ORIGINAL

SUPREME COURT OF THE UNITED STATES

RASHID EL MALIK,
Petitioner,

v.

DOUGLAS A. COLLINS, SECRETARY OF VETERANS AFFAIRS,
Respondent.

PETITION FOR WRIT OF CERTIORARI

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

Rashid El Malik

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Date: July 28 2025

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The United States Court of Appeals for the Federal Circuit has entered a decision in direct conflict with its own binding precedent in Martin v. O'Rourke, 891 F.3d 1338 (Fed. Cir. 2018), and Cushman v. Shinseki, 576 F.3d 1290 (Fed. Cir. 2009), raising an important federal question and departing so far from accepted judicial practice as to require this Court's supervisory review.

QUESTIONS PRESENTED

1. Whether a catastrophically disabled veteran facing imminent, life-threatening harm is entitled to mandamus relief under Martin v. O'Rourke when a government agency has unreasonably delayed implementation of a final Board grant for over 1,185 days, no appellate remedy exists, and all Martin factors for unreasonable delay are overwhelmingly satisfied.

2. Whether the Federal Circuit violated its own precedent in Cushman v. Shinseki by permitting the Veterans Affairs agency to maintain in a veteran's file a tainted document—containing demonstrably false statements used to deny disability benefits—which the agency has effectively admitted is false, but refuses to remove absent a court order, thereby depriving the veteran of due process.

PARTIES TO THE PROCEEDING

- **Petitioner-Appellant:** Rashid El Malik appearing -*pro se*, a Catastrophic disabled United States Veteran who served in the Army and Vietnam from January 1968 to June 1969.

- **Respondent:** Douglas A. Collins, Secretary of Veterans Affairs, Respondent-Appellee sued in his official capacity

CORPORATE DISCLOSURE STATEMENT

- Pursuant to Supreme Court Rule 29.6, a corporate disclosure statement is not required as petitioner Not applicable. Petitioner is an individual proceeding *pro se*.

RELATED PROCEEDINGS

This case is directly related to the following proceedings:

- *El Malik v. Collins*, U.S. Court of Appeals for Veterans Claims, No.
- 25-3872 (petition for extraordinary relief denied July 14, 2025)

- *El Malik v. Collins*, U.S. Court of Appeals for the Federal Circuit, No. 24-5450-25-1300 (mandamus petition denied and sanctions imposed, July 8, 2025)
- *El Malik v. McDonough*, U.S. Court of Appeals for the Federal Circuit, Nos. 2023-1684, 2023-2279 (mandamus petition dismissed March 14, 2024)
- *El Malk v US 20-CV-267- 24-1746*-(Dismissed February 13, 2025)

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STATEMENT OF RELATED CASES DEMONSTRATING PATTERN

El Malik v. United States, U.S. Court of Federal Claims, No. 20-CV-267: Petitioner pursued breach of contract claims that is a part of this case. The Court declared Petitioner a third-party beneficiary, denied government's summary judgment motion, and ordered damages calculations, after four years of litigation, and allowed the respondent to refile a motion to dismiss. A new judge was assigned, the new judge granted defendant motion to dismiss and dismissed for lack of jurisdiction, eliminating all relief despite four years of merits-based proceedings.

OPINIONS BELOW

The order of the United States Court of Appeals for the Federal Circuit affirming the denial of Petitioner's mandamus petition and imposing filing restrictions was entered on July 8, 2025 (*El Malik v. Collins*, No. 25-1300). The order is unreported and included in the **(Appendix B)**

The order of the U.S. Court of Appeals for Veterans Claims denying Petitioner's motion for leave to file petition for extraordinary relief was entered on July 14, 2025 **(*El Malik v. Collins*, No. 25-3872).** The order is unreported and included in the **(Appendix C)**

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on July 8, 2025. This petition is timely filed within 90 days of that judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

"No person shall be...deprived of life, liberty, or property, without due process of law..."

U.S. Constitution, Article I §1; All legislative Powers herein granted shall be vested in a Congress of the United States..."

38 U.S.C. § 7104(d)(1) provides:

"A decision by the Board is final unless appealed to the United States Court of Appeals for Veterans Claims under section 38 U.S.C. § 7252

38 CFR § 20.1100 All BVA decisions become final on the date stamped on the face of the decision. Decisions are not subject to change or review except outlined in **38 U.S.C. 1975**, 1984, or chapters 37 and 72

M21-5, Chapter 7, Section G.1.e (Reviewing the Claims Folder and/or Implementing the Board Decision) provides:

\When a decision has been made, the Board returns the claim to the Decision Review Operations Center (DROC) or the RO for review of the claims folder and implementation of the decision, if necessary."

Important: "The assigned DROC or RO should implement the Board's grant or partial grant of benefits in any favorable decision *before* initiating development of the remand."

M28R Manual, Chapter 1, Section 1.03 provides:

"Implementation of Board grants is a non-discretionary ministerial duty.

STATEMENT OF THE CASE

I. THE LIFE-THREATENING EMERGENCY

Petitioner is a catastrophically disabled, wheelchair-bound veteran who cannot escape from a very important rear exit of his home in case of fire or emergency based on a collapse rear deck **(Appendix D)** that the Board approved to be replace with a lift to evacuate from the second floor. On April 7, 2022, the Board of Veterans' Appeals granted four critical safety modifications to prevent his death in a fire emergency:

- Automatic door openers (never installed)
- A lift for emergency evacuation (never installed)
- Two-story addition to the rear of his home to include living room, dining room, master bed room, and kitchen on the first floor, bedrooms, family room, and stair well on the second floor (never installed)
- Non-Slip Hardwood flooring throughout the home to replace marble flooring **(Appendix E** April 7, 2022, Grant Order)

On October 1, 2024, the Board granted deck replacement widening all doors, and remodel kitchen (never implemented) Veteran Court No. 24-8553

Today marks over 1,185 + days since the grant. None of the modifications have been implemented. "Martin Violation"

The rear deck, essential for emergency egress, has collapsed, creating a complete evacuation failure. Petitioner's home is located in Palos Verdes Estates, California, in a Very High Fire Hazard Severity Zone where catastrophic wildfires pose constant threat. Without these modifications, Petitioner can die if fire breaks out.

II. TAINTED DOCUMENT MAINTAINED AFTER ADMISSION

A. The tainted Document and Its Improper Use

In September 2018, VA official Anthony Roeback inserted a Report of General Information form (27-0820) into Petitioner's file containing demonstrably tainted statements: (Appendix F)

- California District Court dismissed case because veteran "lied about injuries"
- Personally witness Petitioner walking for 2+ hours
- Mischaracterized lawsuit damages as "$200 million"

- Lift for his wheelchair had been installed in other parts of his home to be able to access the 2nd floor provided in other parts of the home so there were no reasoning to be on the stairs.

The Board went outside the scope of evidence to use this document to deny Petitioner disability claim violating their own procedures that require review of only officially submitted evidence from the regional Office. The Board made material credibility findings based on this prohibited evidence, leading to benefit denial. **(Appendix G-2019 Board Decision)** Petitioner requested an investigation-No Response

LEGAL ARGUMENT /REASONS FOR GRANTING THE PETITION

The question whether a catastrophically disabled veteran facing the imminent death may seek mandamus relief under *Martin v. O'Rourke* when a Government agency causes self-inflected unreasonable delays to implement a Board grant that is now over 1,185 + days since the inception of the grant, with no appellate remedy exists, and all Martin factors for unreasonable delay are overwhelmingly satisfied.

This case presents urgent questions of exceptional national importance concerning the constitutional rights of veterans and the proper enforcement of binding agency and judicial mandates. The lower courts' refusal to enforce the clear standards articulated in Martin v. O'Rourke and Cushman v. Shinseki threatens to render veterans' rights illusory, especially for the most vulnerable.

There is no traditional circuit split because the Federal Circuit has exclusive jurisdiction over veterans' appeals. However, this Court's intervention is warranted where, as here, lower courts depart from controlling precedent and constitutional standards established by this Court and the Federal Circuit. The issues raised are recurring and

impact millions of veterans dependent on fair and timely benefits administration.

The agency's prolonged refusal to implement a final Board grant—leaving a catastrophically disabled veteran in life-threatening danger—and its deliberate maintenance of a tainted document in the veteran's file, despite effective admission of its falsity, constitute arbitrary government action that shocks the conscience and violates due process. The lower courts' failure to remedy these violations, and their imposition of sanctions for seeking judicial relief, raise fundamental questions about access to the courts and the rule of law.

Immediate Supreme Court review is essential to restore the proper application of Martin and Cushman, vindicate veterans' constitutional rights, and ensure the integrity of the veterans' benefits system.

I. The Lower Courts Abdicated Their Duty Under *Martin v. O'Rourke* by Ignoring a Clear Case of Unreasonable Delay.

The Court's precedent in *Martin v. O'Rourke*, 891 F.3d 1338 (Fed. Cir. 2018), was intended to provide a clear, six-factor test to prevent precisely this kind of agency inertia. The facts here overwhelmingly satisfy that test. The delay of over 1,185 + days is facially unreasonable,

and the prejudice to a veteran in need of home modifications is self-evident.

Critically, the agency's stated reasons for the delay were exposed as pretextual. The November 2022, "Clarification Memo" request after the Board granted the claim in April 2022, and following petitioner's writ to the Veterans Court was disavowed by the BVA response to Congressman Ted Lieu office inquiry in July 2024, itself, confirming it was an administrative fiction.

The agency's subsequent actions—including a 2024 decision in violation of the finality rule 38 U.S.C. § 7104(d)(1) that removed two components from the original 2022,

grant causing more chaos and delays where Board decision are final unless a CUE is declared and in spite of the Board July response to Ted Lieu—are not good-faith administrative processes; they are acts of defiance. Such executive action, which is arbitrary and "shocks the conscience," is the very definition of a substantive due process violation under *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

By ignoring the pretextual nature of the delay and dismissing the Petitioner's writ, the lower courts abdicated their judicial responsibility. The agency's defiance places its authority at its "lowest ebb," as

described in Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Congress established a clear statutory scheme where BVA decisions are final and subject to judicial review. By refusing to implement a final decision, the agency acts in a manner incompatible with the expressed will of Congress, undermining the very structure of administrative accountability. Ted Lieu inquiry was totally ignored by the Regional Office, the Board, the Veterans Court, and the Federal Court of Appeals; thereby, rending Congress established clear statutory scheme useless.

Therefore, under the ***Youngstown* analysis**, the VA's refusal to implement the BVA's decision is not just an administrative delay; it is an unlawful overreach that upsets the constitutional balance of power between the executive and legislative branches. Under Justice Jackson's framework the VA's actions are unconstitutional and should be subject to the highest level of judicial scrutiny.

II. THE FEDERAL CIRCUIT'S REFUSAL TO APPLY CUSHMAN PERMITS AGENCIES TO MAINTAIN ADMITTEDLY TAINTED DOCUMENTS

Whether Government agencies violate *Cushman v. Shinseki* by maintaining a tainted document in veterans' files that contain statements the agency has effectively admitted are tainted through judicial admission by silence when ordered to respond to specific falsity allegations and refuse to remove the tainted document without a Court Order.

A. Cushman Violation Clearly Established

Cushman v. Shinseki held that tainted documents in veterans' files violate due process by tainting all subsequent proceedings. This case presents all *Cushman* elements:

1. **Tainted Document:** Board's judicial admission by silence when ordered to respond to falsity allegations proves the document contains tainted statements under established legal principles.
2. **In Veterans' File:** Document remains in official file affecting all proceedings.
3. **Taints All Proceedings:** Board used document for material credibility findings; *Cushman* holds such taint violates due process in all subsequent proceedings.

