

IN THE UNITED STATES COURT OF
APPEALS FOR VETERANS CLAIMS

LEIGH ANN BURCH,)
)
 Petitioner,)
)
 v.) Vet. App. No. 13-2095
)
 ERIC K. SHINSEKI,)
 Secretary of Veterans Affairs,)
)
 Respondent.)

**RESPONDENT'S RESPONSE TO THE PETITION FOR WRIT
OF MANDAMUS AND COURT'S ORDER, DATED AUGUST 21, 2013**

Pursuant to U.S. Vet.App. Rule 21(b) and the Order of this Court, dated August 21, 2013, Respondent, Eric K. Shinseki, Secretary of Veterans Affairs (Secretary or Respondent), hereby responds to the petition for a writ of mandamus and advises the Court of action undertaken by the Detroit, Michigan Regional Office (RO) in the matter of Petitioner's requests before the Department. For the reasons set forth below, the Court should deny the petition.

PERTINENT FACTS AND BACKGROUND

The Court's August 21, 2013, Order directs the Secretary within thirty days after the Order to respond to Petitioner's petition for extraordinary relief, filed July 13, 2013. This petition alleges that the Department of Veterans Affairs (VA) has failed to act on her requests for a copy of her claims file after making numerous requests to the Baltimore, Maryland and Detroit, Michigan ROs, as well as other

VA offices. She asserts that her requests have gone unanswered. Additionally, Petitioner seeks contact information for the VA employee supervising the photocopying process and attorney's fees.

The Secretary advises the Court that personnel from the Detroit RO, Ms. Littles, contacted Petitioner by telephone on August 22, 2013, requesting an alternative address to her Post Office (P.O.) Box number because the United Parcel Service (UPS) could not deliver a package (containing the copy of the claims file) to a P.O. Box. See Exhibit. Petitioner informed Ms. Littles that the copy should be sent to her attorney, Mr. Snyder. *Id.* Ms. Littles then called Mr. Snyder and left a voicemail message for him requesting that he contact her concerning the delivery of the claims file copy. *Id.* Mr. Snyder did not respond to the voicemail message. *Id.* UPS tracking information reflects that the package containing the copy of the claims file was delivered to Mr. Snyder on August 27, 2013, at an address in Rockville, Maryland, and that Mr. Snyder signed at the time of delivery. *Id.*

ARGUMENT

The Court has authority to issue extraordinary writs in aid of its jurisdiction pursuant to 28 U.S.C. § 1651(a). See *Ramsey v. Nicholson*, 20 Vet.App. 16 (2006); *Cox v. West*, 149 F.3d 1360 (Fed. Cir. 1998). However, as the Court has held, “[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.” *Lane v. West*, 12 Vet.App. 220, 221 (1999) (citing *Kerr v. United States District Court*, 426 U.S. 394, 402, 96 S.Ct. 2119, 48 L.Ed.2d 725

(1976)). The Court has stressed the need for a Petitioner seeking an extraordinary writ to demonstrate a “clear and indisputable entitlement” and the lack of an adequate alternative means to obtain the requested relief. *Erspamer v. Derwinski*, 1 Vet.App. 3, 9 (1990), quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384, 74 S.Ct. 145, 148, 98 L.Ed. 106 (1953).

As set forth above, the Detroit RO forwarded a copy of Petitioner's claims file to her attorney, Mr. Snyder, at Petitioner's direction. See Exhibit. Mr. Snyder signed for the package containing a copy of the claims file on August 27, 2013.

With regard to a delay in providing a copy of the claims file, the undersigned was informed by personnel at the Baltimore RO that the causes for such a delay included a high level of inventory, high volume of mail, and workload prioritization at the Baltimore RO. Personnel at the Detroit RO informed the undersigned that the claims file was forwarded to the Detroit RO as part of a special initiative to assist the Baltimore RO with claims processing and completion. The Detroit RO received Petitioner's claims file in April 2013. On June 3, 2013, a rating decision was issued with regard to claims before the agency (accompanied by a June 5, 2013 notice letter).

