IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

JAMES M. KERNZ, Appellant,	)	
v.	)	Docket No. 20-2365
ROBERT L. WILKIE, Secretary of Veterans Affairs, Appellee.	)	

APPELLANT'S REPLY TO THE SECRETARY'S AUGUST 25, 2021 RESPONSE TO COURT'S JUNE 11, 2021 ORDER

On June 11, 2021, the Court ordered the Secretary to (1) "explain how VA determines the timeliness of submitted forms;" (2) "explain the 'electronic constraints' [the Board of Veterans' Appeals (Board)] has in tracking and identifying calculation errors;" and (3) "provide a remedial plan as to how it will determine which claimants have received erroneous notification about letters denying appellate eligibility/jurisdiction under the AMA and Legacy (non-modernized) review system for issues timely appealed via VA Form 10182" and "detail what efforts will be taken to properly notify claimants." *See* Court's June 11, 2021 Order.

The Secretary responded by maintaining his jurisdictional objection that the Court lacks subject matter jurisdiction over the case at bar because the Board's letter at issue is not a decision of the Board. Secretary's August 25, 2021 Response (Sec. August 25, 2021 Resp.) at 1-2. Mr. Kernz again notes that the Board's dismissal of an active appeal fits the binary definition of a decision provided by the Federal Circuit Court of Appeals in *Maggitt v. West*: benefits are either granted, or they are denied. 202 F.3d 1370, 1376 (Fed. Cir.

2000) Here, Mr. Kernz and the putative class members have been denied benefits. The wrongful extinguishment of their appeals cannot be construed in any other way but an express denial of benefits.

Regarding the remedial plan to determine which claimants have received erroneous letters rejecting their timely filed VA Form 10182 appeals, the Secretary outlined the notice of the erroneous letters that it drafted and "voluntarily" published on its website and the VA|Insider intranet website, provided the notice to veterans service organizations (VSOs) located a VA facilities and the executive leadership of those VSOs, all directors of state departments of veterans affairs via the National Association of State Directors of Veterans Affairs, published the notice on VA's social media and in a VSO monthly meeting distribution and Veterans Experience Office email. Sec. August 21, 2021 Resp. at 2-3. The Secretary took the position that the published notice was distributed because the Board is unable to determine or estimate the number of notice letters that erroneously rejected the timely filed VA Form 10182s due to limitations in its electronic systems. *Id*. at 4.

A. The Secretary's actions have not rendered this matter "essentially moot."

As an initial matter, Mr. Kernz notes that when the Court ordered the Secretary to provide it with a remedial *plan* and detail what efforts *will be* taken to notify claimants, it did not authorize, approve, nor otherwise instruct him to take any action. *See* Court's June 11, 2021 Order at 2. The Court's Rule 23 governing Class Actions states that the Court may direct notice to the class. U.S. Vet. App. R. 23(c)(2). By acting without the Court's approval, the Secretary is attempting to circumvent the Court's authority to determine and direct the best method of notice. *Id*. This is important because the Secretary has decided,

in ex-parte fashion, to convert the proposed class to an "opt-in" class. Effectively, the Secretary has taken action to provide notice to potential class members and to require affirmative action from them to have their appeals reinstated, while simultaneously requesting the Court dismiss this case and deny Mr. Kernz's request for class certification and class action.

While the Secretary stated that he wants to correct the calculation errors that resulted in the improper rejection of timely filed appeals (Sec. August 21, 2021 Resp. at 7) it is clear from his actions that he does not want Court oversight in doing so. *Godsey v. Wilkie*, 31 Vet. App. 207, 224 (2019)("deciding this petition as a class empowers the Court to monitor and enforce its order"). Stated another way, rather than conceding that class certification and class action are warranted, the Secretary has decided, on his own, to treat this case as an "opt-in" class and then asserted that his actions were sufficient to render this matter "essentially moot" thereby negating any further Court involvement. Sec. Aug. 21, 2021 Resp at 9.