4. **Never Removed:** Despite effectively admitting falsity, agency refuses removal. **FRCC (8) (b)(6)** Board did not dispute falsity

5. **Government Announces:** it would not remove the tainted document until ordered by a Court **(Appendix H-(response by respondent 22-5317 at 8**

B. This Case Presents Worse Constitutional Violation Than Cushman

In Cushman: Agency acted properly when confronted with tainted document—they removed it.

The Agency here stated "No Order of the Court, or other legal finding, required VA to remove the September 2018 statement from Petitioner's file. This action taints the whole judicial system and even if an appeal was appropriate the outcome is prejudicial, and a fair hearing is negated. Therefore, the appeal process is not applicable the removal of the tainted document is the only legal recourse. *Beaudette v McDonough* 34 Vet App 95 (2021

When government agencies ignore their own binding regulations and Court precedent for over 1,185+ days while a catastrophically disabled veteran faces possible imminent death, such conduct transcends administrative error and enters the realm of conscience-shocking arbitrary action.

The life-threatening emergency circumstances show why *Martin* and *Cushman* protections are essential and require clear enforcement standards.

III. THE COURT OF APPEAL FOR VETERANS' CLAIMS AND THE FEDERAL CIRCUIT'S REFUSAL TO PROPERLY APPLY MARTIN AND APPLYING SANCTIONS TO THE PETITIONER CREATES AN IMPOSSIBLE STANDARD FOR VETERANS SEEKING RELIEF FROM IMPLEMENTATION DELAYS

This case presents a fundamental breakdown of administrative law and due process within the veterans' benefits system. It reveals a situation where a veteran, having secured a final and binding grant of benefits from the Board of Veterans' Appeals (BVA), is left with a right that exists only on paper. The lower courts have not only failed to provide a remedy for the agency's flagrant and prolonged non-compliance but have gone so far as to sanction the Petitioner for attempting to invoke the sole judicial tool available to him.

- **RETALIATION**

Under the principles established in *Hartman v. Moore*, 547 U.S. 250 (2006), and affirmed in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), the First Amendment is violated when the government takes retaliatory action against a citizen for engaging in protected speech or petitioning activity. The elements of such a claim are clearly met in this case.

- **Protected Activity**:

The Petitioner engaged in a constitutionally protected activity by petitioning the court for a writ of mandamus to compel the VA to implement a final, favorable decision from the Board of Veterans' Appeals. Seeking to enforce a legally granted benefit is a fundamental exercise of the right to petition the government for a redress of grievances.

- **Adverse Action**:

In direct response to this protected activity, the Petitioner was classified as a "vexatious filer." This is a severe adverse action designed to punish the Petitioner and restrict his future access to the courts. **For the Petitioner, a 75-year-old veteran subsisting solely on Social Security and VA disability compensation, and is now required by the Veteran Court to file the filing fee, seek permission to file a writ, and the Federal Circuit requirement to seek permission to appeal into their jurisdiction, coupled with the threat of sanctions, is not an abstract legal concept—it is a tangible financial wall that threatens his basic livelihood.**

This action carries significant stigma and concrete legal consequences far beyond a minor slight.

- **Causal Connection**:

The causal link between the protected activity and the adverse action is direct and unambiguous. The "vexatious filer" designation was not an unrelated event; it was imposed as a direct consequence of the Petitioner's persistent efforts to have his legally granted benefits implemented. This action flows from a clear temporal relationship with the Petitioner's filings and demonstrates the agency's institutional memory of him as an adversary.

- **Chilling Effect**:

The act of branding a vulnerable Catastrophic disabled veteran a "vexatious filer" for seeking to enforce a final BVA decision has a profound chilling effect. Contrast to a VA official false statements allowed to stay in the file and no investigation of a law Judge going outside the scope of evidence

Having established the devastating financial impact of this action, it sends a powerful message that the cost of challenging agency non-compliance is to be formally labeled an abuser of the legal system and face potential ruin. This action is designed to deter not only the

Petitioner but all veterans from pursuing their rights, effectively silencing future advocacy and insulating the agency from accountability.

IV. The Veteran's Court is Not an Article III Court; Its Limited Power Makes Mandamus Essential, Not Frivolous

The entire structure of veterans' law hinges on a critical constitutional distinction: the United States Court of Appeals for Veterans Claims (CAVC) is an **Article I tribunal**, not an Article III court. Established by Congress under 38 U.S.C. § 7251, its jurisdiction is strictly limited to that which is conferred by statute. Unlike Article III courts, the CAVC lacks inherent equitable powers; it cannot grant damages for constitutional torts or fashion remedies beyond its statutory mandate.

This limitation has a profound consequence. A veteran's entitlement to benefits is a protected property interest under the Due Process Clause, as established in

Goldberg v Kelly 397 U.S. 254 (1970) and affirmed in the veterans' context by Cushman v Shinseki 576 F.3d 1290 (Fed. Cir. 2009). Once the BVA grants that right, the veteran is constitutionally owed a process that is not merely theoretical but real and effective. For a veteran whose right

has already been established by a final BVA decision, the **All-Writs Act (28 U.S.C. §1651** is not merely one option among many—it is the **sole judicial Lifeline.**

The writ of mandamus, which compels an agency to perform a clear, non-discretionary duty, is the only mechanism provided by Congress to enforce a right the agency is unlawfully withholding. While mandamus is an extraordinary remedy, it is reserved for precisely these circumstances, to ensure that executive officials adhere to the law when a petitioner has a "clear and indisputable" right to relief, as clarified in *Cheney v. U.S. District Court*, 542 U.S. 367 (2004). In this case, the Petitioner's right was established by the BVA's final decision. The subsequent duty of the VR&E office was not discretionary; it was a ministerial act of implementation. When the agency failed to perform that duty, the Petitioner correctly turned to the only tool available to him. To sanction the Petitioner for filing this writ is a perverse and constitutionally untenable outcome. It is a punishment for invoking the only remedy Congress has provided. It transforms the All Writs Act from a shield for the powerless into a trap for the unwary, sending a chilling message to all veterans: **do not dare ask the court to enforce your rights, or you will be penalized for it**. *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803)

V. The Government's Suggestion That Petitioner Could Use the Appeal Process Is a Fallacy.

Petitioner appeal the removal of the two components and the denial of the six remaining components to the Veterans court Appeal 38 U.S.C. § 7252 No. 24 8553" **(Appendix I)** Petitioner maintain the removable of the two components was a red Herring to protect the Agency after the congressional inquiry.

24 8553 addresses the Board removal of the 2 of 4 components that were taken out of the Board 2022 Grant in violation of the finality rule 38 U.S.C. § 7104(d)(1) and cannot compel implementation or address the 1,185 + day delay.

The agency's position creates a classic catch-22.

The agency unlawfully withholds a benefit and, when challenged via a writ, argues its own subsequent and unlawful modification of that benefit creates an "appeal" that precludes the writ. This is not a legitimate administrative process; it is a shell game designed to evade judicial review. The whole judicial process is tainted because of the agency's refusal to remove the tainted letter. The agency's argument is particularly misplaced because its refusal to act is not a matter of unreviewable discretion. Unlike an agency's decision not to initiate an

enforcement action, as discussed in *Heckler v. Chaney,* 470 U.S. 821 (1985), the VA here is not exercising discretion; it is failing to adhere to a final, binding legal mandate. When a lower court closes off all avenues for relief, the purpose of the All-Writs Act is to provide a necessary safety valve.

Prejudice to Veteran: The delay directly harms the veteran's health, safety, and welfare by denying him the very home modifications the BVA found necessary three years ago.

The lower court's failure to properly apply the *Martin* factors and their dismissal of the Petitioner's writ constitutes an abdication of judicial responsibility. If a 1,185-day delay, based on a disproven pretext, for a simple ministerial task does not warrant judicial relief, then the *Martin* standard has been rendered a dead letter.

VI. THE CASE PRESENTS QUESTIONS OF EXCEPTIONAL NATIONAL IMPORTANCE

A. Veterans' Rights Rendered Meaningless

If agencies can ignore Board grants indefinitely while maintaining admittedly tainted documents, and courts refuse mandamus relief, veterans' rights become illusory. This systematic breakdown affects over

18 million veterans who depend on enforceable agency compliance.

B. Fundamental Administrative Law Principles at Stake

Martin Standard: Becomes meaningless if agencies can delay a granted benefit "1,185+" implementation indefinitely without consequences

Cushman Protections: Become worthless if agencies can maintain admittedly tainted documents

Mandamus Relief: Becomes unavailable precisely when most needed for constitutional violations and to declare a declaratory right.

B. Emergency Circumstances Require Immediate Intervention

Unlike typical administrative disputes, this case involves imminent threat to life. Each day of delay increases risk of preventable death, making immediate Supreme Court intervention essential.

C. Lower Court Conflict Requiring Resolution

The Federal Circuit's refusal to apply clearly satisfied legal standards creates uncertainty about when veterans can obtain relief for constitutional violations, requiring this Court's clarification

VII. THE PETITION PRESENTS AN IDEAL VEHICLE FOR CLARIFYING MARTIN AND CUSHMAN STANDARDS

A. Clean Legal Issues Without Factual Disputes

Martin Application: All six factors clearly satisfied with objective evidence (1,185+ days, life-threatening emergency, Catastrophic disabled, Prejudice, time table established, pretextual delays, improper activities, (simple implementation)

B. Cushman Application: Board's non judicial admission eliminates any ambiguity and document, (show be removed)

CONCLUSION

The decision of the court represents a catastrophic failure of judicial oversight and a complete breakdown of the due process rights guaranteed to this nation's veterans.

The Petitioner, a catastrophically disabled veteran, secured a final, binding grant of benefits from the Board of Veterans' Appeals, a property right protected under *Cushman v. Shinseki*. Yet, for years, he has been denied this right not by legal disagreement, but by the agency's simple refusal to comply with the law. When he sought the only remedy available to him—a writ of mandamus—the lower

courts did not provide relief but instead punished him for his petition, effectively closing the courthouse doors.

This case is not merely about an administrative delay; it is about an agency's deliberate and conscience-shocking misconduct. The government has openly admitted in court filings that it will not remove an admittedly tainted document from the Petitioner's official file until a court forces it to do so. This act of maintaining known falsehoods to be used against a veteran in all future proceedings is the kind of arbitrary government conduct that "shocks the conscience," as described in *County of Sacramento v. Lewis*.

The very essence of civil liberty—the right to seek protection of the laws for an injury received, as established in *Marbury v. Madison*—has been denied.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted

Rashid El Malik

Rashid El Malik

Date: July 28, 2025

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

RASHID EL MALIK,
Claimant-Appellant

v.

DOUGLAS A. COLLINS, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2025-1300

Appeal from the United States Court of Appeals for Veterans Claims in No. 24-5450, Judge William S. Greenberg.

Decided: July 8, 2025

RASHID EL MALIK, Palos Verdes Estate, CA, pro se.

THOMAS J. ADAIR, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent-appellee. Also represented by MICHAEL GRANSTON, MARTIN F. HOCKEY, JR., PATRICIA M. MCCARTHY.

Before LOURIE, REYNA, and STARK, *Circuit Judges*.

PER CURIAM.

Rashid El Malik appeals from a decision of the United States Court of Appeals for Veterans Claims ("Veterans Court") denying his request for a writ of mandamus ordering the Department of Veteran's Affairs ("VA") to comply with an April 7, 2022 Board of Veteran's Appeals ("Board") decision. Because we lack jurisdiction to hear portions of this appeal, we dismiss-in-part. On the issue within our jurisdiction, we affirm.

