*. The Board failed to provide that review in violation of 7104(a) (error of law) a procedural due process violation.

The Board and the (CAVC) Veterans Court found that appellant timely appealed the June 12, 2015 untimely decision and the Board did not follow 7104(a) statue, clear error of law and violation of Procedural Due Process, both the Board, Veterans Court 19-7749 and the Federal Circuit 22-1618 stated the appellant timely file his appeal to the untimely decision to the Board and the Board failed to apply the law.

> *Simmons v. Wilkie*, this Court recognized that VA errors that affect essential fairness automatically prejudice veterans and claimants. These are errors that deprive veterans of a meaningful opportunity to participate and be heard in the adjudication process. 30 Vet.App. 267, 281-82 (2018), *aff'd*, 964 F.3d 1381 (Fed. Cir. 2020) . . . We determined that these types of errors have the natural effect of depriving claimants of meaningful participation and the opportunity to be heard during the VA adjudicatory process. *See*

Simmons, 30 Vet.App. at 281-82 (citing *Shinseki v. Sanders*, 556 U.S. 396, 411 (2009)

CONCLUSION:

The facts are undisputed, that the appellant filed a timely appeal in May 2018, Rebutting the *Untimely Decision of June 12, 2015* with the facts i.e. "the June 4, 2014 SOC was issued in response to the June 4, 2014 AOJ-DRO Decision". The 07-18-19 Board Decision violated § 7104(a), § 7105(d) and § 7261(d) and the decision was clearly erroneous and violated the law by suppressing the 2018 Appeal.

The appellant's request of the Adjudicated Facts (FRE-201) proves the June 2015 untimely decision was false. The Appellant Demands an En Banc Hearing on the mandatory requirement of taking Judicial Notice FRE-201.[1]

Respectfully,

Robert G Thornton Pro Se

/s/ Robert G Thornton

---

[1] (e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

NOTICE OF DISAGREEMENT AND RELATED DOCUMENTATION (DECEMBER 17, 2015)

VA Claims Intake Center, Newnam, GA - 01
12222015 0323 PM
To Varopitts Page 13 of 13
2015-12-17 00:13 23 (GMT)
19042160396 From: robert george

DEPARTMENT OF VETERANS AFFAIRS

In Reply Refer to: 311/IPC/DK

26158594
Robert Thornton

311/IPC/JGH
26158594
Thornton, R G

I do not want my case reviewed by the Decision Review Officer

I want a traditional appeal process

Please issue a SOC

/s/ Robert G. Thornton

12-16-2015

Designated for electronic publication only

UNITED STATES C OURT OF APPEALS
FOR VETERANS CLAIMS

ROBERT G. THORNTON,

Petitioner,

v.

SLOAN D. GIBSON,
ACTING SECRETARY OF VETERANS AFFAIRS,

Respondent.

No. 14-1601

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

Before: PIETSCH, Judge.

ORDER

On May 23, 2014, pro se petitioner Robert G. Thornton filed a petition for extraordinary relief in the form of a writ of mandamus. The petitioner asked the Court to (1) order the VA regional office (RO) to certify

his appeal of the effective dates the RO assigned to his awards of disability benefits for tinnitus, hearing loss, and post-traumatic stress disorder (PTSD) and forward those claims to the Board of Veterans' Appeals (Board); (2) order the Board to expedite its consideration of his appeal; (3) require VA to abide by 10 U.S.C. § 1553; (4) require the RO "to fully comply with" the Veterans Benefits Improvements Act of 1994; and (5) require VA to stipulate that it has "acted unlawfully withheld or unreasonably delayed" his benefits, Petition (Pet.) at 19-20.

On June 2, 2014, the petitioner submitted a document that he styled a "direct appeal" but the Court construes to be a supplement to his May 23, 2014, petition. In it, he asked the Court to grant him the benefits he seeks.

On June 20, 2014, the Court ordered the Secretary to respond to the petitioner's arguments. On July 7, 2014, the Secretary submitted his response. The Secretary reported that on June 4, 2014, the RO issued a decision review officer (DRO) decision granting the petitioner a March 1, 2007, effective date for entitlement to disability benefits for PTSD, hearing loss, and tinnitus. On that same date, the RO also issued a Statement of the Case denying the appellant entitlement to an effective date prior to March 1, 2007, for all three of his service connected disorder.

On July 7, 2014, the petitioner replied to the Secretary's response, He raised additional arguments concerning his PTSD, hearing loss, and tinnitus claims. He also, for the first time during . . .

VA Claims Intake Center, Newnam, GA - 01
12222015 0323 PM
To Varopitts Page 10 of 13
2015-12-17 00:13 23 (GMT)
19042160396 From: robert george

Clarification of the June 26, 2015 Fax and email to:

June 29, 2015

Director: Jennifer Stone-Barash:
Response: Letter of June 12, 2015
VA Regional Office Pittsburgh, PA
Fax: (412) 395-6184
Bobbiretta E. Jordan, Attorney:
Appellate Attorney Office of the General Counsel (027J)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W. Washington, DC 20420
Fax: (202) 273-6388 bobbiretta.jordan2@va.gov,

From: Robert Thornton
c/o Charles Bazaar
2136 Wembley Lane
Corona, CA 92881

Dear Jennifer Stone-Barash,

In clarification to the Letter of June 26, 2015, please note the following:

June 12, 2015, Letter from the DEPARTMENT OF VETERANS AFFAIRS

Stated:

(1) We are writing in response to the VA Form 9 "Appeal to Board of Veterans' Appeals" (or statement in Lieu of VA Form 9) that you submitted to our office and was received on February 2, 2015. This letter

will explain what we decided, what you should do if you disagree with our decision, and who to call if you have questions.

