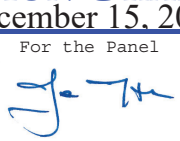
IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

MOTION GRANTED
December 15, 2020
For the Panel



Joseph L. Toth
Judge

JEREMY BEAUDETTE AND MAYA BEAUDETTE, individually and on behalf of others similarly situated, **Petitioners,**	)	
v.	)	Vet. App. No. 20-4961
ROBERT WILKIE, in his capacity as Secretary of Veterans Affairs, **Respondent.**	)	

PETITIONERS' MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF CLASS CERTIFICATION

Petitioners Jeremy and Maya Beaudette ("Petitioners") respectfully request, pursuant to Rule 23(b)(3) of the Court's Rules of Practice and Procedure, that the Court grant leave for Petitioners to file the enclosed 10-page Reply brief to respond to the Secretary's arguments raised in his Response brief (filed Dec. 7, 2020) to Petitioners' Motion for Class Certification. The Secretary does not oppose this request.

Through the Petition, Petitioners request that this Court compel the Secretary to allow Petitioners to seek review at the Board of Veterans' Appeals ("Board") of VA's decision to revoke their benefits under the Program of Comprehensive Assistance for Family Caregivers ("Caregiver Program"). Through their Motion for Class Certification, Petitioners request that the Court issue an order to ensure that all Caregiver Program claimants are promptly and efficiently provided notice and opportunity to pursue a Board

appeal without delay and without the burden of having to petition this Court to enforce their rights.

Since Petitioners filed their Motion for Class Certification, this Court issued Rules 22 and 23 governing class certification in this Court. In response to Petitioners' Motion, the Secretary made arguments relating to typicality (as styled in the new Rules) and the factor addressing 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. The Secretary also asserted arguments relating to the adequacy of the clinical appeals process applied to the Caregiver Program.

Petitioners request leave to file the enclosed Reply brief to respond to the Secretary's arguments.

Respectfully submitted,

Date: Dec. 14, 2020

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PETITIONERS' REPLY IN SUPPORT OF CLASS CERTIFICATION

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I. INTRODUCTION

The Secretary does not dispute that the numerosity, commonality, and adequacy factors are met in this case. Nor does the Secretary dispute that this action alleges the Secretary has acted or failed to act on grounds that apply generally to the Proposed Class. The Secretary only argues that typicality is lacking and that a precedential decision on a non-class basis should suffice. The Secretary is wrong on both fronts.

First, the typicality factor does not apply to the merits of the underlying benefits decision, as the Secretary suggests, but rather applies to the merits of the legal issues raised in the petition as they relate to the requested relief. Petitioners are not asking the Court for restoration of benefits. Rather, Petitioners are asking the Court to order the Secretary to provide statutorily-mandated Board appeal rights. That legal issue is typical of the many Caregiver Program claimants who, like Petitioners, received an adverse benefits decision under the Caregiver Program, exhausted the VHA review process, and were not accorded the right to appeal to the Board. Typicality is present in this case.

Second, the Secretary's Response brief confirms the need for timely remedial enforcement. Specifically, he has confirmed that VA will not take steps to ensure past claimants are given the opportunity to pursue a Board appeal following a precedential decision. Instead, the Secretary contends that any past claimants must file a petition for extraordinary relief on an individual basis in this Court to secure the right to pursue a Board appeal. Remedying this type of systemic harm without the unnecessary burden and delay proposed by the Secretary is precisely why the Court should use the class vehicle.

Moreover, while the Secretary defends the new VHA directive applicable to the

Caregiver Program—*i.e.*, the written words on the page—the Secretary offers no response to the grave concerns raised by the *actual* operation of the Caregiver Program or the well-documented reports of widespread wrongful denial of benefits. These issues persist despite the fact that a VHA directive may offer a clinical review process.

In sum, the Caregiver Program is critical to ensuring the health and wellbeing of veterans; there is undisputed evidence of large-scale wrongful denial of Caregiver Program benefits; and the Secretary has made clear that he would not apply any precedential decision to past claimants, and would instead force them to file individual petitions to secure Board appeal rights that were wrongfully withheld. For these reasons, this case presents the quintessential circumstances warranting class-wide relief to ensure prompt, efficient, and effective remedial enforcement.

II. ARGUMENT

A. The Typicality Factor is Met

This Court's Rule 23(a)(3) requires that "the legal issue or issues being raised by the representative parties on the merits are typical of the legal issues that could be raised by the class." The Secretary argues the "on the merits" language should be interpreted as requiring typicality with respect to the merits of the underlying benefits claims. Resp. at 10–11. But this is illogical in a case where the merits of underlying benefits claims are not at issue. Here, the merits issue raised by Petitioners—and on which class and non-class relief is sought—is whether Board review is available for the Caregiver Program.