The undersigned was further informed that following the issuance of the June 2013 rating decision the claims file was mistakenly forwarded to the scanning vendor on June 10, 2013. Pursuant to the special initiative, all claims files from the Baltimore RO were forwarded to the vendor for scanning after completion of the claims process. However, the undersigned was informed that

Petitioner's claims file should not have been sent to the scanning vendor in light of Petitioner's request for a copy of her claims file. Personnel at the Detroit RO, as well as the Secretary, apologize for mistakenly forwarding the claims file to the vendor and further delaying Petitioner obtaining a copy of her claims file.

With regard to Petitioner's request for attorney's fees, the Secretary submits that such fees are not warranted given the Secretary's acquiescence to the relief sought as to Petitioner's request for a copy of her claims file. See 28 U.S.C. § 2412(d)(1)(A); *Sumner v. Principi*, 15 Vet.App. 256, 264 (2001) (en banc) (holding that "prevailing-party status either require[s] the ultimate receipt of a benefit that was sought in bringing the litigation, i.e., the award of a benefit, or, at a minimum, a court remand predicated upon administrative error," and conditioning receipt of an EAJA award on prevailing-party status). The Secretary submits that where a claimant achieves the result desired in a petition because of a voluntary change in the Secretary's conduct, rather than through a confession of error or a finding of error by this Court, the claimant is not a prevailing party for EAJA purposes. See *Thayer v. Principi*, 15 Vet.App. 204, 211 (2001); see also *Vaughn v. Principi*, 336 F.3d 1351, 1357 (Fed.Cir.2003) ("This court further holds that the catalyst theory is an improper basis for an award of attorney fees as a 'prevailing party' under EAJA."). As to Petitioner's request for contact information for the VA employee supervising the photocopying process, the Secretary submits that such information is irrelevant and moot in light of the fact that the

Detroit RO provided a copy of the claims file to Petitioner's attorney upon her request.

Accordingly, despite the amount of time involved in adjudicating this case, Petitioner has not shown that the delay is "so extraordinary, given the demands and resources of the Secretary, that the delay amounts to an arbitrary refusal to act, and not the product of a burdened system." See *Costanza v. West*, 12 Vet.App. 133, 134 (1999). "The mere passage of time in reviewing a matter does not necessarily constitute the extraordinary circumstances requiring the Court to invoke its mandamus power. The delay involved, although frustrating to petitioner, must be unreasonable before a Court will inject itself into an administrative agency's process." *Bullock v. Brown*, 7 Vet.App. 69 (1994).

In the instant case, the Detroit RO forwarded a copy of Petitioner's claims file to Petitioner's attorney at her request, and her attorney received the requested documents. See Exhibit. In light of the foregoing, the petition should be denied. See *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004) (condition that party seeking issuance of a writ must have no other adequate means to attain the desired relief is designed to ensure a writ is not used to substitute for regular appeals process).

WHEREFORE, Respondent, Secretary of Veterans Affairs, hereby notifies the Court of the action undertaken by the Detroit RO on the matter underlying the petition for extraordinary relief, and moves the Court to deny the petition.

