

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 21-4168

MARK FREUND AND MARY S. MATHEWSON,

PETITIONERS,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

RESPONDENT.

Before ALLEN, *Chief Judge*, and MEREDITH and LAURER, *Judges*.

ORDER

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

Mark Freund is the brother of J. Roni Freund, who served the Nation in the United States Army.¹ Mary S. Mathewson is the surviving spouse of Marvin Mathewson, who also served the Nation in the Army. On June 21, 2021, petitioners filed a petition for extraordinary relief. We assume that the parties understand the nature of this action. So, we provide only the context necessary to explain what we direct in this order.

I. PROCEDURAL HISTORY

In their petition, petitioners argued that VA inappropriately closed their administrative appeals pending in the legacy system due to the automated sweeping function in the Veterans Appeals Control and Locator System (VACOLS).² VACOLS is an automated electronic database that tracks and monitors VA legacy appeals and records details of those appeals, such as the filing date of appellate documents and issuances of decisional documents.³ Petitioners requested that the Court: (1) declare VA's withholding of action regarding petitioners' timely-filed legacy appeals as agency action "unlawfully withheld" within the meaning of 38 U.S.C. § 7261(a)(2); (2) declare that VA's closures of petitioners' appeals without notice violates 38 C.F.R. § 19.32 and fair process; (3) order the Secretary to reactivate petitioners' appeals within 30 days; (4) retain jurisdiction over

¹ Ms. Freund was one of the two original petitioners in this action. Unfortunately, she passed away on July 7, 2022. Ms. Freund's brother, Mark Freund, moved to be substituted as a petitioner in his sister's place. The Secretary recognized Mr. Freund as a proper substitute to continue his sister's pending claims at the Agency and thus did not oppose the motion. On October 12, 2022, the Court granted Mr. Freund's motion to be substituted as a petitioner. We will generally refer to Mr. Freund as a petitioner even in situations in which it was his sister who took the action at issue.

² Petition (Pet.) at 2-3.

³ 68 Fed. Reg. 69,062, 69,064 (Dec. 11, 2003) (proposed rule); VA APPEALS AND REVIEWS MANUAL (M21-5), ch. 6, sec. A.

this case until the Secretary complies with the Court's order; and (5) order any such other relief as appropriate.⁴

Along with their petition, petitioners also filed a Request for Class Certification and Class Action (RCA) in which they sought to represent a class of purportedly similarly situated claimants. Specifically, petitioners sought certification of a proposed class consisting of:

All claimants with a timely perfected legacy appeal: (1) that is an original appeal,^[5] (2) that the Secretary has closed, (3) that remains closed, (4) that appears in VACOLS, (5) for which a copy of the [S]ubstantive [A]ppeal appears in [the Veterans Benefits Management System (VBMS)],^[6] and (6) for which VA has not issued a rating decision regarding the [S]ubstantive [A]ppeal's timeliness.^[7]

On October 20, 2022, after the parties filed numerous pleadings and the Court had held oral argument, we denied petitioners' RCA and dismissed the petition.⁸ In relevant part, we concluded that petitioners' individual claims were moot given VA's actions in reactivating their improperly closed appeals.⁹ As to the RCA, we concluded that certifying a class was not warranted because petitioners were not adequate representatives of the class they sought to represent and there were no questions of law or fact common to the class.¹⁰ Petitioners appealed our decision to the United States Court of Appeals for the Federal Circuit.

On August 20, 2024, the Federal Circuit vacated our decision and remanded the matter for us "to further consider class certification and, if the class is certified, to determine the appropriate relief."¹¹ Using the class as petitioners defined it,¹² the court held that the inherently transitory exception to mootness applied such that, if a class were certified, a court could address the merits of the petition even though petitioners' individual claims were moot.¹³

⁴ Pet. at 2-3.

⁵ RCA at 8. Petitioners refer to original claimants or, if the original claimant is deceased, an individual eligible to substitute for the original claimant under 38 U.S.C. § 5121A. *Id.* at 9. They also specify that "original appeal" is one that the Board has not previously remanded. *Id.*

⁶ Petitioners indicate "closed" to mean that VACOLS designates that the appeals status is "HIS" meaning "history." *Id.* at 9. M21-5, ch. 6, sec. B.4.b explains that "[i]f a [S]ubstantive [A]ppeal is not timely input, the VACOLS record will automatically close and show a status of history (HIS)."

⁷ RCA at 8.

⁸ *Freund v. McDonough*, 35 Vet.App. 466 (2022) (order) (*Freund I*), vacated and remanded, 114 F.4th 1371 (Fed. Cir. 2024) (*Freund II*).

⁹ *Freund I*, 35 Vet.App. at 482-83.

¹⁰ *Id.* at 485-89; see U.S. VET. APP. R. 23(a)(2), (a)(4).

¹¹ *Freund II*, 114 F.4th at 1381. The Federal Circuit did not disturb our holding that petitioners' individual claims were moot. *Id.* at 1379.

¹² *Id.* at 1375.

¹³ *Id.* at 1379-80.

