

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

GEORGE BALL)
11 Via Tivoli)
Palm Beach Gardens, FL 33418)

MALIK BIEL)
119 Raleigh Drive)
Elizabethtown, KY 42701)

LAT V. BOWEN, III)
10964 East Pima Creek Drive)
Vail, AZ 85641)

TIMOTHY J. DEATON)
218 Shady Bluff Drive)
Wimberly, TX 78676)

CHRISTOPHER D. GARCIA)
1811 Medical Parkway)
San Marcos, TX 78666)

EUGENE F. MACCASLIN, JR.)
1080 San Miguel Road)
Concord, CA 94518)

CONSTANCE M. MCLEOD)
9929 Old Frederick Road)
Frederick, MD 21701)

Plaintiffs,)

v.)

DEPARTMENT OF VETERANS)
AFFAIRS)
810 Vermont Avenue NW)
Washington, DC 20420)

Defendant.)

Civil Action No. 15-cv-586 (RMC)

**AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

INTRODUCTION

1. Plaintiffs George Ball, Malik Biel, Lat Bowen, Timothy Deaton, Christopher Garcia, Eugene MacCaslin, and Constance McLeod bring this action pursuant to the Privacy Act of 1974, 5 U.S.C. § 552a, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 702 and 706, to compel the United States Department of Veterans Affairs (VA) to act on Plaintiffs' requests for access to documents in their claims files. These documents are urgently needed to enable Plaintiffs to apply for military disability benefits. Although the requests were made as long as 27 months ago, the VA has neither produced the requested documents nor denied the requests. Accordingly, Plaintiffs seek a declaration that the VA has unreasonably delayed responding to Plaintiffs' requests for access to their records and an order requiring the VA to produce the requested records within 20 days of the Court's order.

PARTIES

2. Plaintiff George Ball is a disabled veteran of the United States Army. On January 17, 2013, Mr. Ball requested the records in his VA claims file from the VA.

3. Plaintiff Malik Biel is a disabled veteran of the United States Army. On August 2, 2013, Mr. Biel requested the records in his VA claims file from the VA.

4. Plaintiff Lat Bowen is a disabled veteran of the United States Army. On November 21, 2014, Mr. Bowen requested the records in his VA claims file from the VA.

5. Plaintiff Timothy Deaton is a disabled veteran of the United States Army. On October 6, 2014, Mr. Deaton requested the records in his VA claims file from the VA.

6. Plaintiff Christopher Garcia is a disabled veteran of the United States Army. On October 29, 2014, Mr. Garcia requested the records in his VA claims file from the VA.

7. Plaintiff Eugene MacCaslin is a disabled veteran of the United States Navy. On October 31, 2014, Mr. MacCaslin requested copies of certain records in his VA claims file from the VA.

8. Plaintiff Constance McLeod is a disabled veteran of the United States Air Force. On July 17, 2014, Ms. McLeod requested the records in her VA claims file from the VA.

9. Each Plaintiff is an individual within the meaning of the Privacy Act, 5 U.S.C. § 552a(a)(2).

10. The VA is an agency of the federal government.

JURISDICTION

11. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

FACTS

12. The VA maintains a claims file for each veteran who has applied to the VA for disability benefits. Generally, the claims file contains all documents submitted by the veteran, any information the VA has obtained on behalf of the veteran, and any records the VA creates regarding the veteran. Documents in a claims file may include: a veteran's separation-from-service documents, setting forth the veteran's complete record of service; letters from the VA notifying the veteran of its decision to deny or grant benefits; the VA's rating decision, explaining the veteran's disability rating as determined by the VA; medical records from the veteran's term(s) of service; medical records from the VA Medical Center where the veteran was treated; and the veteran's active duty personnel file. The claims file is also referred to as a claims folder.

13. A veteran's VA claims file is located in a system of records maintained by the VA within the meaning of the Privacy Act, 5 U.S.C. §§ 552a(a)(3), (4), (5).