(2) We cannot accept your VA Form 9 "Appeal to Board of Veterans' Appeals" as your substantive appeal as the time limit to continue your appeal has passed. In order to continue an appeal you must submit your substantive appeal (VA Form 9 "Appeal To Board Of Veterans' Appeals" or statement in lieu of) 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.

(3) 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.

July 31, 2014, ORDER: PIETSCH Judge

Stated on Page 1:

The Secretary reported that on June 4, 2014, the RO issued a decision review officer (DRO) decision granting the petitioner a March 1, 2007, effective date for entitlement to disability benefits for PTSD, hearing loss, and tinnitus. On that same date, the RO also issued a Statement of the Case denying the appellant entitlement to an effective date prior to March 1, 2007, for all three of his service-connected disorders.

Facts:

1st: DRO decision 6-4-14

2nd: SOC on the 6-4-14

3rd: There has never been a decision issued denying earlier effective date on any claim(s). If the SOC were issued from the 2012 DRO decision "a full grant of benefits sought on appeal" then the RO is saying they erred. That decision was on a VA 9 substantive appeal which would require an issuance of a SSOC which does not require a response from the appellant, as it would follow the traditional appeals process. This means it would be certified with a docket number of July 2010 as there was an SOC issued July 2010 and a statement in lieu of VA 9 appeal filed 27 July 2010.

If it is "considered a full grant" and you disagree with the decision (2012), you would be required to initiate a new appeal by submitting a notice of disagreement. (which the Claimant did on 11-7-2013) That means the DRO decision of June 4, 2014 was a decision on that NOD, consequently issuing an SOC on that decision would requiring filing a Form VA 9 after receiving a Statement of the Case (which the Claimant did), you must complete and *return the VA Form 9 within one year from the date of our letter denying you the benefit (filed 28, Jan 2015)* or within 60 days from the date that we mailed the Statement of the Case to you, whichever is later.

Veteran submitted a timely VA form 9 (filed on Jan 28, 2015)

/s/ Robert G. Thornton
Digitally Signed by Robert Thornton

June 29, 2015

C-26-158-594/CAVC Case: 15-2059

VA Claims Intake Center, Newnam, GA - 01
12222015 0323 PM
To Varopitts Page 8 of 13
2015-12-17 00:13 23 (GMT)
19042160396 From: robert george

To the extent Mr. Thornton argues that VA's failure to certify his appeal to the board following the issuance of the December 11, 2012, DRO decision amounts to an arbitrary refusal to act, this assertion is contrary to law. In the December 11, 2012, DRO decision, VA expressly stated that the decision "is considered a full grant of benefits sought on appeal." SA48. As a result, Mr. Thornton's case was no longer in appellate status. *AB v. Brown*, 6 Vet. App. 35, 38 (1993) (citation omitted). To return his case to appellate status, it was necessary that he file a new NOD, which he did on November 7, 2013.

To the extent Mr. Thornton argues that he has had an NOD pending since 1989 regarding a claim for service connection for tinnitus and left ear hearing loss, such an argument involves a purely factual determination, which is not properly before this Court for review. In an October 4, 2012, letter to VA, Mr. Thornton's former attorney expressed Mr.

Thornton's intention to withdraw those claims. in any event, the only remedy available to Mr. Thornton is the issuance of an SOC. Further, the SOC dated June 4, 2014, addressed the issues Mr. Thornton asserts were raised by the 1989 purported NOD. SA44-46.

[. . .]

VA Claims Intake Center, Newnam, GA - 01
12222015 0323 PM
To Varopitts Page 7 of 13
2015-12-17 00:13 23 (GMT)
19042160396 From: robert george

DEPARTMENT OF VETERANS AFFAIRS
PITTSBURGH REGIONAL OFFICE
100 LIBERTY AVENUE
PITTSBURGH PA 15222

ROBERT G. THORNTON

VA File Number
26 158 594

Represented by:
AGENT OR PVT ATTY-EXCLUSIVE
CONTACT NOT REQUIRED

Decision Review Officer Decision
December 11, 2012

INTRODUCTION

The records reflected that you are a veteran of the Veteran Era. You served in the Army from October 12, 1965 to July 15, 1968. We received your Substantive Appeal on July 27, 2010. Based on a review of the evidence listed below, we have made the following decisions on your claim.

This decision is considered a full grant of benefits sought on appeal.

DECISION

1. Evaluation of post-traumatic stress disorder, which is currently 50 percent disabling, is increased to 100 percent effective October 17, 2007.

2. Service connection for tinnitus is granted with an evaluation of 10 percent effective October 17, 2007.

3. Evaluation of bilateral hearing loss (formerly evaluated as right ear only), which is currently 0 percent disabling, is increased to 0 percent effective August 19, 1970. An evaluation of 20 percent is assigned from October 17, 2007.

[. . .]