That issue is typical of all Program claimants who were not permitted a Board appeal.[1]

B. Class Certification is Far Superior to a Precedential Decision

Class relief would serve the interests of justice to a far greater degree than a precedential decision in view of several factors. First, the Secretary does not dispute that the implementation of the Caregiver Program to date has resulted in widespread reports of wrongful arbitrary revocations and inconsistent application of eligibility criteria across the country. Second, the Secretary's decision to preclude Board and judicial review has prevented claimants from correcting erroneous decisions. The end result is that potentially thousands of claimants have been wrongfully revoked, denied, or downgraded without opportunity to pursue the statutorily-required review path to correct the errors.

The importance of Caregiver Program benefits cannot be overstated. The benefits are critical to ensuring the health and wellness of veterans and their families, including providing much-needed assistance with activities of daily living, A0031–32, and preventing the well-documented rise in veteran suicides. As VA acknowledges, caregivers are in a unique position to prevent veteran suicides. *See* Mot. at 3, n.1; *see*, *e.g.*, A0124 (describing a mentally ill veteran who "attempted suicide by swallowing 54 anti-anxiety pills," prompting his wife/caregiver to keep his medicine locked and monitored; VA subsequently revoked their benefits on questionable grounds).

[1] Petitioners are confused by the Secretary's request to hold class certification in abeyance. *See* Mot. at 3. Class certification would be moot if the Court holds that there is no Board review for the Caregiver Program; thus, Petitioners assume the Court would address class certification, if at all, after first addressing the merits of the Petition. The Court ordered briefing on class certification, Aug. 4, 2020 Order; Oct. 2, 2020 Order, and it has now been briefed. It is unclear what exactly the Secretary is requesting.

The Secretary does not respond to the systemic issues that have permeated the Caregiver Program since its inception, *see* Mot. at 4–6; Pet. at 5–9, just as the Secretary did not respond to these issues in his Response to the Petition, *see* Reply at 7–8 (filed Dec. 7, 2020). Moreover, the Secretary does not assert that he would ensure past claimants are accorded Board appeal rights that were wrongfully withheld following a precedential decision in Petitioners' favor. Rather, the Secretary contends that "any interested party could file a separate matter with relative ease." Resp. at 16. Presumably, the Secretary means that, far from ensuring past claimants would receive a Board appeal, the Secretary would require any claimant not allowed a Board appeal must file a petition for extraordinary relief in this Court under Rule 21 to secure the right to a Board appeal. The *possibility* that the Secretary might take this position is why Petitioners sought class-wide relief. The *confirmation* that the Secretary intends to take this position is why the Court should utilize the class vehicle to ensure appropriate remedial enforcement.

This case presents the quintessential circumstances warranting class-wide relief. Class-wide relief here would "compel correction of systemic error and [] ensure that like veterans are treated alike," *Monk v. Shulkin*, 855 F.3d 1312, 1321 (Fed. Cir. 2017), including past claimants who, by no fault of their own, were refused Board review prior to a precedential decision in this action. The alternative, per the Secretary's suggestion, would be "individual petition[ers] seeking compliance in each claimant's case," *Godsey v. Wilkie*, 31 Vet. App. 207, 224 (2019), which will result in a flood of petitions to this Court (likely hundreds) seeking the exact same relief: requesting that the Court compel VA to provide a Board appeal for each petitioner's claim.

In addition to needlessly burdening this Court by requiring it to review and issue orders on the same legal issue for each petition, this result would also impose a substantial and unnecessary obstacle for past claimants by requiring each to prepare and file a petition in compliance with Rule 21. This result would also needlessly delay the prospective Board appeal for claimants who are desperately dependent upon caregiver support and for whom Caregiver Program benefits provided a critical lifeline until they were arbitrarily revoked when VA purportedly sought to "correct[] the error of letting way too many people in at the beginning." A0152 (NPR article on VA's response to reports of widespread revocations from the Caregiver Program).[2]

The disabled veterans eligible for the Caregiver Program are the most vulnerable class of disabled veterans: those who suffered a "serious injury . . . in the line of duty" such that they require "personal care services" from a "family caregiver." 38 U.S.C. § 1720G(a)(2). Wrongful revocation from the Caregiver Program is devastating to veterans and their families. It drastically reduces veterans' ability to engage in the affairs of daily life that the majority of Americans take for granted, such as the ability to bathe, toilet,

