UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS
625 Indiana Avenue N.W., Suite 900
Washington, D.C. 20004

CONLEY F. MONK, JR., on behalf of himself and all others similarly situated, Petitioner, v. ROBERT A. MCDONALD, SECRETARY OF VETERANS AFFAIRS, in his official capacity, Respondent.	:	PETITION FOR EXTRAORDINARY EQUITABLE AND COLLECTIVE RELIEF

INTRODUCTION

Conley F. Monk, Jr. is a Marine Corps combat veteran who suffers from Post-Traumatic Stress Disorder (PTSD) and other significant disabilities. In this petition, he requests the Court direct the Secretary of Veterans Affairs to promptly adjudicate his long-pending disability benefits application, as well as those of veterans who face significant financial or medical hardship and whose applications have similarly languished before the Secretary for more than twelve months since the timely filing of a Notice of Disagreement (NOD), the first step in the disability benefits appeals process.

Mr. Monk served in Vietnam, but was not diagnosed with combat-related PTSD until late 2011. Shortly thereafter, he applied to the U.S. Department of Veterans Affairs (VA) for service-connected disability benefits. The Hartford VA Regional Office (VARO) denied his initial application. Mr. Monk timely filed an NOD in July 2013 and elected local reconsideration via a Decision Review Officer (DRO) hearing. More than

twenty months since he filed an NOD to start his appeal, Mr. Monk has not received a decision. This delay is a constructive denial of benefits to which he is entitled and which he needs to manage his PTSD, medical conditions, and vulnerability to homelessness.

Delays are pervasive throughout the VA system, but the worst delays concern the processing of initial appeals. The Secretary has failed to render a timely decision on the pending disability benefits applications of countless other veterans who, like Mr. Monk, face significant financial or medical hardship and have waited twelve months or more for a decision since timely filing an NOD to initiate the appeals process.

This Court has previously declined to adopt a class action procedure under its organic statute or to aggregate claims through the doctrine of associational standing. In a series of dissenting and concurring opinions, however, its judges have recognized that the Court may, in an appropriate case, exercise its inherent equitable powers or its authority under the All Writs Act, 28 U.S.C. § 1651(a), for aggregate resolution. The Secretary's pervasive and unlawful delay in adjudicating post-NOD claims by thousands of veterans like Mr. Monk warrants judicial intervention on an aggregate basis.

In this petition, Mr. Monk does not seek review of his underlying claim, nor of the individual merits of the thousands of other applications still pending twelve months after an NOD was filed. Mr. Monk requests only that this Court compel the Secretary promptly to *decide* his claim and that of thousands of similarly situated veterans who confront significant financial or medical hardship while awaiting a VA decision.

A. Statement of Relief Sought

1. Mr. Monk seeks an order of the Court requiring Respondent to comply with

the Constitution, laws, and regulations of the United States and to process his application expeditiously. Mr. Monk further requests that the Court require the Secretary to grant him benefits or certify his appeal to the BVA within 30 days, on pain of either contempt or summary grant of the benefit sought by Mr. Monk. Finally, Mr. Monk requests an award of costs, attorneys' fees, and any further relief this Court deems just and appropriate.

2. On behalf of all other veterans in medical or financial need who have not received a decision within twelve months of timely submitting an NOD, Mr. Monk seeks an order of the Court requiring Respondent to process their applications in an equally expeditious manner. Mr. Monk requests that the Court require Respondent to grant benefits to those similarly situated veterans or certify their appeals to the BVA within 30 days, on pain of either contempt or summary grant of the benefit sought, together with an award of costs, attorneys' fees, and any other and further just and appropriate relief.

II. Statement of Facts

A. The Parties

3. Petitioner Conley F. Monk, Jr. served on active duty in the United States Marine Corps from 1968 to 1970, when he was discharged under other-than-honorable conditions. Mr. Monk suffers PTSD, major depressive disorder, diabetes mellitus, hypertension, hepatitis, and other disabilities as a result of his combat duty in Vietnam.

4. Respondent Robert A. McDonald is the Secretary of the VA. Through the Veterans Benefits Administration (VBA), the VA is responsible for providing disability compensation to veterans disabled due to their military service.

