20-1305

United States Court of Appeals for the Federal Circuit

CONLEY F. MONK, JR., TOM COYNE, WILLIAM DOLPHIN, JIMMIE HUDSON, SAMUEL MERRICK, LYLE OBIE and STANLEY STOKES,

Claimants-Appellants,

– v. –

ROBERT L. WILKIE, Secretary of Veterans Affairs,

Respondent-Appellee.

On Appeal from the United States Court of Appeals for Veterans Claims in No. 15-1280, en banc

BRIEF OF *AMICUS CURIAE* NATIONAL VETERANS LEGAL SERVICES PROGRAM IN SUPPORT OF APPELLANTS AND IN FAVOR OF REVERSAL

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CERTIFICATE OF INTEREST

1) The full name of every party or amicus represented by me is:

National Veterans Legal Services Program.

2) The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None.

3) All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None.

4) The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

John Niles, National Veterans Legal Services Program.

5) The title and number of any case know to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal. See Fed. Cir. R. 47.4(a)(5) and 47.5(b).

Monk v. Wilkie, No. 19-1094, United States Court of Appeals for the Federal Circuit.

Date: March 16, 2019 /s/ Katherine A. Helm

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STATEMENT OF INTEREST OF AMICUS CURIAE

National Veterans Legal Services Program ("NVLSP") is one of the nation's leading organizations advocating for veterans' rights. Founded in 1981, NVLSP is an independent, nonprofit veterans service organization recognized by the Department of Veterans Affairs and dedicated to ensuring that the government honors its commitment to our veterans. NVLSP prepares, presents, and prosecutes veterans' benefits claims before the VA, pursues veterans' rights legislation, and advocates before this and other courts. NVLSP has secured more than $5.2 billion in VA benefits for veterans and their families. NVLSP attorneys have significant experience serving as counsel for individual veteran-plaintiffs and certified classes of veteran-plaintiffs.

NVLSP has long argued that the U.S. Court of Appeals for Veterans Claims ("Veterans Court" or "CAVC") should adjudicate veterans delay claims, including through class proceedings and precedential decisions, in a manner that alleviates the longstanding system-wide delays and inefficiencies in the VA's claims and appeal processes that affect numerous claimants in a similar manner. The issues in

this appeal lie at the core of NVLSP's experience and expertise. NVLSP has a strong interest in these issues and is well-positioned to address them.[1]

SUMMARY OF ARGUMENT

The Veterans Court's decision relies on erroneous interpretations of both the unreasonable delay standard as applied to Appellant Dolphin (the only Appellant whose delay claim was decided on the merits) and the mootness doctrine as applied to the other Appellants. As a result, and in light of the Veterans Court's denial of class certification that is under review by this Court in Dkt. No. 19-1094, the Appellants and their fellow veterans still awaiting appeal decisions will be left without an effective remedy for what will almost certainly be additional unreasonable delay in their continuing efforts to pursue all of the benefits to which Congress has given them a right.

We are in general agreement with all of the arguments made by Appellants in their principal brief, and submit this brief to provide additional perspective on the following points:

First, the Veterans Court misinterpreted several of the factors adopted from *Telecommunications Research and Action Center v. F.C.C.*, 750 F.2d 70 (D.C. Cir.

[1] All parties to this case have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person contributed money that was intended to fund preparing or submitting this brief.

1984) ("*TRAC*") in a manner that effectively immunizes VA delays arising from activities other than ministerial tasks like the pre-certification review stage addressed in a class context in *Godsey v. Wilkie*, 31 Vet. App. 207 (Vet. App. 2019). On *TRAC* factor one – whether the VA's process is governed by a rule of reason – the Veterans Court concluded that because it earlier held in *Godsey* that an 18-month delay was *per se* unreasonable for a pre-certification review process, that Appellant Dolphin's then-8-month post-certification wait for a decision from the BVA was not too long. That conclusion is a *non sequitur* because it does not follow that if an 18-month delay is *per se* unreasonable for one thing that another delay is reasonable for something else, like Appellant Dolphin's five-year-delay in his BVA appeal. Indeed, the *Godsey* decision specifically stated that its use of an 18-month pre-certification review period did not mean anything for the merits of the delay claims of petitioners excluded from the class. 31 Vet. App. at 225 n.5; *see also Martin v. O'Rourke,* 891 F.3d 1338, 1346 (Fed. Cir. 2018) ("[b]ecause reasonableness depends on the particular agency action that is delayed, a two-year delay may be unreasonable in one case, and it may not be in another").

