UNITED VETERAN'S DISABILITY, LLC

Wesley A. McCauley

Admitted to the United States Court of Appeal for Veterans Claims

Putting veterans and their families in charge.

2024-January-15

VIA: DIRECT UPLOAD
Board of Veterans' Appeals
c/o Chairman Areizaga-Soto
P.O. Box 27063
Washington, DC 20038

Re: *Appellant:* [redacted]
Veteran: [redacted]
VA File Number [redacted]
Veteran's [redacted]
Docket # 230523-350314

Dear Chairman Areizaga-Soto:

MOTION TO RECUSE VETERANS LAW JUDGE HARVEY P. ROBERTS

As the appointed representative for [redacted], I hereby seek recusal of the Honorable Harvey P. Roberts, under the provisions of 28 U.S.C. § 455, 38 U.S.C. 7102, and 38 C.F.R. § 20.107.

wesley@unitedforvets.com
Phone: (229) 425-7612
Facsimile: (229) 506-7370

P.O. Box 1162
Valdosta, Georgia 31603
unitedforvets.us

VA disability benefits are protected by the Due Process Clause of the Fifth Amendment to the U.S. Constitution. *See Cushman v. Shinseki*, 576 F.3d 1290, 1290 (Fed. Cir. 2009). In addition to protecting veterans' constitutional due process rights, the Board is obligated to ensure that it provides appellants with fair process in the adjudication of their claims. *See Smith v. Wilkie*, 32 Vet. App. 332, 337 (2020). Fair process includes providing fair process during VA's solicitation, gathering, and development of evidence. *See Bryant v. Wilkie*, 33 Vet. App. 43 (2020).

BACKGROUND

Unfortunately, Veterans Law Judge Harvey P. Roberts has repeatedly failed to properly consider and apply the law in Mrs. Caldon's case. The July 2008 decision by Judge Roberts was remanded and vacated by the Veteran's Court since the decision did not properly address the cohabitation evidence of record, which is favorable to Mrs. Caldon's appeal. For a second time, the Board's February 2015 decision[1] was vacated and remanded in a memorandum decision. This time, the Court found several deficiencies with the Board's reason and bases for its decision. Specifically, the Court found in its February 2017 memorandum decision that the "Board failed to fully discuss the circumstances surrounding [redacted] and Mr. Caldon's cohabitation, as agreed to by the parties in the joint motion for remand".

In other words, Judge Roberts failed to comply with the Court's first remand, and additional errors were made in the subsequent February 2015 Board decision.

For a third time, the Board's July 2020 decision was remanded by the Veteran's Court under a January 2021 Joint Motion for Remand. Again, the remand found that the

[1] Each Board decision herein refers to a decision rendered by Judge Roberts.

Board failed to address favorable evidence and failed to address arguments of record. The same reasons the case was remanded twice before.

In December of 2022, Judge Roberts remanded the issue to the AOJ for record development. The records the Board sought to obtain were unequivocally already in the claims folder. Accordingly, the entire basis for the Remand was unwarranted, and only served to delay the adjudication of Mrs. Caldon's claim. In a February 10, 2023, letter, the Clerk of Court states "[a]s instructed in the request received back in November of 2021 (attached for reference), the entire file was transmitted via e-mail to Mr. [redacted] @va.gov). The **entire** file was again **mailed** and **e-mailed** on June 1, 2022, June 17, 2022, and January 30, 2023. The Court file was also provided to Mrs. Caldon and sent via e-mail to Judge Roberts [redacted] @va.gov)".

Since the records were already part of the claims folder, I would encourage you to ask why Judge Roberts remanded the claim in December of 2022 regardless? There was absolutely no basis to do so, and the records sought in the remand had already been submitted multiple times.

For the reasons herein, Mrs. Caldon respectfully submits that Veterans Law Judge Roberts has not been impartial in adjudicating the issue of entitlement to spousal recognition and in turn DIC benefits and appears to have a personal bias or prejudice against her, such that she should be removed from this appeal.

ARGUMENT

Mrs. Caldon respectfully submits that Veterans Law Judge Roberts has not been impartial in adjudicating the issue of this appeal and appears to have a personal bias or prejudice against her. 38 C.F.R. § 20.107 provides that a member of the Board will

disqualify himself or herself in a hearing or decision on an appeal where there are other circumstances which might give the impression of bias either for or against the appellant. The regulation further states that the Chairman of the Board, on his or her own motion, may disqualify a Member from acting in an appeal on the grounds set forth in paragraphs (a), or "in those cases where a Member is unable or unwilling to act".

Further, 28 U.S.C. § 455(a) provides that any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. § 455(b)(1) states that a judge shall also disqualify himself or herself where he or she has a personal bias or prejudice concerning a party. In *Liljeberg v. Health Services Corp.*, 486 U.S. 847, 861 (1988), the U.S. Supreme Court held that a judge should recuse himself if "an objective observer would have questioned his or her impartiality." *See also Aronson v. Brown*, 7 Vet. App. 153, 157 (1994) (a judge should recuse himself where a reasonable man knowing all the circumstances would harbor doubts concerning the judge's impartiality). It is not sufficient for a party to feel a judge is unfair or not impartial. "The cause of apparent partiality must almost always be from an 'extrajudicial source.'" *Higgins v. Brown*, 7 Vet. App. 389, 392 (1995) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

This is not simply a case where a veteran feels the adjudicator is unfair because she has made an adverse finding. Here, Judge Roberts thrice shown an unwillingness to adjudicate this appeal in a manner that address all favorable evidence and arguments. That much is evident from the Court's remands. Then in December of 2022, Judge Roberts signed an absolute useless remand order for records that were submitted numerous times. In fact, the records were e-mailed to him directly. Judge Roberts has frequently ignored favorable evidence, ignored persuasive arguments of counsel, and failed to apply the law correctly. On three separate occasions, Mrs. Caldon has prevailed on appeal to the Veteran's Court.

For these reasons, Mrs. Caldon now seeks the recusal of Veterans Law Judge Roberts. *See Sutherland v. Barnhart*, 322 F.Supp. 2nd 282, 292 (E.D.N.Y. 2004); *see also Travis v. Sullivan*, 985 F.2d 919, 923-24 (7th Cir. 1993) (urging the SSA to transfer the case to a new ALJ on remand, because the current ALJ's decisions suggested an "unshakable commitment to the denial of this applicant's claim").

The above reasons show that Judge Roberts has demonstrated an unwillingness or inability to act in this appeal.

As of the date of this letter, Mrs. Caldon has never received a final decision on her claim for benefits. Mr. Chairman, surly we can both agree that is unacceptable. I believe the recusal of Judge Roberts will aid in ending the long and torturous procedural history that Mrs. Caldon's appeal presents.

On a final note, Mrs. Caldon opted into the AMA in 2023. This was a strategic decision in order to remove Judge Roberts from the case. According to CaseFlow data, Judge Roberts is now assigned to Mrs. Caldon's appeal. Thus proving the need for this Motion.

I thank you for your consideration of this matter.

Godspeed,

Wesley A. McCauley
Counsel for the Claimant
Admitted: *U.S. CAVC*
POA I9A; Accreditation Number 50884