UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

LARRY M. WARD,	)	No. 16-2157
and	)	
GABRIEL S. NEAL,	)	No. 17-1204
Appellants,	)	
v.	)	
ROBERT L. WILKIE,	)	
Acting Secretary of Veterans Affairs,	)	
Appellee.	)	

APPELLANT'S REPLY BRIEF IN SUPPORT OF
MOTION FOR CLASS CERTIFICATION

Appellants seek certification of a class of veterans who are subject to the Secretary's unlawful "permanent worsening" standard for deciding whether a service-connected disability has aggravated a secondary disability under 38 C.F.R. § 3.310(b). That unlawful standard violates the governing statute and regulation, as well as the Court's long-standing interpretation of those authorities. The Secretary does not fully contest that the Court can certify the class—he disputes only one of the four class action requirements. And the Secretary agrees that the Court has jurisdiction over a segment of the proposed class—he only argues to exclude a subset of members. The Court should certify the class as proposed and grant preliminary injunctive relief.

I. The proposed class meets the requirements under the general framework of Fed. R. Civ. P. 23.

The Secretary concedes that the description of the proposed class meets three of the four requirements under the Rule 23 framework: commonality, typicality, and adequacy of representation. Sec. Resp. at 12-13. *Id.* The only factor in the Rule 23 framework that the Secretary contests is numerosity. The Secretary incorrectly claims

that the proposed class size is too "speculative" to be certified. Mr. Neal and Mr. Ward[1] are not required to identify an exact number of class members. They need only allege a sufficient number of class members such that joinder of their individual claims would be impractical. *See* 1 Newberg on Class Actions § 3:13 (5th ed.), citing *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993); *Doe v. Charleston Area Medical Ctr., Inc.*, 529 F.2d 638, 645 (4th Cir. 1975). Here, from analysis of publicly available information from the Board of Veterans' Appeals (BVA) and the Court, and from corresponding estimates for the Regional Office (RO) level, Appellants indicated that no fewer than 800 veterans were members of the proposed class based on just one year of data—meaning that the total size of the class is in the thousands. App. Mot. at 6-7. *See, e.g.*, *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (stating when the alleged number of class members is greater than 40, numerosity can be presumed). Moreover, where only injunctive and declaratory relief are sought, the Court may certify a class even where the size of the class is based on speculation. *See Doe v. Flowers*, 364 F.Supp. 953 (D.C. W.Va. 1973), affirmed without opinion, 416 U.S. 922 (1974).[2]

[1] Mr. Ward is also a proposed class representative. Mr. Ward, like Mr. Neal, meets the requirements for typicality and ability to serve as a class representative.

[2] The cases cited by the Secretary do not support his conclusions about numerosity. In *Marcial v. Coronet*, the "speculation" that the court found problematic was not about the number of class members but rather the plaintiffs' underlying, unsupported assumptions about whether all individuals included in the estimate were actually part of the proposed class. 880 F.2d 954, 957 (1989). Here, the estimation of class size is not based on unsupported assumptions, but rather on a discernable fact: whether class members are subject to the "permanent worsening" standard. The Secretary's reliance on *RadioShack Corp. v. United States* is also misplaced because there the plaintiff's *entire* proposed class was based on speculation about "future" parties. 105 Fed. Cl. 617, 625 (2012).

The Secretary alleges that the proposed class fails the numerosity standard because Mr. Neal and Mr. Ward failed to "demonstrate that [they are] 'prepared to prove that there are *in fact* sufficient numerous parties.'" *See* Sec. Resp. at 11. As an initial matter, the Secretary—as the exclusive holder of the data that would identify individuals to be included in the class—does not say that the class size is, in fact, not numerous. Instead, he attacks Mr. Neal and Mr. Ward's good faith efforts to estimate the class size. The Secretary has the most complete information about and the ability to identify which decisions at the ROs, the BVA, and the Court have involved application of the unlawful standard in question. At the class certification stage, Mr. Neal and Mr. Ward have met their burden to show numerosity. *See* 1 Newberg on Class Actions § 3.13, n.3, citing *Violette v. P.A. Days, Inc*., 214 F.R.D. 207, 213 (S.D. Ohio 2003) ("it is permissible for a plaintiff to make reasonable inferences drawn from available facts" and "an 'information monopoly [by the party opposing the class] will not stand in the way of persons seeking relief'" (quoting *Jackson v. Foley*, 156 F.R.D. 538, 542 (E.D.N.Y. 1994))).

II. By certifying the proposed class, the Court can provide efficient relief to affected veterans harmed by the Secretary's use of an unlawful standard.