I

Mr. El Malik is a disabled veteran who was awarded certain home modifications under the Veteran Readiness and Employment ("VR&E") living plan. A modification of his award, which included, in pertinent part, installation of hardwood flooring in his home and a light in his garage, was outlined in an April 7, 2022 Board decision. Appx. 1-5.[1]

The modification project for Mr. El Malik's home began in June 2018, and as of May 2022 at least eleven modifications had been successfully completed. Appx. 81. To date, the cost of these modifications has exceeded $685,000. Appx. 99. Notwithstanding this progress, Mr. El Malik has repeatedly petitioned the Veterans Court for a writ of mandamus directing the VA to implement the Board's April 2022 decision. The present case is Mr. El Malik's third appeal to this Court on the exact same issue: denial of a writ seeking an order to implement the Board's April 2022 decision. *See El Malik v. McDonough*, Case Nos. 2023-1684, 2023-2279 (consolidated), 2024 WL 1109263 (Fed. Cir.

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[1] "Appx." refers to the Government's Corrected Appendix, Volumes I and II, which can be found at ECF. Nos. 13-1 and 13-2, respectively.

2024). As Mr. El Malik did in his prior appeals, he again argues that the Veterans Court erred in denying his petition for a writ of mandamus he contends is justified by the VA's continued failure to implement the Board's April 2022 decision, resulting in unreasonable delay, and VA's reliance on purported mischaracterizations of fact. Open. Br. at 10-15. We concluded in connection with each of Mr. El Malik's prior appeals that we lacked jurisdiction to decide the majority of the issues Mr. El Malik raised. *El Malik*, 2024 WL 1109263, at *1.

II

Our jurisdiction to review mandamus decisions of the Veterans Court is limited. *Id.* at *3; *see also Love v. McDonough*, 100 F.4th 1388, 1392 (Fed. Cir. 2024). "Although we have jurisdiction to 'decide all relevant questions of law, including interpreting constitutional and statutory provisions,' 38 U.S.C. § 7292(d)(1), we 'may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case,' *id.* § 7292(d)(2)." *Id.*

Mr. El Malik again argues that the VA is engaged in a pattern of violating Board orders and ignoring congressional communications regarding implementation of his VR&E award. Open. Br. at 5. The Veterans Court, however, considered this contention and ultimately determined there was "no evidence that the Secretary is refusing to implement the April 2022 Board decision" and, thus, "[t]he issue appears to be confusion over the procurement process with [Special Adaptive Housing]." Appx. 5. We lack jurisdiction to review this factual determination. *See El Malik*, 2024 WL 1109263, at *4 ("The court based its denial of writ on Mr. El Malik's failure to demonstrate that the VA refused to comply with the Board's April 2022 order. We thus discern no . . . issue appropriate for our review in these appeals."). While we may review fact issues in connection with constitutional challenges, we may not do so where, as

here, the constitutional challenge is not genuine but, instead, frivolous. *See Love*, 100 F.4th at 1392 ("We have jurisdiction to review the Veterans Court's decision whether to grant a mandamus petition that raises a non-frivolous legal question.") (internal citation and punctuation omitted). Although Mr. El Malik alleges VA is violating his constitutional right to due process, *see* Open. Br. at 2, 6, 11, his claim is frivolous. *See El Malik*, 2024 WL 1109263, at *3-4 ("[Mr. El Malik] does not raise a constitutional challenge that confers on us jurisdiction that we otherwise lack.") (internal quotation marks omitted). Accordingly, we lack jurisdiction over these claims.

Mr. El Malik's appeal does raise one issue within our jurisdiction, namely, a purported violation of the VA's finality rule. Open. Br. at 10-11. On this issue, we affirm the Veterans Court's dismissal, as res judicata bars Mr. El Malik from again litigating this already-resolved dispute. *See, e.g.*, *Sharp Kabushiki Kaisha v. ThinkSharp, Inc.*, 448 F.3d 1368, 1370 (Fed. Cir. 2006) ("Res judicata . . . refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided.") (citing *Migra v. Warren City Sch. Dist. Bd. Of Educ.*, 465 U.S. 75, 77 n.1 (1984)); *see also El Malik*, 2024 WL 1109263, at *3 (rejecting an identical finality challenge as the one Mr. El Malik presses here).

Accordingly, Mr. El Malik's appeal is affirmed-in-part and dismissed-in-part.

III

In its response, the government asks this court to "take appropriate actions" to prevent "further abuse of the legal process" by Mr. El Malik. Resp. Br. 2. In support of its request, the government cites our most recent decision addressing identical issues to those Mr. El Malik again raises in this appeal. *El Malik*, 2024 WL 1109263, at *3 n.4 (noting Mr. El Malik has filed 17 suits against VA that have been appealed to this court and dismissing for at least the

second time, an appeal relating to implementation of his VR&E award); *see also* Resp. Br. at 10 (listing prior appeals). In that opinion, we cautioned Mr. El Malik against "rais[ing] this issue yet again in another appeal from a denial of a petition of a writ of mandamus" warning him that "[t]his court has previously sanctioned pro se petitioners who have attempted to relitigate previously adjudicated issues," including by "imposing the opposing party's attorneys fees" and "requiring individuals to seek leave from the court before filing any future appeal." *Id.*

Mr. El Malik disregarded our warning by filing this duplicative appeal. Thus, the government suggests "it may be time for this Court to consider appropriate action given Mr. El Malik's apparent disregard of the Court's prior warnings," although it does not take a position on what sanctions would be appropriate. Resp. Br. at 2. Considering the totality of the circumstances, including Mr. El Malik's repeated relitigation of the same issue despite our warnings, on the one hand, and his status as a disabled veteran on the other, we have concluded it is appropriate to require Mr. El Malik to obtain court approval to file any new notices of appeal. *See Constant v. United States*, 929 F.2d 654, 659 (Fed. Cir. 1991) (explaining that court had concluded it "cannot assume the papers [appellant] may hereafter file . . . will be well-founded and presented in good faith"). We will today issue a restrictive filing order instructing the Clerk of Court to require Mr. El Malik to obtain leave consistent with what we have set out here from this point forward.

IV

We have considered Mr. El Malik's remaining arguments and find they lack merit. Because we lack jurisdiction to review all but one of Mr. El Malik's challenges to the Veterans Court's denial of a writ of mandamus and his remaining challenge is barred by res judicata, we affirm-in-part and dismiss-in-part. Because this appeal is

duplicative and frivolous, Mr. El Malik is sanctioned and the court will enter a restrictive filing order.

AFFIRMED-IN-PART AND DISMISSED-IN-PART

COSTS

No costs.

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 24-5450

RASHID EL MALIK, PETITIONER,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before GREENBERG, *Judge*.

ORDER

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

I.

On August 5, 2024, the pro se petitioner petitioned the Court for extraordinary relief in the nature of a writ of mandamus, asking the Court to compel the Secretary to implement an April 7, 2022, Board of Veterans' Appeals (Board or BVA) order. The petitioner alleged that in April 2022, the Board ordered Veteran Readiness and Employment (VR&E) to install hardwood floors in the petitioner's home. Petition at 1. The petitioner further alleged that the former chief of VR&E issued a referral to the special adaptive housing (SAH) department to implement the April 2022 Board order. *Id.* The petitioner then alleged that the SAH department granted an application to install hardwood flooring in the house and provided the petitioner with a list of approved contractors. *Id.* The petitioner claimed that he entered into a contract with one of the approved contractors and sent the contract to the new VR&E chief for approval. Petition at 2. Yet the petitioner claimed that the new chief of VR&E has failed to move forward on the contract. *Id.*

II.

Based on the petitioner's allegations, the Court deemed a response by the Secretary necessary. In October 2024, the Secretary responded to the Court. The Secretary provided the following procedural history:

1. April 7, 2022: Veteran Readiness and Employment (VR&E) received the Board of Veteran[]s['] Appeal[s] (BVA) order noting a grant of purchase of new hardwood flooring, installation of automatic door openers, a complete two-story addition to the rear of the home and installation of a lift at the back of home.

2. May 16, 2022: VR&E completed the final payment to Moderno for the completion of the construction project which began on May 30, 2018. The project noted completion of an adaptative master bedroom, bathroom, new hardwood flooring in bedroom and tile flooring in bathroom, automatic doors on front door, master bathroom outside exit door and elevator doors, three-stop elevator in the home and two[-]stop elevator at the rear of the home.
3. August 2, 2022: VR&E received a medical opinion from Dr. Peter Glassman regarding additional nine matters remanded from the April 7, 2022, BVA ruling.
4. August 22, 2022: VR&E submitted a referral for the VR&E housing adaptation grant to request a Specially Adaptative Housing (SAH) Agent assist with the garage lighting and hardwood flooring.
5. August 30, 2022: VR&E issued a [S]upplemental [S]tatement of the [C]ase (SSOC) to the Mr. El Malik.
6. September 26, 2022: Mr. El Malik responded to the SSOC.
7. September 30, 2022: VR&E provided Mr. El Malik with an updated SSOC. The Veteran requested a delay on returning the SSOC until his medical appointment on November 2, 2022.
8. December 20, 2022: VR&E issued an edited SSOC to the Veteran.
9. December 22, 2022: BVA remands the matter to VR&E for 90 days following November 28, 2022, correspondence to the Veteran that granted a 90-day extension to submit additional evidence.
10. January 6, 2023: VR&E sent a follow up letter to Mr. El Malik regarding the referral to SAH for using the VR&E housing adaptation grant.
11. January 25, 2023: Mr. El Malik declined to move forward with SAH on the hard[][wood] floor and garage light due to the method of procurement.
12. March 17, 2023: VR&E issued the SSOC to the Veteran.
13. March 23, 2023: The SSOC was returned to BVA.
14. July 31, 2023: BVA remanded the matter to VR&E for more development prior to final adjudication of the claim on appeal.
15. November 24, 2023: VR&E sent a third letter to the Veteran requesting information about names, addresses, dates of treatment of all medical care providers, VA, and Non-VA.
16. February 22, 2024: Mr. El Malik provided contact information and dates of service for all medical providers.
17. April 5, 2024: an independent medical opinion was completed.
18. May 3, 2024: . . . SSOC[] was issued. This SSOC noted three of the four grant issues had been implemented; however, the remaining matter was intertwined with remand matters which denied the requested items.
19. May 6, 2024: Mr. El Malik responded to the SSOC.
20. May 13, 2024: Mr. El Malik provided additional information regarding the SSOC.
21. June 24, 2024: VR&E returned the completed remand to BVA and informed Mr. El Malik of this action.
22. June 25, 2024: Docket notification letter sent by the Board.

23. June 27, 2024: Mr. El Malik confirmed to BVA that he has no additional materials to submit.
24. September 4, 2024: VR&E informs Mr. El Malik by email that the May 2024 SSOC contains VBA's positions on the remanded items.

Secretary's Response at 2-4.