[2] Statements such as this from the Director of the Program raise the question of whether VA took a stricter approach to eligibility for reassessments to increase revocations in light of VA's initially underestimating the amount of veterans likely to be eligible for the Program—as Petitioners alleged in their Petition. *See* Pet. at 5–6, 8 n.10. To the extent budgetary considerations have driven eligibility decisions, such decisions are inherently arbitrary. *See*, *e.g.*, *Kerr v. Holsinger*, No. 3:03-cv-00068-JMH, 2004 U.S. Dist. LEXIS 7804, at *33 (E.D. Ky. Mar. 25, 2004) ("reducing mandatory benefits to qualified recipients by manipulating eligibility standards in order to make up for budget deficits is unreasonable . . . because it exposes recipients to 'whimsical and arbitrary' decisions"). As with many other factual and legal issues in this case, however, the Secretary has not disputed or otherwise responded to this issue—thus permitting the Court to find that it has been conceded. *See MacWhorter v. Derwinski*, 2 Vet. App. 133, 136 (1992).

and feed oneself. The need for timely remedial enforcement is profound in this case.

The Secretary's suggestion that, following a precedential decision confirming the right to Board review, past claimants still have to file individual petitions in this Court to obtain Board review "would amount to a monumental waste of agency and judicial resources in a system already rife with delay." *Wolfe v. Wilkie*, 32 Vet. App. 1, 33 (2019) ("the class action device here would allow for consistent adjudication of similar claims . . . and allow the Court to more quickly address this systemic issue to reduce delay associated with individual appeals"). Rather, the "more efficient and effective vehicle" for correcting the systemic harm created by VA's no-Board-review policy would be to certify the Proposed Class and provide notice of the ability to appeal to the Board. *See id*.

C. A Brief Comment on the VHA Clinical Appeals Process

The Secretary misunderstands Petitioners' comments with respect to VA's implementation of the Caregiver Program and why it compels class-wide relief in this case. Resp. at 12–14. In their Motion, Petitioners stated: "VA's implementation of the Caregiver Program has been permeated with widespread reports of wrongful and arbitrary eligibility decisions—undoubtedly leaving eligible veterans and caregivers without benefits and, coupled with the lack of meaningful review process, with no avenue to correct the errors." Mot. at 19. To be clear, this was not a comment on any particular VHA directive—*i.e.*, the words on the printed page—and whether, in theory, such a directive describing a review process *could* provide adequate review of benefits decisions. Rather, Petitioners' comments were directed to the *actual* implementation of the clinical review process to *actual* Caregiver Program claims. As described, the actual

(rather than theoretical) implementation of the Caregiver Program suffers from systemic problems—widespread arbitrary revocations and improper eligibility decisions—that are, by all accounts, not capable of proper resolution by VHA's clinical review process. The distinction is one of facial versus as-applied. The Secretary responded in detail to the former, Resp. at 12–14 (describing VHA Directive 1041), but not a word to the latter.[3]

Moreover, the Secretary boasts in detail about all of the "medical professionals" involved in the "clinical appeals process":

> [T]he decision under dispute is reviewed by a team of *at least three medical professionals*. . . . The second-level review would include a review by yet *another team of at least three medical professionals*. . . . During the clinical appeals process, these medical determinations remain in the hands of the *medical professionals best qualified to make clinical treatment decisions*, and multiple levels of review . . . ensure that a *large number of qualified medical professionals* have input before a final decision is made.

Id. at 14–15 (emphasis added). But these medical professionals—as skilled as they may be in their medical practice—are simply not equipped to review legal challenges.

For example, before it was revised on October 1, 2020, 38 C.F.R. § 71.20(c)(4)

[3] The Secretary repeatedly claims that any medical professional deciding appeals is a different person than the one who made the original decision. Resp. at 13–14. Perhaps this is how appeals are now operating. However, this was one of the many inconsistent and unfair practices that inflicted the Caregiver Program for years until VA purported to end to it by issuing a July 31, 2017 Memorandum. *See* A0140 (noting "inconsistent practices in implementing [VHA] Directive 1041 . . . across medical centers, . . . [which] were identified as areas of significant concern," and instructing: "*[i]t is imperative that the individual(s) responsible for making the decision under dispute are not the same individuals in a position of determining the outcome of the appeal*") (emphasis added). A subsequent VA OIG report notes that governance problems such as these persisted, *see* A0200 (Aug. 2018 report finding that oversight was "compromised" because 65% of VISNs assigned VISN-level responsibilities to medical facility-level employees), prompting VA to issue another memorandum in January 2019, *see* A0240.