14. A veteran's claims file is part of his record and constitutes information pertaining to him within the meaning of the Privacy Act, 5 U.S.C. §§ 552a(a)(4), (d)(1).

15. When a veteran requests a copy of his or her own claims file, the Privacy Act and its implementing regulations require the VA to make a copy of the file for the veteran or inform the veteran of the denial of the request and the reasons for the denial. 5 U.S.C § 552a(d)(1); 38 C.F.R. §§ 1.577, 1.580. Upon information and belief, the VA usually makes no redactions to the claims file documents provided to a requesting veteran.

16. The VA's procedures for processing Privacy Act requests state that "[r]equests for access to records will be acknowledged within 10 business days if the response cannot be provided within 20 business days, as required by the Privacy Act." VA Handbook 6300.4(3)(d)(1) (Aug. 19, 2013), *available at* http://www.va.gov/vapubs/viewPublication.asp?Pub_ID=701&FTtype=2.

17. Each Plaintiff submitted a request to the VA for a copy of all or, in one instance, specific documents contained in his or her VA claims file. To date, the VA has failed to act on Plaintiffs' requests. Without the requested documents, Plaintiffs cannot apply to the Combat-Related Special Compensation program for benefits or to the Physical Disability Board of Review (PDBR) for adjustment of his or her disability rating, on which various benefits are based, and cannot determine whether he is eligible for additional monthly disability benefits.

**A. REQUESTS RELATED TO APPLICATIONS FOR COMBAT-RELATED
SPECIAL COMPENSATION**

18. Plaintiffs George Ball, Christopher Garcia, Lat Bowen, Timothy Deaton, and Constance McLeod believe that they are eligible for, and desire to apply for, monthly benefits from the Combat-Related Special Compensation program.

19. The Combat-Related Special Compensation program is a U.S. Department of Defense program providing tax-free monthly payments to military retirees with combat-related disabilities. *See* 10 U.S.C § 1413a. Combat-Related Special Compensation benefits supplement any monthly disability benefits the veteran is otherwise receiving from a military department or the VA.

20. Plaintiffs Ball, Garcia, Bowen, Deaton, and McLeod are eligible to apply for Combat-Related Special Compensation benefits because each receives military disability retirement pay and has one or more combat-related disabilities. 10 U.S.C. § 1413a(c).

21. To qualify for Combat-Related Special Compensation, a veteran must file an application with supporting documentation demonstrating that the veteran's disability is a direct result of combat-related injuries.

22. Copies of certain records from the applicant's VA claims file "must be submitted" with the application for Combat-Related Special Compensation in order for it to be processed. *See* DD Form 2860, Claim for Combat-Related Special Compensation, at Section V, *available at* <https://www.hrc.army.mil/TAGD/Apply%20for%20CRSC>. Required documents include: copies of "ALL VA Rating Decisions, letters, and code sheets"; "All VA documents discussing changes in benefits including Special Monthly Compensation . . . and/or Individual Unemployability"; "Medical records or notes that verify how the injury/disability occurred"; "Physical Evaluation Board [] results and/or summaries"; and "Any evidence which can be used to verify the events or circumstances." *Id.*

23. The veteran-applicant has the burden of proving that his or her disability was caused by a combat-related event. The documents submitted with the application are the basis for the decision whether to grant Combat-Related Special Compensation benefits.

GEORGE BALL

24. Plaintiff George Ball believes that he is entitled to Combat-Related Special Compensation and plans to file an application for Combat-Related Special Compensation.

25. Mr. Ball seeks the documents in his VA claims file to prepare an application for Combat-Related Special Compensation.

26. On January 17, 2013, the National Veterans Legal Services Program (NVLSP) sent a request on behalf of Mr. Ball to the VA Regional Office in St. Petersburg, Florida, requesting all documents contained in Mr. Ball's VA claims folder.

27. Attached to the January 17, 2013, request was a Privacy Act waiver form signed by Mr. Ball and authorizing disclosure of his records to individuals at NVLSP.