The Secretary then stated on October 1, 2024, the Board issued its decision on appeal. Secretary's Response at 9-10. In discussing the hardwood floor issue that the appellant seeks a writ for, the Board found:

> Having addressed all of the issues remaining on appeal, the Board will briefly address the four equipment purchases/home modifications it previously granted in April 2022. In the May 2024 SSOC, the AOJ [agency of original jurisdiction] noted that, in granting the purchases and modifications in that decision, the Board may not have been aware that a modification project was underway at that time and was subsequently completed in May 2022. In that regard, the AOJ provided updates and sought further clarification.
>
> As to the hardwood flooring, the Board previously found that "[a]ll floor surfaces throughout the house must allow for a wheelchair to move uninhibited. . . . In-home use of an electric wheelchair will require a solid surface floor of some type." See April 2018 VA examination. The AOJ explained that during the modification project, the Veteran was provided hardwood floors in the bedroom and tile flooring in the bathroom. According to the AOJ, the remainder of the flooring consists of marble-type flooring that allows for a wheelchair to move uninhibited. The AOJ then explained that, to the extent additional hardwood flooring is necessary, an SAH agent was assigned to work with the Veteran on installation of the approved modification. However, the Veteran declined to move forward as he disagreed with the procurement method being utilized by VR&E.
>
> As noted by the AOJ, the Board addressed this issue in its April 2024 decision. Specifically, the Board found that Public Law 115-177 proscribes further processing of the Veteran's case under the provisions of 38 U.S.C. Chapter 31, and mandates that it be processed under the provisions of 38 U.S.C. § 2102B. Accordingly, as the Board remarked in April 2024, to the extent that further hardwood flooring remains to be installed, the Veteran should work with his assigned SAH agent to ensure the approved modifications can be made in a timely manner.

Secretary's Response at 37-38, Attachment B.

III.

"The 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, 96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976). Three

conditions must be met before the Court can issue a writ: (1) the petitioner must demonstrate the lack of adequate alternative means to obtain 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 issuance of the writ is warranted. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004). Failure to establish any of the three Cheney conditions may be sufficient to deny a petition. *See Amgen Inc. v. Hospira, Inc.*, 866 F.3d 1355, 1362-63 (Fed. Cir. 2017) (denying a petition for an extraordinary writ of mandamus for failure to satisfy the second *Cheney* condition without addressing the first and third conditions).

The Court will deny the petition as unwarranted. The petitioner has provided no evidence that the Secretary is refusing to implement the April 2022 Board decision. The issue appears to be confusion over the procurement process with SAH. The documents and procedural history of the case appear to show that all the petitioner needs to do for his desired relief is reach out to SAH to implement the April 2022 Board decision about hardwood flooring. *See* Secretary's Response at 2-4, 37-38; *id.* Attachment B. Thus, there is no relief to be provided by the Court in the context of a petition as a granting a writ would not be in aid the Court's prospective jurisdiction. *See* 28 U.S.C. § 1651(a). Thus, the Court will deny the petition as unwarranted.

To the extent that the petitioner disagrees with anything said in the October 1, 2024, Board decision, the appellant can appeal that decision and make any arguments in a Substantive Appeal. It is

IV.

ORDERED that the August 5, 2024, petitioner for extraordinary relief is DENIED as unwarranted.

DATED: October 31, 2024

BY THE COURT:

WILLIAM S. GREENBERG
Judge

Copies to:

Rashid El Malik

VA General Counsel (027)

APPENDIX C

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 25-3872

RASHID EL MALIK, PETITIONER,

V.

DOUGLAS A. COLLINS,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before LAURER, *Judge*.

ORDER

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

On April 29, 2025, self-represented veteran Rashid El Malik moved for leave to file a petition for extraordinary relief in the nature of a writ of mandamus. He asks the Court to compel VA to complete purportedly deficient home modifications granted in Board of Veterans' Appeals (Board) decisions from April 7, 2022, and October 1, 2024.[1] Mr. El Malik also asks the Court to order VA to vacate the October 2024 Board decision, expedite his claims, immediately provide him with an accessible deck, and provide monthly progress reports.[2] In an April 29, 2025, motion to supplement his original motion for leave, Mr. El Malik also asserts that VA has acted in bad faith.[3]

On June 5, 2025, the Court issued an order denying Mr. El Malik's April 29, 2025, motion for leave to file a petition and dismissing his request for a writ. The same day, he moved for reconsideration. Because the Court finds it necessary to provide more clarity and address his points about the similarity of his claims, the Court will grant his motion, withdraw the June 5, 2025, order, and issue this order in its stead.

Given Mr. El Malik's frequent and repetitive filings, he's subject to a September 29, 2016, order that directs him to move for leave before the Court will accept further petitions for

[1] Motion for Leave to File Petition (Pet.) at 1. For convenience, citations refer to the page numbers in the scroll bar of the Portable Document Format (PDF).

[2] Motion for Leave to File Pet. at 29.

[3] Motion to Supplement at 3.

extraordinary relief.[4] Repetitive and frivolous filings are prohibited.[5] Since Mr. El Malik has been previously warned, the Court can sanction him for noncompliant filings.[6]

Before Mr. El Malik filed the current motion, he had a related appeal already pending at the Court under docket number 24-8553. In that docket, he appealed the Board's October 1, 2024, decision and asserted that VA hasn't properly implemented the home modification work on his house. So his current arguments are substantially similar to, if not the same as, the arguments in the appeal pending under docket number 24-8553. Because the Court is already considering Mr. El Malik's arguments in his pending November 19, 2024, appeal, the Court denies his April 29, 2025, motion for leave to file a petition.[7] The September 2016 order prohibits such duplicative filings.[8]

The Court's June 5, 2025, order initially found similarities to one of his other petitions under docket number 25-2946. Although Mr. El Malik pointed to differences between his two petitions in his motion for reconsideration, the Court still won't grant his motion for leave to file a petition. The Court is considering his arguments in his appeal in docket number 24-8553.

The Court again reminds Mr. El Malik that filing duplicative or repetitive petitions with this Court in such a short period is an abuse of judicial resources. Time spent ruling on duplicative petitions is time the Court could otherwise devote to resolving appeals or petitions from other claimants. Although he's self-represented,[9] the Court won't consider any filings that don't comply with the Court's September 2016 order.[10]

For these reasons, it is

ORDERED that petitioner's June 5, 2025, motion for reconsideration is granted. It is also

ORDERED that the June 5, 2025, order is WITHDRAWN, and this order is issued in its place. It is also

---

[4] *El Malik v. McDonald*, No. 16-2001, 2016 WL 5462684, at *3 (Vet. App. Sept. 29, 2016) (order). Any motion for leave must (1) explain why the particular pleading isn't prohibited by the September 2016 order; (2) describe the document he wants to file and the relief described in the filing; (3) be no more than two pages; and (4) be accompanied by a filing fee.

[5] *El Malik*, 2016 WL 5462684, at *3.

[6] U.S. VET. APP. R. 38 (noting that sanctions or dismissal are appropriate when a filing is frivolous).

[7] *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380-81 (2004) (holding that for this Court to issue a writ, three conditions are required: (1) Petitioner must show a lack of adequate alternative means to obtain the desired relief, thus ensuring that the writ isn't used to replace the appeals process, (2) petitioner must prove a clear and indisputable right to the writ, and (3) the Court must be convinced, given the circumstances, that the writ is warranted).

[8] *El Malik*, 2016 WL 5462684, at *3.

[9] *Calma v. Brown*, 9 Vet.App. 11, 15 (1996) (explaining that it is the Court's practice to liberally construe the pleadings of self-represented litigants).

[10] *See* U.S. VET. APP. R. 38.

ORDERED that petitioner's April 29, 2025, motion for leave to file a petition for extraordinary relief is DENIED. It is also

ORDERED that petitioner's April 29, 2025, request for a writ compelling VA to take appropriate action on his home modifications and the October 1, 2024, Board decision is DISMISSED. It is also

ORDERED that, under Rule 41(c)(3) of the Court's Rules of Practice and Procedure, this order is the mandate of the Court.

DATED: July 14, 2025

BY THE COURT:

SCOTT J. LAURER
Judge

Copies to:

Rashid El Malik

VA General Counsel (027)

APPENDIX D

UNITED STATES COURT OF APPEALS FOR VETERANS' CLAIMS

RASHID EL MALIK,	:
Petitioner,	: **Case No. 25-3872**
v.	:
DOUGLAS A. COLLINS,	: **RECONSIDERATION**
SECRETARY OF VETERANS AFFAIRS,	:
Respondent.	: **Rule 35**

Petitioner, Rashid El Malik, a catastrophically disabled veteran appearing *pro se*, respectfully moves this Honorable Court to reconsider its Order of July 14, 2025. That Order denied Petitioner's Motion for Leave to File a Petition for Extraordinary Relief. Reconsideration is urgently warranted because the Court's Order rests on a critical misapprehension of both the facts and the law that the relief sought in the writ is "substantially similar" to the issues in Petitioner's pending appeal **(No. 24-8553).**

The Court found that the pending appeal in docket No. **24-8553** constitutes an "adequate alternative means" of relief, thereby precluding a writ of mandamus. The relief sought is, in fact, fundamentally different. The pending appeal addresses the legal correctness of a past Board decision, a process that offers no remedy for the immediate, life-threatening danger Petitioner now faces. The writ, by contrast, seeks to compel immediate action to prevent irreparable harm—namely, the risk of death in a fire—a situation the standard appellate process is utterly powerless to address.

STATEMENT OF THE CASE

This case and the multiple writs filed to this Court based on the Government actions exemplifies a profound failure of a catastrophically disabled veteran who faces the risk of death in a preventable fire, yet each branch of government disclaims responsibility, pointing to procedural barriers when answering the writ as justification for inaction. These writs are the necessary foundation or *prerequisite* for a writ to be issued in the first place. The government's failure to meet these obligations creates the situation where a writ becomes a potential remedy not sanctions.

- The **rear deck**, which was intended to provide emergency egress, has since **collapsed** and remains unrepaired.
- **Non-Slip Hardwood flooring** to replace the Marble flooring in Petitioner home to avoid falls were never installed, Petitioner recent fall in July 2025, injuring his shoulder and knees are documented in his medical files.
- **Automatic door openers**, and **wheelchair lift**, necessary for emergency evacuation, were **never installed and the Board unilaterally remove both items from the Grant violating the Finally rule**.

The government's decision to leave a catastrophically disabled veteran in this known fire trap, despite having officially approved the necessary safety modifications, is an act of deliberate indifference that "shocks the conscience" and constitutes a substantive due process violation under *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

ARGUMENT

I. The Writ is Not Duplicative Because the Harm is Immediate, and the Remedy Sought is Fundamentally Different from the Pending Appeal that Addresses a Systemic Constitutional Violation the Pending Appeal Cannot Cure

The Court's characterization of this writ as "substantially similar" to appeal 24-8553 fundamentally misunderstands the different nature of the relief sought:

- Appeal 24-8553: Challenges the legal correctness of the October 1, 2024, Board decision
- This Writ: Seeks immediate implementation of the April 7, 2022, Board grant to prevent death.

Appeal 24-8553 cannot order implementation of the 2022 grant because that grant is not the subject of the appeal. Even if Petitioner prevails in 24-8553, that victory would only address the 2024 decision—it provides no mechanism to compel implementation of the separate 2022 grant that creates the life-threatening emergency.

The Supreme Court has long held that a writ is appropriate for "exceptional circumstances." What could be more exceptional than a veteran being trapped in a known fire hazard due to agency defiance? This is precisely the type of "peculiar emergency" where a court must "interfere and protect the health and life of the individual concerned."

To deny the writ under these circumstances is to allow a life-threatening situation to persist, subjecting Petitioner to irreparable harm.

The pending appeal **(No. 24-8553)** challenges the legal propriety of a past Board decision. The Petition for a Writ of Mandamus in this action seeks an entirely different remedy: an immediate Court order compelling the VA to execute a grant awarded in 2022. This grant is for home modifications, including a deck which has now collapsed, **(See Apex 1)** rendering Petitioner's home a fire trap from which he cannot escape with his wheelchair. The pending appeal in docket number **(24-8553)** challenges the legal propriety of the Board's October 1, 2024, decision.

