

**IN THE UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS**

**AMANDA JANE WOLFE and**  
**PETER E. BOERSCHINGER,**  
individually and on behalf of others  
similarly situated,

**Petitioners,**

v.

**ROBERT WILKIE,**  
in his capacity as  
Secretary of Veterans Affairs,

**Respondent.**

Vet. App. No. 18-6091

**PETITIONERS' OPPOSED MOTION  
TO CLARIFY THE ROLE OF CLASS COUNSEL**

Petitioners bring this motion to clarify the role of class counsel in monitoring the implementation of this Court's Orders. A dispute has arisen because, following this Court's enactment of its own Rule 23, VA is taking the position that class counsel's ability to monitor execution is limited because its monitoring involves "[r]epresentation of class members before the agency" on pending claims within the meaning of Rule 23(f)(5)(B). VA's position not only threatens the ability of class counsel to effectively monitor VA's implementation of this Court's Orders, but also threatens to make it difficult for class counsel to work with any special master this Court appoints. Class Counsel offered to meet-and-confer with VA's counsel on this issue, but VA declined to do so.

Here is the issue in a nutshell. VA has providing status reports to Class Counsel every 45 days, which report on the status of the re-adjudications the Court has ordered VA

to make. Those reports have indicated that the claims of certain named class members have been fully re-adjudicated. Because these reports frequently have been inaccurate, Class Counsel contacted a sample of these named class members, and nearly all of the veterans in the sample—42 of them—reported that they have not received any re-adjudication decision from the VA. Class Counsel therefore asked VA to provide a copy of the re-adjudication decisions for those veterans. VA refused, citing this Court’s Rule 23(f)(5), and reasoning that because Class Counsel does not represent the veterans before the agency, they are not entitled to documents created by VA in the veterans’ agency proceedings. Of course, Class Counsel is not asking for the decisions because they seek to represent the veteran in administrative proceedings, but rather to check the accuracy of VA’s 45-day reports and VA’s compliance with the Court’s Orders. Because the issues that Class Counsel needs to monitor all involve what VA denominates as agency administrative proceedings, VA’s position threatens to impede the ability of Class Counsel to fulfill its duties to the class.

This Court should therefore clarify that class counsel is entitled to receive information, including decisions, related to the VA re-adjudications ordered by the Court, and that Rule 23 does not serve as any impediment to doing so.

### **FACTUAL BACKGROUND**

On September 9, 2019, this Court invalidated 38 C.F.R. § 17.1005(a)(5) and ordered the VA to re-adjudicate all claims that had been wrongfully denied based on the invalidated regulation. Because VA had not indicated a willingness to readjudicate these claims in a timely manner, Petitioners requested—and this Court required—that Petitioners be

required to submit status reports on their re-adjudications every 45 days. As discussed in Petitioner’s Motion for Appointment of a Special Master to Enforce the Court’s Judgment, in review of those status reports, Class Counsel have found multiple and repeated inaccuracies and inconsistencies.

As part of their due diligence to represent the class, Class Counsel has contacted class members (1) who, according to VA’s status reports, have received requests for Explanation of Benefits (EOBs) from the VA; or (2) whose claims, according to VA’s status reports, have been fully adjudicated. Most of those claimants have stated that they (1) had never received an EOB request and/or (2) were not in fact aware of the any readjudication and had not received any VA readjudication decision.

Therefore, on December 3, 2020, Class Counsel sent an email to VA identifying 42 class members who—despite being listed VA’s October status report as having received a decision or EOB request from VA—informed Class Counsel that they have not received either of the two. *See* Ex. A at 2. On December 21, counsel for VA responded indicating that only one veteran of the 42 identified was “miscategorized.” *See id.* at 1. Because this was not consistent with what the class members were telling Class Counsel, Class Counsel requested copies of each decision or notification that VA claimed to have sent. *See* Ex. B. at 2. On January 11, 2021, counsel for VA indicated that VA cannot provide the copies of the decision or notification sent to the 41 class members “in the absence of a Form 21-22a on file with the agency. Per CAVC Rule 23(f)(5), you are Class Counsel for proceedings

before the Court only.”<sup>1</sup> *See* Ex. C at 1-2. On January 13, Class Counsel responded, requesting to meet and confer about the issue and indicating that the request for the 41 decisions or notifications was made in furtherance of Class Counsel’s responsibilities, pursuant to this Court’s order. Ex. D at 2. The next day, VA declined the request to meet and confer and indicated that the Court will need to resolve this question. *Id.* at 1.<sup>2</sup>