B. The Benefit Sought

5. The Secretary provides disability compensation to veterans for a current physical or mental disability linked to an injury, disease or event in military service.

6. Veterans whose applications for disability compensation are denied by the local office have a right to appeal. A veteran initiates the review process by filing an NOD and electing either a DRO hearing or an administrative appeal to the BVA. The VARO must then issue a Statement of the Case (SOC) explaining its denial.

7. If the veteran elects a DRO hearing and the VA adheres to its denial, the VARO will issue a Supplemental Statement of the Case (SSOC) and the veteran may pursue an appeal to the BVA after the VARO has certified the record. In the alternative, the veteran may forego a DRO hearing and appeal directly to the BVA.

C. Allegations as to Representative Conley F. Monk, Jr.

8. Mr. Monk seeks disability compensation for the PTSD, major depressive disorder, diabetes mellitus, and other disabilities that he incurred while serving in the Marine Corps during the Vietnam War.

9. Mr. Monk enlisted in the Marine Corps in 1968 and arrived in Vietnam on or about July 20, 1969. There, he drove in equipment and troop convoys, experienced frequent ambushes, and witnessed the deaths of unit members.

10. Despite these horrors, Mr. Monk earned several decorations and was promoted to Lance Corporal on October 1, 1969. Mr. Monk received a 4.6 proficiency rating for his performance and a 4.5 rating for conduct, showing that he performed at an "excellent" level. His service record reflects no disciplinary problems in Vietnam.

11. After his transfer to Okinawa in November 1969, Mr. Monk's acute PTSD manifested in substance abuse and behavioral problems. In September 1970, Mr. Monk accepted an other-than-honorable discharge (OTH) in lieu of court-martial for periods of Absence Without Official Leave (AWOL), attempted larceny, and striking a superior officer. None of these actions constituted willful and persistent misconduct.

12. Mr. Monk's transition to civilian life was not easy. Financially, it was difficult to support his family due to his discharge status and combat wounds, especially without the assistance of VA education, employment, medical, or disability benefits. He was also devastated by deaths of close family members. He struggled with substance abuse issues, deepening anxiety, and recurrent flashbacks to combat experience.

13. Mr. Monk eventually sought assistance from the Veterans Legal Services Clinic at Yale Law School, which arranged for an independent psychiatric assessment in late 2011 by Dr. Bandy Lee, Outpatient Psychiatrist at Connecticut Mental Health Center and Assistant Clinic Professor at Yale School of Medicine.

14. Dr. Lee concluded that Mr. Monk has suffered PTSD with extreme symptoms that "have their clear onset with the Vietnam War experience," leading Mr. Monk to engage in aggressive behavior that was "grossly out of character" for him. Dr. Lee also diagnosed Mr. Monk with major depressive disorder.

15. Mr. Monk has also been diagnosed with diabetes mellitus, hepatitis, and hypertension. Diabetes mellitus is a disease associated with exposure to herbicide agents such as Agent Orange. Per 38 C.F.R. § 3.309, such diseases are presumptively service-connected for those like Mr. Monk who served in Vietnam.

16. Mr. Monk has also suffered a number of strokes, resulting in legal blindness. He experiences short-term memory loss and chronic pain.

17. Mr. Monk's medical conditions render him reliant on Social Security to pay his living expenses, along with Medicaid and Medicare to provide health care.

18. Further exacerbating Mr. Monk's financial hardship was a fire that severely damaged his home in January 2014, leaving it uninhabitable and Mr. Monk emotionally and physically displaced. He has not received an insurance payment or been able to return to the house. Mr. Monk is dependent on a Section 8 housing voucher for temporary accommodations. There is no guarantee that his voucher will be renewed next year.

19. In February 2012, Mr. Monk applied for VA benefits for service-connected PTSD. An OTH does not bar disability compensation if the veteran was "insane" at the time of committing the misconduct. 38 U.S.C. § 5303; 38 C.F.R. § 3.12(b).

20. Six months later, by letter dated August 22, 2012, the VARO denied Mr. Monk's claim. The VARO did not immediately send this letter to Mr. Monk or his counsel. Mr. Monk and his counsel received this denial only in spring 2013.