The problem with the Secretary's approach is that Mr. Kernz requested that the class be certified because the Secretary has acted or refused to act on grounds that apply generally to the class and that the relief requested would affect the entire class at once. *See* Request for Class Cert. and Class Action at 5-13. This is precisely the type of class and type of relief contemplated by Federal Rule of Civil Procedure (FRCP) 23(b)(2). *Godsey*, 31 Vet. App. at 223.[1] Contrary to the Secretary's "opt-in" approach, the Supreme Court

[1] Mr. Kernz acknowledges that the Court drafted its Rule 22 and 23 to govern Class Actions but asserts that Vet. App. R. 22 and 23 do not address whether the class actions certified

has held that classes certified under FRCP 23(b)(2) are mandatory classes – that is all the putative class members are part of the class and are not required to take the affirmative step to "opt-in." *Wal-Mart Stores, Inc., v. Dukes*, 564 U.S. 338, 361-62, 131 S. Ct. 2541 (2011); *see also See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S. Ct. 2965 (1985) ("We reject [the] contention that the Due Process Clause of the Fourteenth Amendment requires that absent plaintiffs affirmatively 'opt in' to the class, rather than be deemed members of the class if they do not 'opt out.'"). In fact, mandatory classes provide no opportunity for class members to opt out. *Id*.

Additionally, classes certified under FRCP 23(b)(3) have also been deemed "opt-out" classes in which the class members are automatically part of the class but are entitled to withdraw from the class at their option. *Id*. As noted by the Court of Appeals for the Second Circuit, Professor Benjamin Kaplan of Harvard Law School, who served as Reporter of the Advisory Committee on FRCP from 1960 to 1966, explained that the Committee rejected the suggestion "that the judgment in a (b)(3) class action, instead of covering by its terms all class members who do not opt out, should embrace only those individuals who in response to notice affirmatively signify their desire to be included . . ." *Kern v. Siemens Corp.*, 393 F.3d 120, 126-27 (2nd Cir. 2004), cert. denied. 544 U.S. 1034,

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are "opt-in" or "opt-out" classes. However, in *Monk v. Wilkie*, 30 Vet. App. 167, 170 (2018), the Court determined that it would use Rule 23 of the FRCP as a guide for deciding requests for class certification until it issued its own aggregate action rules. Because the Court's rules governing aggregate actions do not expressly address whether the certified action would be an "opt-in" or "opt-out" class, Mr. Kernz asserts that the Court should use FRCP 23 as a guide.

125 S. Ct. 2272 (2005). Professor Kaplan elaborated the rationale of the Committee's decision stating that:

> [R]equiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people-especially small claims held by small people-who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step. The moral justification for treating such people as null quantities is questionable. For them the class action serves something like the function of an administrative proceeding where scattered individual interests are represented by the Government. In the circumstances delineated in subdivision (b)(3), it seems fair for the silent to be considered as part of the class.

Id. The Secretary's position fails to appreciate the critical difference between reinstating the appeals of only those that affirmatively opt-in to the class by March 1, 2022 and reinstating *every* VA Form 10182 appeal that was improperly rejected by the Board due to its own calculation errors (with the option to withdraw or opt-out vesting in the class member).

Thus, whether this class is certified as a 23(b)(2) or (b)(3) class, neither class is an "opt-in" class that requires putative class members to take an affirmative step to become a part of the class to have their erroneously rejected VA Form 10182 appeals reinstated. Therefore, the Secretary's ex-parte attempt to create an "opt-in" resolution to the problem *it created* has the potential to "freeze out" class members whose timely filed appeals were wrongfully dismissed. *See id*.

Further still, because the Secretary is improperly treating this case as an "opt-in" class and has taken the position that locating all of the putative class members who's VA

Form 10182 appeals were improperly rejected is too burdensome, the Secretary's actions do not render this matter "essentially moot." Sec. Aug. 21, 2021 Resp. at 9. The Federal Circuit has explained that "A 'class-action claim is not necessarily moot upon the termination of the named plaintiff's claim' in circumstances in which 'other persons similarly situated will continue to be subject to the challenged conduct' but the challenged conduct was effectively unreviewable, because no plaintiff possesses a personal stake in the suit long enough for litigation to run its course.'" *Godsey*, 31 Vet. App. at 218-19) (quoting *Monk*, 855 F.3d at 1317).

Mr. Kernz asserts that the Secretary's actions will inevitably identify and cure the Board's erroneous dismissals of some of the putative class members but will ultimately forsake others who either do not receive the Board's notice or do not affirmatively "opt-in" for some reason. Not only does this not resolve the case or controversy requirement for the putative class members who were harmed but did not receive the requested relief, it also creates a windfall for the VA, due to its own error, by reducing the number of valid timely filed appeals it must adjudicate by law and by saving money it may have had to pay to those class members if their claims were ultimately granted. Allowing this case to be dismissed allows the Secretary to dismiss timely filed appeals while simultaneously shielding his actions from appellate review by the Court.