The Court's Mandate: The Court orders Petitioner to resolve his claims through the standard appeal process.
The ultimate remedy available in that appeal is a potential vacatur and remand for re-adjudication, a process that can take months or years. A remand in late 2025 or 2026 cannot prevent a fire in 2025.
More fundamentally, the Court's denial overlooks the constitutional dilemma that poisons Petitioner's every interaction with the VA. The standard appeal is not an adequate remedy because the entire process is predicated on a constitutionally defective record. An appeal process that is itself tainted cannot be the adequate remedy for the taint.

II. The Court's Proposed Remedy Is Itself a Constitutional Violation. The Court's order directs Petitioner to pursue an appeal on a record known to be tainted by a fraudulent document. This forces Petitioner into a constitutionally untenable dilemma:

The Known Constitutional Violation: The record in that appeal 24-8553 is contaminated by a false document that the Department of Veterans Affairs (VA) refuses to remove without a court order. When Petitioner sought removal of the false document through mandamus, **(Doc No. 22-5317)**,

the VA made an extraordinary admission:

> "To the extent Appellant seeks extraordinary relief in the nature of a writ of mandamus compelling VA to remove a September 2018 VA employee statement from his file, Petitioner cannot demonstrate a clear and indisputable right to the writ of mandamus he seeks. **No Order of the Court, or other legal finding, required VA to remove the September 2018 statement from Petitioner's file." (Doc. No. 22-5317), at 8)** Emphasis added

The Binding Precedent:

The Federal Circuit's decision in *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009), holds that litigating on a tainted record is a due process violation that poison the whole adjudication process. Emphasis added.

The Inescapable Prejudice:

Therefore, complying with the Court's order forces Petitioner to participate in a process that is unconstitutional from its inception.

An unconstitutional process can never be an "adequate" remedy. The purpose of the writ is to purify the record *before* the appeal proceeds, thereby preventing the certain prejudice that a tainted record creates.

The writ is not duplicative of the appeal; it is a necessary prerequisite to ensure the appeal is fair.

The Procedural Trap That Prevents Any Remedy The Constitutional Violation: False Documents in Official Records

In 2018, VA Chief of Vocational Rehabilitation & Employment (VR&E) Anthony Roeback inserted a memorandum into Petitioner's file falsely stating:

- Petitioner sued the VA for $200 million
- A federal court dismissed the suit because Petitioner "lied about his injuries"
- The court found Petitioner fell off a ladder in Pennsylvania, not down stairs in California

Every statement was demonstrably false. Court records prove the case was dismissed solely for lack of jurisdiction under 38 U.S.C. § 511. *El Malik v. United States*, No. CV 17-5085 FMO (ASx), 2018 WL 6252420 (C.D. Cal. Feb. 14, 2018).

The Cushman Violation

In *Cushman v. Shinseki*, 576 F.3d 1290, 1299 (Fed. Cir. 2009), the Federal Circuit held that false documents in veterans' files violate due process because they "taint" all subsequent proceedings. The court stated that "none of the subsequent appeals and rehearing's that the veteran received satisfied his due process right to a fair hearing" when false documents remain.

III. Complete Governmental Breakdown

1. Executive Branch Defiance

- VA acknowledges Board orders but failed to implementation
- VA admits it won't remove false documents without court order
- VA ignores Congressional oversight

2. Legislative Branch Impotence

- Congressman Ted Lieu inquired about the unimplemented grant
- VA acknowledged to Congress its duty to implement
- VA then simply... didn't
- Congress took no further action

The Human Cost

While courts debate procedure:

- Petitioner remains trapped in a fire hazard
- False documents continue poisoning his file
- Each day increases risk of preventable death
- The Constitution's promises ring hollow

IV. PETITIONER FACES IMMINENT DEATH WHILE COURTS DEBATE PROCEDURE

A. This Is Not an Abstract Legal Question

Petitioner will burn to death if fire breaks out. This is not hyperbole—it is the documented reality of a catastrophically disabled veteran whose home has become a death trap due to governmental inaction.
The traditional exhaustion doctrine assumes delay causes mere inconvenience. Here, delay is potentially fatal. No principle of law requires Petitioner to die waiting for the VA to navigate its own bureaucracy.

B. Mandamus Is Necessary

Mandamus is necessary to Preserve Life and Prevent Irreparable Harm
In *Ex parte Fahey*, 332 U.S. 258, 259 (1947), this Court recognized that a writ of mandamus is an extraordinary remedy appropriate for "exceptional circumstances". The facts of this case present the very definition of an exceptional circumstance: an agency's refusal to comply with its duties has placed a catastrophically disabled veteran at imminent risk of death.

The government's defiance has created a situation of "peculiar emergency" that necessitates this Court's intervention. The modifications ordered by the Board are not a matter of mere convenience; they are essential to Petitioner's safety and survival. As a result of the agency's obstruction, Petitioner is unable to evacuate his home in his wheelchair in an emergency, a condition that poses a direct and ongoing threat to his life.

This is precisely the type of extreme case where the judiciary is "competent to interfere and protect the health and life of the individual concerned". When an agency's actions—or inaction—create a life-threatening situation, the harm is irreparable, and the circumstances are undeniably "extraordinary". A standard appeal, which would take years to resolve, is not an adequate remedy for a danger that exists today.

Therefore, this petition meets the high bar for an extraordinary writ. The risk to Petitioner's life is the ultimate "exceptional circumstance," making a writ of mandamus not only appropriate but necessary to preserve life.

Behavior That Shocks the Conscience

The government's decision to leave a catastrophically disabled veteran in a known fire trap for three years, despite having officially approved the necessary safety modifications, rises beyond mere negligence. It is an act of deliberate indifference to a known, life-threatening danger that "shocks the conscience" and constitutes a substantive due process violation under County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998). This executive abuse of power requires this Court's immediate intervention

The Agency Created the Extraordinary Circumstances

Cheney v. U.S. District Court, 542 U.S. 367, 380 (2004), requires "extraordinary circumstances" for mandamus. Here, the VA created those

circumstances by explicitly conditioning constitutional compliance on judicial orders it knew would not issue.

When an agency announces it will violate the Constitution unless compelled otherwise, that announcement itself satisfies the extraordinary circumstances test. To hold otherwise allows agencies to immunize themselves through calculated defiance.

Lack of Adequate Alternative Means:

The Court's finding that appeal 24-8553 provides "adequate alternative means" ignores three critical defects in that proposed remedy:

1. **WRONG SUBJECT MATTER**: Appeal 24-8553 challenges the 2024 decision, not the 2022 grant requiring implementation

2. **CONSTITUTIONAL TAINT:** Under Cushman v. Shinseki, any proceeding on the current record violates due process because false documents remain unremediated

3. **TEMPORAL IMPOSSIBILITY:** Even successful appeal would take months/years while the fire danger exists today

The pending appeal is inadequate. It offers no protection from the immediate danger of fire. Furthermore, it forces Petitioner to litigate his claims using a record contaminated by a known-false document, in direct violation of the due process principles established in ***Cushman v. Shinseki***, 576 F.3d 1290 (Fed. Cir. 2009).

A Clear and Indisputable Right to the Writ: Petitioner's right is twofold and absolute.

- **First, the Right to be Free from State-Created Danger:** The VA's failure to execute the 2022 grant has directly led to the collapse of an essential exit, creating a life-threatening hazard. This conduct "shocks the conscience" and violates Petitioner's fundamental due process rights.
- **Second, the Right to a Fair Adjudication:** The VA is knowingly maintaining a false, prejudicial document in Petitioner's file. The Respondent has created an impossible procedural "Catch-22." In a prior action, the Secretary made the extraordinary admission that it would not remove the document because **"No Order of the Court, or other legal finding, required VA to remove the September 2018 statement from Petitioner's file."** (Resp't's Br. at 8, *El Malik v. McDonough*, No. 22-5317 (Vet. App. 2022)). The VA will not act without a court order, and this Court denies an order on the grounds that an alternative remedy exists—a remedy the VA has already declared it will disregard. This procedural impasse is precisely the type of situation the Court addressed in ***Beaudette v. McDonough***, 34 Vet. App. 95 (2021), *aff'd*, No. 22-1264 (Fed. Cir. 2024). Just as the Court found in *Beaudette* that a writ was necessary to break a procedural logjam where the VA's policy wrongfully denied veterans an avenue for appeal, a writ is necessary here to remedy a situation where the Respondent's actions have rendered the standard appeal process futile and inadequate.

The Writ is Warranted Under the Circumstances: There can be no circumstance more warranting of this Court's extraordinary intervention than the prevention of the foreseeable death of a catastrophically disabled veteran, compounded by the VA's admitted and perpetual violation of his constitutional right to a fair process.

A Clear and Indisputable Right to the Writ:

Petitioner's right is twofold. First, he has a right to the execution of a grant that the BVA already awarded three years ago. The VA's duty to perform this action is no longer discretionary; it is a ministerial act that has been unlawfully withheld for years. Second, and more fundamentally, Petitioner has a constitutional right to be free from state-created danger.
The VA's failure to act on the grant, leading directly to the collapse of an essential exit, is conduct that "shocks the conscience" and constitutes a grave violation of Petitioner's due process rights.

1. **The Writ is Warranted Under the Circumstances:** There can be no circumstance more warranting of this Court's extraordinary intervention than the prevention of the foreseeable death of a catastrophically disabled veteran who cannot use his wheelchair to exit his home in the event of an emergency. The VA's multi-year failure has moved beyond bureaucratic delay and into the realm of conscious disregard for human life.

IV. The Three Conditions for a Writ of Mandamus Are Unequivocally Met.

The Court's Order correctly cites the three conditions for a writ from *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367 (2004). Petitioner's circumstances satisfy all three.
Under *Cheney v. U.S. District Court*, 542 U.S. 367, 380 (2004), mandamus requires: (1) no adequate alternative means, (2) clear and indisputable right, and (3) warrant under the circumstances.

1. No Adequate Alternative Means

As established above, appeal 24-8553 addresses a different decision, requires years to complete, and must proceed on a constitutionally tainted record that *Cushman* declares fundamentally unfair.

2. Clear and Indisputable Right

Petitioner has both a statutory right to implementation of the final 2022 grant and a constitutional right to be free from state-created danger. The VA's three-year refusal to act constitutes deliberate indifference that shocks the conscience.

3. Warranted Under the Circumstances

No circumstance could be more warranting than preventing the foreseeable death of a catastrophically disabled veteran who cannot escape his home in an emergency due to government inaction.

CONCLUSION AND STATEMENT OF INTENT

For the foregoing reasons, Petitioner implores this Court to grant this Motion and provide the relief that only a writ can offer. The standard appeals process is not merely inadequate; it is a tainted and futile exercise in the face of immediate danger and systemic constitutional violations.

Furthermore, Petitioner requests that the Court vacate the sanctions imposed upon him. As a *pro se* litigant raising legitimate, substantive issues regarding a life-threatening danger and a clear constitutional dilemma, demonstrate Petitioner's filings were good-faith efforts to secure a remedy, not frivolous abuses of the judicial process. Acknowledging the merit of this petition necessitates acknowledging that the basis for sanctions was unfounded.

Should this Court deny relief, Petitioner respectfully notes that such denial will complete the record demonstrating that:

- No court will order VA to remove false documents (constitutional violation)
- No court will compel implementation of final agency decisions (separation of powers breakdown)
- Courts sanction veterans for seeking either remedy (First Amendment violation)

This systematic denial of all remedies necessitates Supreme Court intervention to resolve the constitutional crisis that renders veterans' rights meaningless.

