IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

VICTOR B. SKAAR, Appellant, v. DENIS MCDONOUGH, Secretary of Veterans Affairs, Appellee.	))))))))))	Vet. App. No. 17-2574

APPELLANT'S RESPONSE TO COURT'S JULY 25, 2023 ORDER

Appellant Victor Skaar respectfully submits this response to the Court's order as to whether the Court should issue mandate and return Mr. Skaar's individual claim to the Board for further proceedings consistent with *Skaar II* or whether there are further proceedings that must take place at the Court.

First, Appellant respectfully requests that the Court issue mandate to return his individual claim to the Board.

Second, Mr. Skaar advises that on remand, he intends to petition the Board to certify an "agency class action" to aggregate his claim with those of similarly situated veterans challenging the same flawed methodology on which the Secretary relies to calculate the radiation exposure of Mr. Skaar and other Palomares veterans. Edward Feeley, a member of the class certified by this Court in *Skaar I*, previously requested that the Board aggregate claims of veterans challenging the lack of a presumption of exposure for Palomares veterans (a claim this Court had concluded Mr. Skaar lacked standing to

assert). There, the Board held it lacks jurisdiction to aggregate claims. Mr. Feeley appealed, prompting three different motions from the Secretary (to strike, dismiss, and stay), but his appeal was dismissed when the PACT Act mooted out the class claims. Order, *Feeley v. McDonough*, No. 21-7045 (Vet. App.) (Oct. 13, 2022). In light of the *Feeley* experience as discussed below, Mr. Skaar requests substantive or procedural guidance from this panel as how best to ensure the orderly and efficient adjudication of his appeal upon a similar Board denial of a motion for agency aggregation.

Finally, Appellant reserves the right to petition this Court for attorneys' fees.

DISCUSSION

The Court is familiar with the facts and proceedings of this case, and they will be summarized only briefly. Mr. Skaar participated in the 1966 clean-up of radioactive material at Palomares, Spain after a mid-air collision during refueling resulted in two nuclear warheads falling to the earth and cracking open. He applied for disability benefits for injuries resulting from his radiation exposure. After the Board denied his claim, relying on a flawed U.S. Air Force methodology to calculate exposure of Palomares veterans, he appealed. He sought to represent a class of Palomares veterans to challenge VA reliance on both the faulty methodology and the absence of a presumption of exposure for Palomares veterans. The *en banc* Court certified a class on the first claim and held Mr. Skaar lacked standing as to the second claim. *Skaar v. Wilkie*, 32 Vet. App. 156 (2019). The case was then returned to this panel, which held the Secretary had failed to justify his reliance on the contested methodology. *Skaar v. Wilkie*, 33 Vet. App. 127

(2020). After an appeal, cross-appeal, and petition for certiorari, the class certification order has been vacated and Mr. Skaar's individual claim is ripe to be returned to the Board.

Meanwhile, after this *en banc* Court held that Mr. Skaar lacked standing to challenge the exclusion of Palomares from the list of radiation events for which exposure is presumed, *see* 38 C.F.R. § 3.309(d)(2), another Palomares veteran, Edward Feeley, raised this same claim before the Board. He moved to certify a class, which the Board denied,[1] and then appealed to this Court. *Feeley v. McDonough*, No. 21-7045 (Vet. App.). The Secretary responded with three separate motions: to strike Mr. Feeley's statement of related case, in which he noted his membership in the then-certified *Skaar* class; to dismiss; and for a stay. *Id.* (motions filed Dec. 1, 2021; Dec. 1, 2021; Dec. 15, 2021).

While the class certification appeal and the Secretary's motions were pending at this Court, Mr. Feeley appeared before the Board. He presented the expert reports and testimony of nuclear physicists Dr. Frank N. von Hippel and Dr. Jan Beyea. Relying on this testimony, the Board granted Mr. Feeley's individual claim. Bd. Vet. App. A22019407, 2022 WL 1657313 (Sept. 21, 2022). Then, because the PACT Act recognized Palomares as a radiation event for which exposure is presumed, Mr. Feeley dismissed his class certification appeal as moot. Motion to Dismiss, *Feeley v. McDonough*, No. 21-7045 (Oct.