VA Claims Intake Center, Newnam, GA - 01
12222015 0323 PM
To Varopitts Page 4 of 13
2015-12-17 00:13 23 (GMT)
19042160396 From: robert george

DEPARTMENT OF VETERANS AFFAIRS

June 12, 2015

Robert G. Thornton
C/O Charles Bazaar
2136 Wembley Lane
Corona, CA 92881,

In Reply Refer To: 311/IPC/JGH
26158594
Thornton, R G

Dear Mr. Thornton:

We are writing in response to the VA Form 9 "Appeal to Board of Veterans' Appeals" (or statement in Lieu of VA Form 9) that you 'submitted to our office and was received on **February 2, 2015**. This letter will explain what we decided, what you should do if you disagree with our decision, and who to call if you have questions.

What We Decided

We cannot accept your VA Form 9 "Appeal to Board of Veterans' Appeals" as your substantive appeal as the time limit to continue your appeal has passed. In order to continue an appeal you must submit your substantive appeal (VA Form 9 "Appeal To Board Of Veterans Appeals" or statement in lieu of) 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.

Please note: On February 14, 2015, we sent you correspondence informing you we accepted the following on appeal based on our October 23, 2014 decision: PTSD, Hearing Loss, Tinnitus, Otitis Externa, Dizziness, Special Monthly Compensation. Our records indicate that an employee mistakenly considered your untimely Form 9 as a Notice of Disagreement and sent you a Appeals Election Letter in error. If it is your intent to file a Notice of Disagreement with our October 23, 2014 Notification Letter, please submit VA Form 21-0958 for that decision. We have included two copies of VA Form 21-0958 with this correspondence.

What This Means To You

Because you did not submit a timely substantive appeal, our decision on your claim is final. If you wish

to reopen a claim for a benefit that was denied you need to submit evidence that has not been considered before (new evidence) and evidence that directly relates to your claim (Material evidence). This evidence can be submitted at any time.

What You Should Do If You Disagree with Our Decision

If you do not agree with our decision, you must complete and return to us the enclosed VA Form 21-0958. *Notice of Disagreement*, in order to initiate your appeal. You have *one year from the date of this letter to appeal the decision.* The enclosed VA Form 4107, *Your Rights to Appeal Our Decision*," explains your right to appeal.

What Is eBenefits?

eBenefits provides electronic resources in a self-service environment to Service members, Veterans, and their families. Use of these resources often helps us serve you faster! Through the eBenefits website you can:

- Submit claims for benefits and/or upload documents directly to the VA
- Request to add or change your dependents
- Update your contract and direct deposit information and view payment history
- Request a Veterans Service Officer to represent you
- Track the status of your claim or appeal
- Obtain verification of your military service, civil service preference, or VA benefits.

- And much more!

Enrolling in eBenefits is easy. Just visit www.eBenefits.va.gov for more information. If you submit a claim in the future, consider filing through eBenefits. Filing electronically, especially if you participate in our fully developed claim program, may result in faster decision than if you submit your claim through the Mail.

If You Have Questions or Need Assistance

If you have any questions or need assistance with this claim, you may contact us by telephone, e-mail, or letter.

If you	Here is what to do.
Telephone	Call us at 1-800-827-1000 If you use a telecommunications Device for the Deaf (TDD) the Federal number is 711. For Veterans living overseas call or visit the nearest American Embassy or Consulate for assistance. In Canada, call or visit the local office of Veterans Affairs Canada. From Guam, call us by dialing toll free, 475-8387. From American Samoa and N. Marianas, call us at 1-800-844-7928. All other Veterans living overseas may contact us at 412-395-6727. For Veterans living overseas, if you use a Telecommunications Device for the Deaf (TDD), the number is 1-800-829-4833.

Use the Internet	Send electronic inquires through the Internet at https://iris.va.gov
Write	VA now uses a centralized mail system. For all written communications, put your full name and VA file number on the letter. Please mail or fax all written correspondence to the appropriate address listed on the attached *Where to Send Your Written Correspondence.*

In all cases, be sure to refer to your VA file number that is listed at the top of this letter.

If you are looking for general information about benefits and eligibility, you should visit our website at https://www.va.gov, or search the Frequently Asked Questions (FAQs) at https://iris.va.gov.

We sent a copy of this letter to your representative, **Joseph R Moore**, whom you can also contact if you have questions or need assistance.

Sincerely yours,

Regional Office Director

To make an Email inquiry, go to https://iris.va.gov

Enclosure(s):
VA Form 4107
VA Form 21-0958
Where to Send Your Written Correspondence

cc: **Joseph R Moore**

VA Claims Intake Center, Newnam, GA - 01
12222015 0323 PM
To Varopitts Page 1 of 13
2015-12-17 00:13 23 (GMT)
19042160396 From: robert george

Fax Cover Sheet

To: VAROPITTS
Company: Veterans Administration
Fax Number: 14123956184
From: Robert George
Date: 2015-12-17 00:12:29 GMT
RE: NOD traditional appeals process

Cover Message

311/IPC/JGH
26158594
Thornton, R G

I do not want my case reviewed by the Decision Review Officer

I want a traditional appeal process

Please issue a SOC

VA Claims Intake Center, Newnam, GA - 01
12222015 0323 PM
To Varopitts Page 2 of 13
2015-12-17 00:13 23 (GMT)
19042160396 From: robert george

NOTICE OF DISAGREEMENT

DEPARTMENT OF VETERANS AFFAIRS

Part 1 – Personal Information

1. Veterans' Name

   Robert G. Thornton

2. VA File Number

   C/CSS-28158594

3. Veteran's Social Security Number

   XXX-XX-XXXX

4. Claimant's Name

   Robert G. Thornton

5. Mailing Address

   c/o Charles Bazaar
   2136 Wembley Lane
   Corona CA 92881 USA

7. Preferred E-Mail Address

   thorntonrobert560@gmail.com

Part II – Telephone Contact

8. Would you like to receive a telephone call or email from a representative at your Local Regional Office Regarding your NOD?

