

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-1280

CONLEY F. MONK,

PETITIONER,

V.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS,

RESPONDENT.

Before HAGEL, *Judge*.

ORDER

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

On April 6, 2015, Conley F. Monk filed through counsel a petition for extraordinary relief in the nature of a writ of mandamus. Mr. Monk asserts that his claim for benefits for post-traumatic stress disorder was denied in August 2012 and that he has received no response to his July 2013 Notice of Disagreement. He contends that the Secretary's failure to respond in the intervening 20 months amounts to "a constructive denial of benefits." Petition (Pet.) at 2. Mr. Monk further argues:

The Secretary has failed to render a timely decision on the pending disability benefits applications of countless other veterans who, like Mr. Monk, face significant financial or medical hardship and have waited twelve months or more for a decision since timely filing a[Notice of Disagreement] to initiate the appeals process.

This Court has previously declined to adopt a class action procedure under its organic statute or to aggregate claims through the doctrine of associational standing. In a series of dissenting and concurring opinions, however, its judges have recognized that the Court may, in an appropriate case, exercise its inherent equitable powers or its authority under the All Writs Act, 28 U.S.C. § 1651(a), for aggregate resolution. The Secretary's pervasive and unlawful delay in adjudicating post-[Notice of Disagreement] claims by thousands of veterans like Mr. Monk warrants judicial intervention on an aggregate basis.

Id.

Mr. Monk requests that the Court "compel the Secretary promptly to decide his claim and that of thousands of similarly situated veterans who confront significant financial or medical hardship while awaiting a VA decision." *Id.* He argues that, in addition to compelling the Secretary to address his individual claim, the Court should adopt an aggregate resolution procedure for "all veterans who applied for VA disability benefits and (a) have timely filed a[Notice of Disagreement] . . . and have not received a decision within twelve (12) months . . . ; and (b) can demonstrate medical or financial hardship as defined by 38 U.S.C. §§ 7107(a)(2)(B), (C)." *Id.* at 10.

A. Mr. Monk's Individual Case

Mr. Monk alleges the following facts pertinent to *his individual claim* for benefits before VA:

- He served in the U.S. Marine Corps between 1968 and September 1970. He received an other than honorable discharge in lieu of a court-martial for various offenses.
- He filed a claim for VA disability benefits for post-traumatic stress disorder in February 2012.
- That claim was denied by a VA regional office in August 2012 because the character of Mr. Monk's discharge precluded his entitlement to benefits. Mr. Monk and his representative did not receive notice of the decision until "spring 2013." Pet. at 7.
- Mr. Monk filed a Notice of Disagreement with that decision in July 2013 and requested a hearing before a decision review officer.
- In December 2012, before he received notice of VA's August 2012 decision, Mr. Monk submitted additional evidence.
- In February 2013, again before Mr. Monk received notice of VA's August 2012 decision, VA advised Mr. Monk that he could submit "supplemental information about his discharge and military records" within 60 days and could also request a personal hearing. Pet. at 6.
- In March 2013, Mr. Monk requested a personal hearing.
- In February 2014, Mr. Monk testified at a hearing before a decision review officer and presented additional evidence.
- In November 2014, a U.S. District Court remanded his application for correction of records to the Board for Correction of Naval Records "for reconsideration in light of Secretary of Defense Hagel's September 2014 instruction that record

correction boards give 'liberal consideration' to post-service [post-traumatic stress disorder] diagnoses, especially for Vietnam veterans who had received "an other than honorable discharge. Pet. at 7.

- In February 2015, Mr. Monk contacted the regional office and his congressional representative to inquire as to the status of his claim.
- In March 2015, VA notified Mr. Monk's congressional representative that it could not process Mr. Monk's appeal "because some of his records are with the Board for Correction of Naval Records," and that VA could not proceed without the records. *Id.*

Mr. Monk argues that the pendency of his application to correct his records to reflect a character of discharge that would not preclude entitlement to benefits "in no way justifies" VA's delay in acting on his July 2013 Notice of Disagreement with the August 2012 denial of disability benefits. Pet. at 8. He asserts that "[t]he Secretary has neither offered a reason why he cannot obtain a copy of the allegedly relevant records, nor offered a reason why a decision cannot be made on the existing administrative record." *Id.*

The Court concludes that a response from the Secretary will assist in addressing the issues raised by Mr. Monk in this part of his petition. Accordingly, the Court will order the Secretary to file a response to the petition not later than 30 days after the date of this order. The Secretary should explain what action, if any, has been taken on Mr. Monk's appeal since the February 2014 decision review officer hearing, and what effect, if any, the pendency of Mr. Monk's application to correct his records before the Board for Correction of Naval Records has on the Secretary's ability to process Mr. Monk's appeal.

B. Request for Aggregate Resolution

In his statement of facts regarding "the Aggregate Group [g]enerally," Mr. Monk alleges a series of facts and statistics for which he offers no citation or authority. *See* Pet. at 8-9. The Court will not recount these particular facts; suffice it to say that Mr. Monk alleges that the time from the filing of a Notice of Disagreement to a decision by the Board is, on average, "multiple years," Pet. at 8, and that these "extensive delays" create hardships for claimants, *id.* at 9.