21. In December 2012, not having received the VARO's August 2012 decision, Mr. Monk submitted supplemental materials, including Dr. Lee's PTSD and major depressive disorder diagnosis. His brief enumerated his service-connected disabilities, explained his qualification for the "insanity exception," and requested a VA examination.

22. By letter dated February 14, 2013, the VARO permitted Mr. Monk to submit supplemental information about his discharge and military records within 60 days and request a personal hearing. In March 2013, Mr. Monk requested a personal hearing.

23. In spring 2013, Mr. Monk received a denial letter from the VARO, dated August 22, 2012. The stated basis for denial of his application was that Mr. Monk had been "separated from active duty under conditions which preclude entitlement" to VA benefits. The letter was addressed to Mr. Monk's previous residence.

24. In July 2013, despite the pendency of his December 2012 supplemental filing, Mr. Monk timely filed an NOD regarding the August 2012 decision, so as to preserve the proper effective date of his claim, and requested a DRO hearing.

25. On February 18, 2014, the Hartford VARO held a DRO hearing. Mr. Monk appeared with undersigned counsel and presented additional testimony and evidence to DRO David Odlum. Mr. Monk's sister testified, as did Dr. Lee.

26. Mr. Monk's counsel also notified DRO Odlum that Mr. Monk had been recently displaced due to a house fire and that the VA Homelessness Outreach Coordinator had been alerted. Counsel requested an expedited decision.

27. In February 2015, counsel for Mr. Monk contacted the Hartford VARO and his Congressperson, Rosa DeLauro, to inquire about the status of his claim.

28. In March 2015, the VA notified Rep. DeLauro that it cannot process Mr. Monk's appeal because some of his records are with the Board for Correction of Naval Records (BCNR). According to the VA, it cannot move forward without those records.

29. Mr. Monk did apply separately to the BCNR for a discharge upgrade and sought judicial review of the BCNR's initial denial. In November 2014, the U.S. District Court remanded his case to the BCNR for reconsideration in light of Secretary of Defense Hagel's September 2014 instruction that record correction boards give "liberal

consideration" to post-service PTSD diagnoses, especially for Vietnam veterans who had received an OTH. *See Monk v. Mabus*, No. 3:14-cv-260-WWE (D.Conn.), ECF No. 48.

30. The pendency of Mr. Monk's separate application for a record correction, and his successful effort to seek judicial review of the BCNR's initial adverse determination, in no way justifies the Hartford VARO's failure to adjudicate his long-pending request for disability benefits. The Secretary has neither offered a reason why he cannot obtain a copy of the allegedly relevant records, nor offered a reason why a decision cannot be made on the existing administrative record.

31. It has been thirty-six months since Mr. Monk filed an application, more than twenty months since he filed his NOD, and thirteen months since the Hartford VARO held a DRO hearing. Neither Mr. Monk nor his counsel have received a decision.

D. Allegations as to the Aggregate Group Generally

32. At present, approximately 454,133 veterans await decisions on their disability compensation claims. Approximately 288,603 veterans have pending appeals.

33. According to the VA, on average, a veteran who files an NOD will wait nearly 10 months (295 days) merely to receive the SOC necessary to file an appeal.

34. A veteran who elects an administrative appeal to the BVA waits, on average, 24 months (725 days) for the VA to certify and transfer the appeal. The VA has not disclosed average wait-times for decisions for veterans who elect DRO hearings. It then takes on average nearly 8 months (235 days) for the BVA to decide the case.

35. In other words, it takes multiple years, on average, for the VA to decide an initial appeal, whether the veteran elects a DRO or a direct BVA appeal.

36. Many veterans face acute medical conditions similar to those of Mr. Monk. At present, approximately 45% of the veteran population is over the age of 65.

37. Delay in adjudicating disability benefits applications is especially detrimental to those who suffer the "invisible wound" of PTSD. Approximately 30% of Vietnam veterans, for instance, have suffered PTSD at some point in their lives.

38. Many veterans also face acute financial conditions similar to those of Mr. Monk. In a 2013 Urban Institute study, nearly one-third of 1.3 million uninsured nonelderly veterans had incomes below 100% of the federal poverty level.