[1] The Board held it "does not have the legal authority to aggregate claims or certify a class of claimants." Exhibit 1, Secretary's Motion to Dismiss, *Feeley v. McDonough*, No. 21-7045 (Vet. App.) (Dec. 1, 2021). A copy of the decision is attached as Exhibit A.

11, 2022).[2] On remand, Mr. Skaar intends to petition the BVA to certify an agency class of Palomares veterans challenging the flawed methodology at issue in this case. If the Board holds it lacks jurisdiction to do so, as it did in *Feeley*, he intends to appeal to this Court.

[2] It is well-settled "that agencies have discretion to develop case management techniques that make best use of their limited resources." *Ramsey v. Nicholson*, 20 Vet. App. 16, 28 (2006). Nearly 70 other federal agencies have procedures to aggregate claims, advancing interests in efficiency, uniformity, and equitable treatment of claimants. Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 Yale L. J. 1634, 1657 (2017). The Board is authorized to hear claims in a variety of forms and to adapt procedures as circumstances demand. Its aggregation of claims is authorized by the Board's authority to prescribe "necessary and appropriate" rules. *See* 38 U.S.C. § 501(a). The BVA is required to maintain at least two dockets, 38 U.S.C. §§ 7107(a), 7105(3), 7107(a)(2); nothing prevents the BVA from creating a docket for aggregate action. Claim aggregation would also alleviate delays in adjudication of claims waiting. The Supreme Court has historically afforded agencies significant levels of flexibility in determining the most appropriate procedure that best serves their needs in adjudication. Sant'Ambrogio & Zimmerman, *supra*, at 1653. The Board erred in holding it lacked jurisdiction ever to aggregate a claim in *Feeley* and it should not repeat its error on remand in this case.

CONCLUSION

Appellant respectfully requests that the Court issue mandate to return his individual claim to the Board of Veteran Appeals and provide substantive or procedural guidance that might ensure the orderly and efficient adjudication of this case. At the Board, Mr. Skaar intends to seek relief in this matter on a class-wide basis and to appeal from a denial of aggregation. Finally, Appellant reserves the right to petition this Court for attorneys' fees.

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EXHIBIT A

DEPARTMENT OF VETERANS AFFAIRS
Board of Veterans' Appeals
Washington, DC

[redacted]
FEELEY, Edward P.

October 6, 2021

Edward P. Feeley
[redacted]

Dear Mr. Feeley:

This letter responds to correspondence from you, received by the Board of Veterans' Appeals (Board) in June 2021. You requested that the Board aggregate as a class those veterans who participated in the clean-up of Palomares, Spain, for the purpose of challenging exclusion of such work from in-service activities presumed to have resulted in radiation exposure. For the reasons set forth below, the Board will not certify a class of claimants as you requested.

The Board does not have the legal authority to aggregate claims or certify a class of claimants. As recognized in the present filing, there is no explicit legal authority to permit such action by the Board. In fact, aggregation of appeals is inconsistent with 38 C.F.R. § 20.1303, which provides that "[a]lthough the Board strives for consistency in issuing its decisions, previously issued Board decisions will be considered binding only with regard to the specific case decided," and "each case presented to the Board will be decided on the basis of the individual facts of the case in light of applicable procedure and substantive law."

You seek to have the Board determine that Palomares clean-up activities, if performed as an employee of the Department of Energy, would be sufficient to qualify under 38 C.F.R. § 3.309(d)(3)(ii)(E), which effectively would create a presumption that Palomares clean-up activities constitute a radiation-risk activity under 38 C.F.R. § 3.309(d)(3)(ii). By statute, the Board is "bound in its decisions by the regulations of [VA], instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department." 38 U.S.C. § 7104(c). It is not empowered to engage in rulemaking or to provide authoritative interpretations of VA's regulations. *See* 38 C.F.R. § 20.1303 (2016); *see also* 57 Fed. Reg. 4088, 4103 (Feb. 3, 1992) (noting that "[s]everal factors are behind the long-standing rule that [Board] decisions are not precedential in nature," including "that proceedings before the [Board] are ex parte in nature," and so "the Department has no opportunity to present and defend its position in the proceeding"). If it was the Secretary's intent that in-service radiation exposure be presumed for veterans who participated in the Palomares clean-up, the Secretary could have explicitly included such activities in § 3.309(d)(3)(ii). The Board is bound by the exclusion of Palomares from the list of

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presumed radiation-risk activities and is not permitted to engage in rulemaking by effectively creating such a presumption.