Mr. Monk seeks "extraordinary injunctive relief" for an aggregate group comprised of

all veterans who applied for VA disability benefits and (a) have timely filed a [Notice of Disagreement] upon denial of their initial application and have not received a decision within twelve (12) months, whether the veteran elected a [decision review officer] hearing or proceeded directly to a [Board] appeal; and (b) can demonstrate medical or financial hardship as defined by 38 U.S.C. §§ 7107(a)(2)(B), (C).

Id. at 10.

Mr. Monk recognizes that the Court has previously declined to permit class actions because to do so would be unmanageable and unnecessary. *Id.* (citing *Lefkowitz v. Derwinski*, 1 Vet.App. 439, 440 (1991)). He also acknowledges that the Court has "declined to address claims on an aggregate basis by applying the doctrine of associational standing." Pet. at 11 (citing *American Legion v. Nicholson*, 21 Vet.App. 1, 8 (2007) (en banc)).

Nevertheless, Mr. Monk argues that any relief he obtains individually as a result of his petition "would not benefit similarly situated veterans unless each one filed a petition for extraordinary relief in this Court." *Id.* He contends that "the potentially unmanageable volume of cases necessitates an aggregate procedure here" and that fashioning an aggregate resolution procedure under these circumstances "would be a less burdensome way to address the systemic and recurring problem" of post-Notice of Disagreement delays. *Id.*

Mr. Monk contends that the Court has the discretion under the All Writs Act, 28 U.S.C. § 1651(a), to entertain class actions in appropriate circumstances and that the Court has the equitable power to adopt an aggregate resolution procedure. He notes, too, that the Court is authorized to make its own rules of practice and procedure. Pet. at 12 (citing 38 U.S.C. § 7264(a)). He concludes that, "[f]or practical and policy reasons," it is necessary for the Court "to 'compel correction of a systemic error' unaddressed by VA." *Id.* at 12-13 (quoting Lawrence B. Hagel and Michael P. Horan, *Five Years Under the Veterans' Judicial Review Act: The VA Is Brought Kicking and Screaming Into the World of Meaningful Due Process*, 46 ME. L. REV. 43, 65 (1994)).

Mr. Monk notes that Rule 23 of the Federal Rules of Civil Procedure serves as "the standard for class actions in civil suits in the U.S. District Courts" and asserts that even where—as in this Court—the Federal Rules of Civil Procedure do not apply, Rule 23 "has served as a basis for collective action procedures." Pet. at 11. In that light, Mr. Monk contends that the requirements of Rule 23 are met by the proposed aggregate group in this case.

Mr. Monk then argues that his petition should be granted as to the aggregate group, a discussion into which the Court need not delve, given its determination that he has not demonstrated that a class action or aggregate resolution is permitted here.

Even assuming Mr. Monk's statistics regarding the number of potential class members are correct, or that his proposed class meets the dictates of Rule 23, Mr. Monk fails to appreciate the Court's long-standing declaration that it does not have the authority to entertain class actions. See *Harrison v. Derwinski*, 1 Vet.App. 438 (1991) (en banc); *Lefkowitz*, 1 Vet.App. at 440; see also *American Legion*, 21 Vet.App. at 3-4; *Henderson v. Brown*, 10 Vet.App. 272, 278 (1997) ("[T]his Court determined, en banc, in *Lefkowitz* . . . and *Harrison* . . . that it lacked the authority to establish

a class action procedure and that to do so would be both unwise and unnecessary."). In the absence of such authority, no other arguments matter.¹

Accordingly, the Court will deny that part of Mr. Monk's petition that seeks class action or aggregate status for a group of similarly situated veterans.

C. Other Matter

On April 9, 2015, veteran Harold William Van Allen, who is self-represented, filed a motion styled as one to "Reopen/Consolidate/Join Petition for Immediate Mandamus Relief as a Similarly Situated Class Member in 15-1280." That motion contains no substance, but its intent is clear from its title.

Mr. Monk filed a response to that motion on April 20, 2015, stating that, at this time, he opposes joinder of Mr. Van Allen "or any other individual veteran in this case." Response at 1. Nevertheless, Mr. Monk notes that, since filing his petition, his counsel "has received inquiries from a very substantial number of veterans" interested in becoming part of any class action or aggregate group that may result from this petition. *Id.* at 1-2.

In light of the Court's disposition of this portion of Mr. Monk's petition, the Court will deny Mr. Van Allen's motion to join.

Upon consideration of the foregoing, it is

ORDERED that the Secretary file an answer to that portion of Mr. Monk's petition that pertains to his individual circumstances not later than 30 days after the date of this order. It is further

ORDERED that the portion of Mr. Monk's April 6, 2015, petition seeking certification of a class action is DENIED. It is further

¹ The question of associational standing is irrelevant here, as Mr. Monk filed his petition on his own behalf and not as a member or representative of any organization or association. Moreover, the Court has held that it is "not permitted to go beyond the jurisdictional statute set forth by Congress and allow for associational standing." *American Legion*, 21 Vet.App. at 2-3 (petition filed by American Legion on behalf of numerous veterans).

ORDERED that Harold Van Allen's motion to join is DENIED.

DATED: May 8, 2015

BY THE COURT:



/s/ Lawrence B. Hagel
LAWRENCE B. HAGEL
Judge

Copies to:

Michael J. Wishnie, Esq.

VA General Counsel (027)

Harold Van Allen