   ☒ YES

   Email Me

Part III – Specific Issues of Disagreement

9. Notification/Decision Letter Date

   06/12/2015

10. Please List Each Specific Issue of disagreement and note the area of disagreement if you disagree on the Evaluation of a disability specify percentage evaluation sought if known please list only one disability in each box you may attach additional sheets if necessary

A. Specific Issue of Disagreement

311 / TPC / JGH 26158594 Thornton, RG This NCD applies only to the VAROPITTS "Letter of Decision 6-12-15 denying VA Form 9 "Appeal" as untimely

B. Area of Disagreement

☒ Other (*Please specify*)

C. Percentage (%) Evaluation Sought (*If Known*)

earlier effective date This NOD applies only to the VAROPITTS "Letter of Decision 6-12-15 denying VA form 9 "Appeal" as untimely

11A. In The Space Below Or On A Separate Page Please Explain Why You Feel We Incorrectly Decided Your Claim And List Any Disagreement(s) Not Covered Above

311/IPC/JGH
26158594 Thornton, R G

NOD Form 21-0959 **Item 8** Can not call me I am deaf Please Email

This NOD applies only to the VAROPITTS "Letter of Decision denying VA Form 9 "Appeal"

Quote: "We cannot accept our Form 9" Appeal to Board of veterans' Appeal as your substantive

appeal as the time limit to continue our appeal has passed "Clear Error" Page 1-3

Quoted: from CAVC 14-7136 RESPONDENT-APPELLEE'S INFORMAL BRIEF

> "In the December 11, 2012, DRO decision, VA expressly stated that the decision "is considered a full grant of benefits sought on appeal" SA48. As a result Mr. Thornton's case was no longer in appellate status. *AB v. Brown*, 6 Vet. App. 35, 38 (1993) (citation omitted). To return his case to appellate status, it was necessary that he file a new NOD, which he did on November 7, 2013."

Pg. 4-5

July 31, 2014, ORDER: PIETSCH JudgeCAVC 14-1601

> "The Secretary reported that on June 4, 2014, the RO issued a decision review officer (DRO) decision granting the petitioner a March 1, 2007, effective date for entitlement to disability benefits for PTSD hearing loss, and tinnitus. On that same date, the RO also issued a Statement of the Case denying the appellant entitlement to an effective date prior to March 1, 2007, for all three of his service-connected disorder."

Pg.6

There has never been a decision issued denying earlier effective date until the June 4, 2014 SOC on any claim(s). If the SOC were issued from the 2012 DRO decision "a full grant of benefits sought on appeal" then the RO is saying they erred. That decision was on a VA 9 substantive appeal which would require an issuance of a SSOC which does not require a response from the appellant, as it would follow the traditional

appeals process. This mean it would be certified with a docket number of July 2010 as there was an SOC issued July 2010 and a statement in lieu of VA 9 appeal filed 27 July 2010 and DRO decision 12-11-12.

11B. Did you attach additional Pages to this NOD?

☒ YES

Part IV – Certification and Signature

Certify that the statements on this form are true and correct to the best of my knowledge and belief.

12A. Signature

/s/ Robert G. Thronton

12B. Date Signed: 12/16/2015

Penalty: The law provides severe penalties which include a fine, imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.

VA FORM 9 APPEAL 05-07-18

DEPARTMENT OF VETERANS AFFAIRS
Pittsburgh
100 Liberty Avenue
Pittsburgh, PA 15222

ROBERT G. THORNTON

VA File Number
26 158 594

Decision Review Officer Decision
June 04, 2014

INTRODUCTION

The records reflect that you are a veteran of the Vietnam Era. You served in the Army from October 12, 1965 to July 15, 1968. We received a Notice of Disagreement from you on November 7, 2013 about one or more of our earlier decisions. Based on a review of the evidence listed below, we have made the following decision(s) on your claim.

DECISION

1. Entitlement to an earlier effective date for service connection for posttraumatic stress disorder is granted effective March 1, 2007.

2. Entitlement to special monthly compensation based on Housebound criteria being met is granted from May 17, 2010.

3. Service connection for left ear hearing loss is granted at the same time an evaluation of 40% is assigned for bilateral hearing loss from the earlier effective date of 3-1-07. An evaluation of 50 percent is assigned from May 17, 2010.

4. Entitlement to an earlier effective date for service connection for tinnitus is granted effective March 1, 2007.

5. Entitlement to an earlier effective date for the grant of eligibility to Dependents' Educational Assistance under 38 U.S.C. chapter 35 is granted, with a new effective date of March 1, 2007.