More than 20 years ago, the Court issued a precedential decision on the very legal question at issue in this case: the correct standard for aggravation in the context of secondary service connection claims. In 1995, the Court decided *Allen v. Brown*, 7 Vet. App. 439, explaining its specific definition for aggravation as follows:

> Note: Unless otherwise indicated, the Court will use the terms "aggravation" and "aggravated" as general terms referring to *any* increase in disability. This is to be distinguished from the more specific form of the term "aggravation" as defined in 38 U.S.C. § 1153, infra at part III.A.1., and 38 C.F.R. § 3.306(a) (1994), which

> authorize compensation for an increase in disability resulting from aggravation during service of an injury or disease which existed before service.
> *Id*. at 445 (emphasis added).

The Court could not have been more clear in distinguishing between aggravation in the secondary service-connection context and the pre-existing condition context. Only the latter context requires the aggravation to be permanent.[3] Despite this precedent, the Secretary has adopted as its official policy use of the "permanent worsening" standard for aggravation in the secondary service-connection context. Even more concerning, the Secretary has continued to cite to the *Allen* decision in support of its unlawful standard, as enshrined in the VA Adjudication Procedures Manual (VA Manual). *See* App. Mot. at 2, n.2. Thus, a precedential decision has already proven to be inadequate on its own to ensure consistent and correct application of the law. A class action is appropriate.

Second, as the Secretary conceded, Mr. Neal and Mr. Ward "may potentially be able to demonstrate that a single injunction or declaratory judgment would provide relief to each member of the class." Sec. Resp. at 14. Indeed, on a practical note, a precedential decision alone would not ensure that the Secretary would act swiftly enough to ensure that the correct legal standard is applied to cases at all levels of adjudication following the issuance of that decision. To effectuate a precedential decision, the Secretary must correct internal policies and practices, including revising the VA Manual. History has shown that the Secretary is slow to make such changes.[4] Here, the Court has the power to

[3] *See* App. Neal's Reply Br. at 4-5 (noting key distinctions between these two contexts).
[4] For example, after the Court decided *Southall-Norman v. McDonald* in December 2016, affirming the plain language of an unambiguous regulation (38 C.F.R. §4.59), the Secretary did not update the VA Manual for approximately five months. *See* 28 Vet.App.

avoid recreating this cycle of incorrect agency decisions and administrative delay by certifying the proposed class and granting the request for preliminary injunctive relief.

III. The Court has jurisdiction over all proposed class members. [5]

The Court should reject the Secretary's unduly constricted view of this Court's power to certify a class of veterans to include not just those veterans with pending judicial appeals, but also those who have not yet filed judicial appeals.[6]

First, the Secretary's arguments fail to recognize that a court's authority to issue an order under the AWA "relies upon not *actual* jurisdiction but *potential* jurisdiction." *Yi v. Principi*, 15 Vet.App. 265, 267 (2001) (emphasis in original). *See American Legion v. Nicholson*, 21 Vet.App. 1, 13 (Schoelen, J., dissenting) ("the exercise of AWA power is not dependent on actual jurisdiction (meaning that no Board decision is required for the Court to issue a writ), but it extends to the potential jurisdiction of the appellate court

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346 (2016); VA Manual, Part III, Subpart iv, section 4.A.1.i.; VA.GOV, M21-1 Changes By Date, Article ID: 554400000050785, https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000050785/M21-1%20Changes%20By%20Date. Due to the Secretary's failure to timely update the VA Manual, veterans whose claims were decided within that five-month period did not have the benefit of the lawful standard. To correct their decisions, those veterans had to appeal, facing a lengthy appeals process.

[5] References to jurisdiction here are to subject matter jurisdiction, not personal jurisdiction. The Secretary does not contest personal jurisdiction. *See American Legion*, 21 Vet.App. at 13 (Schoelen, J., dissenting) (the concept of "personal jurisdiction . . . only protects defendants in a lawsuit from having to defend their conduct in a forum in which they have no presence. . . and the Secretary could not reasonably dispute this Court's personal jurisdiction over him.") (internal citations omitted).

[6] The Secretary does not contest the Court's power to entertain a class action involving a class of veterans who, like Mr. Neal and Mr. Ward, have pending appeals at the Court. The Secretary's arguments about the scope of the class only go to whether the class may also include those veterans who are subject to the unlawful permanent worsening standard at the agency level. *See* Sec. Resp. at 11.

where an appeal is not then pending but may later be perfected") (internal quotation marks and citations omitted). For this and other reasons, the Secretary's extensive reliance on three Supreme Court cases involving the jurisdictional statute for judicial review of Social Security (SSA) benefit decisions—*Weinberger v. Salfi*, 422 U.S. 749 (1975), *Califano v. Yamasaki*, 442 U.S. 682 (1979), and *Bowen v. City of New York*, 476 U.S. 467 (1986)—is misplaced. Sec. Resp. at 2-4.