Mr. Kernz also takes issue with the actual notice disseminated by the Secretary to any putative class members. Specifically, the Secretary gives the class members a deadline of March 1, 2022 in which to respond to his notice about the erroneously rejected VA Form 10182 appeals. Sec. Aug. 21, 2021 Resp. at 3. To the extent that the Secretary has argued

in his prior pleadings that the Board's erroneous rejections of the putative class members' timely filed VA Form 10182s was not a final decision subject to appellate review, the Secretary has created an arbitrary deadline of March 1, 2022[2] for the class members to respond to have their appeals reinstated. This arbitrary deadline is contrary to the Secretary's entire position in this case and this Court's established case law. This Court has held that a timely filed appeal remains pending until the Secretary follows the proper appellate procedure. *Myers v. Principi*, 16 Vet. App. 228, 236 (2002); *see also Manlincon v. West*, 12 Vet. App. 238, 240-241 (1999); *Holland v. Gober*, 10 Vet. App. 433, 436 (1997) (per curiam order) (vacating Board decision and remanding the matter when VA failed to issue a statement of the case after receiving the claimant's timely NOD). Thus, the Secretary is arguing on one hand, that the Board's decision is not a final decision subject to appellate review, and on the other hand that the class members only have until March 1, 2022 to have their pending appeals reinstated. The Secretary simply cannot have it both ways and both of these positions are incorrect as a matter of law.

Mr. Kernz maintains that the Board's erroneous rejections of the timely filed VA Form 10182 appeals constitute final appealable decisions by the Board because the Board clearly rejected the appeals, did not indicate that any further action would be taken on the claims, and expressly stated that the time limit to appeal the decision either the AMA and Legacy appeals system had passed. As such, this Court has jurisdiction to consider this appeal and should deny the Secretary's motion to dismiss and grant Mr. Kernz's request

[2] The Secretary did not explain the basis for selecting this date.

for class certification and class action. *See Maggitt v. West*, 202 F.3d 1370, 1376 (Fed. Cir. 2000).

Congress began providing veterans pensions in early 1789, and created the VA in 1930 to administer veteran's benefits to a special class of citizen who risked life and liberty in their military service to this country. *Sneed v. Shinseki*, 737 F.3d 719, 728 (Fed. Cir. 2013); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 309, 105 S. Ct. 3180, 3183 (1985). The veterans benefits scheme is thus "imbued with special beneficence from a grateful sovereign." *Bailey v. West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998) (Michael, J., concurring). Mr. Kernz asserts that the Secretary's decision to only correct the erroneously rejected VA Form 10182 for claimants who have opted-in to the class is not only contrary to FRCP 23(b) but is also contrary to the VA's objective to administer benefits to those who served this country. This is especially true in light of the fact that all putative class members have complied with the law and requests of the VA and it was the VA itself that erroneously rejected their appeals.

B. The Secretary fails to explain how its burden to identify its own errors outweighs the potential harm to the putative class members.

Mr. Kernz avers that contrary to the Secretary's August 21, 2021 response, determining or estimating the number of potential class members is not as difficult as asserted therein. According to the Secretary's response, the VA's electronic systems allow the Board to determine how many VA Form 10182s have been received. *See* Sec. August 21, 2021 Resp. at 4-5 (explaining that when the Board receives a document it is assigned a document type in VBMS including "VA Form 10182 Notice of Disagreement" and

showing that the documents received in the mail portal can be filtered to just show VA Form 10182s). Yet, the Secretary takes the position that he is unable to determine or estimate the number of erroneously rejected VA Form 10182s without manually reading each uploaded document related to every VA Form 10182, because the Board's computerized tracking system "Caseflow" only contains records for appeals that have been docketed at the Board. *Id*. at 4-6. However, it is unclear why the Board is unable to compare the number of VA Form 10182s received, which is available in VBMS, to the number of VA Form 10182s docketed in Caseflow to determine the number of VA Form 10182s that were not docketed. For example, if VBMS shows 200,000 VA Form 10182s and only 198,000 were docketed, then 2,000 VA Form 10182s were received but not docketed; thus creating an estimated class size of 2,000. As such, the VA would only need to review those 2,000 cases rather than all of the VA 10182s ever received.[3]

In this same context, the Secretary has asserted in his previous pleadings that the process of manually locating and evaluating hundreds of thousands of documents would require the Board "to augment and train its current personnel, which it is not resourced to do" and that such action would adversely affect other veterans with pending appeals. Sec. Resp. at Exhibit J ¶ 19. The Secretary also stated that the Board has already created an internal team in January 2020 to, in part, "identify and correct any administrative docketing errors that *might* occur." *See* Sec August 21, 2021 Resp. at Exhibit J at ¶ 20. However, the

[3] Mr. Kernz readily concedes that his suggestion is based on his limited knowledge of the VA's computer systems because only the VA possesses the knowledge and data of its operations and computer systems and does not provide this information to the public.

