UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-4134

JAMES R. RUDISILL, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before BARTLEY, *Chief Judge*, ALLEN, *Judge*, and SCHOELEN[1], *Senior Judge*.

O R D E R

ALLEN, *Judge*, filed the opinion of the Court. BARTLEY, *Chief Judge*, filed a concurring opinion.

ALLEN, *Judge*: Pending before us is appellant's opposed motion for an injunction pending appeal (Motion). After careful consideration, and for the reasons we will explain below, (1) we conclude we have jurisdiction to consider the Motion; (2) we conclude that though the Motion is not contemplated under our Rules of Practice and Procedure, we have the inherent authority to manage our own proceedings as circumstances require, including as relevant here, to enforce our judgments; and (3) we have analyzed the Motion on the merits, and we will grant appellant the relief he seeks.

We begin by reviewing the history of this matter's proceedings, which substantially affect our analysis of the Motion. Though the parties are familiar with the course of proceedings, we want to ensure that everyone is on the same page. We then turn to questions of jurisdiction and the propriety of the Motion under our Rules and our inherent authority. Finally, we address the parties' arguments on the merits and explain why we will grant the Motion.

I. PROCEDURAL HISTORY

We need not exhaustively recite this case's history. A few key developments set the stage for our analysis and explanation of our grant of the Motion.

On August 15, 2019, after pre-argument briefing, oral argument, and supplemental-authorities briefing postargument, the Court issued a split-panel precedential decision. As relevant to the Motion before us, and after extensive statutory and regulatory interpretation, the Court reversed the Board decision on appeal and remanded the matter, holding:[2]

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[1] Judge Schoelen is a Senior Judge acting in recall status. *In re Recall of Retired Judge*, U.S. VET. APP. MISC. ORDER 04-21 (Jan. 4, 2021). Judge Schoelen was assigned this panel case before she became a Senior Judge.

[2] All the cited provisions of our August 2019 opinion appear in *BO v. Wilkie*, 31 Vet.App. 321 (2019). At the time of our earlier decision, the appellant's identity was sealed and the matter progressed under the designation "*BO*." We

- Appellant, and others like him with two separate periods of qualifying service, may obtain the full benefits of both the Montgomery GI Bill education program (MGIB), chapter 30 of title 38 of the United States Code, and the Post-9/11 GI Bill education program (Post-9/11 GI Bill), chapter 33 of that title, subject to a 36-month cap on utilization of each of the two separate programs and a 48-month cap overall.

- Under statute, a veteran such as appellant with more than one period of separately qualifying service need not relinquish or exhaust entitlement under the MGIB program before receiving education benefits under the Post-9/11 GI Bill program.

On October 7, 2019, the Secretary moved for reconsideration and, alternatively, en banc review. That same day, the Secretary also moved to stay the precedential effect of our August 2019 decision. On October 18, 2019, appellant responded to the motion to stay.

On November 4, 2019, we denied the Secretary's motion for reconsideration and held the motion for en banc review in abeyance. On December 11, 2019, the full Court denied the Secretary's motion for en banc review.

And on January 7, 2020, we denied the Secretary's motion to stay the precedential effect of our August 2019 decision. We considered the motion under Rule 8 of our Rules of Practice and Procedure and the *Ribaudo*[3] factors. We denied it because we "conclude[d] that the Secretary ha[d] not carried his burden of demonstrating that a stay of the precedential effect of our decision is warranted."[4] We explained that, "[a]lthough the panel members disagree as to whether the Secretary has a strong likelihood of success on the merits of an appeal, we agree that the remaining factors weigh against granting a stay of precedential effect in this case."[5] That same day, we entered judgment.

On March 6, 2020, the Secretary filed his appeal to the Federal Circuit. That appeal remains pending. The Federal Circuit has received briefing and that court heard argument on December 9, 2020.

On March 5, 2021, appellant filed the present Motion under Rule 8 of our Rules, as well as under the Federal Rules of Appellate Procedure, asking the Court to "direct the Secretary to provide him with the additional Post-9/11 GI Bill benefits called for by *BO v. Wilkie*, 31 Vet. App. 321 (2019), pending final resolution of this case."[6] The Secretary responded to the Motion on April 2, 2021, urging the Court to deny it, citing both jurisdictional and merits concerns.[7] On April 5,

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lifted the seal on appellant's motion after we issued our decision.