39. In 2011, approximately 900,000 veteran households relied on the federal Supplemental Nutrition Assistance Program (SNAP). In 2012, the National Center for Veterans Analysis and Statistics found that 41% of veterans in SNAP were also disabled.

40. The extensive delays experienced by a veteran at each stage of the appeals process after submitting an NOD severely prejudice veterans who are elderly, indigent, and suffer serious medical conditions. For these veterans, income from VA disability benefits, income earned by their service, is crucial for their health and their very survival.

41. Congress has provided that the BVA may advance a case on its docket where a veteran faces significant financial or medical hardship. 38 U.S.C. §§ 7107(a)(2)(B), (C). This statute does not apply to the VARO, which makes initial decisions, holds DRO hearings, and certifies records for appeal.

The Proposed Aggregate Group Definition

42. This petition seeks extraordinary injunctive relief entered pursuant to the Court's equitable powers or under the All Writs Act, 28 U.S.C. § 1651.

43. The proposed aggregate group includes all veterans who applied for VA disability benefits and (a) have timely filed an NOD upon denial of their initial application and have not received a decision within twelve (12) months, whether the veteran elected a DRO hearing or proceeded directly to a BVA appeal; and (b) can demonstrate medical or financial hardship as defined by 38 U.S.C. §§ 7107(a)(2)(B), (C).

In this Case, the Court Should Adopt an Aggregate Resolution Procedure That Incorporates Principles of Rule 23 of the Federal Rules of Civil Procedure

44. The Court has previously declined to promulgate a rule for class actions based on statutory language and policy considerations. *Lefkowitz v. Derwinski*, 1 Vet. App. 439, 440 (1991) (stating that a general class action procedure would be unmanageable and unnecessary, given the binding effects of the Court's published opinions); *see also Harrison v. Derwinski*, 1 Vet. App. 438 (1991) (same); *McKinney v. Shinseki*, 2013 WL 2902799 (U.S. App. Vet. Cl. June 14, 2013).

45. Chief Judge Kasold has elaborated the policy rationale that, to date, has led the Court to decline fashioning a general rule for collective actions. *Hearing Before the House Subcommittee on Disability Assistance and Memorial Affairs*, 111 Cong. 1st sess. (2009) (statement of Hon. Bruce E. Kasold, Judge, U.S. Court of Appeals for Veterans Claims) ("the actual basis for denying the class action to proceed in that case was that it would be unmanageable and unnecessary"); *Hearing Before the House Subcommittee on Disability Assistance and Memorial Affairs*, 112 Cong. 1st sess. (2011) (testimony of Hon. Bruce E. Kasold, Chief Judge, U.S. Court of Appeals for Veterans Claims) ("2011 Hearing") (precedential effect of Court's decisions obviates need for class actions).

46. The Court has also declined to address claims on an aggregate basis by applying the doctrine of associational standing. *American Legion v. Nicholson*, 21 Vet. App. 1, 8 (2007) (holding veterans' organization lacks associational standing).

47. Yet relief obtained by Mr. Monk individually would not benefit similarly situated veterans unless each one filed a petition for extraordinary relief in this Court. Given how many veterans in medical or financial need await decisions more than twelve months after timely filing an NOD, and the dearth of legal services for indigent veterans, the potentially unmanageable volume of cases necessitates an aggregate procedure here.

48. Exercising the Court's equitable powers or its authority under the All Writs Act to fashion an aggregate resolution procedure in this case would be a less burdensome way to address the systemic and recurring problem of post-NOD delays.

49. Federal courts have discretion to adopt "appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage." *Harris v. Nelson*, 394 U.S. 286, 299 (1969).

50. For instance, Rule 23 of the Federal Rules of Civil Procedure, the standard for class actions in civil suits in the U.S. District Courts, has served as a basis for collective action procedures in cases where Rule 23 does not, by its terms, apply. *See United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125-7 (2d Cir. 1974) (holding that Rule 23 does not apply in *habeas corpus* proceedings, but fashioning a rule for representative habeas actions that incorporates Rule 23 principles).