EVIDENCE

- (2) Audiometric reports conducted at Bumrungrad International on 6-26-07 and 5-17-10
- VA examination dated 5-5-08
- Your informal claim received 3-1-07
- Your formal claim received 10-17-07
- Service treatment and personnel records from October 12, 1965 to July 15, 1968
- VA letter dated 4-23-07
- (2) Veterans Claims Assistance Act (VCAA) Letters, dated 10-29-07 and 4-14-08
- (2) VA Form 21-4138 dated 12-28-07 and 1-2-08
- Private Medical records from Dr. Jones from 6-21-07 to 2-4-09

- (2) Notices of Disagreement received 10-14-08 and 11-7-13
- VA Form 21-0781, Statement In Support Of Claim For Service Connection for Post-Traumatic Stress Disorder (PTSD), dated May 26, 2008
- PTSD Stressor Corroboration Research dated 7-1-08
- Undated "Buddy" statement from Patrick O'Neill
- VA PTSD exam dated 7-23-08
- VA rating decisions dated 9-12-08 and 12-11-12
- Treatment reports from the Key West CBOC received 11-17-08
- Statement of the Case (SOC) dated 7-19-10
- Psychological Evaluation, Psychological Services International dated 11-15-10
- Traditional review election received 12-5-13

REASONS FOR DECISION

1. Entitlement to an earlier effective date for service connection of posttraumatic stress disorder.

We received an informal claim from you on 3-1-07. We requested that you specify which issues you were claiming on VA letter dated 4-23-07 and gave you one year to respond. You filed a formal claim to service connection for an acquired psychiatric disability on 10-17-07. Service connection for PTSD was granted by VA rating decision dated 9-12-08. An evaluation of 70% was assigned effective 10-17-07 and an evaluation of 50% was assigned effective 7-31-08. You filed a

NOD with this decision and ultimately the evaluation of your service connected PTSD was increased to 100% effective 10-17-07 by VA rating decision dated 12-11-12. You filed another NOD on 11-7-13 and elected the Traditional review process on 12-5-13.

Entitlement to an earlier effective date for service connection for posttraumatic stress disorder has been granted. An evaluation of 100 percent is assigned from March 1, 2007, the date of receipt of the informal claim.

An evaluation of 100 percent is assigned whenever there is evidence of total occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name.

2. Entitlement to special monthly compensation based on Housebound.

Special monthly compensation provided by 38 U.S.C. 1114(s) is payable when a Veteran has a single service-connected disability rated as 100 percent and additional service-connected disability or disabilities independently ratable at 60 percent, separate and distinct from the 100 percent service-connected disability and involving different anatomical segments or bodily systems.

Entitlement to special monthly compensation is warranted in this case because criteria regarding Housebound have been met effective 5-17-10, the date your service connected bilateral hearing loss and tinnitus reached a combined 60%.

3. Entitlement to an earlier effective date for the grant of service connection for left ear hearing loss and the evaluation assigned to the service connected bilateral hearing loss.

We received an informal claim from you on 3-1-07. We requested that you specify which issues you were claiming on VA letter dated 4-23-07 and gave you one year to respond. You filed a formal claim to service connection for left ear hearing loss and an increase in your service connected right ear hearing loss on 10-17-07. Service connection for left ear hearing loss and entitlement to a compensable evaluation for the service connected right ear hearing loss were denied by VA rating decision dated 9-12-08. You filed a NOD with this decision and service connection for left ear hearing loss was ultimately granted by VA rating decision dated 12-11-12 (it may appear from this rating decision that service connection for left ear hearing loss was granted effective 8-19-70. However, this was a typographical error. There is no basis for granting service connection for left ear hearing loss from 8-19-70, nor the assignment of a noncompensable evaluation for "bilateral hearing loss" from 8-19-70). An evaluation of 20% was assigned for bilateral hearing loss effective 10-17-07. You filed a NOD on 11-7-13 and elected a Traditional review on 12-5-13.

An Audiometric Report conducted at Bumrungrad International on 6-26-07 showed 78 percent speech

discrimination in the left ear. Decibel (dB) loss at the puretone threshold of 500 Hertz (Hz) was 45 with a 60 dB loss at 1000 Hz, a 90 dB loss at 2000 Hz, a 85 dB loss at 3000 Hz, and a 105 dB loss at 4000 Hz, The average decibel loss was 85 in the left ear. The right ear showed a speech discrimination of 70 percent. Decibel (dB) loss at the puretone threshold of 500 Hertz (Hz) was 30 with a 45 dB loss at 1000 Hz, a 75 dB loss at 2000 Hz, a 85 dB loss at 3000 Hz, and a 85 dB loss at 4000 Hz. The average decibel loss was 73 in the right ear.

VA examination findings dated 5-5-08 showed the left ear with 78 percent discrimination. Decibel (dB) loss at the puretone threshold of 500 Hertz (Hz) was 45 with a 55 dB loss at 1000 Hz, a 90 dB loss at 2000 Hz, a 90 dB loss at 3000 Hz, and a 105 dB loss at 4000 Hz. The average decibel loss was 85 in the left ear. The right ear showed a speech discrimination of 70 percent. Decibel (dB) loss at the puretone threshold of 500 Hertz (Hz) was 30 with a 45 dB loss at 1000 Hz, a 75 dB loss at 2000 Hz, a 80 dB loss at 3000 Hz, and a 85 dB loss at 4000 Hz. The average decibel loss was 71 in the right ear. Based on these results, the 40 percent evaluation is continued because your right ear had a speech discrimination of 70 with an average decibel loss of 71 and your left ear had an average decibel loss of 85.

Service connection for left ear hearing loss and the evaluation of bilateral hearing loss is increased to 40 percent. The effective date of this grant is 3-1-07, the date we received your informal claim. When an increased evaluation is granted based on private medical evidence, and the claim is received within one

year of the date of the evidence, the effective date of the increase is the date of the evidence.