Respectfully submitted,

WILL A. GUNN
General Counsel

DAVID L. QUINN
Acting Assistant General Counsel

/s/ Nisha C. Hall
NISHA C. HALL
Deputy Assistant General Counsel

Dated 9/19/13

/s/ Amy S. Gordon
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EXHIBIT



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 329 | 2. IDENTIFICATION NUMBERS (C, XC, SS, XSS, V, K, etc.) [REDACTED] |
| | 3. LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN (Type or print) BURCH, LEIGH ANN | |
| 5. ADDRESS OF VETERAN (Include number and street or rural route, city or P.O., State and ZIP Code) [REDACTED] | | 4. DATE OF CONTACT (Month, day, year) 08/22/2013 |
| | | 6A. TELEPHONE NUMBER OF VETERAN (Include Area Code) DAY ([REDACTED] [REDACTED] 465) EVENING |
| | | 6B. E-MAIL ADDRESS (If applicable) |
| 7. NAME OF PERSON CONTACTED PAULINE LITTLES | 8. TYPE OF CONTACT <input type="checkbox"/> PERSONAL <input checked="" type="checkbox"/> TELEPHONE | |
| 9. ADDRESS OF PERSON CONTACTED SAME AS #5 | 10. TELEPHONE NUMBER OF PERSON CONTACTED (Include Area Code) SAME AS #6A | |

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

11. BRIEF STATEMENT OF INFORMATION REQUESTED AND GIVEN:

On 22 August 2013 at 0930, I spoke with Mrs. Leigh Ann Burch concerning the mailing of her claim file. I informed her that UPS would not deliver to a Post Office Box so I needed a street address. Mrs. Burch informed me that the copy should go to her attorney, Mr. Keith Snyder, who also has a PO Box. I was informed through her spouse that if we waived the signature requirement that UPS would deliver the package. At this time Mr. Burch requested to speak to me concerning the lengthy appeal process. Mr. Burch stated that "if a blind man could see that his wife's illness was connected to the service, why couldn't VA see the same thing". I informed Mr. Burch that the process is lengthy and I was not qualified to walk him through the appeal process.

I telephoned Mr. Snyder, the attorney for Mrs Burch and left a message for him to call me concerning the delivery of the copies he requested. I am awaiting the return call.

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 Public Contact/VARO 329 | EXECUTED BY (Signature and title) PAULINE LITTLES |
|--|--|

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.whitehouse.gov/omb/library/OMBINV.VA.EPA.html#VA. If desired, you can call 1-800-827-1000 to get information on where to send comments or suggestions about this form.

From: UPS Quantum View [auto-notify@ups.com]
Sent: Tuesday, August 27, 2013 11:51 AM
To: Littles, Pauline, VBADTRT
Subject: UPS Delivery Notification, Tracking Number 1ZA40E410394731792



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***Do not reply to this e-mail. UPS and VA VBA EAO 329 RO will not receive your reply.

At the request of VA VBA EAO 329 RO, this notice is to confirm that the following shipment has been delivered.

Important Delivery Information

Tracking Number: 1ZA40E410394731792
Delivery Date / Time: 27-August-2013 / 11:27 AM

Delivery Location: FRONT DESK
Signed by: KEITH

Shipment Detail

Ship To:
KEITH SNYDER
51 MONROE ST
ROCKVILLE
MD
20850
US
Number of Packages: 1
UPS Service: GROUND
Weight: 7.0 LBS
Reference Number 1: 329/21

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[Contact UPS](#)

From: UPS Quantum View [auto-notify@ups.com]
Sent: Friday, August 23, 2013 8:15 AM
To: Littles, Pauline, VBADTRT
Subject: UPS Ship Notification, Tracking Number 1ZA40E410394731792



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This message was sent to you at the request of VA VBA EAO 329 RO to notify you that the electronic shipment information below has been transmitted to UPS. The physical package(s) may or may not have actually been tendered to UPS for shipment. To verify the actual transit status of your shipment, click on the tracking link below or contact VA VBA EAO 329 RO directly.

Important Delivery Information

Scheduled Delivery: 27-August-2013

Shipment Detail

Ship To:
KEITH SNYDER
51 MONROE ST STE 1901
ROCKVILLE
MD
208502409
US

Number of Packages: 1

UPS Service: GROUND

Weight: 7.0 LBS

Tracking Number: [1ZA40E410394731792](#)

Reference Number 1: 329/21

[Click here](#) to track if UPS has received your shipment or visit http://www.ups.com/WebTracking/track?loc=en_US on the Internet.

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