The choice before this Court is clear: grant relief to prevent a preventable death, or create the final record proving that the constitutional system has completely failed America's most vulnerable veterans.

"Respectfully submitted,

/s/ Rashid El Malik Rashid El Malik

Rashid Elk Malik

Pro Se

Date: July 15, 2025

APPENDIX E

BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
RASHID A. ELMALIK
(A.K.A. RASHID A. EL MALIK)
(A.K.A. ROY MELTON)

C [redacted]
Docket No. 17-07 416
Advanced on the Docket

DATE: April 7, 2022

ORDER

Entitlement to additional Veteran Readiness and Employment (VR&E) equipment purchases/home modifications, claimed as purchase of new hardwood flooring, installation of automatic door openers, a complete two-story addition to the rear of the home, and installation of a lift at the back of the home, under the provisions of Chapter 31, Title 38, United States Code (U.S.C.) is granted.

Entitlement to additional VR&E equipment purchases/home modifications, claimed as a front-loading washer and dryer and a whole house intercom system, under the provisions of Chapter 31, Title 38, United States Code is denied.

FINDINGS OF FACT

1. The evidence is at least in approximate balance as to the necessity of additional equipment purchases/home modifications, including purchase of new hardwood flooring, installation of automatic door openers, a complete two-story addition to the rear of the home, and installation of a lift at the back of the home.

2. The Veteran does not require additional equipment purchases or home modifications, claimed as a front-loading washer and dryer and a whole house intercom system, to function more independently in the family and community without the assistance of others or a reduced level of the assistance of others.

IN THE APPEAL OF
RASHID A. ELMALIK
(A.K.A. RASHID A. EL MALIK)
(A.K.A. ROY MELTON)

C [redacted]
Docket No. 17-07 416
Advanced on the Docket

CONCLUSIONS OF LAW

1. The criteria for additional equipment purchase or home modifications under a VR&E independent living plan, including purchase of new hardwood flooring, installation of automatic door openers, a complete two-story addition to the rear of the home, and installation of a lift at the back of the home, have been met. 38 U.S.C. §§ 3104, 3109, 3120; 38 C.F.R. §§ 21.160, 21.161.

2. The criteria for additional equipment purchase or home modifications under a VR&E independent living plan, claimed as a front-loading washer and dryer and a whole house intercom system, have not been met. 38 U.S.C. §§ 3104, 3109, 3120; 38 C.F.R. §§ 21.160, 21.161.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty in the U.S. Army from January 1968 to June 1969.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from decisions dated in October 2016 and November 2016 of a Regional Office (RO) of the Department of Veterans Affairs (VA).

In May 2019, the Board denied the Veteran's claim of entitlement to various equipment purchases/home modifications under a vocational rehabilitation independent living plan. The Veteran appealed the Board's decision to the United States Court of Appeals for Veterans Claims (Court). In a December 2020 memorandum decision, the Court vacated the Board's May 2019 decision and remanded the matter for further development and readjudication.

In May 2021, the Board remanded the case to the agency of original jurisdiction (AOJ) for additional development. After taking further action, the AOJ confirmed and continued the prior denial and returned the case to the Board.

IN THE APPEAL OF
RASHID A. ELMALIK
(A.K.A. RASHID A. EL MALIK)
(A.K.A. ROY MELTON)

C [redacted]
Docket No. 17-07 416
Advanced on the Docket

Entitlement to various equipment purchases/home modifications under a VR&E independent living plan.

The Veteran asserts entitlement to a number of equipment purchases and home modifications are required to fulfill his VR&E independent living plan.

VA may conduct programs of independent living services for severely handicapped persons. *See* 38 U.S.C. § 3120(a). The purpose of independent living services is to assist eligible veterans whose ability to function independently in family, community, or employment is so limited by the severity of disability (service- and nonservice-connected) that vocational or rehabilitation services need to be appreciably more extensive than for less disabled veterans. *See* 38 C.F.R.§ 21.160(a).

The term "independence in daily living" means the ability of a Veteran, without the services of others or with a reduced level of the services of others, to live and function within the Veteran's family or community. 38 C.F.R. § 21.160(b). Independent living services may be furnished: (1) as part of a program to achieve rehabilitation to the point of employability; (2) as part of an extended evaluation to determine the current reasonable feasibility of achieving a vocational goal; (3) incidental to a program of employment services; or (4) as a program of rehabilitation services for eligible veterans for whom achievement of a vocational goal is not currently reasonably feasible. This program of rehabilitation services may be furnished to help the Veteran: (i) function more independently in the family and community without the assistance of others or a reduced level of the assistance of others; (ii) become reasonably feasible for a vocational rehabilitation program; or (iii) become reasonably feasible for extended evaluation. *See* 38 C.F.R. § 21.160(c).

The services which may be authorized as part of an Individualized Independent Living Plan (IILP) include: (1) any appropriate service which may be authorized for a vocational rehabilitation program as that term is defined in § 21.35(i) except for a course of educational training as described in § 21.120; and (2) independent living services offered by approved independent living centers and programs which are determined to be necessary to carry out the Veteran's plan including:

(i) evaluation of independent living potential; (ii) training in independent living skills; (iii) attendant care; (iv) health maintenance programs; and (v) identifying appropriate housing accommodations. *See* 38 C.F.R. § 21.160(d).

A program of independent living services and assistance is approved when: (1) VA determines that achievement of a vocational goal is not currently reasonably feasible; (2) VA determines that the Veteran's independence in daily living can be improved, and the gains made can reasonably be expected to continue following completion of the program; (3) all steps required by §§ 21.90 and 21.92 of this part for the development and preparation of an IILP have been completed; and (4) the VR&E officer concurs in the IILP. *See* 38 C.F.R. § 21.162(a).

According to VA's General Counsel, VA has both the authority and the responsibility to provide *all services and assistance deemed necessary* on the facts of a particular case to enable an eligible veteran participating in an independent living program to live and function independently in his family and community without, or with a reduced level of, services from others. VAOPGCPREC 6-2001 (indicating VA may approve a veteran's requested modification to enclose and heat a deck for a home painting and photography studio as part of an independent living services program) (emphasis added). It was further noted that the operative word as to this matter was "necessary," and independent living services (to include services that may have a recreational component) provided to the veteran must be "vital" to achieving the independent living program goal, not merely desirable or helpful. *Id.*

The Veteran's entitlement to VR&E services is not in dispute as he has already been approved for an independent living plan.

As noted above, following the May 2019 previous denial on this matter, the Veteran appealed to the Court. In its December 2020 memorandum decision, the Court found that the Board erred for several reasons. First, the Board erred when it relied on a VR&E Chief's statement regarding the circumstances of a lawsuit dismissal for a fall that apparently differed from what the Veteran reported to question the Veteran's credibility. As noted by the Court, however, VA conceded the Board relied on inaccurate information, pointing to a district court order

dismissing the civil tort claim for lack of jurisdiction because it was related to a benefits determination. Given the concession by VA General Counsel, and the Court's findings, the Board will not discuss these statements further.

The Court also noted the Board failed to provide rationale for its reliance on the M28R Veteran Readiness and Employment Service Manual. The Court noted the M28R is a VA manual and VA manuals are not binding on the Board. *See Gray v. Sec'y of Veterans Affairs*, 875 F.3d 1102 (Fed. Cir. 2017) (affirming the Federal Circuit's position in *DAV v. Sec'y of Veterans Affairs*, 859 F.3d 1072, 1077 (Fed. Cir. 2017), that the Board is not bound by M21-1 provisions); 38 C.F.R. § 20.105. As the Board is not bound by the policies set forth in the M28R, this case will not be decided on the basis of a policy manual.

The Board similarly questioned the Board's findings that some of the Veteran's requested modifications are unnecessary to meet minimum property requirements (MPRs). The Court indicated that while MPRs are relevant to other VA programs, such as Specially Adapted Housing grants, their relevance to an independent living program is unclear. Following review 38 U.S.C. Chapter 31 and Chapter 38 of the Code of Federal Regulations, the Board finds no reference to MPRs in relation to an independent living program. As such, MPRs will not be used as a basis for this decision.

Having discussed the findings in the Court's memorandum decision, the Board turns to the merits of the claim.

An August 2016 independent living needs assessment reflects considerable difficulty in the Veteran's independent living. It was noted that he did the following with help or assistive device: taking care of self, including eating, dressing, or bathing; moving in and out of a bed or chair; walking indoors; participating in community activities; writing; sleeping; preparing own meals; and getting in and out of his residence. The following were noted as activities he usually did not do because of his disability: walking several blocks; walking one bloc, or climbing one flight of stairs; walking indoors; doing work around the house, such as cleaning or laundry; doing errands; driving a car; taking care of others; participating in moderate recreation activities; bending, stooping, lifting;

and participating in vigorous activities. It was noted the Veteran had no difficulty with taking medications, handling money, using the phone, controlling the environment, and communicating electronically. Finally, it was noted the Veteran required a personal care attendant.

An October 2016 functional capacities evaluation reflects the Veteran is never able to bend, squat, climb, crawl, or reach overhead. He is further never able to carry anything up to, and over, 10 pounds. The physician noted no lifting and "n/a" to sitting, standing, walking, and mixed activity. The physician found the Veteran was not able to use his hands for repeated grasping, pulling, pushing, twisting, or fine manipulation. He had limited use of his feet. The physician finally noted that the Veteran has limited use of the upper and lower extremities due to should injuries, joint arthritis, carpal tunnel syndrome, knee arthritis status post joint replaced, as well as suffering from posttraumatic stress disorder and emphysema.

In October 2016, a private physician opined on, in pertinent part, the need for automatic door installation and the replacement of a whole-house intercom system. The physician opined that it was a medical necessity to install automatic doors throughout the home to avoid pain in his bilateral wrists. As to the intercom system, the physician opined that the home needed such a system because of the size of the residence and for safety reasons, such as to alert emergency personnel and recreation.

Subsequently, an April 2018 VA examiner provided an opinion on the requested modifications and equipment purchases. The examiner, following review of the file, made several findings regarding the Veteran claimed equipment purchases/home modifications. First, as to the two-story addition, the examiner found that this modification was necessary as the Veteran's multilevel home is a danger to himself because of his bilateral service-connected wrist and knee conditions. These conditions are so severe that he is having difficulty walking more than 15 feet or climbing more than a few steps without falling. Therefore, without structural changes to his home, the Veteran will not be able to live there safely, even in the presence of a caregiver.

As to installation of a rear lift, the April 2018 examiner indicated that a lift is needed. The examiner noted that the Veteran's treatment records show repeat falls when he has tried to climb few stairs or walk more than 15 feet. These falls are secondary to his service-connected knee and wrist condition; therefore, his movement throughout the house is limited by his stair climbing and poor balance. Therefore, some type of single or multiple lift systems will be required to move the Veteran from one level of the home to another.

Next, the VA examiner found automatic door openers were necessary. Her rationale was that the Veteran's bilateral hand and wrist conditions prevent him from opening and closing doors effectively. Because he is unable to use his hands to open and close doors, certain doors will need to open automatically to allow him independence. Moreover, without the presence of a caregiver, his household movements would be restricted.

In regard to hardwood flooring, the examiner noted that all floor surfaces throughout the house must allow for a wheelchair to move uninhibited and reduce his risk for falls. In-home use of an electric wheelchair will require a solid surface floor of some type. The examiner noted that review of the California Building Code for the physically challenged indicated that the floor must be stable, firm, and slip resistant.

