IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

VICTOR B. SKAAR,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 17-2574
	)	
DAVID J. SHULKIN, M.D.,	)	
Secretary of Veterans Affairs,	)	December 11, 2017
	)	
Appellee.	)	

MOTION FOR CLASS CERTIFICATION OR AGGREGATE RESOLUTION

1. Pursuant to U.S. Vet. App. R. 27, 28 U.S.C. § 1651(a), 38 U.S.C. § 7264(a), and this Court's inherent powers, Appellant Victor B. Skaar respectfully moves for class certification or aggregate resolution of claims set forth herein under the Administrative Procedure Act and the U.S. Constitution.

2. The putative class includes all U.S. veterans who were present at the 1966 cleanup of plutonium dust at Palomares, Spain and whose application for service-connected disability compensation based on exposure to ionizing radiation the Department of Veterans Affairs ("VA") has denied or will deny.

3. Appellee intends to file a response in opposition to this Motion.

THE SECRETARY REFUSES TO RECOGNIZE
PALOMARES VETERANS' SERVICE-CONNECTED DISABILITIES

4. On January 17, 1966, a B-52 bomber carrying four hydrogen bombs crashed during mid-air refueling. The non-nuclear explosives in two of the bombs detonated, releasing radioactive plutonium dust over the Spanish countryside.

5. The U.S. ordered 29-year-old Victor Skaar and approximately 1,600 U.S. servicemembers to the site to conduct tests and remove plutonium. The government failed to provide servicemembers with adequate protection in the weeks or months that they worked at the site, test many servicemembers for exposure to harmful radiation, and inform most of those tested of their results.

6. Mr. Skaar and many of his fellow Palomares veterans have suffered from radiogenic illnesses, including cancers and blood disorders, in the decades since. *See, e.g.*, Dave Philipps, *Decades Later, Sickness Among Airmen After a Hydrogen Bomb Accident*, N.Y. TIMES (June 19, 2016), http://nyti.ms/2ubdAEF.

7. The VA recognizes some radiation events as "radiation-risk activit[ies]." 38 U.S.C. § 1112(c)(3)(b); 38 C.F.R. § 3.309(d)(3)(ii).

8. A veteran present for one of these listed "radiation-risk activit[ies]" and who later develops one or more enumerated disabilities is presumed to have suffered a service-connected disability. *Id.* § 3.309(d)(1).

9. The Secretary does not recognize Palomares as a "radiation-risk activity." *Id.* § 3.309(d)(3)(ii). As a result, Palomares veterans such as Appellant Skaar who later develop one of the enumerated disabilities are <u>not</u> presumed to have suffered a service-connected disability.

10. There is a separate regulatory path—38 C.F.R. § 3.311(a)—for disabilities caused by radiation exposure events not recognized in § 3.309(3)(ii).

11. The VA first requests exposure data from the veteran's military service records, and the Under Secretary for Health prepares a dose estimate.

Id. § 3.311(a)(2)(iii). The Under Secretary for Benefits then determines if "it is at least as likely as not" that the condition is the result of exposure to ionizing radiation, based on six enumerated factors. *Id.* § 3.311(c)-(e).

12. Mr. Skaar has been diagnosed with skin and prostate cancer, which are listed as potentially "radiogenic diseases" under *id.* § 3.311(b)(2). However, the VA applies the same review procedures to conditions not listed, "provided that the claimant has cited or submitted competent scientific or medical evidence that the claimed condition is a radiogenic disease." *Id.* § 3.311(b)(4).

13. The VA denies Palomares veterans compensation for their service-connected radiogenic diseases because it has not recognized participation at Palomares among the "radiation-risk activities" listed in *id.* § 3.309(3)(ii) and because it applies a fundamentally flawed dosimetry methodology to calculate Palomares veterans' dose estimates under *id.* § 3.311.

14. This action challenges the VA's exclusion of Palomares from *id.* § 3.309(3)(ii) and its reliance on scientifically flawed methodology under *id.* § 3.311 as arbitrary and capricious under the Administrative Procedure Act, and as a violation of veterans' Fifth Amendment due process and equal protection rights.

THE VA'S TREATMENT OF PALOMARES IS ARBITRARY AND CAPRICIOUS AND VIOLATES VETERANS' FIFTH AMENDMENT RIGHTS.

15. Pursuant to 38 U.S.C. §§ 501(A), 1154(a), the VA has the regulatory authority to recognize "radiation-risk" activities under 38 C.F.R. § 3.309(3)(ii). It has exercised this authority in the past.

16. Palomares is similar to the activities listed: in each, (a) radiation was released; (b) service members were present during or shortly after the release; (c) a large number of service members were exposed to ionizing radiation; (d) the protective gear provided was inadequate to protect against the adverse health effects of ionizing radiation; and (e) service members subsequently developed radiogenic cancers and other radiogenic disabilities.