Second, the court's interpretation of *TRAC* factor four – the effect of expediting delayed action on other agency activities – was also fatally flawed. The court held that factor four undermined a finding of unlawful delay because relief would require zero-sum line-jumping in contravention of the Board's statutory

first-in-first-out obligation. But the court ignored the Federal Circuit's reasoning in *Ebanks v. Shulkin*, 877 F.3d 1037, 1040 (Fed. Cir. 2017), which held the delay issue is "best addressed in the class-action context" rather than by individual mandamus petitions. Before the Veterans Court issued the decision on appeal, it *denied* class certification in this delay case. The Veterans Court cannot have it both ways; it cannot both deny class certification to all similarly situated claimants in line and then use the availability of class relief as a bar to individual mandamus petitions. Moreover, the VA itself employs a *de facto* line-jumping system in which claimants are forced to file individual mandamus actions, which routinely results in the VA solving the problems alleged to moot the action. *Martin*, 891 F.3d at 1351-52 (Moore, J., concurring) ("In most of the cases before us today, when a mandamus petition was filed, the VA actually took action…. It is unfortunate, but the takeaway from all this is quite simple: hiring a lawyer and filing a mandamus petition forces the VA to act."); *Monk v. Shulkin*, 855 F.3d 1312, 1320-21 (Fed. Cir. 2017). Absent the effective availability of class relief, the court should not deny individual veterans relief on the ground of line-jumping.

Third, the Veterans Court concluded pursuant to an overly restrictive legal standard that the Appellants' delay claims were mooted by the Board of Veterans' Appeals issuance of decisions during the pendency of Appellants' Veterans Court mandamus actions but, due to the nature of the VA benefits process, were not

subject to an exception to the mootness doctrine for claims that are capable of repetition, yet evading review. When assessing this exception to mootness, the Veterans Court should have considered the vital health and welfare interest underlying veterans' service-connected disability claims, and the public interest in providing for these former service members. Other courts do so when deciding similar individual delay or deprivation claims for federal benefits, with good reason. This Court should find that the Appellants' claims are not moot, especially given the Veterans Court's reluctance to allow class relief.

ARGUMENT

I. THE VETERANS COURT'S MISINTERPRETATION OF SEVERAL *TRAC* FACTORS MAKES THE DELAY STANDARD LARGELY INSURMOUNTABLE

Having previously (and wrongly) held Appellants' delay claims unredressable through a class action, the Veterans Court then compounded its error by misinterpreting the *TRAC* factors when deciding the individual delay claim of one Appellant, Mr. Dolphin, in a manner that would effectively immunize nearly all mandamus challenges to the BVA appeal process from review.[2] *Martin*, 891

[2] In its ruling on the Appellants' individual delay claims, the Veterans Court found the claims of all but one Appellant moot, and decided the merits of only the delay claim of Mr. Dolphin, who had not received a BVA appeal decision by the court's October 23, 2019 decision. As discussed in Appellants' principal brief, the BVA issued its decision on Mr. Dolphin's appeal on February 4, 2020. We anticipate that the Secretary will argue that Mr. Dolphin's delay claim is therefore also moot (continued…)

F.3d at 1348 (adopting the six-factor *TRAC* test for the Veterans Court's evaluating mandamus petitions based on alleged unreasonable delay under the Fifth Amendment due process clause and 38 U.S.C. § 7261(a)(2)).

Amicus NVLSP concurs wholeheartedly with the arguments in Appellants' principal brief regarding the Veterans Court's erroneous interpretation of the *TRAC* factors in deciding Mr. Dolphin's claims. We submit this amicus brief to make several additional points about the errors in the Veterans Court's interpretation of *TRAC* factors one and four, and the implications if this Court were to allow that decision to stand.

