

Attorney for Petitioner

**PETITIONER’S RESPONSE TO RESPONDENT’S RESPONSE
TO PETITION FOR EXTRAORDINARY RELIEF
IN THE FORM OF A
*WRIT OF MANDAMUS***

NOW COMES the Petitioner, Gordon A. Graham, (hereinafter “Petitioner” or “Veteran”), pursuant to 38 U.S.C. § 7261(a)(2), U.S. Vet. App. R. 21 and 32, and responds to the Respondent’s response to his petition filed with the Court.

For the reasons set forth below the Petitioner requests that the Court order the full relief sought.

RELIEF SOUGHT

The Petitioner demonstrates below that he continues to have a clear entitlement to relief from this Court in the form of a *writ of mandamus* for the following unresolved benefits claims:

1). Award a 100% service connected disability compensation rating for Porphyria Cutanea Tarda (PCT) using an analogous rating such as 38 C.F.R. § 4.115a which comprehends ongoing systemic blood therapy with effective date of March 31, 1994, as per the Court’s Joint Motion for Partial Remand (JMPR) agreement approved by the Court by order dated April 23, 2013.

The respondent has granted the effective date correctly, the rating has only been partially granted. See Petitioner’s Exhibit G.

2). Award Special Monthly Compensation “S” (SMC-S) at the housebound rate effective March 31, 1994, based on 38 U.S.C. § 1114(s) pursuant to two 100% schedular totally disabling diseases.

This has been granted. See Petitioner’s Exhibit G.

3). Either grant benefits or issue a decision on claims for Cryoglobulinemia (DC 7354-7820) and Fibromyalgia (DC7354-5025), secondary to service-connected Hepatitis C, filed on October 1, 2012, from which Petitioner might appeal.

The Respondent promises that compensation and pension examinations and adjudication will be forthcoming. The Petitioner does not place much stock in such promises.

4). Either grant benefits or issue a Supplemental Statement of the Case (SSOC) with certification (Form 8) and advancement on the docket under 38 C.F.R. § 20.900(c) for appeal of Independent Living Program (ILP) claim filed May 2011 for a greenhouse pursuant to 38 U.S.C. §§ 3106(e), 3109, and 3120.

The Respondent asserts that this issue has now been passed on to the Board but offers no date for action.

5. Immediately convert my paper VA benefits claims file to electronic format to expedite processing of my claims.

The Petitioner desires his file to be scanned such that it is available in electronic format for his review and so that the regional office staff might be able to locate it and adjudicate his claims. A promise to scan it when it is eligible seems evasive and non-responsive.

6. Ensure that VLJ Mark Hindin has no further contact with the adjudication of my claims.

Mr. Hindin's contact with the adjudication of the claims of the Petitioner indicates that he is adversarial and hostile to the Petitioner. This is contrary to the Congressional mandate for veterans benefits claims. The Court should order him to have no contact with these claims in the future.

7. Power of Attorney.

Counsel notes that the regional office staff have now posted his appearance to the system such that he will have some chance of receiving correspondence regarding this case in the future.

THE ACTIONS OF THE SECRETARY SINCE THE FILING OF THE PETITION

Since Mr. Graham filed his petition the Secretary has moved forward with the adjudication of some of his claims. Petitioner agrees with the effective date of March 31, 1994, which has been established for his Porphyria Cutanea Tarda (PCT). Since that was the date the claim was filed a Petition for a *Writ of Mandamus* should not have been required to obtain this limited objective.

What has been obtained is a partial grant of the relief envisioned in the Court's Joint Motion for Partial Remand (JPMR) to the Board approximately twenty three months after the fact and only by virtue of taking the extraordinary measure of filing a Petition for a Writ. The Petitioner did not take this step lightly. The actions of the regional office staff indicate they do not take our action as seriously.

The regional office did deny Petitioner's claim for a finding of clear and unmistakable error (CUE) on October 6th, 2014. They now make a grant of 60 percent and implement the effective date requested in the CUE motion on the same record. That claim was already listed as on appeal to the BVA on October 27th, 2014 according to VA eBenefits.

