

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VIETNAM VETERANS OF AMERICA

and

VETERANS OF MODERN WARFARE

Plaintiffs,

v.

JAMES B. PEAKE, M.D., in his official
capacity as SECRETARY OF THE
DEPARTMENT OF VETERANS AFFAIRS

Defendant.

Civil Action No.: 08-1934 (RBW)

**PLAINTIFFS' COMBINED REPLY MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION
AND OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

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INTRODUCTION

Defendant, in his Memorandum Supporting Defendant's Motion to Dismiss and Opposition to Plaintiffs' Motion for a Preliminary Injunction (hereinafter, "Combined Memorandum"), takes several, conflicting positions with respect to Plaintiffs' efforts to compel the Department of Veterans Affairs ("VA") to make timely determinations of requests for disability benefits made by veterans of the United States Armed Forces.

For example, Defendant challenges Plaintiffs' right to seek judicial review of the VA's extraordinary delays in adjudicating disability claims on the basis that oversight of the VA should be left to Congress. Yet Defendant attempts to sweep under the rug the fact that Plaintiffs, in this lawsuit, are attempting to give effect to Congress's express directive to the VA that it handle veterans' disability claims expeditiously. (In the same vein, Defendant suggests, by analogy to Social Security disability benefits, that Congress has implicitly approved of the VA's conduct. In fact, Congress has long been critical of the delays in the VA's adjudication of disability claims; has, as Defendant concedes, allocated additional resources to decrease such delays; and has statutorily mandated expeditious adjudication of disability claims.)

Defendant also characterizes this case as a rerun of *Veterans for Common Sense v. Peake*, 563 F.Supp.2d 1049 (N.D.Cal. 2008), and urges the same outcome, denial of a request for an injunction against the VA. Yet Defendant, apart from ignoring the very different claims at issue in *Veterans for Common Sense*, tries mightily to distance itself from the detailed findings of fact in that case, including the finding that it takes approximately 4.4 years, on average, for a veteran to adjudicate a benefits claim through a decision of the Board of Veterans Appeals. *Veterans for Common Sense*, 563 F.Supp.2d at 1074.

It is telling that Defendant devotes 12 pages of his Combined Memorandum to an explication of the claims process and a recitation of various attempts to place blame for the VA's

extraordinary delays on the veterans themselves and the Veterans Service Organizations that assist veterans in attempting to secure their rightful benefits. Despite all the explanations and all the details, certain facts remain undisputed: by the VA's own estimates, it takes the VA 182 days, on average to reach an initial ratings decision – with the actual time likely double that – and nearly 4-1/2 years to adjudicate a claim through the Board of Veterans Appeals. The extraordinary delays in providing disability benefits to deserving veterans flies in the face of express congressional mandates, the very mission of the VA, and America's commitment to its men and women in uniform.

PRELIMINARY MATTERS

Two preliminary matters deserve comment.

First, Defendant repeatedly characterizes the instant action as identical to *Veterans for Common Sense*. The underlying facts demonstrating the inexcusable nature of the VA's delays are indeed identical as between the two cases, and form the basis for the virtually undisputable factual allegations in Plaintiffs' Complaint here. The similarities between the two cases, however, stop there. The claims in *Veterans for Common Sense* were broad and overarching, as was the relief sought. By contrast, the claims and relief sought here are narrowly tailored to fall within the injunctive powers of this Court.

Briefly summarized, the Plaintiffs in *Veterans for Common Sense* challenged “the manner in which the VA provides mental health care and the procedures for obtaining veteran disability benefits” and sought injunctive relief based on (1) denial of due process in violation of the Fifth Amendment; (2) denial of access to the courts in violation of the First and Fifth Amendments; (3) violation of 38 U.S.C. § 1710(e)(1)(D) relating to medical care for returning veterans; and (4) violation of Section 504 of the Rehabilitation Act. *Veterans for Common Sense*, 563 F. Supp. 2d

at 1055-56. In the instant case, Plaintiffs challenge only the delay in the initial adjudication of disability benefits and the delay in the appeal of disability benefit decisions.