51. This Court has the discretion, under the All Writs Act, to exercise its power to entertain class actions "in appropriate situations." *Lefkowitz*, 1 Vet. App. at 440

(Kramer, J., concurring); *see also American Legion*, 21 Vet. App. at 9 (Kasold, J., dissenting) (Court has "authority under the All Writs Act to exercise [its] judicial authority in aid of [its] appellate jurisdiction"); *id.*, 21 Vet. App. at 12 (Hagel, J., dissenting) (Court should have exercised its "substantial latitude to evaluate the third prong of the test for whether the writ itself should be granted, i.e., the Court must be convinced, given the circumstances, that issuance of the writ is warranted"); 2011 Hearing (a veteran "would have to come up with an All Writs Act petition based on cases being delayed improperly, and then [the Court] might be able to grant jurisdiction").

52. This Court may also exercise its equitable powers to adopt an aggregate resolution procedure. This Court applies "the principles of Article III of the Constitution," and it is "emphatically a court with equitable power." *Ferguson v. Shinseki*, 2014 WL 463690, No. 13-1149, 3-4 (Feb. 6, 2014) (Greenberg, J., concurring); *see also Pacheco v. Gibson*, 27 Vet. App. 21, 43 (2014) (Greenberg, J., concurring in part, dissenting in part) (equity is "informed by clear congressional intent, and the judicial tradition of executing that intent when reviewing veterans benefits").

53. "Equitable remedies are distinguished for their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use." *Gazaille v. McDonald*, 27 Vet. App. 205, 214 (U.S. App. Vet. Cl. 2014) (Greenberg, J., concurring) (internal quotation omitted).

54. Moreover, this Court is explicitly authorized to make its own rules of practice and procedure. 38 U.S.C. § 7264(a).

55. For practical and policy reasons, it is necessary here for the Court to

"compel correction of a systemic error" unaddressed by the VA. *See* Lawrence B. Hagel and Michael P. Horan, *Five Years Under the Veterans' Judicial Review Act: The VA Is Brought Kicking and Screaming Into the World of Meaningful Due Process*, 46 ME. L. REV. 43, 65 (1994) (recognizing value of class actions in addressing systemic VA errors).

The Proposed Aggregate Group Would Satisfy the Requirements of Rule 23

54. In civil litigation in U.S. District Courts, a party seeking class certification must demonstrate that: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

56. If it were applicable, Rule 23(a)(1) would be satisfied in this case because the proposed aggregate group is reasonably expected to include thousands of veterans. *See Fiscal Year 2013 Annual Report of the Board of Veterans' Appeals*.

57. While a more precise estimate cannot be made at this time, one is not required for satisfying Rule 23(a)(1). *See Hirschfeld v. Stone*, 193 F.R.D. 175, 182 (S.D.N.Y. 2000); *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (holding numerosity presumed if over forty persons). Moreover, a class need not be fixed. Class "fluidity," in which members regularly enter and exit, confirms that "joinder [of all members] would be impracticable." *Hirschfeld*, 193 F.R.D. at 182.

58. Rule 23(a)(2) is satisfied because there are questions of law and fact common to the proposed aggregate group, including but not limited to:

a. Whether the Secretary has violated the group members' due process rights through the VARO's extensive delay in failing to render decisions on disability benefits claims within twelve months of timely NOD submission, whether the veteran elected a DRO hearing or appealed to the BVA; and

b. Whether the VARO's delay here amounts to an arbitrary refusal to act.

59. Moreover, the relief sought, namely the *expeditious adjudication* of applications, without regard to the individual merits of each claim, is common to the proposed aggregate group. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) ("What matters…[is] the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.") (internal quotation omitted).

60. The claim of Mr. Monk is typical of the claims of the proposed aggregate group members. *See* Fed.R.Civ.P. 23(a)(3). Plaintiffs seeking relief from similar administrative delays have been found to satisfy class typicality. *See Robidoux v. Celani*, 987 F.2d 931, 937 (2d Cir. 1993) ("the typicality requirement plainly was met with respect to persons suffering delays with respect to their applications for benefits").

61. The Petitioner and his counsel would fairly and adequately protect the interests of the proposed aggregate group in accordance with Rule 23(a)(4). The named plaintiff, Mr. Monk, has no interest antagonistic to the remainder of the class.