A. *TRAC* Factor One: The Veterans Court Wrongly Used the *Per Se* Unreasonableness of an 18-Month Delay for Pre-Certification Review from its *Godsey* Decision to Benchmark Reasonableness for Mr. Dolphin's Claim

TRAC factor one, considered most important by a number of courts, requires courts to consider that "the time agencies take to make decisions must be governed by a 'rule of reason.'" *Martin*, 891 F.3d at 1345. In *Martin*, this Court noted that in evaluating the reasonableness of agency actions, courts could consider the nature of the challenged actions, including whether the actions were complex or merely ministerial. *Id.* at 1345-46.

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for the same reason the Veterans Court found the claims of the other Appellants moot. We believe Mr. Dolphin's claim is not moot, for the reasons stated in Appellants' principal brief and below.

By the time of the Veterans Court's October 23, 2019 decision, five years had passed since Mr. Dolphin's November 2014 notice of disagreement ("NOD") filing, 19 months had passed since he had filed his March 2018 Substantive Appeal, and there had been an almost 11-month and 17-month delay between his March 2, 2018 Substantive Appeal and the VA's appeal certification to the BVA and docketing, respectively. Appx9-Appx10.

Despite these delays, the Veterans Court concluded that factor one weighed in favor of the Secretary because of the complexity of Mr. Dolphin's case and because many of the activities engaged in by the VA were in furtherance of its statutory duty to assist the veteran in the claims process. Appx12-Appx14.

Having rejected Mr. Dolphin's contention that his entire appeal process – or any intermediate subset of it – was unreasonably long, the Veterans Court went on to conclude that the then-eight-month delay between the February 7, 2019 certification of Mr. Dolphin's BVA appeal and the Veterans Court's opinion last October was not excessive because it was shorter than the 18-month period that that court held was statutorily unreasonable in *Godsey* for pre-certification review. Appx13-Appx14, citing *Godsey*, 31 Vet. App. at 228. This was legal error.

Godsey did not cabin or otherwise place any minimum time-limited constraint on the application of *TRAC* factor one to all delay claims. Indeed, as noted, the court expressly stated that its holding – that an 18-month delay

involving complete inaction awaiting the purely ministerial process of conducting pre-certification reviews of Substantive Appeals to the BVA was *per se* unreasonable under the *TRAC* factors – said nothing about the merits of other mandamus petitioners' delay claims. *Id.* at 225 n.5 ("In certifying the modified class, the Court is not expressing an opinion as to whether those excluded from the class have been subject to unconstitutional or unreasonable delay in the appeal certification process.").

The *Godsey* court's conclusion, that 18 months was too long to complete pre-certification review, was conservative in the extreme. Indeed in *Martin*, this Court found inexplicable why the entire VA appeal certification process – of which the pre-certification review in *Godsey* was just a ministerial subset – took an average of 773 days, which is equivalent to 25 months. 891 F.3d at 1341, 1346 n.9. Certainly, the *Godsey* court did not purport to opine that all other VA activities, ministerial or substantive, should be judged under 38 U.S.C. § 7261(a)(2) and the Due Process Clause against the *Godsey* 18-month yardstick for pre-certification review, and in fact expressly disclaimed such an approach. *Godsey*, at 225 n.5. Yet the court's comparison below on Mr. Dolphin's claim suggests use of such a rule of thumb. Such a rule threatens to trump all of the important veteran-focused interests incorporated into the *TRAC* standard, which this Court adopted specifically because the Veterans Court's prior standard did not

adequately consider those interests. *Martin*, 891 F.3d at 1345 (in rejecting the Veterans Court's use of the standard for delay claims in *Costanza v. West,* 12 Vet. App. 133 (Vet. App. 1999) (per curiam), this Court stated "Appellants assure us, the *TRAC* standard provides a more balanced approach [for delay claims] because it requires consideration of the veterans' interests and does not require a showing of intent. We agree.").

The Veterans Court's disregard of the five-year delay for Mr. Dolphin's appeal and its holding that an 8-month wait for a BVA decision was not unreasonable based on the *Godsey* pre-certification review benchmark were deeply flawed as a matter of jurisprudence and policy. *Cf. Barrett v. Roberts*, 551 F.2d 662, 670 n.8 (5th Cir. 1977) (precedent finding unreasonable delays of 2-6 months for provision of AFDC assistance was not instructive to present question of 8-to-20-day delay under AFDC benefits provision at issue). This Court should emphatically reject the Veterans Court's backwards reliance on *Godsey* as a benchmark for any amount of delay being *per se reasonable*.