The decision by the court in *Veterans for Common Sense* recited in great detail all of the challenged actions, which included: timely and effective health care; delays in mental health care; the clinical appeals process; the VA's mental health strategic plan; the Feeley memorandum; delays in adjudicating the SCDDC benefits; the right of access to the courts; and the VA' extraordinary awards procedures. *Id.* at 1079-81. Although Judge Conti plainly was sympathetic to the plight of veterans established by the Plaintiffs in that action, *id.* at 1070, when faced with such a broad attack on so many different aspects of the VA's procedures, he essentially threw up his hands and admitted in the penultimate sentence of his opinion that the relief sought by Plaintiffs in that case "would call for a complete overhaul of the VA system, something clearly outside of this Court's jurisdiction." *Id.* at 1091-92.

Veterans for Common Sense was therefore a completely different type of challenge – virtually a frontal assault on the VA – than the one brought by Plaintiffs here. Nothing in the nature of the relief requested – ordering the VA to act on disability benefit claims in a reasonable time, and imposing financial consequences if it does not – requires this Court to become immersed in the day-to-day workings of the VA's administrative processes, or requires a "complete overhaul of the VA system."

Second, Defendants' attempt to obscure the extent of its delays by assigning blame to the veterans themselves and by referencing its own, suspect statistics does not eliminate the fact that the VA's delays are unconscionably long. With respect to the VA's delays in rendering initial determinations, Defendant points to some minor delays outside of its control but largely ignores the fact that virtually every significant step in the ratings determination process. Defendant

offers no disaggregated data to provide any meaningful context to the various excuses provided for the VA's delay – for example, it is unknown how many claims actually require medical waivers, or how many veterans provide waivers along with their initial applications, or how long it takes to obtain waivers if they are not included in the initial application – rendering worthless the generalized assertions contained in the Declarations of Diana M. Rubens and Steven L. Keller. In the case of appeals, Defendant does not dispute the VA's own internal statistics showing that, as of March 2008, it took the VA an average of 261 days – and sometimes more than 1000 days – to send out a “Statement of the Case” explaining the rationale for its ratings decision. *See* Exhibit 2 to Decl. of Creighton R. Magid; *Veterans for Common Sense*, 563 F. Supp. 2d at 1073. Nor does Defendant dispute the VA's own statistics showing that it takes the VA 573 days, on average – and sometimes more than 1000 days – to certify an appeal to the Board of Veterans Appeals. *See* Exhibit 1 to Magid Decl.; Exhibit 3 to Magid Decl. at 215:7 – 217:12; *Veterans for Common Sense*, 563 F. Supp. 2d at 1073. None of these delays is attributable to the veterans claiming benefits or to the Veterans Service Organizations assisting them. These egregious delays are solely the responsibility of the VA.

ARGUMENT

I. DEFENDANT'S MOTION TO DISMISS SHOULD BE DENIED

A. Plaintiffs Have Associational Standing on Behalf of Their Members

Plaintiffs have standing to bring the claims in the Complaint. An association has standing to bring suit on behalf of its members when “(a) its members would otherwise have standing to sue in their own right, (b) the interests it seeks to protect are germane to the organization's purpose, and (c) neither the claim asserted nor the relief requested requires the

participation of individual members in the lawsuit.” *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977).¹ Plaintiffs meet all three prongs of this test.

Members of both Vietnam Veterans of America and Veterans of Modern Warfare have been harmed by extensive delays in the handling of their disability claims, giving them standing in their own right to bring constitutional and statutory challenges to the VA’s failure timely to adjudicate their benefits claims. *See, e.g.*, Decl. of Don Overton ¶¶ 8 – 16; Decl. of Richard Weidman ¶¶ 6 – 15; Decl. of Bobby O’Daniel.² The harm to the identified members, as well as many others among the more than 58,000 veterans who are members of Plaintiffs, is concrete, particularized, and ongoing. *Id.*³ Plaintiffs therefore stand in far different shoes than the plaintiffs in *Sierra Club v. Morton*, 405 U.S. 727 (1972), and *Conservation Law Found. of New England, Inc. v. Reilly*, 950 F.2d 38 (1st Cir. 1991), both cited by Defendant, who could not identify any injured members but only an “organizational interest in the problem.” *Sierra Club*, 405 U.S. at 739.