In none of those cases did the Supreme Court consider, much less decide, whether the AWA provided a basis for the district court to certify a class of SSA claimants to include those who did not independently satisfy the requirements of the judicial review statute applicable to the SSA context. Rather, those cases turned on whether the district courts possessed jurisdiction over all class members under the SSA judicial review statute.[7] That is, *Salfi*, *Yamasaki*, and *City of New York* all turned on the courts' exercise of their actual jurisdiction, not the issuance of orders in aid of their prospective jurisdiction—which is the relief Mr. Neal and Mr. Ward seek through class certification as to those members of the class who have not yet appealed to this Court.

Moreover, in his reliance on these cases, the Secretary misunderstands the relief Mr. Neal and Mr. Ward seek for proposed class members. The Secretary repeatedly

[7] *See, e.g.*, *City of New York*, 476 U.S. at 478, n. 9 ("Because we conclude that jurisdiction under § 405(g) [the SSA judicial review statute] is available, we do not reach the issue whether mandamus jurisdiction would have been appropriate in this context."). And while the Supreme Court in *Yamasaki* noted that the courts below had found jurisdiction under the mandamus statute, 442 U.S. at 691, the Supreme Court's analysis and holding were focused on whether the district court possessed jurisdiction under the SSA judicial review statute. *Id*. at 706.

emphasizes that "Not until a benefits applicant goes through that process [receipt of a decision from the BVA] can this this Court have jurisdiction over *the merits* of that person's benefits claim." Sec. Resp. 5 (emphasis added). But Mr. Neal and Mr. Ward do not ask the Court to decide the merits of any class members' benefit claims. They merely ask the Court to conclude that VA is using an incorrect legal standard to adjudicate secondary service-connection claims based on aggravation and then to issue an injunction that requires VA to adjudicate the class members' claims using the correct legal standard.

By certifying the class proposed here and granting the preliminary injunctive relief requested, the Court would properly exercise its authority under the AWA to issue orders in aid of its prospective jurisdiction. *Bates v. Principi*, 17 Vet.App. 443, 444 (2004) (the AWA "is to be used only for the limited purpose of protecting [the Court's] potential jurisdiction"), *rev'd on other grounds*, *Bates v. Nicholson*, 398 F.3d 155 (Fed. Cir. 2005). The Secretary has evinced a troubling pattern and practice of frustrating this Court's jurisdiction to hear the issue of whether VA is applying the incorrect legal standard to decide claims for aggravation of a secondary disability. *See* Mot. for Class Certification 2-4; Mot. for Suspension of Secretarial Action 1-2, 5 n.5.[8]

[8] In fact, even in the last three weeks, the Secretary picked off another veteran by conceding in a joint motion for remand that the VA may have unlawfully used the "permanent worsening" standard to decide his secondary disability claim. *See* App. Neal's Reply Br. 6-7. Here, the Court should take little comfort in the Secretary's statement that he "is not seeking to settle the issue *at this point*." Sec. Resp. 5 (emphasis added). Nothing prevents the Secretary, as he has done on other issues referred for panel decisions, from offering too-good-to-reject offers of remand to Mr. Neal and Mr. Ward at any point until the Court issues a precedential decision on the merits of these cases. *See Monk*, 855 F.2d at 1321 (describing value of class action mechanism in light of

Second, the Secretary has failed to respond to key elements set forth by the Federal Circuit in *Monk* about the nature of this Court's class action authority.[9] Among other things, the Federal Circuit rejected the view that the "Court would exceed its [Veterans Judicial Review Act] jurisdiction if, for example, it certified a class that included veterans that had not yet received a Board decision or had not yet filed a notice [of appeal]." *Monk*, 855 F.3d at 1320. The Federal Circuit also underscored that "class action suits could be used to compel correction of systemic error and to ensure that like veterans are treated alike." *Id*. at 1321. To make this point, the Federal Circuit cited an article that expressed concern over how, even where the Court issued precedent favorable to veterans, in the absence of a class action "VA is under no duty to identify those veterans and make them whole. . . ." *Id*. Given the systemic error at issue here and the challenges inherent in VA's lengthy administrative appeals process,[10] the Federal Circuit's decision in *Monk* counsels in favor of granting Appellants' motion.