B. *TRAC* Factor Four: The Veterans Court Wrongly Held That Line-Jumping Undermines an Individual Delay Claim

TRAC factor four requires the court to consider the effect of expediting delayed action on the agency's other activities of higher or competing priorities. *Martin*, 891 F.3d at 1344. Here, the Veterans Court held that this factor counted against Mr. Dolphin because mandamus relief would result in the line-jumping

problem, *i.e.* his case being processed before others in line in violation of the VA's duty to handle appeals in docket number order. Appx15-Appx16.

The court's unqualified interpretation of a line-jumping prohibition under *TRAC* factor four constitutes error, because it could effectively forestall the application of the *TRAC* analysis to all individual delay claims. Despite this Court's encouragement in its 2017 opinion in this case and in *Ebanks* to the Veterans Court's use of class relief for systematic delays, the court below has proven reluctant to do so, except for its holding in *Godsey* adopting Appellants' recommendation of an 18-month trigger for the purely ministerial, pre-certification review period. *Monk,* 855 F.3d at 1321 (Veterans Court had authority to certify class actions for veterans' delay claims); *Ebanks*, 877 F.3d at 1040 (the issue of unreasonable delay in the VA's first-come-first-served queue "seems best addressed in the class-action context, where the court could consider class-wide relief."); *Monk v. Wilkie*, 30 Vet. App. 167 (Vet. App. 2018) (by a 4-4 vote, denying class certification).

In light of the Veterans Court's refusal to address system-wide delays through class actions – to hurry up the entire claimant line – in these very proceedings, it should not be able to deny relief to individual mandamus petitioners on the ground that *TRAC* factor four forbids line-jumping. Indeed, by refusing by grant both class and individual relief on this ground, the court only perpetuates the

de facto line-jumping system that arises from the VA's forcing of claimants to file mandamus actions before the VA systematically expedites their cases to moot mandamus relief by the Veterans Court. *Monk*, 855 F.3d at 1320-21, citing *Young v. Shinseki*, 25 Vet. App. 201, 215 (Vet. App. 2012) (Lance, J. and Hagel, J. dissenting) (noting the "reality" that when the Veterans Court orders the Secretary to respond to a veteran's delay petition "the great majority of the time the Secretary responds by correcting the problem within the short time allotted for a response, and the petition is dismissed as moot because the relief sought has been obtained.").

II. THE VETERANS COURT MISINTERPRETED THE CAPABLE-OF-REPETITION EXCEPTION TO THE MOOTNESS DOCTRINE TO DISMISS APPELLANTS' CLAIMS

The Veterans Court found that the delay claims of all Appellants but Mr. Dolphin were moot because the BVA had issued its decisions on their appeals during the pendency of their mandamus actions, and that no exception to mootness doctrine applied.[3] Appx6-Appx9. We concur with the mootness arguments in Appellants' principal brief. But we also believe that case law from other federal benefits cases supports the conclusion that the Veterans Court gave inadequate

[3] As noted above, because the BVA issued its decision on Mr. Dolphin's appeal on February 4, 2020, it is likely that the Secretary will argue that his claim is also moot and should be dismissed.

consideration of the public and claimants' interests at issue, causing it to misinterpret the "capable-of-repetition yet evading review" exception to mootness.

The doctrine of mootness does not prevent consideration of a claim where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again. *Kingdomware Techs., Inc. v. U.S.*, 136 S. Ct. 1969, 1976 (2016).

The Veterans Court determined that the second prong did not apply, dismissing Appellants' claims of future delay as "speculative." Appx8. The court came to this conclusion despite the undisputed evidence cited in this and other court opinions describing prior delay in the Appellants' cases and system-wide delays for all claimants.