Secretary does not explain how an entire internal team tasked with reviewing documents for prospective docketing errors is unable to also review documents for the retrospective docketing errors it now has notice of.

Moreover, Mr. Kernz notes that the Secretary has recently requested and been approved for an additional $32 million dollars[4] for the Board's budget for fiscal year 2022 to, *inter alia*, hire additional personnel, correct mail processing problems, and enhance its operating IT technologies such as Caseflow. *See* FY 2022 VA Budget Submission and Rollout Briefing available at https://www.va.gov/budget/products.asp (Last visited Oct. 27, 2021); *see also* Senate Committee Approves FY2022 MilCon-VA Appropriations Bill available at https://www.appropriations.senate.gov/news/senate-committee-approves-fy22-milcon-va-appropriations-bill (Last visited Oct. 27, 2021). In fact, the VA has sent correspondence to veterans stating that the additional funding will be used to "hire and train new staff" to ensure claims are adjudicated quickly. *See* Attachment. It is unclear why the Secretary is unable to allocate some of its resources from Congress to hire and/or train personnel to identify the erroneously rejected VA Form 10182 appeals of the putative class members in this case. Reinstating wrongfully dismissed appeals is equally tantamount to enhancing technology and clearing the Board's backlog. Afterall, the putative class members were lawfully entitled to appellate review by the Board but were denied that right.

In this vein, Mr. Kernz notes that the task of identifying and docketing the erroneously rejected VA Form 10182 appeals of the putative class members in this case

[4] For a total budget of $228 million dollars for the Board alone.

does not have to be done by the Board, it can easily be done by personnel at any of the 57 VA Regional Offices. The Board is not an independent entity, but is merely part of VA (*Boone v. Shinseki*, 22 Vet. App. 412, 414 (2009)) and the Secretary has not asserted that the Board possesses any special expertise that renders personnel at the Regional Office incapable of reviewing VA Form 10182 related documents. In fact, the Secretary has conceded that the VA Forms were improperly rejected due to a "calculation error." Sec. Aug. 21, 2021 Resp. at 2. Surely, VA Regional Office personnel, whom already calculate the timeliness of Legacy substantive appeals, Legacy notices of disagreements, and Appeals Modernization Act requests for higher level review and supplemental claims, can also calculate the timeliness of a VA Form 10182 appeal.

C. The Secretary's remaining assertions are immaterial to this case.

As a final matter, the Secretary asserts that Kernz has not alleged any error in the processing or calculations of potential Legacy appeals for him or any other identified claimant. Sec. August 21, 2021 Resp. at 8. However, the Secretary's argument is irrelevant because the March 24, 2020 Board determination received by Kernz and similar Board determinations received by the other putative Class members at issue in this case expressly states that the time limit for filing an appeal in the Legacy system has expired. Thus, notwithstanding the fact that Mr. Kernz and the putative Class members timely filed their VA Form 10182 appeals, the calculation of that appeal period to pursue an appeal in the Legacy system has no bearing on the fact that the Board improperly denied appellate review to Mr. Kernz and the other Class members by erroneously rejecting their VA Form 10182s.

Conclusion

Mr. Kernz asserts that while the Secretary attempts to characterize the issue in this case as a mere docketing error by the Board, it is also the way in which the Board denied appellate review while attempting to simultaneously evade judicial review that is also in error and of considerable importance. Mr. Kernz maintains that the Board's decisions rejecting the putative class members' timely filed VA Form 10182 appeals were final decisions that ended any further action by the Board. Certainly, in dismissing the appeals, the Board did not indicate that further action would be taken or that the putative class members' appeals otherwise remained pending. Each of the putative class members were affected by the same Board action and until each putative class member is identified and the erroneous Board action corrected the case or controversy in this case remains live and actionable. As such, Mr. Kernz reiterates his request that the Court deny the Secretary's motion to dismiss this case and request that the Court grant his request for class certification and class action.

Respectfully Submitted on this 27th day of October, 2021.