[3] *Ribaudo v. Nicholson* (*Ribaudo II*), 21 Vet.App. 137, 140 (2007) (en banc) (per curiam).

[4] Order 2, *Rudisill v. Wilkie*, No. 16-4134 (Jan. 7, 2020).

[5] *Id.* (citation omitted).

[6] Appellant's Motion (Mot.) at 1.

[7] Sec'y's Response (Resp.) at 1-9.

2021, appellant sought leave to reply and the Secretary opposed. We granted leave to reply on April 13, 2021.

For the reasons that follow, we conclude that we have jurisdiction to address the Motion. Moreover, though appellant's Motion is not contemplated under Rule 8, we conclude that we have the inherent authority to manage our own proceedings as circumstances require, so we will address the Motion on its merits. And, as to the merits, we conclude that appellant has made the showing necessary to justify extraordinary relief. So, we will grant the requested injunction.

II. JURISDICTION AND PROPRIETY UNDER THE RULES

We begin with our jurisdiction to consider appellant's Motion. The Secretary insists that we lack jurisdiction to consider the Motion. Up front, as the Secretary points out, we acknowledge that "[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the [lower] court of its control over those aspects of the case involved in the appeal."[8]

Because the Secretary has appealed the August 15, 2019, precedential decision, it might appear at first glance that we lack jurisdiction to consider appellant's Motion. But we do not. Appellant asks only for what we have already decided he is entitled to under statute.[9] And he does not ask us to exercise "control over those aspects of the case involved in the appeal" currently pending at the Federal Circuit by, say, moving to vacate, alter, or amend the judgment.[10] Therefore, addressing appellant's Motion poses no "danger" that both we and the Federal Circuit "would be simultaneously *analyzing* the same judgment," which generally serves as the reason why filing a notice of appeal functions as an event of jurisdictional significance.[11]

Rather, here, we will do no more than comport with our clear precedent that "we retain jurisdiction over the *enforcement* of our decisions even after we no longer have jurisdiction over the *merits* of a case because it has been appealed to the Federal Circuit."[12] Again, appellant moves only for what we have already decided he is entitled to under statute, pending the Federal Circuit's decision. In other words, he seeks to enforce our prior decision. His Motion does not change the merits questions currently pending the Federal Circuit's review. Therefore, despite the pendency

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[8] *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982).

[9] *See Burris v. Wilkie*, 888 F.3d 1352, 1359 (Fed. Cir. 2018) (precluding only veterans from "obtain[ing], on equitable grounds, monetary relief that they are not *otherwise eligible to receive under substantive statutory law*" (emphasis added)). Therefore, the Appropriations Clause poses no issue here, until and unless the Federal Circuit reverses our decision on appeal. *See* U.S. CONST. art. I, § 9, cl. 7; *OPM v. Richmond*, 496 U.S. 414, 424 (1990). As for the Secretary's point about finality and 38 U.S.C. § 7291, we think our discussion about *Tobler v. Derwinski*, *see infra* Section III.A, addresses the Secretary's concern. Nothing in section 7291 bars us from granting what is here the equivalent of a preliminary injunction pending the Federal Circuit's decision on appeal.

[10] *See Griggs*, 459 U.S. at 58 (discussing those types of motions as the causes for concern regarding concurrent jurisdiction).

[11] *Id.* at 58-59 (emphasis added).

[12] *Ribaudo II*, 21 Vet.App. at 139-40 (emphasis added) (overruling "[a]ny panel opinion by this Court suggesting otherwise").

of the Federal Circuit appeal, we conclude that we have jurisdiction to address appellant's Motion because it concerns the enforcement, not the merits, of our prior decision.