### **ARGUMENT**

The dispute is simple: VA has refused to produce to Class Counsel any correspondence that it sent to class members, on the basis that Class Counsel has not provided a completed and co-signed power of attorney (VA Form 21-22a) for each individual Veteran. VA claims that Class Counsel is attempting to exceed the role of Class Counsel as articulated under the Court’s Rule 23(f)(5). Petitioners disagree; these re-adjudication decisions clearly involve “issues related to the class proceedings before the Court,” within the meaning of CAVC Rule 23(f)(5)(A), and thus VA should be compelled

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<sup>1</sup> VA Form 21-22a is a three-page form entitled “Appointment of Individual as Claimant’s Representative” which requires the signature of the claimant and the appointed representative and completion of 22 boxes of information.

<sup>2</sup> VA’s reliance on Rule 23(f)(5) to block the efforts of Class Counsel was not limited to the request for re-adjudication decisions. VA also relied on the rule to refuse to provide Class Counsel with an address for class members to submit EOBs so that their claims could be re-adjudicated. VA’s letters to class members requesting EOBs did not provide such an address. *See* Ex. B. at 1. VA initially took the position that there was a return address on the envelope and they would send an updated request letter to affected class members. *See* Ex. C. VA then provided a PO Box in Tampa, which is separate from the Offices of Community Care where claims are being re-adjudicated. *See* Ex. D at 1. But the notion that Class Counsel – who had received calls from veterans seeking that missing piece of information – should not be provided *an address* signals that VA intends to improperly rely on Rule 23(f)(5) in the future as well.

to produce copies of these 41 re-adjudication decisions. Indeed, the only reason that VA is even re-adjudicating the claims is *because of* “the class proceedings before the Court.”

This dispute provides the Court with its first opportunity to construe its recently promulgated class action rules. If accepted by the Court, the construction advanced by VA would have a severe deleterious impact on the ability of Class Counsel to monitor and enforce the terms of a Court class action order not only in this case, but also in future class action cases certified by this Court. Accordingly, Petitioners respectfully suggest that the Court resolve this dispute in a precedential panel decision that will also serve as guidance to any special master appointed by the Court. Petitioners respectfully request that the Court order VA to produce copies of the 41 readjudication decisions to Class Counsel and provide guidance that will allow Class Counsel to make reasonable requests for copies of decisions as needed for the purpose of auditing status reports and ensuring class members receive their Court-ordered readjudication decisions.

## **I. LEGAL STANDARDS**

This Court’s Rule 23 governs Requests for Class Certification and Class Actions. Rule 23(f)(5) sets forth the “Limitation on Role of Class Counsel”:

(A) The role of Class Counsel is to act as lead counsel on all issues related to the class proceedings before the Court.

(B) Representation of class members before the agency is a matter between Class Counsel and class members.

The Court’s Rule 23 is modeled on Fed R. Civ. P. 23, which is used by other courts in class actions. In certified class actions brought against the VA in other cases, the courts have ordered the VA to provide Class Counsel with all of the VA decisions made pursuant

to a class action order—without regard to whether each individual class member has filed an individual administrative power of attorney form with the VA. *See* Ex. E, Nov. 5, 2020 order in *Nehmer v. U.S. Dep’t of Veterans Affairs* at 10 (ordering VA to make an individual readjudication decision for each individual in a defined group of class members and disclose to Class Counsel each and every readjudication decision made by VA as to those class members). Indeed, at the request of Class Counsel in *Nehmer*, over the decade VA has voluntarily supplied Class Counsel, pursuant to the privacy protection order in that case, with a copy of the VA notice letter, regional office decision, and the coding sheet of the more than 120,000 decisions made by VA pursuant to the Orders in that class action case.

