

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-4961

JEREMY BEAUDETTE & MAYA BEAUDETTE,
INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED, PETITIONERS,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before ALLEN, TOTH, and FALVEY, *Judges*.

ORDER

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

On April 19, 2021, we granted petitioners a writ of mandamus under the All Writs Act ordering the Secretary to allow the Board of Veterans' Appeals to review decisions rendered under the Program of Comprehensive Assistance for Family Caregivers ("Caregiver Program").¹ We also granted petitioners' request to represent a class of "[a]ll claimants who received an adverse benefits decision under the Caregiver Program, exhausted the administrative review process within the [Veterans Health Administration (VHA)], and have not been afforded the right to appeal to the Board."² We also directed the parties to "jointly prepare and submit to the Court for approval a plan to provide notice to members of the proposed class of (1) their right to appeal Caregiver benefits decisions to the Board and (2) the procedure for obtaining Board review of the decision."³

After receiving several extensions, on August 5, 2021, the parties responded to our order concerning notice by submitting a memorandum attached to which was a Notice Plan and a proposed Notice.⁴ The parties agreed on the bulk of the provisions in the Notice Plan and the Notice itself. However, they could not agree on three issues. In this order, we will first resolve those three disputed issues. Thereafter, and considering our resolution of the disputed issues, we will explain why we approve the Notice Plan and the Notice.

¹ *Beaudette v. McDonough*, 34 Vet.App. 95, __, 2021 U.S. App. Vet. Claims LEXIS 671 at *25 (Apr. 19, 2021).

² *Id.* at *24-*25.

³ *Id.* at *25.

⁴ The Notice Plan is Attachment A to the parties' August 5th submission (which we will refer to as the Joint Response) while the proposed Notice is Attachment B to that document. When we cite these documents, we will simply refer to them as the "Notice Plan" and the "Notice," respectively.

We pause to comment on an important point we do not address because it is not before us. In footnote 1 of the Joint Response, petitioners maintain that VA has not provided notice of appellate rights to claimants under the Caregiver Program even after our April 19, 2021, order. We express no view on this matter in this order because neither party has filed an appropriate motion concerning the matter.

I. The Disputed Issues in the Notice Plan and Notice

As we said, the parties agree on most of the provisions of the Notice Plan and Notice. They disagree on three issues, however. We will discuss each in turn.

A. Disagreement Under ¶ 3 of the Notice Plan

The first dispute between the parties arises under ¶ 3 of the Notice Plan. The parties state that they "agree that any decision under the Caregiver Program is appealable to the [Board] regardless of whether the claimant initiated or obtained a higher level decision within the VHA . . . clinical appeals process."⁵ Given this statement, we confess that, at some level, we are left to wonder why the dispute?

It appears that the disagreement under ¶ 3 really is about the appropriate scope of the class. The parties report that VA's information technology infrastructure does not allow VA to identify Caregiver Program recipients who exhausted the VHA appeals process before October 1, 2020.⁶ But VA could identify *all* claimants who obtained an adverse decision under the program regardless of VHA exhaustion. To rectify the problem of providing notice to the class we certified given VA's technological limitations, the parties sensibly proposed to provide notice to the larger group of claimants even though that group included claimants who both exhausted and did not exhaust their VHA appeal rights.⁷ So, again, why the dispute?

The parties apparently disagree about whether providing notice to a larger group than the certified class affects class membership. To the extent that this is the dispute, we agree with the Secretary's position. There is no reason why providing notice to a larger group than that comprising the class has any impact on the scope of the class itself. To be sure, in a perfect world the group to which notice is provided would match the class precisely. But we do not live in a perfect world. Here, the parties have dealt with the imperfection we face by identifying a group that can be notified even though the group is overinclusive related to the class. That action is appropriate under the circumstances. But it does not affect the scope of the class.⁸ So, to reiterate, we resolve the parties' dispute under ¶ 3 of the Notice Plan in the Secretary's favor.

⁵ Notice Plan, ¶ 3.

⁶ Joint Response at 3. It seems that the IT limitation does not affect decisions rendered after October 1, 2020.

⁷ *Id.*

⁸ We note that any dispute from a person provided notice of the class but who is not afforded class-member status by VA is a hypothetical question not before us today.

B. Disagreement Under ¶ 4 of the Notice Plan

The parties' second disagreement concerns ¶ 4 of the Notice Plan, entitled: "Timing for Implementation of the Joint Notice Plan."⁹ Petitioners propose the following:

Within 90 days after the Court's approval of this Joint Notice Plan, (1) the parties will finalize the remaining details of the Proposed Notice attached hereto and enclosures, and (2) VA will begin sending the claimants described in [¶]1 a copy of the Proposed Notice.¹⁰

For its part, VA suggests the following:

Within 90 days after the Court's approval of this Joint Notice Plan, VA will provide the Court and class counsel an update on its implementation plan and estimated timeline to (1) finalize the remaining details of the Proposed Notice attached hereto and enclosures, and (2) begin sending to claimants described in [¶] 1 a copy of the Proposed Notice.¹¹

We believe petitioners' proposal is the better one. We entered our order on April 19, 2021. When we reach 90 days after the date of this order, approximately 7 months will have passed since we ruled in petitioners' favor. We conclude that after that amount of time, action is required, not merely providing information about when action might take place. All that is required under petitioners' view of this matter—the one we adopt—is that the parties finish the notice documents and VA *begin* sending notice. Those obligations are not onerous. So, we will adopt petitioners' suggested language under ¶ 4 of the Notice Plan.