28. The VA Regional Office in St. Petersburg, Florida, received the request on January 28, 2013, as shown by a certified mail return receipt.

29. As of the date of this complaint, the VA has not substantively responded to the January 17, 2013, request and has not produced any of the requested documents.

30. The VA's delay of over 578 working days in acting on Mr. Ball's request has deprived him of his ability to apply for monthly benefits.

CHRISTOPHER GARCIA

31. Plaintiff Christopher Garcia believes that he is entitled to Combat-Related Special Compensation and plans to file an application for Combat-Related Special Compensation.

32. Mr. Garcia seeks the documents in his VA claims file to prepare an application for Combat-Related Special Compensation.

33. On October 29, 2014, a paralegal at the law firm DLA Piper sent a request on behalf of Mr. Garcia to the VA Regional Office in Waco, Texas, requesting all documents contained in Mr. Garcia's VA claims folder and specifying Mr. Garcia's claims file number.

34. Attached to the October 29, 2014, request was a Privacy Act waiver form signed by Mr. Garcia authorizing disclosure of his records to DLA Piper.

35. The VA Regional Office in Waco, Texas, received the request on November 5, 2014, as shown by a certified mail return receipt.

36. By letter dated November 7, 2014, the VA Regional Office in Waco, Texas, responded by stating that the request was being referred to the VA Regional Office in New Orleans, Louisiana.

37. By letter dated February 21, 2015, the VA Evidence Intake Center in Janesville, Wisconsin, acknowledged receipt of Mr. Garcia's request.

38. As of the date of this complaint, the VA has not substantively responded to the October 29, 2014, request and has not produced any of the requested documents.

39. Without access to his VA claims file, Mr. Garcia is unable to file his application for Combat-Related Special Compensation benefits.

40. The VA's delay of over 128 working days in acting on Mr. Garcia's request has deprived him of his ability to apply for monthly benefits and precluded him from receiving any Combat-Related Special Compensation to which he may be entitled.

LAT BOWEN

41. Plaintiff Lat Bowen believes that he is entitled to Combat-Related Special Compensation and plans to file an application for Combat-Related Special Compensation.

42. Mr. Bowen seeks the documents in his VA claims file to prepare an application for Combat-Related Special Compensation.

43. On November 21, 2014, a paralegal at the law firm DLA Piper sent a request on behalf of Mr. Bowen to the VA Regional Office in Phoenix, Arizona, requesting all documents contained in Mr. Bowen's VA claims folder and specifying Mr. Bowen's claims file number.

44. Attached to the November 21, 2014, request was a Privacy Act waiver form signed by Mr. Bowen authorizing disclosure of his records to DLA Piper.

45. The VA Regional Office in Phoenix, Arizona, received the request on November 26, 2014, as shown by a certified mail return receipt.

46. By letter dated February 2, 2015, the VA Records Management Center in St. Louis, Missouri, acknowledged receipt of the request.

47. As of the date of this complaint, the VA has not substantively responded to the November 21, 2014, request and has not produced any of the requested documents.

48. Without access to his VA claims file, Mr. Bowen is unable to file his application for Combat-Related Special Compensation benefits.

49. The VA's delay of over 117 working days in acting on Mr. Bowen's request has deprived him of his ability to apply for monthly benefits and precluded him from receiving any Combat-Related Special Compensation to which he may be entitled.

TIMOTHY DEATON

50. Plaintiff Timothy Deaton believes that he is entitled to Combat-Related Special Compensation and plans to file an application for Combat-Related Special Compensation.

51. Mr. Deaton seeks the documents in his VA claims file to prepare an application for Combat-Related Special Compensation.

52. On October 6, 2014, a paralegal at the law firm DLA Piper sent a request on behalf of Mr. Deaton to the VA Regional Office in Houston, Texas, requesting all documents contained in Mr. Deaton's VA claims folder and specifying Mr. Deaton's claims file number.

53. Attached to the October 6, 2014, request was a Privacy Act waiver form signed by Mr. Deaton authorizing disclosure of his records to DLA Piper and to individuals at the NVLSP.