## **II. THIS COURT SHOULD CLARIFY THAT CLASS COUNSEL IS ENTITLED TO INFORMATION TO MONITOR VA’S CONDUCT.**

### **A. Class Counsel’s Request for Copies of Certain Readjudication Decisions and Notifications is Within the Scope of the Role of Class Counsel as Outlined in Rule 23.**

Rule 23(f)(5)(a) provides the requisite authority for Class Counsel to receive and review the readjudication decisions of these 41 class members as part of Class Counsel’s efforts to ensure compliance with the Court’s orders. Rule 23(f)(5)(a) states that “Class Counsel is to act as lead counsel on all issues *related to* the class proceedings before the Court” (emphasis added). This articulation of the role of Class Counsel entails more than simple representation in class proceedings before the Court, but also on issues *related to* class proceedings.

There is no doubt that Class Counsel's efforts to audit and verify the accuracy of VA's 45-day status reports and to monitor compliance with the Court's Orders are plainly "related to the class proceedings before the Court." The Court's April 6, 2020 Order granting in part Petitioners Motion for Enforcement of the Court's September 9, 2019 Order required VA to serve a status report updating Class Counsel on the readjudication of the class members' claims every 45 days after beginning readjudication. *See* April 6, 2020 Order at 4. Then, Class Counsel filed the pending Motion for Appointment of a Special Master in an effort to, among other things, remedy inconsistencies and inaccuracies with those status reports and speed up the re-adjudication process, which at the current pace could take 18 years. Class Counsel's requests for the 41 readjudication decisions are in furtherance of the same issues raised in its prior motions on behalf of the class, namely, ensuring that VA timely complies with the Court's Orders in this class proceeding.

Petitioners and Class Counsel certainly understand that, under Rule 23(f)(5)(b), representation of individual class members regarding their individual claims before the agency would require individual power of attorney authorization. But Class Counsel is not seeking to circumvent that limitation. In requesting copies of the readjudication decisions, Class Counsel is in no way attempting to enter an appearance on behalf of individual veterans regarding their individual claims before the agency. Class Counsel simply requests the decisions in order to monitor VA compliance with the Court's Orders and verify the veracity of VA's status reports, given that those reports have been rife with inconsistencies as explained above and in Petitioner's Motion for Appointment of a Special Master. Class Counsel's requests for copies of the decisions in order to evaluate VA's

court-ordered status reports is certainly “related to the class proceedings before the Court,” within the meaning of CAVC Rule 23(f)(5)(A)

**B. Providing Class Counsel with Copies of the Requested Readjudication Decisions and Notifications Serves a Practical End.**

In all 41 cases at issue, VA’s status report states that VA issued a decision pursuant to the Court’s September 9, 2020 Order, and the class member informed Class Counsel after VA’s status report that the member had not received a decision or indeed any other communication from the VA. VA has admitted that a reason these class members may not have received the VA’s decision is that the class member may reside at an address that is different from the address that VA possesses for these class members. *See* Ex. A at 1 (“Please note, VHA is mailing notification letters to the last reported address, and in some instances, the Veteran’s mailing address may have changed without notification to VHA.”). Yet, VA refuses to release the decision to Class Counsel, even though Class Counsel has been in contact with each of those 41 class members recently and can provide those class members with copies of their individual decisions. VA’s continued refusal to provide copies of the readjudication decisions to Class Counsel defies common sense and prevents these class members from following up on their Court-ordered readjudication decisions.

**CONCLUSION**

For the foregoing reasons, Petitioners respectfully request that the Court enter an order (1) clarifying that Class Counsel is entitled to receive information from VA relating to the progress of re-adjudication decisions, and that such requests are consistent with and permitted by this Court’s Rule 23; and (2) order VA to produce copies of the requested



readjudication decisions and notifications to Class Counsel, which serves the interest of monitoring and enforcing this Court's Orders.

Respectfully submitted,

Date: January 29, 2021

/s/ Mark B. Blocker

Barton F. Stichman

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