62. Undersigned counsel is qualified and experienced in handling veterans' benefits cases before this Court. *See*, *e.g.*, *Cardona v. Shinseki*, 2012 WL 3264497, No. 11-3083 (Vet. App. Aug. 13, 2012). These include petitions for extraordinary relief in the nature of mandamus. *See, e.g., B.G. v. McDonald*, 2014 WL 4404484, No. 14-2591

(Vet. App. Aug. 20, 2014); *B.I. v. McDonald*, No. 15-1067 (Vet. App. Mar. 19, 2015).

63. Undersigned counsel are also qualified and experienced in supervising law student interns in class action litigation. *See Monk v. Mabus*, No. 3:14-cv-260-WWE (D. Conn.) (clinic as lead counsel in proposed nationwide class action of Vietnam veterans with PTSD); *Shepherd v. McHugh*, No. 3:11-cv-641-AWT (D.Conn.) (same); *Brizuela v. Feliciano* No. 3:12-cv-226-JBA (D.Conn.), ECF No. 27 (clinic as lead counsel in proposed habeas "representative action" settled before certification); *Reid v. Donelan*, 297 F.R.D. 185, 194 (D.Mass. 2014) (certifying class of immigration detainees, with veteran as class representative, and appointing undersigned counsel and clinic as class counsel).

64. A Rule 23 class must also satisfy the requirements for one of the three types of class actions under Rule 23(b). Because Mr. Monk seeks only injunctive relief – namely, an order to promptly adjudicate pending claims – this request for aggregate resolution most approximates a class action under Rule 23(b)(2).

65. Respondent, by violating Mr. Monk's due process rights in the adjudication of his claim, and by arbitrarily refusing to act, has acted or refused to act on grounds that apply generally to the aggregate group. Therefore, pursuant to Rule 23(b)(2), final injunctive and declaratory relief is appropriate respecting the aggregate group as a whole.

66. Finally, a court is not bound by a complaint's proposed class, and may instead certify a class it finds to be more appropriate. *See* 7A Charles Alan Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 1790, at 270-271 (3d ed. 2005).

67. Trial courts often resolve proposed class definition disputes after pre-certification discovery. *See, e.g., Burton v. District of Columbia*, 277 F.R.D. 224, 231 (D.D.C. 2011).

68. Like other federal appellate courts, this Court may enter an order pursuant to the All Writs Act or its equitable powers appointing a special master to supervise pre-certification discovery. *See* Fed. R. App. P. 48 ("A court of appeals may appoint a special master to hold hearings, if necessary, and to recommend factual findings and disposition in matters ancillary to proceedings in the court"); *see also* S. Shapiro, K. Geller, T. Bishop, E. Hartnett & D. Himmelfarb, Supreme Court Practice 652 (10th ed 2013) ("Although the [U.S. Supreme] Court customarily appoints a Special Master to take evidence on factual issues in an original case, the Court's rules make no provision respecting the proceedings before a Master, nor even mention a Master").

III. Reasons Why the Petition Should Be Granted as to Mr. Monk and the Proposed Aggregate Group

A. The VARO's delay violates Mr. Monk's due process rights.

69. This Court should order the Hartford VARO to adjudicate Mr. Monk's application immediately because the VA's delay in rendering a decision violates his right to procedural due process.

70. Applicants for VA disability compensation are entitled to due process because the benefits are a constitutionally protected property interest. *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009). Service-connected disability benefits are mandated by statute for all qualified veterans. 38 U.S.C. § 1110.

71. If Mr. Monk's application is approved, he will have an "absolute right" to service-connected disability benefits. *Cushman*, 576 F.3d. at 1297.

72. Delay violates procedural due process when it deprives the applicant of a meaningful right to be heard. "[T]he possible length of wrongful deprivation … is an important factor in assessing the impact of official action on the private interests." *Mathews v. Eldridge,* 424 U.S. 319, 341 (1976). In other words, "implicit in the conferral of an entitlement is a further entitlement, to receive the entitlement within a reasonable time." *Schroeder v. Chicago,* 927 F.2d 957, 960 (7th Cir. 1991) (Posner, J.).