The Court will observe that the rating decision issued in this case did not make an award of a 100 percent analogous rating for PCT, but arrived through rather twisted logic at a 60 percent rating. The VA examiner in 2008 stated unequivocally that Mr. Graham was 100 percent disabled by this condition. See Respondent's Exhibit 1, page 2; Petitioner's Exhibit G.

The Secretary now promises to undertake further development in the case, having requested a Compensation and Pension examination by letter dated February 17, 2015, for Petitioner's August 14, 2012, claim. See Respondent's Exhibit 1, page 3, and Exhibit 2, page 1.

Because Mr. Graham has serious health issues this “develop to deny” approach in responding to his Petition is unsatisfactory. Time is of the essence for the Petitioner. The Veteran’s Benefits Administration’s definition of “all deliberate speed” will result in another seven years of litigation, a luxury the Petitioner cannot afford.

The Respondent’s efforts in this matter have been tepid and unsatisfactory to the Petitioner. Rather than act decisively the Respondent has issued another flawed decision and made promises for action if the future which may or may not occur.

The Petitioner has been seeking the highest and best rating for PCT since March of 1994. See *AB v. Brown* , 6 Vet. App. 35 (1993).

38 C.F.R. §4.7 is unequivocal as is §4.15. The regional office has not discussed this vis’ a vis’ the 100 percent requested rating versus the 60 percent rating they issued. Diagnostic Code (DC) 7704 has no provision for Phlebotomy yet the Decision Review Officer somehow conflates the 2015 rating criteria into the 1994 rating under Anemia (DC 7700X).

The Respondent has in his possession a compensation and pension examination report dated July 18, 2008, which clearly and unequivocally states that the Petitioner is totally disabled. VA persists in squandering scarce judicial resources in a futile defense of (and search for) an analogous rating less than 100% with no advantage accruing to the veteran. Pernicious Anemia (DC 7700X) comprehends a 100% rating for chronic anemia yet the regional office once again has refused to cogently analyze the “whole” disability as comprehended by 38 C.F.R. §4.2. The Petitioner has been seeking, and continues to seek, the highest and best rating for PCT since March of 1994. See *AB v. Brown* , 6 Vet. App. 35 (1993).

The Respondent urges the Court to once again excuse an example of outrageous delay and adversarial adjudication of claims when attached to his response are requests for examinations that can most charitably be described as efforts to develop to deny. This is a prescription for another decade of litigation, a luxury the Petitioner cannot afford. He has been adjudicating some of these issues since March 31, 1994.

The Court should order the relief requested as failing to do so will constitute irreparable harm. The actions of the Respondent have not resolved the major issue presented by the Petitioner, his request for the 100 percent rating for PCT. We concede that the Respondent took some action. It was flawed. We also concede that the Petitioner filed a VA-9 and perfected an appeal, Petitioner's Exhibit I. Since time is of the essence for the Petitioner he had no alternative.

/s/ ROBERT P. WALSH
Robert P. Walsh-Michigan Bar P-42833
Attorney for Claimant-Petitioner
Law Office of Robert P. Walsh
Two West Michigan Avenue
Suite 301
Battle Creek, Michigan 49017

Date: 03/04/2015

Telephone (269) 962-9693
Telecopier (269) 962-9592
E-mail: rpwalsh@SBCglobal.net

CERTIFICATE OF ELECTRONIC FILING

I, Robert P. Walsh, hereby certify that I have

1. Filed this document using the Electronic Filing System of the U.S. Court of Appeals for Veterans Claims which will automatically send it to counsel for the Respondents,

Mr. Mark M. McNabb
Senior Appellant Attorney
Office of General Counsel (027C)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
Telephone (202) 632-7109

And;

2. I have mailed a copy of this document to the Petitioner by first class mail at his address of record.

/s/ Robert P. Walsh
Robert P. Walsh-Michigan Bar P-42833
Attorney for Claimant-Petitioner

Date: March 4, 2015

Law Office of Robert P. Walsh
Two West Michigan Avenue
Suite 301
Battle Creek, Michigan 49017

Telephone (269) 962-9693
Telecopier (269) 962-9592
E-Mail: rpwalsh@SBCglobal.net