In regard to a front-loading washer and dryer, the examiner found this purchase was not necessary. The examiner noted that the Veteran requires assistance with all household chores, including washing clothes, as he is ADL impaired. Therefore, this request is merely desirable, but not necessary, for independent living.

As to the whole-house intercom system, the examiner found this purchase was unnecessary to provide the Veteran a safe and a partially independent environment. The examiner noted that the Veteran uses a hands-free cell phone and headset to communicate with others. This form of communication is more advantageous because it allows communication with family or 911 whenever needed. Moreover, if there is a power outage, his intercom system would not function. As such, the request was found desirable, not necessary.

Subsequently, the Veteran submitted a private medical opinion dated July 2018. The physician opined, following a review of the record, that an upgraded intercom system was necessary to alert his caregiver or emergency medical services due to the size of his residence. The physician indicated that an upgraded smart washer and dryer were a necessity. In doing so, however, the physician noted the Veteran is capable of washing and drying his clothes with a smart system, and the new technology is less physical to operate.

As reminded by the Court, the question the Board must address is whether each of Veteran's requested modifications is necessary to providing a measurable increase in his individual level of independence. *See* Memorandum Decision at p. 3. As such, following a review of all evidence of record, including the Veteran's complete medical records and lay statements submitted on his behalf, the Board finds that purchase of new hardwood flooring, installation of automatic door openers, a complete two-story addition to the rear of the home, and installation of a lift at the back of the home are necessary.

With respect to these requested modifications, the Board acknowledges that the April 2018 VA examiner determined that the Veteran must have free and safe wheelchair movement throughout all areas of his multilevel home and, without structural changes to his home, the Veteran will not be able to live there safely even in the presence of a caregiver. As to these matters, the Board finds the April 2018 VA examiner's opinion persuasive, as the opinion is informed by a thorough review and analysis of the Veteran's treatment records, lay statements, and medical expertise. The examiner's findings as to a rear lift and automatic doors are further supported by the October 2016 private physician's opinion that such modifications were necessary.

As such, the weight of the competent and probative evidence supports a finding that the additional VR&E benefits requested by the Veteran, claimed as purchase of new hardwood flooring, installation of automatic door openers, a complete two-story addition to the rear of the home, and installation of a lift at the back of the home, are "necessary" to support his ability to live and function within his family and community.

However, as to the claimed front-loading washer and dryer and a whole house intercom system, the Board finds the evidence is against a finding that such purchases are "necessary" to support his independent living plan. In this regard, the April 2018 provided a complete and probative rationale why such modifications were unnecessary. Specifically, the examiner competently and credibly discussed that the Veteran requires assistance with all household chores, including washing clothes, as he is ADL impaired. Therefore, a front-loading washer and dryer is merely desirable, but not necessary, for independent living. As to the whole-house intercom system, the examiner found this purchase was unnecessary as the Veteran uses a hands-free cell phone and headset to communicate with others which is more advantageous for communication with family or 911. Moreover, if there is a power outage, his intercom system would not function.

The Board acknowledges the positive opinion of the October 2016 physician as it relates to an intercom system. However, the Board finds the physician's opinion is conclusory in nature, without supporting rationale. *See Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007). Nevertheless, the August 2018 refuted the private opinion by finding the Veteran already had a more advantageous communication system.

The Board also recognizes the July 2018 private opinion. As it relates to the intercom system, the opinion is substantially the same as the opinion rendered in October 2016 and does not refute or address the April 2018 examiner. As for the front-loading washer and dryer, while the physician indicated this equipment is necessary, his opinion is contradictory as he states the Veteran is capable of washing and drying his clothes. The Board finds the July 2018 opinion as it relates to the intercom system and front-loading washer and dryer is, therefore, inadequate.

Simply put, the competent and probative evidence of record is against finding that the additional VR&E benefits, specifically the front-loading washer and dryer and a whole house intercom system, requested by the Veteran are "necessary" to support his ability to live and function within his family and community.

IN THE APPEAL OF
RASHID A. ELMALIK
(A.K.A. RASHID A. EL MALIK)
(A.K.A. ROY MELTON)

[redacted]
Advanced on the Docket

Accordingly, the evidence is in equipoise to support additional VR&E equipment purchases/home modifications, claimed as purchase of new hardwood flooring, installation of automatic door openers, a complete two-story addition to the rear of the home, and installation of a lift at the back of the home. To this extent only, the claim is granted.

The Board finds, however, the evidence is persuasively against the claim for a front-loading washer and dryer and a whole house intercom system. As there is not an approximate balance of positive and negative evidence, the benefit-of-the-doubt doctrine is not applicable and these claims are not warranted.

REASONS FOR REMAND

Entitlement to various equipment purchases/home modifications under a vocational rehabilitation independent living plan is remanded.

Although the Board sincerely regrets the additional delay, a remand is necessary to ensure that there is a complete record upon which to decide the Veteran's remaining claims and to afford him every possible consideration.

The remaining accommodations requested include: (1) an overhead cover for a wheelchair lift at the front of the home; (2) a cover over the front walk; (3) widening of all doorways inside the home; (4) installation of a central air conditioning system; (5) an addition to the home to include installation of a new bathroom downstairs; (6) replacement of the existing wood decks; (7) extension of the rear of the main bedroom to create space for a walk-in closet and a work-out room on the floor below; (8) creating access to an existing outdoor kitchen located near the pool area; and (9) remodeling the kitchen to enable access while using a wheelchair. Simply put, there is evidence both for and against a finding of necessity for these remaining claims. *See* October 2016 private opinion; April 2018 VA examination; July 2018 private opinion. As to the requests for an overhead cover for the wheelchair lift and installation of a new bathroom downstairs, no clinician provided an adequate opinion on necessity. Given the

stark contrast between the competing opinions, as well as the nearly four years since the most recent examination, clarification of the necessity for the remaining additional equipment purchases/home modifications would be helpful.

This matter is REMANDED for the following action:

> 1. Make arrangements to obtain a medical opinion concerning the necessity of each modification and accommodation as requested by the Veteran. These accommodations include: (1) an overhead cover for a wheelchair lift at the front of the home; (2) a cover over the front walk; (3) widening of all doorways inside the home; (4) installation of a central air conditioning system; (5) an addition to the home to include installation of a new bathroom downstairs; (6) replacement of the existing wood decks; (7) extension of the rear of the main bedroom to create space for a walk-in closet and a work-out room on the floor below; (8) creating access to an existing outdoor kitchen located near the pool area; and (9) remodeling the kitchen to enable access while using a wheelchair.
>
> It is noted that the Veteran is service-connected for posttraumatic stress disorder; loss of effective use of both feet; status post arthroscopic repair, left knee; postoperative bursitis, synovial irritation, right knee; post traumatic right wrist derangement; chronic migraine headaches; left wrist arthritis; chronic low back strain; duodenal ulcer and hiatal hernia; voiding dysfunction; erectile dysfunction; amputation of the proximal middle phalanx of left long finger; and bilateral shoulder disorder. His combined disability rating is 100 percent, and he is also in receipt of special monthly compensation based on the need for a higher level of aid and attendance at the rate specified under 38 U.S.C. § 1114(r)(2).

The examiner should address each specific modification and accommodation as requested by the Veteran (noted above) individually and opine as to their necessity in terms of whether each modification or accommodation is required to allow the Veteran to function more independently within his family and community without the assistance of others or a with a reduced level of assistance of others. If any equipment purchases/home modifications that the Veteran is seeking are merely desirable or helpful, but not necessary, the examiner should explain why. The examiner should consider all of the relevant evidence including, but not limited to, the Veteran's medical records, subjective statements, and current functioning. In doing so, the examiner should address and reconcile his or her findings with the previous October 2016 and July 2018 private opinion and the April 2018 VA medical opinion, to the extent feasible.

In doing so, the selected examiner should not rely on or consider the M28R Veteran Readiness and Employment Service Manual or minimum property requirements in rendering their opinion.

The need for another examination and/or telephonic or video interview of the Veteran is left to the discretion of the examiner selected to offer the requested opinions.

A thorough rationale for all opinions afforded, considering all of the evidence of record, would be of significant assistance to the Board.

2. Then, ensure the entire paper vocational rehabilitation and employment folder has been scanned and associated with the electronic claims file.

IN THE APPEAL OF
RASHID A. ELMALIK
(A.K.A. RASHID A. EL MALIK)
(A.K.A. ROY MELTON)

C [redacted]
Docket No. 17-07 416
Advanced on the Docket

3. After completing the above, and any other development as may be indicated by any response received as a consequence of the action taken in the preceding paragraphs, the issue on appeal should be readjudicated based on the entirety of the evidence. If any benefit sought remains denied, the Veteran should be issued a supplemental statement of the case. An appropriate period of time should be allowed for response.

Marissa Caylor
Acting Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board

R. Kettler, 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.

APPENDIX F

OMB Control No. 2900--0734
Respondent Burden: 5 minutes
Expiration Date: 07/31/2021

Department of Veterans Affairs

REPORT OF GENERAL INFORMATION

NOTE - This form must be filled out in ink or on a typewriter or computer, as it becomes a permanent record in the veteran's folder.	1. VA OFFICE VARO 315	2. IDENTIFICATION NUMBERS *(C, XC, SS, XSS, V, K, etc.)* [redacted]
3. LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN *(Type or print)* Elmalik, Rashid		4. DATE OF CONTACT *(Month, day, year)* 09/21/2018
5. ADDRESS OF VETERAN *(Include number and street or rural route, city or P.O., State and ZIP Code)*		6A. TELEPHONE NUMBER OF VETERAN *(Include Area Code)* DAY / EVENING 6B. E-MAIL ADDRESS *(If applicable)*
7. NAME OF PERSON CONTACTED Woodrow Roeback, Chief VR&E		8. TYPE OF CONTACT ☐ PERSONAL ☒ TELEPHONE
9. ADDRESS OF PERSON CONTACTED VR&E Los Angeles VARO		10. TELEPHONE NUMBER OF PERSON CONTACTED *(Include Area Code)*

☐ I certify that I properly identified my caller using the ID Protocol

11. BRIEF STATEMENT OF INFORMATION REQUESTED AND GIVEN:

Mr. Woodrow from VR&E in Los Angles called in response to my email this morning.

He explained that Mr Elmalik sued the VA for $200 million regarding the fall that he reported in his CAPRI records.

Mr. Woodrow reported that the suit was thrown out because the VA found the Veteran lied about the incident and that he did NOT fall down the stairs at his home in California but fell off a ladder in Pennsylvania.

Mr. Woodrow reported also that he personally has witnessed the Veteran walking for 2+ hours at a time even though he's service connected for loss of use of his feet and high levels of SMC. He says this has been reported to OIG but nothing has been done.

Mr. Woodrow stated that VR&E has not touched the stairs in question mentioned in the CAPRI records partly because the Veteran turned out to be untruthful about the fall in question AND because lifts for his wheelchair have been installed in other parts of his home to be able to access the 2nd floor so there was no reason for him to be on the stairs.

