

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

AMANDA J. WOLFE,)	
)	
Petitioner,)	
)	
and)	
)	
DOUGLAS REDWOOD,)	
TERRANCE FOWLER,)	
JAMES LEPANT,)	
JOHN JELEN,)	
KENNETH SCHMIDT, and)	
STEVEN BUTLER,)	
)	
Movants,)	
)	
v.)	Vet. App. No. 18-6091
)	
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

MOTION FOR SUBSTITUTION OF PARTY

Pursuant to U.S. Vet. App. R. 43(b), Messrs. Douglas Redwood, Terrance Fowler, James LePant, John Jelen, Kenneth Schmidt, and Steven Butler move to be substituted as Petitioners in the above-captioned case. On or about August 28, 2022, the undersigned counsel learned that Petitioner Amanda Wolfe finally received the reimbursement payment for coinsurance that had been granted 33 months earlier by the Board of Veterans' Appeals for her out-of-pocket payments for emergency medical treatment rendered in 2016 at a non-VA facility.¹ On May 8, 2023, Ms. Wolfe informed the

¹ A copy of the November 19, 2019 decision issued by the Board of Veterans' Appeals was filed with the Court in this case on February 24, 2020.

undersigned counsel that she no longer wishes to serve as the named petitioner in this case.

Movants are members of the class certified in the above-captioned case in 2019. Movants are also members of the proposed classes described in the second amended petition that accompanies the recently filed motion for leave to file a second amended petition. Thus, movants are entitled to be substituted as named petitioners for the purpose of adjudication of the second amended petition and therefore respectfully request that the Court grant this motion.

Petitioners have contacted counsel for Respondent Secretary of Veterans Affairs McDonough (“the Secretary”) regarding this motion, who has stated that VA opposes the motion.

Statement of the Case

In September 2016, Amanda J. Wolfe received emergency care at a non-VA facility. After her non-VA insurance carrier paid for part of her emergency expenses, she owed \$2,558.54, which included \$2,352.41 as coinsurance. Ms. Wolfe filed a claim to VA for reimbursement, which VA denied pursuant to the then-current version of 38 C.F.R. § 17.1005(a)(5). Ms. Wolfe filed a Notice of Disagreement (NOD) in July 2018 challenging VA’s decision, and filed an amended NOD on August 14, 2018. Ms. Wolfe then filed her initial class action petition with this Court on October 30, 2018, challenging 38 C.F.R. § 17.1005(a)(5), which prohibited reimbursement for all forms of cost-sharing, as inconsistent with 38 U.S.C. § 1725(c)(4)(D), which prohibits reimbursement only for “copayment[s] or similar payment[s]” for which the veteran is responsible under his or

her health insurance plan.

This Court subsequently certified a class defined as:

All claimants whose claims for reimbursement of emergency medical expenses incurred at non-VA facilities VA has already denied or will deny, in whole or in part, on the ground that the expenses are part of the deductible or coinsurance payments for which the veteran was responsible.

Wolfe v. Wilkie, 32 Vet. App. 1, 34 (2019). It held, in the same decision, that 38 C.F.R. § 17.1005(a)(5) was inconsistent with 38 U.S.C. § 1725, and that both coinsurance and deductibles are reimbursable under the statute. Beginning in April 2020, the Secretary mailed the template letter to which the parties had agreed to all *Wolfe* class members, including Messrs. Douglas Redwood, Terrance Fowler, James LePant, John Jelen, Kenneth Schmidt, and Steven Butler, informing them that: “VA will re-decide your claim(s) and will issue a new decision. There is no need for you to take any action at this point.” *See* Template 2 Letter (attached hereto as **Exhibit A**).

The Secretary appealed to the Court of Appeals for the Federal Circuit. On March 17, 2022, the Federal Circuit issued its decision reversing this Court’s grant of a writ of mandamus, and the mandate from that Court issued on May 9, 2022. This Court, however, has not issued any subsequent order or mandate in these proceedings.

The Board granted Ms. Wolfe’s appeal for reimbursement for coinsurance on November 19, 2019, and 33 months later, on or about August 28, 2022, Ms. Wolfe finally received a reimbursement payment for the coinsurance she had paid years earlier. On May 8, 2023, Ms. Wolfe informed class counsel that she no longer wished to serve as named petitioner in this case.

By contrast, VA has still not readjudicated the pending reimbursement claims of Movants Douglas Redwood, Terrance Fowler, James LePant, John Jelen, Kenneth Schmidt, and Steven Butler. These class members wish to be substituted as petitioners.