An additional Audiometric Report conducted at Bumrungrad International on 5-17-10 showed 76 percent speech discrimination in the left ear. Decibel (dB) loss at the puretone threshold of 500 Hertz (Hz) was 45 with a 65 dB loss at 1000 Hz, a 100 dB loss at 2000 Hz, a 105 dB loss at 3000 Hz, and a 105 dB loss at 4000 Hz. The average decibel loss was 94 in the left ear. The right ear showed a speech discrimination of 66 percent. Decibel (dB) loss at the puretone threshold of 500 Hertz (Hz) was 30 with a 45 dB loss at 1000 Hz, a 80 dB loss at 2000 Hz, a 80 dB loss at 3000 Hz, and a 85 dB loss at 4000 Hz. The average decibel loss was 73 in the right ear.

The evaluation of bilateral hearing loss is increased to 50 percent effective 5-17-10, the date of the private Audiometric Report. The evaluation for hearing loss is based on objective testing. Higher evaluations are assigned for more severe hearing impairment.

4. Entitlement to an earlier effective date for service connection of tinnitus.

We received an informal claim from you on 3-1-07. We requested that you specify which issues you were claiming on VA letter dated 4-23-07 and gave you one year to respond. You filed a formal claim to service connection for tinnitus on 10-17-07. Service connection for tinnitus was denied by VA rating decision dated 9-12-08. You filed a NOD with this decision and ultimately service connection for tinnitus was granted by VA rating decision dated 12-11-12 and an evaluation of 10% was assigned effective 10-17-07.

You filed a NOD on 11-7-13 and elected a Traditional review on 12-5-13.

Entitlement to an earlier effective date for service connection for tinnitus has been granted. An evaluation of 10 percent is assigned from March 1, 2007, the date of receipt of the informal claim.

An evaluation of 10 percent is granted for recurrent tinnitus.

5. Entitlement to an earlier effective date for the grant of eligibility to Dependents' Educational Assistance under 38 U.S.C. chapter 35.

Entitlement to an earlier effective date for the grant of eligibility to Dependents' Educational Assistance under 38 U.S.C. chapter 35, 3-1-07, is granted because an earlier effective date was assigned for a total evaluation for PTSD.

References:

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our web site, www.va.gov.

DEPARTMENT OF VETERANS AFFAIRS
Pittsburgh Regional Office
100 Liberty Avenue
Pittsburgh, PA 15222

June 4, 2014

Robert G. Thornton
PO Box 759
Phnom Penh 981
Cambodia

In Reply Refer to: Appeals [redacted]
Robert G. Thornton

Dear Mr. Thornton:

You have filed a Notice of Disagreement with our action. This is the first step in appealing to the Board of Veterans' Appeals (BVA). This letter and enclosures contain very important information concerning your appeal.

Statement of the Case

We have enclosed a Statement of the Case, a summary of the law and evidence concerning your claim. This summary will help you to make the best argument to the BVA on why you think our decision should be changed.

What You Need to Do

To complete your appeal, you must file a formal appeal. We have enclosed VA Form 9, Appeal to the

Board of Veterans' Appeals. which you may use to complete your appeal. We will gladly explain the form if you have questions. Your appeal should address:

- the benefit you want
- the facts in the Statement of the Case with which you disagree; and
- the errors that you believe we made in applying the law.

When You Need to Do It

You must file your appeal with this office within 60 days from the date of this letter or within the remainder, if any, of the one-year period from the date of the letter notifying you of the action that you have appealed. If we do not hear from you within this period, we will close your case. If you need more time to file your appeal, you should request more time before the time limit for filing your appeal expires. See item 5 of the instructions in VA Form 9, Appeal to Board of Veterans' Appeals.

(Page 2 of 27)

Hearings

You may have a hearing before we send your case to the BVA. If you tell us that you want a hearing, we will arrange a time and a place for the hearing. VA will provide the hearing room, the hearing official, and a transcript of the hearing for the record. VA cannot pay any other expenses of the hearing. You may also have a hearing, before the BVA, as noted on the enclosed VA Form 9, Appeal to the Board of Veterans'

Appeals. Do not delay filing your appeal if you request a hearing. Your request for a hearing does not extend the time to file your appeal.

Representation

If you do not have a representative, it is not too late to choose one. An accredited representative of a recognized service organization may represent you in your claim for VA benefits without charge. An accredited attorney or an accredited agent may also represent you before VA, and may charge you a fee for services performed after the filing of a notice of disagreement. In certain cases, VA will pay your accredited agent or attorney directly from your past due benefits. For more information on the accreditation process and fee agreements (including filing requirements), you and/or your representative should review 38 U.S.C. § 5904 and 38 C.F.R. § 14.636 and VA's website at http://wwwvaov/ogc/ accraditntion.asp. You can find the necessary power of attorney forms on this website, or if you ask us, we can send you the forms. You can also find the names of accredited attorneys, agents and service organization representatives on this website.

What We Will Do

After we receive your appeal, we will send your case to the BVA in Washington, DC for a decision. The BVA will base its decision on an independent review of the entire record, including the transcript of the hearing, if you have a hearing.