Notification of Action

☐ I read the following statement to the caller:

"I am a VA employee who is authorized to receive or request evidentiary information or statements that may result in a change in your VA benefits. The primary purpose for gathering this information or statement is to make an eligibility determination. It is subject to verification through computer matching programs with other agencies."

cc: POA *(If applicable)*:

DIVISION OR SECTION	EXECUTED BY *(Signature and title)*
	Laura A. Georgi 253472

PRIVACY ACT NOTICE: The VA will not disclose information collected on this form to any source other than what has been authorized under the Privacy Act of 1974 or Title 5, Code of Federal Regulations 1.576 for routine uses (i.e., civil or criminal law enforcement, congressional communications, epidemiological or research studies, the collection of money owed to the United States, litigation in which the United States is a party or has an interest, the administration of VA programs and delivery of VA benefits, verification of identity and status, and personnel administration) as identified in the VA system of records, 58VA/21/22/28 Compensation, Pension, Education and Vocational Rehabilitation and Employment Records - VA, published in the Federal Register. Your obligation to respond is required to obtain or retain benefits. The responses you submit are considered confidential (38 U.S.C. 5701). Information submitted is subject to verification through computer matching programs with other agencies.

RESPONDENT BURDEN: We need this information to obtain evidence in support of your claim for benefits (38 U.S.C. 501(a) and (b)). Title 38, United States Code, allows us to ask for this information. We estimate that you will need an average of 5 minutes to respond to the questions on this form. VA cannot conduct or sponsor a collection of information unless a valid OMB control number is displayed. Valid OMB control numbers can be located on the OMB Internet Page at www.reginfo.gov/public/do/PRAMain. If desired, you can call 1-800-827-1000 to get information on where to send comments or suggestions about this form.

VA FORM JUL 2018 **27-0820**

SUPERSEDES VA FORM 27-0820, SEP 2015, WHICH WILL NOT BE USED.

APPENDIX G

BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

IN THE APPEAL OF
RASHID A. ELMALIK
ALSO KNOWN AS
RASHID A. EL MALIK
ROY MELTON

[redacted]
Docket No. 17-07 416
Advanced on the Docket

DATE: May 22, 2019

ORDER

Entitlement to various equipment purchases/home modifications under a vocational rehabilitation independent living plan is denied.

FINDING OF FACT

The Veteran does not require additional equipment purchases or home modifications, other than those previously awarded, to function more independently in the family and community without the assistance of others or a reduced level of the assistance of others.

CONCLUSION OF LAW

The criteria for additional equipment purchase or home modifications under a vocational rehabilitation independent living plan have not been met. 38 U.S.C. §§ 3104, 3109, 3120; 38 C.F.R. §§ 21.160, 21.161.

IN THE APPEAL OF
RASHID A. ELMALIK

[redacted] Docket No. 17-07 416

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran had active military service from January 1968 to June 1969. This case was previously before the Board in January 2018, at which time the appeal was remanded to the Agency of Original Jurisdiction (AOJ) for further development.

The Veteran asserts entitlement to a number of equipment purchases and home modifications are required to fulfill his vocational rehabilitation and employment (VR&E) program independent living plan. The items that have been denied, and are subject to the instant appeal, include: an overhead cover for a wheelchair lift at the front of his home; a cover over the front walk; widening of all doorways inside the home; installation of new hardwood flooring throughout the home; replacement of the whole house intercom system; installation of a central air conditioning system; installation of automatic door openers for the kitchen and family room; a complete two-story addition to the rear of the home which would extend the kitchen, living room, master bedroom, lower-level bedrooms, stairway area, and family room, including installation of hardwood flooring; an addition to the home to include installation of a new bathroom in the downstairs area; replacement of the existing wood decks; extension at the rear of the main bedroom to create space for a walk-in closet and a work-out room in the floor below; creating access to an existing outdoor kitchen located near the pool area; remodeling of the kitchen to be able to access while using a wheelchair; purchase of a front-loading washer and dryer; and installation of a lift at the back of the home to allow exit from all levels.

VA may conduct programs of independent living services for severely handicapped persons. *See* 38 U.S.C. § 3120(a). The purpose of independent living services is to assist eligible veterans whose ability to function independently in family, community, or employment is so limited by the severity of disability (service- and nonservice-connected) that vocational or rehabilitation services need to be appreciably more extensive than for less disabled veterans. *See* 38 C.F.R.§ 21.160(a).

The term "independence in daily living" means the ability of a Veteran, without the services of others or with a reduced level of the services of others, to live and function within the Veteran's family or community. 38 C.F.R. § 21.160(b).

Independent living services may be furnished: (1) as part of a program to achieve rehabilitation to the point of employability; (2) as part of an extended evaluation to determine the current reasonable feasibility of achieving a vocational goal; (3) incidental to a program of employment services; or (4) as a program of rehabilitation services for eligible veterans for whom achievement of a vocational goal is not currently reasonably feasible. This program of rehabilitation services may be furnished to help the Veteran: (i) function more independently in the family and community without the assistance of others or a reduced level of the assistance of others; (ii) become reasonably feasible for a vocational rehabilitation program; or (iii) become reasonably feasible for extended evaluation. *See* 38 C.F.R. § 21.160(c).

The services which may be authorized as part of an Individualized Independent Living Plan (IILP) include: (1) any appropriate service which may be authorized for a vocational rehabilitation program as that term is defined in § 21.35(i) except for a course of educational training as described in § 21.120; and (2) independent living services offered by approved independent living centers and programs which are determined to be necessary to carry out the Veteran's plan including: (i) evaluation of independent living potential; (ii) training in independent living skills; (iii) attendant care; (iv) health maintenance programs; and (v) identifying appropriate housing accommodations. *See* 38 C.F.R. § 21.160(d).

A program of independent living services and assistance is approved when: (1) VA determines that achievement of a vocational goal is not currently reasonably feasible; (2) VA determines that the Veteran's independence in daily living can be improved, and the gains made can reasonably be expected to continue following completion of the program; (3) all steps required by §§ 21.90 and 21.92 of this part for the development and preparation of an IILP have been completed; and (4) the VR&E officer concurs in the IILP. *See* 38 C.F.R. § 21.162(a).

According to VA's General Counsel, VA has both the authority and the responsibility to provide all services and assistance deemed necessary on the facts of a particular case to enable an eligible veteran participating in an independent living program to live and function independently in his family and community without, or with a reduced level of, services from others. VAOPGCPREC 6-2001. It was further noted that the operative word as to this matter was "necessary," and

independent living services (to include services that may have a recreational component) provided to the veteran must be "vital" to achieving the independent living program goal, not merely desirable or helpful. *Id.*

Following a review of all evidence of record, including the Veteran's complete medical records and lay statements submitted on his behalf, the Board finds that no additional equipment purchases or home modifications are necessary, beyond those previously approved through the VR&E independent living program and the Specialty Adapted Housing (SAH) and Home Improvement and Structural Alterations (HISA) grant programs. In this regard, the Board has determined that the additional home modifications and equipment purchases requested by the Veteran are not necessary for achieving the independent goal, but are rather merely desirable or helpful.

With respect to the requested structural additions to the Veteran's home, the Board acknowledges that an April 2018 VA examiner determined that the Veteran must have free and safe wheelchair movement throughout all areas of his multilevel home and, without structural changes to his home, the Veteran will not be able to live there safely even in the presence of a caregiver. However, the Board notes that the goal of a VR&E independent living program requires assistance to help the Veteran meet the minimum property requirements (MPRs) similar to those provided by SAH and HISA grants (*i.e.,* a minimum of two ingress and egress points). There is no statutory or regulatory requirement that a VR&E independent living program provide access to the entire home. A review of the record indicates that, through various programs, VA has provided for the MPRs as required, including completion of the master bedroom. Further, other evidence on file, as discussed below, indicates that the Veteran can walk for some distance without aids.

There is no competent evidence of record that would support a finding that a two-story addition to his current 3,800 sq. ft. home, a downstairs addition for the purpose of installing a new bathroom, an extension at the rear of the main bedroom to create a walk-in closet with home gym below, or access to an outdoor kitchen close to the pool area, would provide for greater independence and a reduced reliability on others. In fact, the evidence suggests that installation of a home gym could endanger the Veteran's safety. With respect to installing hardwood flooring

throughout the home, the record indicates a majority of the Veteran's home, with exception of the master bedroom, is currently covered by marble flooring, which provides a sufficient solid surface for the Veteran to move through his home. VR&E services have previously approved modifying the carpet surface to install hardwood flooring in the master bedroom.

With respect to enlargement/extension of the front courtyard, the Board notes previous VA programs completed/adapted this area to include the required four-foot walkway from the bedroom, office, and bathroom. Previous programs have provided for the MPRs for egress and ingress with use of a power wheelchair. As for an additional lift at the back of the home to provide for exit from all levels, the Board notes a lift has previously been awarded through prior programs to provide access to the rear of the home, including the first and second levels. The Board again notes VR&E services are not required under the MPRs to provide complete access to all areas of the property.

With respect to installation of a central air conditioning system, the Board notes the April 2018 VA examiner determined there is no medical necessity for such a system that would provide measurable independence and, therefore, it is merely desirable or helpful. While the Veteran did provide a statement from his private physician that installation of a central air conditioning system would provide for some benefit to his chronic obstructive pulmonary disease (COPD), the physician did not provide any sort of rationale as to why such a system would be necessary to provide for greater independence as opposed to merely helpful or desirable. Finally, as discussed above, prior modifications provided through various VA programs have provided for the MPRs throughout the home as provided by law.

With respect to the Veteran's request for a cover over the front of the home, including the wheelchair lift and front walk, the Board agrees with the AOJ that these projects are not a medical necessity and would not improve independence in daily living, but are rather desirable or helpful. The Board acknowledges the Veteran submitted a medical statement from his private physician that a cover is a medical necessity in that it would protect him from inclement weather that would have a direct impact on his bilateral knee disabilities. However, the Board notes that the Veteran's home includes a garage, modified for wheelchair access by previous VA programs, that would provide for ingress and egress to the home

during times of poor weather conditions. As such, a cover for the front of the home is not medically necessary to provide for greater independent functioning.

With respect to remodeling of the kitchen to allow for the Veteran to prepare his own meals, as well as purchasing of a front-load washer and dryer, the Board notes the Veteran has previously asserted his disabilities prevent him from performing such tasks of daily living. Based on these assertions, as well as related medical evidence, VA has previously granted special monthly compensation based on the need for aid and attendance of another person. As such, these modifications and equipment purchases are not necessary for the Veteran's independent living plan, but are merely helpful or desirable.

With respect to the replacement of a whole-house intercom and replacement of existing wood decks, the Board notes that, as both are current features of the Veteran's home, repair/replacement of these features would be an issue of maintenance or repair, which cannot be provided as part of an independent living program through VR&E services. *See* M28R.IV.C.9.906.

As a final note, the Board has serious concerns regarding the Veteran's credibility as it pertains to the extent of his disabilities and their effect on his ability to safely access portions of his home. For example, the Veteran claims he was injured and broke four ribs when he fell down a set of stairs at his home, and filed a lawsuit against the United States based on this injury. However, the record reflects this suit as dismissed in February 2018 as it was determined the Veteran did not fall down the stairs at his home as reported, but rather fell off a ladder in Pennsylvania. Furthermore, while the Veteran asserts the Board should not take into consideration reports by VA personnel that they have witnessed the Veteran walking for more than two hours at a time, the Board notes that such observations are within the purview of a layperson to witness. Further, VA medical records indicate the Veteran has been witnessed by VA medical personnel to ambulate without the use of a cane or other assistive device without imbalance, incoordination, or weakness as claimed. As such, the Board finds the VA personnel's reports of witnessing the Veteran ambulate without the use of a wheelchair for lengthy periods of time are competent and credible.

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In conclusion, the Board finds the preponderance of the evidence weighs against the provision of additional equipment purchases and/or home adaptations beyond those previously approved as part of a VR&E independent living program. There is no doubt to be resolved, and the Veteran's appeal is denied. 38 U.S.C. § 3107.

MICHAEL D. LYON
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD Christopher Murray, Counsel

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