54. The VA Regional Office in Houston, Texas, received the request on October 8, 2014, as shown by the U.S. Postal Service's electronic tracking confirmation.

55. By letter dated November 6, 2014, the VA Evidence Intake Center in Janesville, Wisconsin, acknowledged receipt of Mr. Deaton's request.

56. As of the date of this complaint, the VA has not substantively responded to the October 6, 2014, request and has not produced any of the requested documents.

57. Without access to his VA claims file, Mr. Deaton is unable to file his application for Combat-Related Special Compensation benefits.

58. The VA's delay of over 150 working days in acting on Mr. Deaton's request has deprived him of his ability to apply for monthly benefits and precluded him from receiving any Combat-Related Special Compensation to which he may be entitled.

CONSTANCE MCLEOD

59. Plaintiff Constance McLeod believes that she is entitled to Combat-Related Special Compensation and plans to file an application for Combat-Related Special Compensation.

60. Ms. McLeod seeks the documents in her VA claims file to prepare an application for Combat-Related Special Compensation.

61. On July 17, 2014, a paralegal at the law firm DLA Piper sent a request on behalf of Ms. McLeod to the VA Regional Office in Baltimore, Maryland, requesting all documents contained in Ms. McLeod's VA claims folder and specifying Ms. McLeod's claims file number.

62. Attached to the July 17, 2014, request was a Privacy Act waiver form signed by Ms. McLeod authorizing disclosure of her records to DLA Piper and to individuals at the NVLSP.

63. The VA Regional Office in Baltimore, Maryland, received the request on July 18, 2014, as shown by a certified mail return receipt.

64. By letter dated September 8, 2014, the VA Records Management Center in St. Louis, Missouri, acknowledged receipt of the request.

65. As of the date of this complaint, the VA has not substantively responded to the July 17, 2014, request and has not produced any of the requested documents.

66. Without access to her VA claims file, Ms. McLeod is unable to file her application for Combat-Related Special Compensation benefits.

67. The VA's delay of over 207 working days in acting on Ms. McLeod's request has deprived her of her ability to apply for monthly benefits and precluded her from receiving any Combat-Related Special Compensation to which she may be entitled.

B. REQUEST RELATED TO APPLICATIONS TO THE PHYSICAL

DISABILITY BOARD OF REVIEW

68. Plaintiff Malik Biel intends to apply to the Physical Disability Board of Review (PDBR) for review of his disability rating.

69. The Military Departments assign to service members who are discharged for disability a "disability rating" between 0% and 100% that represents the service member's disability. The disability rating criteria used by the Military Departments are the same criteria

used by the VA to assess the degree of disability. When a service member has more than one disability, the Military Department calculates a “combined disability rating.”

70. When a Military Department assigns a combined disability rating of 30 percent or more, the service member is entitled to military disability retirement benefits. When a Military Department assigns a combined disability rating of less than 30%, the service member is not entitled to military disability retirement benefits.

71. Congress created the PDBR in 2008 based on studies showing that the Military Departments were shortchanging disabled service members by erroneously assigning them a less than 30% disability rating. These studies showed that a large number of the service members who received disability ratings of less than 30% from a Military Department would apply to the VA after discharge and these same veterans would receive disability ratings of 30% or higher from the VA for the same disabilities under the same disability rating criteria. As a result, Congress created the PDBR to ensure the accuracy and fairness of combined military disability ratings of 20% or less assigned to service members who were discharged between September 11, 2001, and December 31, 2009. *See* 10 U.S.C. § 1554a.

72. An eligible veteran may apply to the PDBR to have the PDBR review his or her combined military disability rating. 10 U.S.C. § 1554a(c).

73. Because, as part of the review process, the PDBR considers the rating previously awarded to an applicant by the VA for his or her medical condition, a veteran’s VA disability rating and VA medical records are essential to the veteran’s application to the PDBR.

74. Documents reflecting the veteran’s VA disability rating and the veteran’s VA medical records are in the veteran’s VA claims file.