But that conclusion does not end our inquiry. The Motion must also be appropriate under our Rules or some other authority. We conclude that our Rule 8, the vehicle appellant relies on to bring the Motion,[13] does not authorize the Motion. There is a serious question (1) whether Rule 8 contemplates a motion for an injunction to compel the Secretary to do something affirmatively, and (2) even if does, whether Rule 8 contemplates a motion made after an appeal has been taken to the Federal Circuit.[14] We conclude that Rule 8 does not contemplate the type of motion that appellant makes here. But we also conclude that we have inherent authority to manage our own proceedings as circumstances require, including enforcing our judgments. So, we will consider the Motion to have been made under that authority.

Turning first to Rule 8, it provides as follows:

> After an appeal or petition has been filed, a party seeking a Court order to suspend action by the Secretary or the Board or the precedential effect of a decision of this Court pending its appeal shall submit for filing with the Clerk a motion [to that effect].[15]

First we consider whether Rule 8 contemplates a motion for an injunction to compel the Secretary to do something affirmatively. We know that Rule 8 explicitly contemplates a motion by "a party seeking a Court order to suspend action by the Secretary or the Board."[16] The Rule's

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[13] Appellant also cited Rule 8 of the Federal Rules of Appellate Procedure. But those rules do not apply in this Court. *Bailey v. West*, 160 F.3d 1360, 1367 (Fed. Cir. 1998) (stating that the Federal Rules of Appellate Procedure "govern appeals from Article III district courts and are inapplicable to the Court of Veterans Appeals, an Article I court"), *overruled on other grounds by Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009), *rev'd and remanded sub nom. Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428 (2011). "The proceedings of the Court of Appeals for Veterans Claims shall be conducted in accordance with such rules of practice and procedure as the Court prescribes." 38 U.S.C. § 7264(a); *see also Bailey*, 160 F.3d at 1367 (quoting and citing § 7264(a)).

To the extent that appellant cites Federal Rule of Appellate Procedure 8 for persuasive value and invokes *Ribaudo v. Nicholson* (*Ribaudo I*), 20 Vet.App. 552 (2007) (en banc), to explain how we could consider a motion not contemplated by our Rules, *see* Appellant's Mot. at 1, 4, those arguments are addressed in more detail below. *See infra* p. 5.

[14] The Court is not sure whether the Secretary intended to argue only the initial jurisdiction point we already discussed, *supra* Section I, or also the scope of Rule 8 as to the motion's timing. *See* Sec'y's Resp. at 2 (discussing appellant's citation to Rule 8 and "concurrent jurisdiction" in the same paragraph), 3 ("Rule 8 does not run contrary to the general prohibition on jurisdiction over the same matter not existing in two places at once."). So the Court acknowledges both arguments. To the extent that the Secretary argues that appellant's Motion is not proper in this Court because an appeal is pending at the Federal Circuit, this Court notes that, though the context is certainly different, at best the Secretary comes awfully close to advancing conflicting positions in this case and in *Wolfe* as to whether a motion filed after a party has appealed to the Federal Circuit falls under Rule 8's scope. *See* Sec'y's Resp. to Court's Mar. 10, 2021, Order, *Wolfe v. Wilkie*, No. 18-6091 (Mar. 22, 2021) (arguing that his Motion was proper under Rule 8 even though his appeal was pending at the Federal Circuit); *see also* Sec'y's Mot. to Suspend Secretarial Action, *Wolfe v. Wilkie*, No. 18-6091 (Jan. 22, 2021).

[15] U.S. VET. APP. R. 8(a).

[16] *Id*.

plain language does not say anything about a motion for an "injunction." Were we to try to shoehorn appellant's Motion into Rule 8, we suppose we could characterize the Motion as a motion seeking a Court order to suspend the Secretary's or the Board's withholding from appellant Post-9/11 benefits that our precedential decision awarded him. But we don't think that characterization, though not an impossible construction of Rule 8, is a natural reading of its language. Therefore, we will afford the Rule its natural reading and hold that Rule 8 does not contemplate appellant's Motion. And given that, we need not address the timing question. Appellant cannot make his Motion under Rule 8.