"allow[ed] a veteran [] to be considered in need of personal care services . . . if the individual is service-connected for a qualifying serious injury, is rated as 100 percent disabled for that injury, and has been awarded special monthly compensation that includes an aid and attendance allowance." 80 Fed. Reg. 1357, 1362 (Jan. 9, 2015).[4] Mr. Beaudette is rated 100% disabled for his loss of vision, A0593, due to a service-connected traumatic brain injury, A0977; A1034, for which he was awarded special monthly compensation (SMC) that includes aid and attendance, A1142, 1182. Therefore § 71.20(c)(4), by itself, confirmed his eligibility under the Caregiver Program, *id*. While VA also confirmed that Petitioners were eligible under the other subsections of § 71.20(c)—*i.e.*, need for supervision, protection, and assistance, A1139–41—these findings were unnecessary in light of his SMC award.

However, when VA decided to revoke Petitioners from the Program, VA *only addressed* Mr. Beaudette's need for supervision, protection, and assistance. A1169. VA overlooked that he was also eligible by reason of his SMC award under § 71.20(c)(4), and that his benefits should never have been revoked in the first place. Petitioners raised this issue expressly in the VISN appeal, *see* A1182; however, the VISN director disregarded it, *see* A1183. It is unsurprising VHA clinicians may fail to appreciate this regulatory nuance—after all, they are trained in medicine, not law.

A similar problem presented when Petitioners requested a reasonable delay of VHA's in-person assessment because Mr. Beaudette was recovering from recent back

[4] VA removed § 71.20(c)(4) this year. *See* 85 Fed. Reg. 46,226, 46,258 (July 31, 2020).

surgeries. *See* Pet. at 11, n.17. VHA denied Petitioners' request for accommodation and proceeded with an "assessment" on the written record, resulting in revocation of benefits. *Id*. On appeal to the VISN, far from recognizing the fundamentally unfair actions on the part of VHA in refusing Petitioners' request for a delay of the proceeding that ultimately resulted in revocation of their benefits, the VISN director instead used it as a basis for upholding the revocation: "Per clinical notes, you were unable to come to the program for a full evaluation at the time of that review. [¶] Unfortunately, without complete physical and occupational therapy evaluations, it is not possible to assess your level of need for physical assistance." A1184. Again, it is not surprising that VHA clinicians would fail to recognize a potential due process violation when one occurs. They are not trained in law.[5]

The potential for legal error is vast—and its scope expands far beyond the legal errors in Petitioners' case. For example, the *Tapia* complaint highlighted many legal errors alleged to be occurring. *See* Pet. at 9, n.11. Under the Secretary's policy, however, these legal errors cannot be brought to the Board, this Court, or any other forum equipped to resolve them. The only avenue for review is to medical professionals under the VHA clinical appeals process—which, as highlighted by the Secretary, is a review process specifically designed to review *clinical treatment decisions*. *See* Resp. at 15 ("During the clinical appeals process, these medical determinations remain in the hands of the medical

[5] The VISN's rationale for upholding the revocation even in the absence of an in-person assessment is flatly contradicted by its own statement that "it is *not possible* to assess your level of need for physical assistance" "without complete physical and occupational therapy evaluations." A1184 (emphasis added). VHA also likely violated its own procedures by revoking Petitioners without first performing the in-person reassessment. *See* A0190 (describing requirements for "re-evaluation" and "re-assessment").

professionals best qualified to make clinical treatment decisions[.]").

Perhaps one of the more fundamental legal errors being committed by VA regarding the Caregiver Program is its persistent violation of 38 U.S.C. § 5104, which requires the Secretary to provide a timely notice of benefits decisions that includes a detailed basis for the factual, evidentiary, and legal basis for the decision. This is another issue the Secretary did not respond to. *See* Mot. at 5, n.3. Instead of providing this information in compliant decision notice letters, VA uses so-called "template letters" that include boilerplate language to inform the claimant of a revocation or tier reduction. *Id*. Even when the template letters are populated with case-specific details, they generally fail to comply with § 5104(b) or provide sufficient information to challenge the decision on appeal. *See*, *e.g.*, Mot. at 5; A0299 ("without stating a reason for the decision"); A0124 ("letter offered a one-sentence reason"); A0158 ("VAs have drastically cut their rolls – often with little explanation to the caregivers").

In sum, even if the Court accepts the Secretary's premise that the VHA clinical appeals process is a robust clinical review process—per the written words of the VHA directive—the Secretary does not dispute that the process has in practice resulted in large-scale wrongful denial of benefits, and further, the Secretary has failed to account for any means by which a claimant could obtain effective review of legal error.

III. CONCLUSION

The record reveals a systemic problem with the implementation of the Caregiver Program. If the Court finds Board review is available, the Court should certify the Proposed Class and order appropriate notice to ensure prompt remedial enforcement.

Respectfully submitted,

Date: December 14, 2020

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