C. Disagreement Under ¶ 5 of the Notice Plan

The parties' final dispute concerns ¶ 5 of the Notice Plan. This part of the plan concerns the potential difficulties that may flow from the reality that the class includes both members whose appeals are subject to the Legacy appeals system and those whose appeals are subject to the appeals system put into place for claims covered by the Veterans Appeals Improvement and Modernization Act of 2017 (AMA).¹² The main thrust of the parties' dispute concerns the forms a claimant uses to appeal an adverse decision. Petitioners argue that we should order VA to draft (and obtain Office of Management and Budget approval of) a single form that can be used by claimants in both the Legacy and AMA systems. The Secretary has not affirmatively rejected petitioners' proposal, but generally suggests that it can proceed with separate forms, one for the Legacy system and the other for the AMA, as is done more generally at the Agency.

⁹ Notice Plan, ¶ 4.

¹⁰ *Id.* (emphasis omitted).

¹¹ *Id.* (emphasis omitted).

¹² 115 P.L. 55, 131 Stat. 1105 (Aug. 23, 2017). Claims for which the initial decision of the agency of original jurisdiction was issued before February 19, 2019, are governed by the Legacy system while those issued on or after that date are subject to the AMA. *See Mattox v. McDonough*, 34 Vet.App. 61, ___, 2021 U.S. App. Vet. Claims LEXIS 712 at *11-*16 (Apr. 26, 2021).

The Court will not order the Secretary to implement petitioners' suggestion that VA create a single form for appealing an adverse decision concerning the Caregiver Program. Based on the confusion we have observed in other matters in which veterans have been tripped up by the use of different forms in the Legacy and AMA systems, it seems advisable for the Agency to revisit its "dual track" form regime. But that choice is one ultimately for VA not the Court.¹³

We also reject petitioners' additional suggestion that, should we decline to order VA to use a single form, we affirmatively state that no claimant will be prejudiced by the use of an incorrect form. We would hope that VA would not penalize a claimant under the Caregiver Program if he or she used a Legacy form in place of one under the AMA, or vice versa. And it might well be that when confronted with such a question, the Court would hold that, in a given case, a claimant should be held to have substantially complied with evincing an intent to appeal even when using the wrong form. But it would be inappropriate for us to address this question in the abstract.

In sum, though petitioners make points rooted in common sense and fairness, we are constrained by our institutional limitations to adopt the Secretary's position under ¶ 5 (and the related provisions in the Notice itself). Nothing in this order prevents the Secretary from adopting petitioners' position, but we will not order that he does so.

II. Approval of the Notice Plan and Notice

We conclude that the parties' proposed Notice Plan and Notice are adequate given the resolution of the disputes we described above. We begin with the Notice itself. Courts have wide latitude when determining the adequacy of a proposed class action notice.¹⁴ We conclude that the jointly proposed Notice (including our resolution of the parties' dispute) is written in plain English and is not misleading. It provides information about the nature of the action and the definition of the class in a way that a class member of average intelligence could understand.¹⁵ It explains class members' rights and how to exercise them. Plus, the Notice provides means to obtain additional information from class counsel as well as VA. Collectively, this type of information is commonly considered important in determining the adequacy of notice.¹⁶ Accordingly, we approve the Notice jointly submitted on August 5, 2021, subject to the resolution of the disputes we described above.

We also conclude the Notice Plan is adequate. A court enjoys great "discretion and flexibility" as to the method of providing notice.¹⁷ Most significantly, as we have discussed above, the Notice Plan uses a methodology that is designed to ensure that notice will be afforded to all

¹³ See *Wolfe v. McDonough*, 2021 U.S. App. Vet. Claims LEXIS 485 *14 (Mar. 24, 2021) (recognizing, in the context of appointing a special master, the limitations on a court interfering with Agency discretion); *id.* at *24-*26 (Falvey, J., concurring) (same).

¹⁴ See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 166 (2d Cir. 1987).

¹⁵ See *Wachtel v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 185-86 (3d Cir. 2006).

¹⁶ See FED. R. CIV. P. 23(c)(2)(B); see also MANUAL FOR COMPLEX LITIGATION § 21.311 (4th ed. 2004). As we have done before, we cite the Federal Rules of Civil Procedure merely as persuasive authority. See *Skaar v. Wilkie*, 32 Vet.App. 156, 178-79 (2019) (en banc).

¹⁷ See FED. R. CIV. P. 23(c)(2) advisory committee's note to 2003 amendment; see also MANUAL FOR COMPLEX LITIGATION § 21.311 (4th ed. 2004).

those in the class given the technological challenges VA faces. Moreover, the Notice Plan proactively seeks to address difficulties class members may face in terms of obtaining documentation allowing them to meaningfully exercise their rights under the Court's order.¹⁸ In addition, the Notice Plan (including the 90-day timeline for beginning sending notice) adequately balances the interests of the class as well as the burdens on VA that are inherent in class actions. And finally, the Notice Plan provides for a way to monitor compliance with the Court's order.¹⁹ In sum, considering the Notice Plan as a whole, and exercising our broad discretion in this area, we conclude the Notice Plan is adequate and will approve it.

Upon consideration of the foregoing, it is

ORDERED that the Notice Plan and Notice the parties submitted on August 5, 2021, are approved as set forth in this order.

DATED: August 19, 2021

PER CURIAM.

Copies to:

Andrew M. LeGolván, Esq.

VA General Counsel (027)

¹⁸ See Notice Plan, ¶ 7.

¹⁹ See Notice Plan, ¶ 8.