But we may still consider appellant's Motion because we have inherent authority to manage our own proceedings as circumstances require, including with respect to the enforcement of judgments.[17] In fact, this Court has already held en banc, in *Ribaudo I*, that we have inherent authority to hear a motion not contemplated by our Rules going to the enforcement of our judgments. There, faced with a situation not contemplated by our Rules, regarding a stay of precedential effect of a decision by this Court, the Court followed how "other Federal courts" handled such a situation and

> [t]o that end . . . adopt[ed] the principle that underlies Rule 8(a) of the Federal Rules of Appellate Procedure and the adaptation of that rule by Federal Circuit Rule 8(a), namely "that the immediately subordinate tribunal has jurisdiction to act on a motion for a stay" even in a case where a Notice of Appeal has been filed seeking review in the Federal Circuit.[18]

To be sure, we acknowledged that Federal Circuit Rule 8(a) speaks in terms of a "trial Court," which we are not.[19] And we "[did] not presume to interpret the Federal Circuit's Rules for it."[20] Nevertheless, "we [saw] no reason not to follow the universally accepted Federal practice that a motion for a stay or injunction pending appeal first be sought in the subordinate court."[21] Those holdings make sense only as an articulation of the inherent power we possess as a court to enforce and regulate our judgments. To put it simply, because appellant's Motion concerns enforcement of our judgment, just as the *Ribaudo I* motion to stay did, *Ribaudo I* assures us that we can properly consider appellant's Motion, even if Rule 8 does not contemplate the Motion. So we will proceed to consider the merits of appellant's Motion.

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[17] *See Monk v. Shulkin* (*Monk II*), 855 F.3d 1312, 1318 (Fed. Cir. 2017) (holding that this Court has "authority to certify and adjudicate class action cases" "under the All Writs Act, other statutory authority, and the Veterans Court's inherent powers"); *see also Skaar v. Wilkie*, 32 Vet.App. 156, 177-78 (2019) (citing *Monk II* for "our inherent authority . . . [and 38 U.S.C. § 7264(a) for] our ability to craft rules of practice and procedure"); *Ribaudo I*, 20 Vet.App. at 559-60 (2007) (following "universally accepted Federal practice"), *abrogated on other grounds by Martin v. O'Rourke*, 891 F.3d 1338 (Fed. Cir. 2018).

[18] *Ribaudo I*, 20 Vet.App. at 559-60.

[19] *Id*. at 560.

[20] *Id*.

[21] *Id*.

III. MERITS

A. Threshold Matter: *Tobler*'s Applicability

Before we reach the heart of the merits, we will explain why we find unpersuasive the Secretary's argument that we should deny appellant's Motion outright under our decision in *Tobler v. Derwinski* because our August 15, 2019, decision is not final.[22] It is certainly true that *Tobler* provides that when one of our precedential decisions is appealed to the Federal Circuit, VA must comply with that decision for all claimants other than the appellant in a given case even though VA need not afford the named claimant the relief he or she would be entitled to under the appealed decison.[23] But we do not read those rules from *Tobler* as immutable. Rather, in light of later precedent such as *Ribaudo I*, which held that a party may ask to change the status quo described in *Tobler* via a motion to stay the precedential effect of a decision by this Court,[24] *Tobler* is best read to set a default rule for how matters should proceed with respect to a precedential decision of this Court when a party appeals to the Federal Circuit: in the absence of any other action, when we issue a precedential decision, (1) the decision binds VA for all further adjudications at the Agency; but (2) until final it does not require implementation with respect to the named appellant.[25] So, if nothing else happens, that is the state of the world.

However, that default rule doesn't mean it is never appropriate to order compliance as to the appellant in a case appealed to the Federal Circuit. It could be appropriate, in a given case, under the right circumstances. Indeed, it is already well established that the default pending appeal can change. As we know, the Secretary moved to suspend the precedential effect of our decision.[26] To be sure, we denied that motion. But if the Secretary can request to change the status quo in a given case with respect to the effect of a precedential decision on all claimants other than the named appellant, we see no principled reason why an appellant cannot seek to change the status quo with respect to him or her. Either way, a change in status quo occurs; it is just a matter of direction. All *Tobler* establishes here is that, assuming he even could, appellant cannot change the status quo unilaterally, as VA did in *Tobler*.[27] So, *Tobler* does not, on its own, suggest the motion should be denied. Instead, what *Tobler* and *Ribaudo I* mean here is that appellant has to shoulder the inherently significant burden of seeking injunctive relief, to show that the status quo should change as to him pending the finality of the appeal. Now we proceed to the heart of the merits, explaining why he has satisfied that burden.