In terms of class certification itself, the Federal Circuit held that this Court abused its discretion when we concluded that the proposed class failed to satisfy the commonality and adequacy of representation prerequisites to class certification.¹⁴ The court also held that the proposed class definition provided objective criteria for class membership such that the implied element of ascertainability of class membership was satisfied.¹⁵

However, the Federal Circuit did not certify the proposed class. In that regard, the court specifically commented that we "did not separately address the other requirements of Rule 23 or the superiority requirement [set out in Rule 22(a)(3)]."¹⁶ While the Federal Circuit did not comment on the requirements for class certification under Rule 23(a) beyond commonality and adequacy of representation, it did discuss what is colloquially referred to as the superiority requirement under Rule 22(a)(3).¹⁷ Specifically, when discussing ascertainability, the court rejected the Secretary's argument that difficulty in identifying class members impacted ascertainability, specifically declining to adopt the minority view in the federal circuit courts about "administrative feasibility."¹⁸ But the Federal Circuit added the following about the difficulty of identifying class members: "As our sister circuits have recognized, administrative feasibility may bear on whether class resolution is superior to individual resolution, [citation omitted], but here the Veterans Court has not yet ruled on the superiority of class resolution, an issue that will need to be resolved on remand."¹⁹ The matter returned to us on October 11, 2024, following entry of mandate at the Federal Circuit.

II. ORDER FOR SUBMISSION OF SUPPLEMENTAL MEMORANDA

The Court requires supplemental memoranda from the parties concerning whether it should grant petitioners' request to certify their proposed class and allow this matter to proceed as a class action. As we noted above, the Federal Circuit held that the proposed class satisfies the prerequisites for proceeding as a class under Rule 23(a)(2) (commonality) and 23(a)(4) (adequacy). So, no further pleadings on those issues are necessary. Second, the Court has determined that the existing pleadings are sufficient for the Court to assess whether the proposed class satisfies the prerequisites for proceeding as a class under Rule 23(a)(3) (typicality) and 23(a)(5) (Secretary acting on grounds that apply generally to the class). So, no further pleadings on those issues are necessary either.

This leaves two issues concerning class certification on which we do require further input from the parties in supplemental memoranda. First, the parties must address the criterion for

¹⁴ *Id.* at 1377.

¹⁵ *Id.* at 1378.

¹⁶ *Id.* at 1376.

¹⁷ *Id.* at 1378; *see* U.S. VET. APP. R. 22(a)(3) ("The RCA shall . . . explain the reasons why a decision granting relief on a class action basis would serve the interests of justice to a greater degree than would a precedential decision granting relief on a non-class action basis."); *see also* *Skaar v. Wilkie*, 32 Vet.App. 156, 197 (2019) (en banc) (setting out factors concerning superiority in the context of an RCA in an appeal), *vacated and remanded on other grounds sub nom.*, *Skaar v. McDonough*, 48 F.4th 1323 (Fed. Cir. 2022).

¹⁸ *Freund II*, 114 F.4th at 1378.

¹⁹ *Id.* (citing U.S. VET. APP. R. 22(a)(3)).

certification under Rule 23(a)(1), namely whether the proposed "class is so numerous that consolidating individual actions in the Court is impracticable." We recognize that the parties have submitted pleadings on the numerosity requirement in the past. However, the size of a proposed class can change over time and there may have been other developments that merit revisiting the issue.

Second, the parties must address the superiority requirement, or, in other words, whether "a decision granting relief on a class action basis would serve the interests of justice to a greater degree than would a precedential decision granting relief on a non-class action basis."²⁰ While the parties considered this issue in earlier submissions, we require the parties to address the Federal Circuit's observation that "administrative feasibility may bear on whether class resolution is superior to individual resolution."²¹ Specifically, do considerations of "administrative feasibility" counsel against class certification here? In addition, the parties are directed to address whether the Court should modify the *Skaar* superiority factors²² to address the issue of superiority in the context of a petition rather than an appeal (as was at issue in *Skaar*). Assuming a party advocates for a modification, how should the Court modify the factors?

Upon consideration of the foregoing, it is

ORDERED that, within 30 days of the date of this order, petitioners file with the Court and serve on the Secretary a supplemental memorandum, not exceeding 15 pages, addressing the matters set forth above. It is further

ORDERED that, within 30 days of the date on which petitioners file their supplemental memorandum, the Secretary file with the Court and serve on petitioners a supplemental memorandum, not exceeding 15 pages, addressing the matters set forth above as well as petitioners' position on the matters they discuss in their supplemental memorandum. And it is further

ORDERED that, within 14 days of the date on which the Secretary files his supplemental memorandum, petitioners file with the Court and serve on the Secretary a reply, not exceeding 7 pages, addressing the Secretary's supplemental memorandum.

DATED: November 4, 2024

PER CURIAM.

Copies to:

John D. Niles, Esq.

VA General Counsel (027)

²⁰ U.S. VET. APP. R. 22(a)(3).

²¹ *Freund II*, 114 F.4th at 1378.

²² *See Skaar*, 32 Vet.App. at 197.