Defendant does not dispute that the interests Plaintiffs seek to protect in this action are germane to their organizational purposes. The mission of both Plaintiffs is to support the social welfare of veterans, including assisting veterans in obtaining benefits and providing information

¹ It is not necessary to establish that all of Plaintiffs’ members are harmed by the VA’s delays, only that “one or more” or their members are injured. *Warth v. Seldin*, 422 U.S. 490, 515 (1975).

² As noted in Plaintiffs’ Complaint, Plaintiffs are not attempting to obtain review of any determination by the VA or its appellate system of the individual claims of the persons submitting or identified in the Declarations.

³ The Declarations establish that the VA’s extensive delays have directly caused Plaintiffs’ members to suffer such actual, concrete, and particularized injuries as depression, substance abuse, and housing and marital problems. This more than satisfies the “constitutional minimum” for standing set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Because the Declarations also make plain that these injuries are ongoing, Defendant’s suggestion that Plaintiffs may not seek injunctive relief is of no moment.

and education regarding benefits. Compl. ¶¶ 13-14; Overton Decl. ¶¶ 2, 15 – 16; Weidman Decl. ¶¶ 6, 15. Plaintiffs' efforts in this lawsuit to compel the VA to make timely determinations on veterans' requests for disability benefits are therefore directly related to Plaintiffs' organizational purposes.

Finally, the participation of individual members of Plaintiffs is not required in order to obtain the requested relief. Where, as here, the claims involve systemic legal violations rather than individual grievances, and the requested relief is declaratory and injunctive rather than monetary damages, individual participation is not required and an association has standing to invoke a court's powers on behalf of its members. *Warth*, 422 U.S. at 515.

Because Plaintiffs satisfy all three prongs of the Hunt test for associational standing, Defendant's standing challenge has no merit.

B. Plaintiffs' Claims Are Not Barred By Sovereign Immunity

Although Defendant argues, in two paragraphs, that Plaintiffs' claims are barred by sovereign immunity, the law is plainly otherwise. 5 U.S.C. § 702 expressly waives sovereign immunity with respect to claims against a U.S. agency seeking non-monetary relief. In relevant part, the statute provides:

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States .

...

5 U.S.C. § 702.⁴ See also *Clark v. Library of Cong.*, 750 F.2d 89, 102 (D.C. Cir. 1984) (5 U.S.C.

⁴ Federal court jurisdiction over claims permitted under the APA's waiver of sovereign immunity is proper in federal district court under the federal question statute, 28 U.S.C. § 1331, the declaratory judgment statute, *id.* §§ 2201-02, or the mandamus statute, *id.* § 1361. See *Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598, 607 (D.C. Cir. 1992).

§ 702 “eliminate[s] the sovereign immunity defense in virtually all actions for non-monetary relief against a U.S. agency or officer acting in an official capacity.”).

This waiver is not, as Defendant asserts, limited to challenges to claims brought under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (“APA”). The D.C. Circuit has “repeatedly” held that 5 U.S.C. § 702’s “waiver of sovereign immunity applies to any suit, whether under the APA or not.” *Trudeau v. Fed. Trade Comm’n*, 456 F.3d 178, 186 (D.C. Cir. 2006) (quoting *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996)).⁵ Accordingly, neither Plaintiffs’ constitutional claims nor their APA claims are barred by sovereign immunity.

C. This Court is a Proper Forum for Plaintiffs’ APA Claims.

Defendant’s challenge to Plaintiffs’ APA claims is similarly infirm. The Supreme Court has noted that the APA’s “‘generous review provisions’ must be given a ‘hospitable’ interpretation.” *Bowen v. Mass.*, 487 U.S. 879, 904 (1988) (quoting *Abbott Lab. v. Gardner*, 387 U.S. 136, 140-41 (1967)); *see also Natural Res. Def. Council, Inc. v. Sec. & Exch. Comm’n*, 606 F.2d 1031, 1043 (D.C. Cir. 1979) (the APA “creates a strong presumption of reviewability”). Defendant, however, urges this Court to construe the APA narrowly rather than generously. In doing so, Defendant misreads the applicable law regarding “discrete agency action” and “final agency action.”