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[22] 2 Vet.App. 8 (1991); Sec'y's Resp. at 5-6.

[23] *Tobler*, 2 Vet.App. at 9, 13.

[24] *Ribaudo I*, 20 Vet.App. at 559-60.

[25] *Tobler*, 2 Vet.App. at 9, 13.

[26] U.S. VET. APP. R. 8(a); *see also Ribaudo I*, 20 Vet.App. at 559-60.

[27] *Tobler*, 2 Vet.App. at 10.

B. Legal Standard and Application

To determine whether we should grant appellant's motion for an injunction pending the Federal Circuit's decision, we consider four factors: (1) whether appellant is likely to succeed on the merits; (2) whether appellant is likely to suffer irreparable harm in the absence of injunctive relief; (3) whether the balance of equities tip in his favor; and (4) whether the injunction is in the public interest.[28]

Here, appellant has demonstrated entitlement to his requested relief. Although the panel members disagree as to whether appellant is likely to succeed on the merits of the appeal, we agree that the remaining factors weigh in his favor.

Though the panel members disagree about appellant's likelihood of success, we point out that appellant was already successful before this Court, which applied well-established rules of statutory interpretation; the en banc Court denied rehearing; and we denied the Secretary's motion to suspend the precedential effect of the decision, which required us to consider his likelihood of success on appeal.[29] In short, appellant *actually* succeeded on his appeal before the panel when we issued our precendential decision. We then considered whether we were likely wrong when, in considering the Secretary's motion to suspend the precedential effect of the decision, we considered whether the Secretary was likely to prevail on his appeal. We thought it was not likely that we were wrong. We see no reason to change our position as to this factor.

Second, based on the specific facts we have here, we think appellant would be irreparably harmed were we to deny the injunctive relief he seeks. "As its name implies, the irreparable harm inquiry seeks to measure harms that no damages payment, however great, could address."[30] The harms that appellant alleges regarding timing and structuring of his life go beyond the dollar amount of the benefits. In his brief, appellant explained that he will exhaust his current benefits on May 21, 2021, and that if he does not receive the additional benefits to which he is entitled, he will be forced to terminate his seminary program effective May 21, 2021.[31] He also explains how and why he is unable to take out loans or secure aid to replace his remaining benefits.[32] And, he says, "[e]ven if he could, he has no adequate remedy at law to recover such expenses if he ultimately wins his case. For example, there is no provision of the Post-9/11 program that obviously compels the Secretary to reimburse him."[33] What's more, if appellant cannot resume his classes in 2022, "it is entirely possible he will never be able to do so again, as that is solely within the discretion of the seminary's provost and faculty to approve or deny."[34] Further, appellant described how

[28] *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *cf. Malik*, 22 Vet.App. at 185-86 (applying similar factors in analysis of a Rule 8 motion); *Ribaudo II*, 21 Vet.App. at 140 (applying similar factors in analysis of a precedential stay motion).

[29] Order, *Rudisill v. Wilkie*, No. 16-4134 (Jan. 7, 2020).

[30] *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012).

[31] Appellant's Mot. at 7.

[32] *Id*. at 4.

[33] *Id*. at 8.

[34] *Id*.

disruption to his academic plan could negatively affect his FBI career.[35] Finally, appellant points out that, even if he eventually prevailed in his litigation, he could run up against his 2026 Post-9/11 benefits delimiting date.[36] All in all, appellant describes imminent harms that would result if we did not grant his request for benefits, harms that an eventual award of benefits could not remedy. And the Secretary does not undermine these harms in his brief.[37] So we conclude that appellant has shown irreparable harm such that the second factor weighs in his favor.