/s/ Adam R. Luck
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Attachment

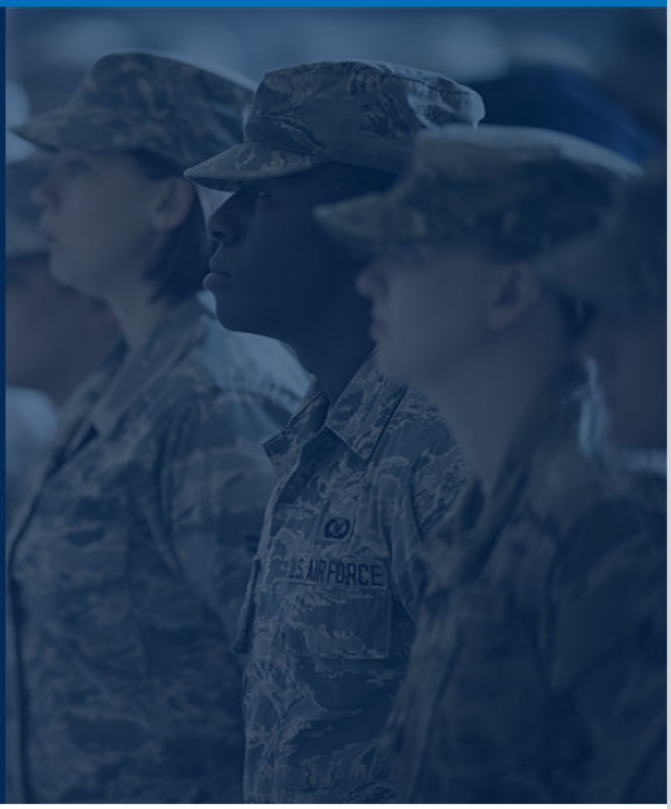
adam@gloverluck.com

From: [redacted]
Sent: Wednesday, October 13, 2021 7:41 PM
To: adam@gloverluck.com
Subject: Fw: VA prepares to get ahead of surge in backlogged claims

----- Forwarded Message -----
From: Veterans Benefits Administration <veteransbenefits@messages.va.gov>
To: [redacted]
Sent: Wednesday, October 13, 2021, 05:40:14 PM CDT
Subject: VA prepares to get ahead of surge in backlogged claims

VA | U.S. Department of Veterans Affairs

VA PREPARES TO GET AHEAD OF SURGE IN BACKLOGGED CLAIMS



Dear Veteran,

Starting in October, the Department of Veterans Affairs will hire and train new staff to ensure Veterans' claims are adjudicated quickly and help reduce an expected increase in the backlog of claims pending more than 125 days. VA is taking the following proactive steps to help in the reduction:

- Hire and train 2,000 new employees to assist in claims processing.
- Leverage authority to transfer CARES funding to VBA and utilize the American Rescue Plan to fund overtime to ensure timely claims processing.
- Deploy requested Fiscal Year 2022 budget resources to support Agent Orange presumptive processing, as well as for general Compensation and Pension claims processing.

As of October 11, there were more than 204,000 backlog claims in an inventory of 603,000 total claims. VA identified more than 70,000 claims to review for additional entitlement stemming from the presumptive relationship between Agent Orange and Parkinsonism, bladder cancer, and hypothyroidism. Many of these will enter the backlog in October, which is projected to reach 260,000 pending claims.

"VA is committed to ensuring timely access to benefits and services for all veterans. This includes making sure that veterans who may have experienced adverse health effects from military related exposures can get access to the benefits they need," said VA Secretary Denis McDonough. "As we process claims such as those for three new disabilities presumptively linked to Agent Orange exposure, including proactive application of Nehmer provisions, as well as three new Gulf War particulate exposure presumptives, we anticipate the claims backlog to increase this fall. The hiring of new employees will help us resolve these claims more quickly."

Several factors have contributed to the recent backlog. Beginning in March 2020, operational changes necessitated by the COVID-19 pandemic resulted in an untimely delay of the Federal Records Centers' retrieval of documents and suspended Compensation and Pension (C&P) examinations. While these actions were necessary to protect the health and safety of employees and veterans, they slowed the processing time for claims. VA workload has also increased as a result of the aforementioned recent decisions and actions, including a court order mandating the review of previously denied Veterans on the basis of qualifying service in the 12 nautical miles surrounding Vietnam.

The backlog has decreased by more than 14,000 claims since the end of August 2021. With continued improvement of VA's ability to obtain C&P examinations and Federal Records, and with all requested resources received, VBA plans to address the impending increase and then further reduce the current claims backlog to 100,000 claims by April 2024.

Learn more about claims and to view reports visit Detailed Claims Data.

If you know a Veteran who is in crisis, call the Veterans Crisis Line at 1-800-273-8255 and press 1.

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