17. Consequently, the VA's failure to include Palomares among the regulatory "radiation-risk activit[ies]" in *id.* § 3.309 is arbitrary and capricious in violation of the Administrative Procedure Act**,** 5 U.S.C. § 706(2).

18. Further, this failure lacks rational basis and deprives veterans of a protected property interest without due process of law, in violation of the Fifth Amendment to the U.S. Constitution.

19. VA procedures for evaluating Palomares veterans' claims for service-connected disability compensation based on exposure to ionizing radiation under *id.* § 3.311 violate their statutory and constitutional rights as well.

20. On December 6, 2013, the VA began implementing a standardized methodology prepared by the Air Force to estimate all Palomares veterans' dose estimates under *id.* § 3.311. R. at 1580 (1580-81).

21. Original bioassay testing shows that many Palomares veterans were exposed to dangerously high levels of radiation, in excess of the current annual limit of 5 rem set in 10 C.F.R. § 20.1201.

22. A 2001 report by a litigation consulting firm hired by VA, Labat-Anderson, concluded that these results were "unreasonably high"—as compared to nuclear test site workers, despite that exposure history of test site workers differs significantly from Palomares veterans'—and attempted to reconcile Palomares veterans' bioassay data with environmental data collected *after* the cleanup. R. at 1888 (1888-89); *see also* LABAT-ANDERSON INC., PALOMARES NUCLEAR WEAPONS ACCIDENT: REVISED DOSE EVALUATION REPORT 32, (April 2001), http://bit.ly/2B795BY [*hereinafter* LABAT-ANDERSON REPORT].

23. The "theoretical exposures" relied on by the VA's consultant in 2001 had "no relationship," however, to the "actual amount of plutonium inhaled by the veterans during the cleanup, when the concentration of airborne plutonium is likely to have been much higher." DR. FRANK VON HIPPEL, PROGRAM ON SCIENCE AND GLOBAL SECURITY WORKING PAPER 1 (Dec. 7, 2017), *available at* https://www.princeton.edu/sgs/faculty-staff/frank-von-hippel/ [*hereinafter* "VON HIPPEL REPORT"]. In fact, the VA's consultant concluded in 2001 that further testing and analysis was needed. LABAT-ANDERSON REPORT at 32.

24. The VA undertook no further testing or analysis. Instead, in 2013 the Secretary adopted a dosimetry methodology based on the 2001 report's urinalysis data to assign a "worst case" dose estimate to Palomares responders. This "worst case" estimate is low enough to result in the VA denying nearly all Palomares veterans' benefits claims under 38 C.F.R. § 3.311, including that of Appellant Skaar. This is despite the fact that "the Air Force's dose estimates

have huge uncertainties and the maximum doses incurred by [some Palomares veterans] could be hundreds of times higher than those that the Air Force has recommended to the VA for determination of benefits." VON HIPPEL REPORT at 14.

25. The current dosimetry methodology does not constitute "sound scientific evidence" under *Id.* § 3.311(c)(3). Rather, "the dose estimates that have been made for the Palomares veterans are extremely uncertain and, in many cases, the maximum doses have been grossly underestimated." VON HIPPEL REPORT at 5. Thus, the VA's use of the methodology is arbitrary and capricious, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2), and of Palomares veterans' Fifth Amendment due process and equal protection rights.

AGGREGATE RESOLUTION IS APPROPRIATE HERE.

26. This Court has the authority to certify a class or aggregate action in order "to promote efficiency, consistency, and fairness in its decisions." *Monk v. Shulkin*, 855 F.3d 1312, 1321 (Fed. Cir. 2017).

27. Appellant asks that this Court certify a class of all U.S. veterans who were present at the 1966 cleanup of plutonium dust at Palomares, Spain and whose application for service-connected disability compensation based on exposure to ionizing radiation the Secretary has denied or will deny.

28. This Court has yet to establish a standard for certification of a class of veteran claimants. However, the veterans who served at Palomares meet the standards generally applicable to the determination of a class under Fed. R. Civ. P. 23, and in similar aggregate procedures.

29. There are questions of law and fact common to this proposed aggregation, Fed. R. Civ. P. 23(a)(1), and Appellant Skaar's claims are typical of the proposed class of Palomares veterans. Fed. R. Civ. P. 23(a)(2).

30. Specifically, the Secretary (a) does not recognize the Palomares incident as a "radiation-risk activity," 38 C.F.R. § 3.309, and (b) has denied or will deny the claims of Mr. Skaar and members of the proposed class based on the same scientifically flawed dose estimate methodology applied per *id.* § 3.311.

31. Appellant Skaar and members of the proposed aggregation share legal claims and request that the Court order the same relief: that the Secretary (a) recognize participation in the cleanup effort at Palomares as a "radiation-risk activity" under 38 C.F.R. § 3.309(3)(ii); (b) apply dose estimate methodology supported by sound scientific evidence in accordance with 38 C.F.R. § 3.311; and (c) re-adjudicate Palomares veterans' denied benefits claims accordingly.