Sincerely yours,

/s/ Ruth Grezlik
Service Center Manager

Enclosure(s): VA Form 9

(Page 3 of 27)

Statement of the Case

Department of Veterans Affairs
Pittsburgh Regional Office

Page 1
6/4/2014

Name of the Veteran: Robert G. Thornton

VA File Number: [redacted]

Issue:

1. Entitlement to an effective date earlier than 3-1-07 for the grant of service connection for posttraumatic stress disorder.
2. Entitlement to an effective date earlier than 3-1-07 for the grant of service connection for left ear hearing loss and the 40% evaluation assigned to the service connected bilateral hearing loss.
3. Entitlement to an effective date earlier than 3-1-07 for service connection for tinnitus.

Evidence

- (2) Audiometric reports conducted at Bumrungrad International on 6-26-07 and 5-17-10
- VA examination dated 5-5-08
- Your informal claim received 3-1-07
- Your formal claim received 10-17-07
- Service treatment and personnel records from October 12, 1965 to July 15, 1968
- VA letter dated 4-23-07
- (2) Veterans Claims Assistance Act (VCAA) Letters, dated 10-29-07 and 4-14-08
- (2) VA Form 21-4138 dated 12-28-07 and 1-2-08
- Private Medical records from Dr. Jones from 6-21-07 to 2-4-09
- (2) Notices of Disagreement received 10-14-08 and 11-7-13
- VA Form 21-0781, Statement In Support Of Claim For Service Connection for Post-Traumatic Stress Disorder (PTSD), dated May 26, 2008
- PTSD Stressor Corroboration Research dated 7-1-08
- Undated "Buddy" statement from Patrick O'Neill
- VA PTSD exam dated 7-23-08

- VA rating decisions dated 5-23-89, 9-12-08, 12-11-12 and 6-4-14
- Treatment reports from the Key West CBOC received 11-17-08
- Statement of the Case (SOC) dated 7-19-10
- Psychological Evaluation, Psychological Services International dated 11-15-10
- Traditional review election received 12-5-13
- Evidence submitted to the US Court of Appeals for Veterans Claims received 5-27-14
- Your request for a personal hearing and a SOC received 10-2-89
- Hearing transcripts dated 1-5-90
- Hearing Officer's Decision dated 2-12-90
- Notification of Hearing Officer's Decision dated 3-16-90

Adjudicative Actions:

03-01-2007
Claim received.

(Page 4 of 27)

12-11-2012
Claim considered based on all the evidence of record.

12-13-2012
Claimant notified of decision.

11-07-2013

Notice of Disagreement received.

11-14-2013
Appeal Election Letter seat to the appellant.

12-05-2013
Traditional appeal process election received from appellant.

Pertinent Laws; Regulations; Rating Schedule Provisions:

Unless otherwise indicated, the symbol. "§" denotes a section from, title 38 of the Code of Federal Regulations Pensions Bonuses and Veterans' Relief. Title 38 contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits.

§ 3.102 Reasonable doubt.

It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under abroad interpretation, consistent; however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a

contradiction in the evidence; the claimant is required to submit- evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not justifiable basis for denying the application of the reasonable doubt doctrine if the entire complete record otherwise warrants invoking this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships. (Authority: 38 U.S.C. 501(a))

§3.103 Procedural due process and appellate rights.

(a)Statement of policy. Every claimant has the right to written notice of the decision made on his or her claim, the right to a hearing, and the right of representation. Proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law . . . .

[. . .]

STATEMENT OF THE CASE

Department of Veterans Affairs
Pittsburgh Regional Office

Page 22
6/4/2014

Name of the Veteran: Robert G. Thornton

VA File Number: [redacted]

Day–July 4; Labor Day–First Monday in September; Columbus Day–Second Monday in October; Veterans Day–November 11; Thanksgiving Day–Fourth Thursday in November; and Christmas Day–December 25; When a holiday occurs on a Saturday, the Friday immediately before is the legal public holiday. When a holiday occurs on a Sunday, the Monday immediately after is the legal public holiday. (Authority: 5 U.S.C. 6103)

VA, in determining all claims for benefits that have been reasonably raised by the filings and evidence, has applied the benefit-of-the-doubt and liberally and sympathetically reviewed all submissions in writing from the Veteran as well as all evidence of record.

Decision

1. Entitlement to an effective date earlier than 3-1-07 for the grant of service connection for posttraumatic stress disorder is denied.
2. Entitlement to an effective date earlier than 3-1-07 for the grant of service connection for left ear hearing loss and the 40% evaluation assigned to the service connected bilateral hearing loss is denied.
3. Entitlement to an effective date earlier than 3-1-07 for the grant of service connection for tinnitus is denied.

Reasons and Bases:

1. **Entitlement to an effective date earlier than 3-1-07 for the grant of service connection for posttraumatic stress disorder.**

Service connection for PTSD was granted by VA rating decision dated 12-11-12 and an evaluation of 100% was assigned effective 10-17-07 by VA rating decision dated 12-11-12. You filed a NOD on 11-7-13 and elected the Traditional review process on 12-5-13.

Based on receipt of your informal claim, service connection for PTSD was granted and an evaluation of 100% was assigned from the earlier effective date of 3-1-07 by VA rating decision dated 6-3-14. It is unclear what effective date you believe is warranted for service connection for PTSD, but it appears you believe it was claimed discharge. While service treatment records show you listed "frequent trouble sleeping" and depression or excessive worry" on separation exam dated 7-15-68, this does not constitute

a claim to service connection for an acquired psychiatric disorder. Since there is no other evidence of a claim to service connection for an acquired psychiatric disorder in your claims folder prior to 3-1-07, your claims to an effective date earlier than 3-1-07 is denied. Instead, and evaluation of 100 percent is continued from 3-1-07, the date receipt of the informal claim.