Third, *Ribaudo* and *Ramsey* demonstrate that the Court already provides a form of aggregate relief in which it designates an appellant-veteran to serve as representative of a class of veterans. There, the Court established its authority, upon motion by the Secretary in a single case over which the Court has VJRA jurisdiction, to aggregate the similar

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Secretary's proclivity for mooting claims scheduled for precedential review and citing an *amicus* brief cataloging examples of Secretary's practice of mooting issues on appeal).

[9] In his opposition to the instant motion for class certification, the Secretary does not cite or discuss the Federal Circuit's *Monk* decision.

[10] *Maggitt v. West*, 202 F.3d 1370, 1378 (Fed. Cir. 2000) ("Realistic considerations may reduce the ability of a veteran to mount legal challenges in the regional office or at the Board").

cases of veterans who have pending claims at any level of VA and to stay VA administrative action on those cases pending the Secretary's pursuit of a further judicial appeal in the single VJRA case. *Ribaudo v. Nicholson*, 21 Vet.App. 137 (2007) (*en banc*); *Ramsey v. Nicholson*, 20 Vet.App. 16 (2006). What is more, in this scenario, the single veteran whose VJRA appeal is before the Court is responsible for responding to the Secretary's motion and representing the interests of similarly situated veterans who only have pending claims at the agency level. *Ribaudo*, 21 Vet.App. at 143. Thus, the Court has already adopted a form of aggregate litigation, complete with an appellant who must represent a *de facto* class of absent veterans who have claims at the agency level.[11]

IV. The Court should reject the Secretary's remaining arguments as meritless.

The Secretary also argues against injunctive relief for the proposed class because of his concerns over interference with the administrative process. Sec. Resp. 8-9. As set forth in the Motion for Stay of Secretarial Authority and the Reply Brief in Support, whatever concerns the Secretary might assert with respect to burdens on the administrative process are more than adequately accounted for by the holistic analysis for injunctive relief required by *Malik v. Peake*, 22 Vet.App. 183, 185 (2008). The Secretary also claims that all the members of the proposed class must have exhausted their

[11] In the context of *Ribaudo* and *Ramsey*, the beneficiary of this model is the Secretary, who is provided an opportunity to invoke the Court's jurisdiction to obtain orders directly impacting veterans with pending cases before the agency. Mr. Neal and Mr. Ward simply seek this same opportunity. Indeed, in its brief in *Monk*, the Secretary, citing *Ribaudo*, stated that "The Veterans Court has ostensibly resolved this question of its abstract authority to provide aggregated relief in subsequent cases in which it actually did so." Brief of Appellee-Respondent, 2016 WL 265708 *23 (Fed. Cir.).

administrative remedies. That is not so because of the AWA precedent discussed *supra* at 8-9, but also because in the class action context courts need not insist on exhaustion by absent class members, *see, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n. 8 (1975), and, as *City of New York* itself demonstrates, exhaustion by absent class members may be waived by the Court based on the circumstances of a case. 476 U.S. 467, 483.

Here, circumstances support waiver of any alleged need for exhaustion by absent class members: the issue presented is a purely legal question; there is no request for the Court to determine eligibility for benefits for anyone; the VA system is intended to be veteran friendly; and meaningful and timely relief is not otherwise available given the unlawful standard adopted in the VA Manual and given the Secretary's commitment to that standard in the instant litigation. *Id*. at 483-85 (describing considerations for waiver of exhaustion). As in *City of New York*, "there [is] nothing to be gained from permitting the compilation of a detailed factual record, or from agency expertise." *Id.* at 485. *See also Liberty Alliance for the Blind, v. Califano*, 568 F.2d 333, 346-47 (3d Cir. 1977).[12]

[12] Finally, to whatever extent necessary to ensure that all absent class members may receive full relief, the Court should toll the 120-day non-jurisdictional VJRA filing deadline. *Henderson v. Shinseki*, 562 U.S. 428 (2011). First, by seeking certification of a proposed class, Mr. Neal's Motion should be understood to have automatically tolled the filing deadline for absent class members. *See Jimenez v. Weinberger*, 523 F.2d 689, 696-97 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). Second, *City of New York* makes clear that the class action context against a government agency, depending on the circumstances of the case, can provide a basis for equitable tolling. 476 U.S. 467, 478-81 (1986). Here, the circumstances warrant equitable tolling because, among other things, the Secretary has over time insulated from precedential review the unlawful "permanent worsening" standard. And third, the Court should equitably toll the filing deadline for absent class members based on these same extraordinary circumstances. *See Bove v. Shinseki*, 25 Vet. App. 136 (2011).

May 18, 2018

Respectfully submitted,

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