Basis for Substitution

Under Rule 43(b) of the Court of Appeals for Veterans Claims Rules of Practice and Procedure, “[i]f substitution of a party in the Court is necessary for any reason other than death, the Court may order substitution on its own initiative or on a party’s motion.” Substitution is appropriate under Rule 43(b) when (1) there is a continuing case or controversy and (2) the substituted party has statutory standing. *Van Giesen v. Nicholson*, No. 04-1896, 2007 U.S. App. Vet. Claims LEXIS 568, at *4-5 (Vet. App. Apr. 9, 2007) (citing *Padgett v. Nicholson*, 473 F.3d 164 (Fed. Cir. 2007)).² Once these two requirements are met, the interest of justice and fairness to the litigants are also considered. *Id.*

A continuing case or controversy still exists: tens of thousands of *Wolfe* class members continue to suffer from VA’s undue delay in readjudicating their long pending claims. As such, the harm resulting from VA’s refusal to reimburse these claimants for coinsurance is still ongoing, as alleged in the second amended petition. Furthermore, movants here have standing. Indeed, the movants are members of both the previously certified class and the proposed classes in the second amended petition. For the reasons below, interests of justice and fairness to the litigants also dictate in favor of granting this

² Petitioner has been unable to identify any precedential decision from this Court interpreting Rule 43(b).

motion.

Substitution of the movants for Ms. Wolfe is necessary for several reasons. First, Ms. Wolfe no longer wishes to serve as the named petitioner in this case. Although there are no cases from this Court dealing with the issue of voluntary withdrawal and substitution of a named plaintiff or petitioner to a class, federal district courts routinely allow named plaintiffs in class action lawsuits to voluntarily withdraw and be substituted. *See, e.g., Solis v. Crescent Drilling & Prod.*, No. SA-19-CV-01194-FB, 2021 U.S. Dist. LEXIS 7259 (W.D. Tex. Jan. 14, 2021); *Baugh v. Fed. Sav. Bank*, No. 2020 U.S. Dist. LEXIS 226522 (D. Md. Dec. 2, 2020); *Thorn v. Bob Evans Farms, LLC*, No. 2:12-cv-768, 2013 U.S. Dist. LEXIS 79577 (S.D. Ohio June 6, 2013). Voluntary withdrawal and substitution of the named petitioner here would not prejudice VA, and it would allow the *Wolfe* class members who have yet to receive decisions on their pending reimbursement claims to continue to pursue those claims. The interests of justice and fairness thus weigh in favor of allowing Ms. Wolfe to withdraw and be substituted by movants.

Second, Ms. Wolfe is no longer a member of either of the two proposed classes in the second amended petition, and therefore the movants, whose pending claims have not been decided, are more appropriate class representatives. Substitution may be necessary when a party is “incapable of continuing the suit,” such as when the focus of the litigation shifts, rendering another party the real interested party. *AFGE v. Dep’t of the Air Force*, 61 F.4th 952, 955-56 (Fed. Cir. 2023) (interpreting Federal Rule of Appellate Procedure 43(b), which also allows substitution for reasons other than death); *Mojave Desert Holdings, LLC v. Crocs, Inc.*, 987 F.3d 1070, 1074-75 (Fed. Cir. 2021) (same).

Here, the second amended petition proposes two classes: (1) former *Wolfe* class members for whom VA has all necessary documentation needed to issue a decision on their pending reimbursement claims, but for whom it has not done so (i.e. the “Delayed Decision Class”); and (2) former *Wolfe* class members whose pending claims are not yet ready for decision because the Secretary has delayed complying with his statutory duty to assist the claimants in substantiating their claims (i.e. the “Delayed Assistance Class”). Ms. Wolfe is not a member of either proposed class because VA has already issued a decision on and paid her claim. Therefore, the claims in the second amended petition are no longer relevant to her. The focus of the litigation has shifted, and substitution is appropriate.

Although VA has reimbursed Ms. Wolfe for her emergency medical expenses, tens of thousands of *Wolfe* class members continue to suffer from VA’s undue delay in readjudicating their pending claims. Fairness to *Wolfe* class members, especially the members of the proposed classes in the second amended petition, demands granting this motion for substitution to allow them to continue to pursue their pending reimbursement claims.

WHEREFORE, Movants respectfully request that the Court grant this motion for substitution of a party.

Respectfully submitted,

Date: May 16, 2023

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EXHIBIT A

Denial for Personal Responsibility (Template 2)

This letter is being sent to you by the Department of Veterans Affairs (VA) as a result of an Order of the U.S. Court of Appeals for Veterans Claims (“the Court”) in the class action known as *Wolfe v. Wilkie*, 32 Vet. App. 1 (2019) (“the *Wolfe* case”). You are a member of the class in the *Wolfe* case.

VA denied your claim or claims for reimbursement of costs associated with the episode(s) of care referenced in this notice because the amounts claimed were coinsurance or deductibles you owed under your health insurance plan. On September 9, 2019, the Court ruled in the *Wolfe* case that VA’s interpretation of the applicable statute was wrong and that VA cannot deny reimbursement of coinsurance and deductible amounts owed by a Veteran under a health insurance plan.

As a result, VA will re-decide your claim(s) and will issue a new decision. There is no need for you to take any action at this point.

If you have questions, you may contact the lawyers who represent you and the other members of the class in the *Wolfe* case at [contact information to be supplied by class counsel after the Court decides disputed issues].

{Signature}

{Contact Information}