(Page 27 of 27)

Prepared By _____

eSign: certified by BCF, DRO

05072018
VA Evidence Intake Center, Janesville, WI

DEPARTMENT OF VETERANS AFFAIRS
APPEAL TO BOARD OF VETERANS' APPEALS

***Important**: Read the attached instruction before you fill out this form. VA also encourages you to get assistance from your representative in filling out this form.*

1. Name of Veteran

   Robert G. Thornton

2. Claim File No.

   26-158594

4. I am the

   ☒ Veteran

5. Telephone Numbers

   A. Home

      855-017246163

6. My Address is

   Mailing Address only

   Robert G. Thornton
   C/O Charles Bazaar
   2136 Wembley Ln
   Corona CA 92881

8. These are the issues I want to Appeal to the Board

   B. ☒ I want to appeal all of the issues listed on the statement of the case and any supplemental statement of the case that my Local VA Office sent to me.

9. Here is why I think that VA Decided my Case Incorrectly:

   a Clearly erroneous decision, not supported by the record.

   The adjudicator Clearly issued a fraudulent decision under "The presumption of regularity" by concealing the June 4, 2014 DRO Decision.

   March 22, 2018 SOC/Decision

   DECISION: The substantive appeal received February 2, 2015 was untimely.

   In order to perfect an appeal, you must submit your substantive appeal (VA) Form 9 "Appeal to Board of Veterans' Appeals" or statement in lieu of) 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 Our decision on your claim for benefits. 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. Accordingly, we cannot accept your VA Form 9 "Appeal to Board of Veterans' Appeals" received February 2, 2015,

as your substantive appeal as the time limit to continue your appeal has passed.

See attached pages 1-12

10. Optional Board Hearing

Important: Read the information about this block in paragraph 6 of the attached instructions. This block is used to request an optional Board of Veterans' Appeals (Board) hearing. DO NOT USE THIS FORM TO REQUEST A HEARING BEFORE VA REGIONAL OFFICE PERSONAL. Check one (and only one) of the following boxes:

A. ☒ I DO NOT WANT AN OPTIONAL BOARD HEARING. (*choosing this option often results in the board issuing its decision most quickly. If you choose you may write down what you would say at a hearing and submit it directly to the Board.*)

11. Signature of the Person Making This Appeal

/s/ Robert G. Thronton

12. Date: 5/3/18

Dated: July 31, 2014
By the Court:
Coral Wong Pietsch
Judge CAVC NO. 14-1601

The Secretary reported that on June 4, 2014, the RO issued a decision review officer (DRO) decision granting the petitioner a March 1, 2007, effective date for entitlement to disability benefits for PTSD, hearing loss, and tinnitus. On that same date, the RO also issued a Statement of the Case denying the appellant entitlement to an effective date prior to March 1, 2007, for all three of his service-connected disorders.

"In the veterans' uniquely claimant friendly system of awarding compensation, breaches of the duty to assist are at the heart of due process analysis." *Cook v. Principi*, 318 F.3d 1334, 1354 (Fed. Cir. 2002) (Gajarsa, J., dissenting). "If the Constitution provides no protection against the occurrence of such breaches, then the paternalistic interest in protecting the veteran is an illusory and meaningless assurance." *Id.* The presumption of competence is inconsistent with the VA's duty to assist veterans and the non-adversarial nature of the proceedings. *See Hayre v. W.*, 188 F.3d 1327, 1331-32 (Fed. Cir. 1999); 38 U.S.C. § 5103A. "Congressional mandate requires that the VA operate a unique system of processing and adjudicating claims for benefits that is both claimant friendly and non-adversarial." *Hayre*, 188 F.3d at 1331. "An integral part of this system is embodied in the VA's duty to assist the veteran in developing facts pertinent to his or her claim." *Id.*

Rizzo v. Shinseki, 580 F.3d 1288, 1292 (Fed. Cir. 2009) ("The presumption of regularity provides that, in the absence of clear evidence to the contrary, the court will presume that public officers have properly discharged their official duties." (emphasis added) (internal citation omitted)). The agency itself should not rely on the presumption that it followed its rules when evaluating the application of those very rules. U.S. Supreme Court 137 S. Ct. 1994 (2017) *Mathis v. Shulkin.* Statement of Justice SOTOMAYOR respecting the denial of certiorari.

This petition raises important questions about how the Government carries out its obligations to our veterans. The Board of Veterans' Appeals (Board) applies a rebuttable presumption when reviewing veterans' disability claims:

Justice GORSUCH, dissenting from denial of certiorari.

The VA appears to apply the same presumption in its own administrative proceedings. But where does this presumption come from? It enjoys no apparent provenance in the relevant statutes. There Congress imposed on the VA an affirmative duty to assist—not impair—veterans seeking evidence for their disability claims. *See* 38 U.S.C. § 5103A(a)(1). And consider how the presumption works in practice.

But how is it that an administrative agency may manufacture for itself or win from the courts a regime that has no basis in the relevant statutes and does nothing to assist, and much to impair, the interests of those the law says the agency is supposed to serve?

A "presumption should be predicated on evidence that gives us confidence that a particular procedure is carried out properly and yields reliable results in the

ordinary course." *Mathis v. McDonald*, 643 Fed. Appx. 968, 973 (Fed. Cir.2016)

SUPREME COURT
PRESS