Other courts that have considered the application of the capable-of-repetition prong in federal benefits cases have not required the plaintiff to clear so high a bar. For example, in *Banks v. Block*, two food stamp recipients sued federal and state officials alleging that the cessation of their benefits violated due process. 700 F.2d 292, 293-94 (6th Cir. 1983). During the district court litigation, in parallel to it, both plaintiffs were awarded the retroactive and continuing benefits they sought after an administrative fair hearing. *Id*. On appeal, the Sixth Circuit concluded that the plaintiffs' individual claims were not moot, and that the "'capable of

repetition, yet evading review'" doctrine applied because "the issue presented could arise again between the named plaintiffs and defendants when future certification periods expire and benefits are discontinued." *Id.* at 294. The court thus found a sufficient likelihood for repetition from the existence of past cutoffs and the very nature of the benefit approval process, and made no suggestion that the plaintiffs were required to demonstrate that the very specific circumstances that resulted in their benefits cessation (or anything similar) would occur in the future. *Id*.

In *Granato v. Bane*, 74 F.3d 406 (2d Cir. 1996), a plaintiff sued state and county agencies to challenge their refusal to resume her Medicaid home health services after a hospital stay. The district court granted summary judgment for the defendants. *Id.* at 410. On appeal, the defendants argued that plaintiff's claims were moot, because during the pendency of the district court case, a state administrative law judge ordered plaintiffs' services restored. *Id.* at 411. The Second Circuit rejected the defendants' argument, finding that plaintiff's claims were capable of repetition, yet evading review. *Id.* On the issue of evading review, the Court found it significant that the state granted her an expedited administrative hearing soon after filing suit, and that in the cases of two similarly situated co-appellants, the state had been willing to reinstate their services as soon as they filed their own suits. *Id.* On the issue of repetition, the Court found that

based on her chronic health problems and the "possibility" of future hospitalizations, there was a "reasonable expectation" she could experience the same benefit denial again. *Id.* The Court did not require a high evidentiary showing of probable future hospitalization. *See also Barrett*, 551 F.2d at 665 (Fifth Circuit held that resumption of plaintiff's AFDC payments did not moot plaintiff's individual claims where "capable of repetition" exception applied; court did not require any specific showing of evidence of likely repetition); *Basel v. Knebel*, 551 F.2d 395, 397 n.1 (2d Cir. 1977) (defendant agency's reversal of plaintiff's food stamp ineligibility determination did not moot her individual claim under "capable of repetition" doctrine where the challenged regulations remained available for the agency's reliance in plaintiff's future recertification requests; plaintiff's pending class claims provided independent reason for finding no mootness); *Amin v. Colvin*, 301 F. Supp. 3d 392, 399-400 (E.D.N.Y. 2018) (holding that agency payment decisions during litigation in favor of mandamus plaintiff SSI beneficiaries who sued for statutory and due process delay violations did not moot claims under "capable of repetition" exception given multiple alleged violations before and during litigation and existence of future eligibility reviews).

This Court's decision in *Ebanks* is not inconsistent with these cases. There, the Court held that the "capable of repetition" exception was inappropriate for the appellant's individual mandamus claim after his Board appeal was resolved,

concluding that the delay issue was "best addressed in the class-action context" where any line-jumping problem could be avoided. *Ebanks*, 877 F.3d at 1039-40. But as noted above in the discussion of the *TRAC* factors, the Veteran's Court has declined this Court's invitation to certify classes for other than ministerial pre-certification review in *Godsey*, reinforcing the VA's *de facto* line-jumping system for claimants who bring mandamus claims.

Given that the Veterans Court's extreme reluctance to meaningfully act on this Court's guidance for class relief for systematic delay, in *Ebanks* and its 2017 decision in this case, we believe that if the Court affirms the denial of Appellants' class certification claims in 19-1094, it should overturn the lower court's *Catch-22* reading of the "capable of repetition" doctrine.

CONCLUSION

In addition to the reasons stated in Appellants' principal brief, the Court should reverse because: (1) the decision below misinterprets *TRAC* factors one and four in a manner that would prevent effective recourse to relief under the applicable *TRAC* standard, and (2) in the absence of class relief outside of the overly-conservative and herein inapplicable *Godsey* context, the lower court's misinterpretation of the "capable of repetition, yet evading review" precludes meaningful review of veterans' delay claims.

Dated: March 16, 2020

Respectfully submitted,

/s/ Katherine A. Helm

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2020, Appellants' foregoing Opening Brief was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

Dated: March 16, 2020

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Federal Circuit Rule 32(a). This brief contains 3,280 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word version 15.0.5197.1000 in 14-point Times New Roman.

Dated: March 16, 2020

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