1. Plaintiffs Are Challenging Discrete Agency Action

The term “agency action” is expansively defined under the APA to include “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or

⁵ The D.C. Circuit has also repeatedly rejected Defendant’s position that the sovereign immunity waiver only applies to “final agency action.” *Trudeau*, 456 F.3d at 187 (the sovereign immunity waiver applies “regardless of whether [the challenged action] constitutes ‘final agency action.’”).

failure to act.” 5 U.S.C. § 551(13) (emphasis supplied). As the D.C. Circuit has recognized, the term “undoubtedly has a broad sweep.” *Indep. Equip. Dealers Ass’n v. Env’tl. Prot. Agency*, 372 F.3d 420, 427 (D.C. Cir. 2004). Plaintiffs’ Complaint challenges the VA’s failure expeditiously to adjudicate veterans’ claims for disability benefits as mandated by statute. See 38 U.S.C. § 7101(a) (directing the BVA to be sufficiently staffed to process appeals “in a timely manner”); 38 U.S.C. § 5109B (directing the VA to “take such actions as may be necessary to provide for *expeditious treatment*” (emphasis added) of claims remanded to a Regional Office by the BVA). Defendant does not dispute that adjudicating disability claims is a “discrete agency action” that the VA “is required to take.” See *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004); *Veterans for Common Sense*, 563 F. Supp.2d at 1084 n.5 (“It is uncontested the adjudication of benefits claims is a discrete agency action that the VA is required to take.”).

2. Plaintiffs’ Complaint Challenges “Final Agency Action”

Defendant erroneously argues that Plaintiffs do not challenge a “final agency action” because the Complaint does not seek review of individual claims. Combined Brief at 20. The fact that Plaintiffs are not challenging agency action on *individual* benefit claims is irrelevant to the issue of final agency action. Plaintiffs claim that the VA has failed to make timely decisions on benefits claims. APA Section 706(1) specifically permits the court to review claims to compel “agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). Where the delay in agency action inflicts such impairment so as to amount to a violation of a legal right of one of the parties, it may be considered “final agency action.” See *Int’l Ass’n of Machinists and Aerospace Workers, AFL-CIO v. Nat’l Mediation Bd.*, 425 F.2d 527 (D.C. Cir. 1970); see also *Norton*, 542 U.S. at 64 (a claim under § 706(1) can proceed where a plaintiff asserts that an agency failed to take action that it is required to take). A “failure to act” includes

the failure to make timely decisions. *Id.* at 63. By seeking to eliminate unjustified delays, Plaintiffs necessarily challenge “final agency action” of the VA.

3. The CAVC is Not an Adequate Alternative Remedy

In asserting that the CAVC provides an adequate alternative remedy for Plaintiffs, the VA has overstated the authority of the CAVC and has failed to address United States Supreme Court precedent. The Supreme Court has ruled that courts with limited jurisdiction, such as the CAVC, cannot provide an adequate remedy in a case seeking prospective injunctive relief. *Bowen*, 487 U.S. at 879. In *Bowen*, Massachusetts appealed a decision of Secretary of the Department of Health and Human Services disallowing Medicaid reimbursement for services received by persons in state-owned intermediate care facilities for the mentally retarded. The Secretary argued that the Court of Claims presented an adequate alternative remedy for the claim. The Supreme Court disagreed, holding: “The Secretary’s novel submission that the entire action is barred by § 704 must be rejected because the doubtful and limited relief available in the Claims Court is not an adequate substitute for review in the District Court.” *Id.* at 901. The Court of Claims “does not have the general equitable powers of a district court to grant prospective relief.” *Id.* at 905.

Similar to the Secretary’s position in *Bowen*, the VA’s argument falls far short from establishing that the CAVC provides an adequate alternative remedy for Plaintiffs. As Judge Conti recognized in *Veterans for Common Sense v. Nicholson*, No. C-07-3758, 2008 WL 114919, *10 (N.D. Cal. Jan. 10, 2008), “the VA claims adjudication system is not an adequate alternative forum for Plaintiffs’ claims.” In reaching that conclusion, Judge Conti explained:

With all due respect to the Sixth Circuit, this Court is convinced that the VJRA system is not an adequate alternative. First . . . Plaintiffs in the present case have no way of even entering the adjudication system established by the VJRA; Plaintiffs are organizations, not individual veterans seeking individual benefits.