75. As a result of its review, the PDBR may recommend to the secretary of the appropriate military service branch an upward adjustment in the veteran's military disability rating to 30% or higher, which would result in lifetime military disability retirement benefits, retroactive to the date the veteran was discharged for disability. The PDBR may not recommend reducing the veteran's military disability rating. 10 U.S.C. § 1554a(d).

MALIK BIEL

76. Plaintiff Malik Biel seeks the documents in his VA claims file to prepare his application to the PDBR for adjustment of his disability rating.

77. On August 2, 2013, NVLSP submitted a request on behalf of Mr. Biel to the VA Regional Office in Louisville, Kentucky, requesting all documents contained in Mr. Biel's VA claims folder.

78. Attached to the August 2, 2013, request was a Privacy Act waiver form signed by Mr. Biel and authorizing disclosure of his records to individuals at NVLSP.

79. By letter dated August 7, 2013, the VA Regional Office in Louisville, Kentucky, acknowledged receipt of Mr. Biel's request.

80. As of the date of this complaint, the VA has not substantively responded to the August 2, 2013, request and has not produced any of the requested documents.

81. Without access to his VA claims file, Mr. Biel is unable to file his application with the PDBR for review of his disability rating.

82. The VA's delay of over 444 working days in acting on Mr. Biel's request has deprived him of his ability to apply for review by the PDBR and precluded him from receiving any additional disability retirement benefits to which he may be entitled.

C. REQUEST RELATED TO AID AND ATTENDANCE BENEFITS

83. A veteran who receives a VA pension and requires the aid and attendance of another person may be eligible for an additional monthly monetary payment called Aid and Attendance if he or she requires the aid of another person to perform personal functions required in everyday living, is bedridden, is a patient in a nursing home, or has limited eyesight.

84. A veteran who believes he is entitled to Aid and Attendance benefits must apply to the VA for the benefits.

EUGENE MACCASLIN

85. Plaintiff Eugene MacCaslin believes that he is entitled to an increase in the amount of Aid and Attendance benefits that he receives from the VA.

86. Mr. MacCaslin currently receives an Aid and Attendance allowance but believes that he is entitled to a higher level of Aid and Attendance allowance than he currently receives.

87. To determine whether he is entitled to more Aid and Attendance, Mr. MacCaslin needs a copy of records contained in his VA claims file.

88. On October 31, 2014, an individual appointed as Mr. MacCaslin's representative for purposes of pursuing VA benefits claims sent a request on behalf of Mr. MacCaslin to the VA Pension Management Center in St. Paul, Minnesota, requesting copies of all records relating to the Aid and Attendance/Special Monthly Pension awarded to Mr. MacCaslin and specifying Mr. MacCaslin's social security number. These records are contained in his VA claims file.

89. As of the date of this complaint, the VA has not substantively responded to the October 31, 2014, request and has not produced any of the requested documents.

90. Without access to these documents, Mr. MacCaslin cannot apply for any additional Aid and Attendance benefits to which he may be entitled.

91. The VA's delay of over 133 working days in acting on Mr. MacCaslin's request has prevented him from applying for additional benefits to which he may be entitled.

CLAIMS FOR RELIEF

92. The VA's failure to act on Plaintiffs' access requests constitutes agency action unlawfully withheld or unreasonably delayed within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(1).

93. The VA's failure to act on Plaintiffs' access requests violated the Privacy Act, 5 U.S.C. § 552a(d)(1), and thus constitutes agency action that is not in accordance with law within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

Wherefore, Plaintiffs request that this Court

- A. Declare unlawful the VA's failure to act on Plaintiffs' requests for documents;
- B. Order the VA to disclose to each Plaintiff the requested records within 20 days of the Court's order;
- C. Award Plaintiffs' their reasonable costs and attorney's fees under 28 U.S.C. § 2412;
and
- D. Grant all other appropriate relief.

Dated: May 19, 2015

Respectfully submitted,

/s/ Rachel M. Clattenburg

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