32. Class or aggregate adjudication is the most efficient procedural means available to resolve Appellant and Palomares veterans' claims, as joinder under Vet. App. R. 3(d) of all members of the putative class is impracticable.

33. The U.S. ordered approximately 1,600 military personnel to Palomares during the cleanup process – a figure that would satisfy the numerosity requirement of Fed. R. Civ. P. 23(a)(1).

34. At least eleven anonymized decisions by the Board of Veterans Appeals deny applications for service-connected disability benefits based on a

veteran's exposure to ionizing radiation in the Palomares cleanup. The Secretary has likely denied many more Palomares veterans' claims at the Regional Offices.

35. Aggregate resolution would ensure that the claims of all Palomares veterans for disability compensation related to radiogenic illnesses resulting from exposure at Palomares are fairly and consistently adjudicated.

36. The Appellant and his counsel would fairly and adequately protect the interests of the proposed class. The named Appellant, Mr. Skaar, has no interest antagonistic to the putative class members' interests.

37. Undersigned counsel is qualified and experienced in handling veterans' benefits cases before this Court, *see*, *e.g.*, *Monk v. Shulkin*, No. 15-1280 (Vet. App.), and supervising law student interns in class action litigation. *See, e.g., Monk v. Mabus*, No. 3:14-cv-260-WWE (D. Conn.) (proposed nationwide class action of Vietnam veterans with PTSD); *Reid v. Donelan*, 297 F.R.D. 185, 194 (D. Mass. 2014) (certifying class of immigration detainees and appointing the undersigned as class counsel).

38. This Court has the authority to order injunctive relief to resolve the claims of the proposed class as a whole. Mr. Skaar seeks only injunctive relief on behalf of the putative class or aggregation.

39. The VA has "refused to act on grounds that apply generally to the class" by failing to recognize Palomares as a radiation-risk activity, and by relying on dose estimate methodology that is not supported by sound scientific evidence. Fed. R. Civ. P. 23(b)(2).

40. Final relief is "appropriate respecting the class as a whole" to ensure that Appellant and the proposed group of similarly situated Palomares veterans are subject to a consistent standard of due process with respect to their applications for Palomares-linked conditions. Fed. R. Civ. P. 23(b)(2).

41. As all Palomares veterans who have developed or may develop radiogenic conditions have been affected by the VA's arbitrary and capricious actions, relief from this Court would vindicate the due process rights of all.

42. This Court may exercise authority under 38 U.S.C. § 7264 to fashion an aggregation rule different from the class action procedures set out in Fed. R. Civ. P. 23. *See Monk v. Shulkin*, 855 F.3d at 1319-20.

43. Alternative aggregate procedures developed by this Court may mirror, for example, the class complaint mechanism available to employees filing with the Equal Employment Opportunity Commission. *See* 29 C.F.R. 1614.204.

44. This Court is also not bound by a claimant's proposed class, and may instead certify the aggregation it finds to be appropriate. *See* 7AA Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 1790 (3d ed. 2017).

45. Trial courts often resolve proposed class definition disputes after pre-certification discovery. *See, e.g., Burton v. District of Columbia*, 277 F.R.D. 224, 231 (D.D.C. 2011). If this Court determines that Appellant has not presented adequate facts to satisfy the requirements of class certification or aggregate resolution adopted by this Court, Appellant requests pre-certification discovery to further inform the scope of the proposed class or aggregate group.

46. This Court may permit discovery, including resolution of any discovery disputes that may arise, and may appoint a special master to supervise discovery pursuant to the All Writs Act or its equitable powers, *see* Fed. R. App. P. 48 (authorizing appointment of special master by U.S. court of appeals); S. Shapiro, K. Geller, T. Bishop, E. Hartnett & D. Himmelfarb, SUPREME COURT PRACTICE 652 (10th ed. 2013) (same as to U.S. Supreme Court, despite absence of Court rule authorizing appointment). This Court may also recall a judge in senior status, 38 U.S.C. § 7257, to oversee any appropriate discovery.

47. In the alternative, the Court may supervise pre-certification discovery directly, including when sitting as a single-judge panel. *See, e.g., Cardona v. Shinseki*, 2012 U.S. App. Vet. Claims LEXIS 1724 (Kasold, C.J.).

48. If the Court is not prepared to grant this motion, Appellant respectfully seeks leave to supplement it with further briefing and evidentiary presentation on a schedule directed by the Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE OF MOTION FOR CLASS CERTIFICATION OR AGGREGATE RESOLUTION

Pursuant to U.S. Vet. App. Rule 10(a)(5), I certify that on the 11th day of December, 2017, a copy of the foregoing Motion to Dispute the Record Before the Agency was filed electronically through the court's CM/EFC system and served via electronic mail to:

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