73. Lengthy administrative delays in processing benefits applications violate due process. *See Kelly v. Railroad Retirement Bd.,* 625 F.2d 486, 490 (3d Cir. 1980) (forty-five month delay in issuing disability application decision unconstitutional); *Kraebel v. New York City Dep't of Hous. Pres. & Dev.*, 959 F.2d 395, 405 (2d Cir. 1992) (more than one year delay in processing landlord subsidies may violate due process).

74. Here, the VA's delay in addressing Mr. Monk's application more than twenty months after he submitted an NOD, and more than thirteen months after his DRO hearing, is sufficiently lengthy to violate due process.

75. The VARO has all but guaranteed that his entire appeals process will take at least three years. *See Fiscal Year 2013 Annual Report of the Board of Veterans' Appeals* (average wait from receipt of NOD to certified appeal is approximately thirty-three months, not including an average eight month wait for a decision from the BVA).

76. Mr. Monk has already waited three years from the date of his original application for disability compensation to receive adjudication from the *initial* step in the

process of administrative and judicial review, nearly two years since he submitted his NOD. This is an unconstitutional delay.

B. The VARO's delay is an arbitrary refusal to act in Mr. Monk's case.

77. The VARO's continued failure to decide Mr. Monk's case nearly two years since he submitted his NOD is "an arbitrary refusal to act."

78. Efforts to resolve a delay, such as through phone calls to the VARO, are relevant in deciding whether "the petitioner lacks, or has exhausted, adequate alternative remedies to obtain the relief he seeks." *Costanza v. West*, 12 Vet. App. 133, 134 (1999). Although Mr. Monk's counsel and his Congresswoman contacted the VARO, Mr. Monk has yet to receive a decision.

79. The Hartford VARO has demonstrated that it can process claims in significantly less time than it has taken since Mr. Monk's DRO hearing. The original, erroneous denial of Mr. Monk's claim was allegedly rejected within six months of his application. The VA's delay since he filed his NOD is a deliberate choice so as to frustrate his ability to pursue his appeal to the BVA and, if necessary, to this Court.

80. The Hartford VARO is holding Mr. Monk's application hostage by refusing to issue a DRO hearing decision and SSOC. Regardless of his application's outcome, Mr. Monk cannot take further action at this time. He can neither receive benefits to alleviate his medical and financial need, nor pursue an appeal of a formal denial to the BVA.

81. Only this Court is capable of remedying the agency's constitutional violations by exercising its equitable powers or ordering a writ of mandamus requiring the VA promptly to evaluate his claim and, if necessary, forward it on to the BVA.

C. Collectively, VARO delay violates the due process rights of members of the proposed aggregate group.

82. By creating lengthy administrative delays in processing claims, the VA violates the due process rights of every individual veteran who has submitted an application for the constitutionally protected property interest of disability benefits.

83. Veterans who face significant financial or medical hardship and have waited at least twelve months to receive a decision after submitting a timely NOD, whether they have elected a DRO hearing or direct appeal to the BVA, have experienced a delay sufficiently lengthy to violate due process.

D. Collectively, VARO delay constitutes an arbitrary refusal to act on the applications of the proposed aggregate group.

84. By failing to issue decisions on disability benefits applications within twelve months of receiving NODs from veterans facing severe financial or medical hardship, the VA is trapping veterans in application limbo. The VA's protracted failure to render decisions after an NOD constitutes an arbitrary refusal to act.

85. Thousands of veterans, like Mr. Monk, can neither receive benefits to alleviate their medical and financial need, nor pursue an appeal of a formal denial. They are not even eligible to advance their appeal on the BVA docket, *see* 38 U.S.C. § 7107, because their cases have not reached the BVA.

86. Only this Court is capable of efficiently remedying the agency's constitutional violations and arbitrary refusal to act for the aggregate group by exercising its equitable powers or ordering a writ of mandamus requiring the VA promptly to evaluate their claims and, if necessary, forward them on to the BVA.

V. Conclusion

For the foregoing reasons, the court should grant this petition and order the Secretary to immediately adjudicate Mr. Monk's application, and those of similarly situated veterans who face significant financial or medical hardship and whose applications are pending twelve months or more since timely submission of an NOD.

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Respectfully submitted,

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