

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-4771

GEORGE D. PREWITT,

PETITIONER,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

RESPONDENT.

Before SCHOELEN, PIETSCH, and TOTH, *Judges*.

ORDER

On December 11, 2017, the self-represented petitioner, George D. Prewitt, filed a motion to recall mandate in *Prewitt v. McDonald*, No. 16-1552, 2016 WL 4904061, at *1 (Vet. App. Sept. 15, 2016), or alternatively, a petition for extraordinary relief in the form of a writ of mandamus. The relief requested in both filings is essentially for the Court to compel VA to recognize and process his pending January 2, 1980, increased rating claim for his service-connected gunshot wound. Specifically, the petitioner asserts that, because VA failed to provide proper notice of his appellate rights in a June 5, 1980, letter notifying him of a May 20, 1980, regional office decision, his increased rating claim is not final and remains pending.

On December 18, 2017, the petitioner filed a motion for class certification identifying the potential class as "eligible disabled veterans" who did not receive notice of their appellate rights in VA decisions issued from "January 1, 1980, to February 1983." Motion for Class Certification at 1. The petitioner requests a limited class action under Federal Rules of Civil Procedure Rule 23(c)(4). *Id.* at 2.

On January 29, 2018, the Court ordered that the case be submitted to a panel to consider class certification. The following month, the Court ordered the Director of Case Evaluation and Placement at the Veterans Consortium Pro Bono Program to investigate the possibility of appointing counsel to provide representation to the petitioner, if he so desired. On March 9, 2018, the Director informed the Court that the petitioner had failed to respond to a voicemail message left for him on February 8, 2018, and failed to repond to a follow-up letter sent to him on February 21, 2018.

In *Monk v. Wilkie*, 30 Vet.App. 167 (2018), the Court determined that it will use Rule 23 of the Federal Rules of Civil Procedure as a guide in considering requests for class certification. To justify class certification, each element of Rule 23(a) must be established and the party seeking certification bears the burden of proving certification. *See Amchem Products., Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *DG ex rel Stricklin v. Devaugh*, 594 F.3d 1188, 1194 (10th Cir. 2010). The threshold requirements for class certification under Rule 23(a) are: (1) numerosity, finding that the

class is so numerous that joinder of all members is impractical; (2) commonality, requiring that there are common questions of fact or law to the class; (3) typicality, requiring that the claims or defenses of the representative are typical of the class; and (4) adequacy, ensuring that the class representative will fairly and adequately protect the interests of the class. *See* FED. R. CIV. P. 23(a).¹

Recently, the Court held that a self-represented petitioner who moved for class certification, without alleging that he had any training as an attorney, did not satisfy the adequacy requirement of Rule 23(a)(4). *Thompson v. Wilkie*, No. 18-2169, 2018 WL 5291818, at *1 (Vet. App. Oct. 24, 2018); FED. R. CIV. P. 23(a)(4); *see also DeBrew v. Atwood*, 792 F.3d 118, 132 (D.C. Cir. 2015) ("[A] pro se litigant who is not trained as a lawyer is simply not an adequate class representative."); *Fymbo v. State Farm Fire & Cas. Co.*, 213 F.3d 1320, 1321 (10th Cir. 2000) (holding that a pro se plaintiff is not an adequate class representative "because the competence of a layman is clearly too limited to allow him to risk the rights of others" (internal quotation marks omitted)).

Here, the self-represented petitioner has not alleged that he has any training as an attorney. Based on the petitioner's filings, the Court concludes that he has not met the adequacy element of Rule 23(a) - that he can fairly and adequately protect the interests of class members - and the motion for class certification will be denied. *See Thompson*, 2018 WL 5291818, at *1.

Upon consideration of the foregoing, it is

ORDERED that the petitioner's motion for class certification is denied.

DATED: November 30, 2018

PER CURIAM.

Copies to:

George D. Prewitt

VA General Counsel (027)

¹ A movant for class certification must also establish that the class is maintainable under one of the subdivisions of Rule 23(b). *See Amchem*, 521 U.S. at 614. The petitioner fails to allege that the proposed class falls within one of the Rule 23(b) subdivisions. Rather, he only asserts that his class should be permitted as a limited class action under Rule 23(c)(4). *See* Motion for Class Certification at 2-3. Because the Court concludes that the petitioner has not met the threshold requirements of Rule 23(a), there is no need to consider whether the proposed class meets the requirements of Rule 23(b).