Third (and fourth here[38]), appellant argues that if the Court were to grant an injunction, no substantial harm would result to the Secretary or the public. And we see no harm of note that would result to the Secretary, or to the public, from this one claim. After all, the Secretary already must apply our precedential decision to every claimant other than appellant. In countering that he would suffer harm, the Secretary did not address that point. Nor did he explain how this case differs from any other statutory interpretation case that we have decided, and he submitted no evidence to support his assertions of irreparable harm.[39] In any event, any harm to the Secretary or public is reparable. Unlike appellant, the Secretary has a remedy at law; he can recoup any valid debt, as appellant points out.[40] But even that would likely be unnecessary, as appellant in his briefs "acknowledges that he would be obligated to repay any final, valid debt resulting from his receipt of benefits under an injunction order."[41] The Secretary asserts that "according to [appellant's] own statements [about how '[s]tudent loans or aid are not options for [him]'[42], VA would be unable to recover any overpayment of Post-9/11 education benefits in this case."[43] We do not follow that logic at all. The Secretary fails to explain how appellant's inability to get a loan has any effect on, for example, VA's ability to reach appellant's salary payments if necessary to recover an overpayment. We will not entertain an argument by the Secretary that seemingly relies on ignorance of his own regulations.[44] So, on balance, we are inclined to rule in appellant's favor.

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[35] *Id*.

[36] *Id*. at 9 (refusing to concede that this deadline could not be equitably tolled).

[37] *See* Sec'y's Resp. at 8.

[38] The third and fourth factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

[39] *See Vazquez-Flores v. Peake*, 22 Vet.App. 91, 94-95 (2008) (rejecting the Secretary's speculative, unsupported allegations of irreparable harm).

[40] Appellant's Reply at 9 (citing 38 C.F.R. §§ 1.910 *et seq*. (providing standards for collection of claims, including installment plans), 1.980 (providing salary offset provisions applicable to Federal employees, such as appellant)).

[41] Appellant's Mot. at 10; Appellant's Reply at 9.

[42] Appellant's Mot. at 4.

[43] Sec'y's Resp. at 9.

[44] *See id*. (arguing that "[a]ppellant provides no solution in his motion as to how VA is to collect any overpayment of education benefits in this case"); 38 C.F.R. §§ 1.910 (providing standards for collection of claims, including installment plans), 1.980 (providing salary offset provisions applicable to Federal employees, such as appellant).

Upon consideration of the foregoing, it is

ORDERED that appellant's motion for an injunction pending appeal is granted. And it is further

ORDERED that VA begin to pay Mr. Rudisill the statutory benefits to which he is entitled, unless and until the Federal Circuit renders a decision reversing or vacating this Court's August 15, 2019, decision on appeal and remanding the matter.

DATED: May 7, 2021 PER CURIAM.

BARTLEY, *Chief Judge*, concurring: I join the majority in all respects, except that, for the reasons set forth in my dissent in this case, I disagree that the veteran has a strong likelihood of success on the merits of his appeal. *See BO v. Wilkie*, 31 Vet.App. 321, 346-54 (2019) (Bartley, J., dissenting); *see also BO v. Wilkie*, No. 16-4134, 2020 WL 62631, at *3 (Bartley, J., concurring in the denial of the Secretary's motion to stay the precedential effect of *BO*). Nevertheless, I agree with the majority that an injunction is warranted because, on balance, the remaining injunction factors weigh in the veteran's favor. *See Al Otro Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020) (employing a "sliding scale" balancing test for injunctive relief, in which "a stronger showing of one element may offset a weaker showing of another" (internal quotation marks omitted)); *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1345 (Fed. Cir. 2018) (currently adhering to a sliding scale approach); *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35-38 (2d Cir. 2010); *Hoosier Energy Rural Elec. Coop. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 51 (2008) (Ginsburg, J., dissenting) ("Consistent with equity's character, courts do not insist that litigants uniformly show a particular, predetermined quantum of probable success or injury before awarding equitable relief. Instead, courts have evaluated claims for equitable relief on a 'sliding scale' . . . ."). Given that the veteran has established that he will be irreparably harmed by further delay in payment of his Post-9/11 education benefits, that the Secretary has adequate means to recoup any erroneous benefit payments if he prevails on appeal, and that the public has a strong interest in veterans and their dependents promptly receiving the benefits that they have been adjudged to be entitled to, I would grant the veteran's motion for an injunction, despite my reservations about the likelihood of his success on the merits of his appeal.