

**IN THE UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS**

<b>JEREMY AND MAYA BEAUDETTE,</b>	)	
	)	
Petitioners,	)	
	)	
	)	
v.	)	Vet. App. No. 20-4961
	)	
<b>ROBERT L. WILKIE,</b>	)	
Secretary of Veterans Affairs,	)	
	)	
Respondent.	)	

**SECRETARY’S RESPONSE TO MOTION FOR CONSOLIDATION AND  
COURT ORDER DATED DECEMBER 17, 2020**

Pursuant to the United States Court of Appeals for Veterans Claims Rule 27(b), and the Order of this Court, dated December 17, 2020, Respondent Robert L. Wilkie, Secretary of Veterans Affairs (Secretary), hereby responds to the motion filed by Blaine and Stacey Sullivan to consolidate their pending matter, *Sullivan v. Wilkie*, Vet.App. No. 20-6570, with this matter. For the reasons set forth below, the Secretary takes no position. However, the Secretary notes that any further briefing in a consolidated case may well encroach upon the oral argument in this matter, contrary to the assertion of the Sullivans in their pleading.

First, the Secretary agrees with the Sullivans that the cases share a common legal issue. The Secretary’s view is that 38 C.F.R. § 20.104(b) and Congressional intent expressed in the language of 38 U.S.C. § 1720G(c)(1) control this case and put both petitions outside of the jurisdiction of this Court, requiring dismissal of both petitions. However, it is not clear that any practical judicial efficiency is gained by consolidation.

Any precedent issued by the panel in this matter will apply to the Sullivans' petition. Accordingly, a grant of the stay of proceedings filed by the Secretary in the *Sullivan* matter pending issuance of a precedential ruling in this case would serve the interest of judicial efficiency as well as would consolidation.

Second, the Secretary does not agree with the Sullivans that, were consolidation granted, "there does not even need to be a change to the ongoing briefing schedules." The Sullivans contend that, because there were 13 days remaining for the Secretary to file a response to the order of the Court in the *Sullivan* case when proceedings were stayed, "the Secretary need only file further briefing in *Sullivan*, to address any unique issues he believes were raised by the Sullivans" and that the remaining 13 days in the timeframe ordered by the Court in *Sullivan* would "still be ample time for the Secretary to submit a response" in this case. However, if the *Sullivan* matter is consolidated with this matter, it would be for the panel in this case to decide whether additional briefing was required, to decide what matters the Court would require be addressed, and to determine on what schedule it would desire this to be completed. Further, the Secretary would not be the only party who would have an opportunity to respond to any pleadings by the Sullivans. The Beaudettes would also presumably be allotted time to respond to any such pleadings. Accordingly, if these matters are consolidated and any additional briefing is required by the Court, the Secretary believes it would either be impractical or impossible for this to be completed in time for the parties and the Court to properly prepare for oral argument as it is currently scheduled.

Third, the Secretary agrees with the Court that the pending motion for class certification in this case adds a novel factor to the consolidation

question. The Sullivans have explained how their case shares the same issue with the pending *Beaudette* matter on its legal merits, but have not explained how their consolidation into the *Beaudette* case would impact, if at all, the Beaudettes' pending motion for class certification. Potential issues of first impression that may require additional pleadings and expenditure of judicial resources include whether the Sullivans concede membership in the proposed class and, if so, whether it is appropriate to consolidate claimants who are so situated, as well as potential issues about the appointment of appropriate class counsel of the consolidated case, if the Court deems class action appropriate and class counsel is to be appointed. These issues would require further research, resulting in further expenditure of the parties' and the Court's resources and potentially jeopardizing the date of the oral argument scheduled by this Court. As the Secretary believes that consolidating these matters with respect to the jurisdictional question would not conserve any more judicial resources than would a grant of a stay of proceedings in *Sullivan* pending the outcome of controlling precedent in *Beaudette*, while potentially adding additional delay and expenditure of judicial resources on this question, it is not clear that the balance is in favor of consolidation.

Accordingly, the Secretary takes no position on the motion. The Secretary agrees that both matters turn on the same question – whether 38 C.F.R. § 20.104(b), which dictates that medical determinations are not within the jurisdiction of the Board, and 38 U.S.C. § 1720G(c)(1), which dictates that the matters in question here are medical determinations, should result in dismissal of the petitions. While such matters may generally be consolidated in the interest of judicial efficiency, given the posture of these matters and the timing of the scheduled oral argument, it

is not clear whether any judicial efficiency would actually be gained here and that a stay of proceedings in the *Sullivan* case would be the better tool in this situation. Further, if the consolidation motion were granted, it would be for the panel of the Court convened in the *Beaudette* matter, not for the Secretary, to decide whether additional briefing in the consolidated case is necessary, but the Secretary believes that such briefing, if ordered, would encroach upon the currently scheduled oral argument and would not be in the interest of judicial efficiency.

### **CONCLUSION**

For the foregoing reasons, Respondent responds to the motion for consolidation and the Court's Order of December 17, 2020, by taking no position on that motion, but urging that the Court take into account the factors detailed above when determining the appropriate course of action.

Respectfully submitted,

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