Moreover, you included in the proposed class Palomares veterans whose claims VA *will* deny. In support of the argument that the Board has the authority to certify a class of claimants, you cited to actions taken by other federal agencies to aggregate claims. Approval of the aggregation actions by other agencies is not persuasive in the instant matter because the authority delegated to the Board by the Secretary is generally limited to adjudication of appeals. *See* 38 C.F.R. § 20.108; *see also* 38 U.S.C. § 7104(a); 38 C.F.R. § 20.104(a). The examples identified in the motion involved aggregation of claims at the *initial adjudication* stage by the respective agencies. Even assuming the Secretary has the authority to take such action, the Board's jurisdiction is limited to *appellate* review of initial adjudications by the Secretary. *See* 38 U.S.C. § 7104(a); 38 C.F.R. § 20.104(a). Therefore, aggregation of claims that have not been adjudicated by the agency of original jurisdiction (AOJ) in the first instance and appealed to the Board goes beyond the limited appellate authority delegated to the Board. *See* 38 C.F.R. § 20.108.

Aggregating a group of claims for the purpose of establishing a legal conclusion for the entire class is also contrary to the Board's role in the veterans claims appeals process. A claim for benefits is first adjudicated by the AOJ. If an adverse decision by the AOJ is appealed to the Board, the Board will review the claim de novo and decide all questions of law and fact necessary to adjudicate the claim for benefits. *See* 38 U.S.C. § 7104(a); 38 C.F.R. § 20.104. You effectively request that the Board apply a legal conclusion to an entire class of claimants without consideration of the specific factual circumstances of each case, including those appeals which are not pending before the Board. Such a result would disrupt the statutorily created procedure by which the AOJ is the initial adjudicator and the Board is the appellate body that reviews each claim based on the individual factual circumstances of that case. *See* 38 C.F.R. § 20.1303; *see also* 83 Fed. Reg. 39,818, 39,818 (Aug. 10, 2018) (acknowledging that modernized review system was designed to "allow the agency of original jurisdiction to be the claim development entity within VA and the Board to be the appeals entity."). In fact, such action would violate putative class members whose claims have not been adjudicated the statutory right to one review on appeal. *See* 38 U.S.C.§ 7104(a) (providing that "[a]ll questions in a matter which under section 511(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary").

Even if the Board had the power to grant the relief sought, the creation of the requested presumption would be contrary to clear intent of the Secretary that such claims be adjudicated on an individual basis supported by sound scientific and medical evidence. When it is contended that a radiogenic disease is the result of in-service radiation exposure, an assessment will be made as to the size and nature of the radiation dose. 38 C.F.R. § 3.311(a)(1). When it is established the claimant had in-service radiation exposure and has a current radiogenic disease, the claim will be

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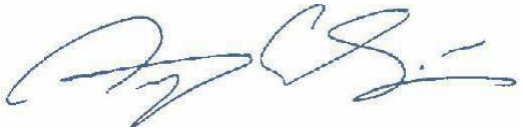
referred to the Under Secretary for Benefits to make a determination, supported by sound scientific and medical evidence, as to whether the radiogenic disease is due to in-service exposure. *See* 38 C.F.R. § 3.311(b), (c). At issue in *Skaar* was the adequacy of certain scientific evidence to support determinations of radiation exposure and dose. *See Skaar v. Wilkie*, 33 Vet. App. 127 (2020), *notice of appeal pending*, No. 21-1757 (Fed. Cir.); *Skaar v. Wilkie*, 32 Vet. App. 156 (2019) (certifying class). A proposed regulatory amendment to include Palomares as a presumed radiation-risk activity by regulation, consistent with the Administrative Procedure Act, would permit the Secretary to make an informed decision based on available scientific and medical evidence. A determination by the Board that all Palomares veterans qualify under § 3.309(d)(3)(ii)(E), on the other hand, would circumvent the procedures established by VA to evaluate radiation dose estimates on an individual basis, as well as the requirement that any determination as to whether a current radiogenic disease is due to in-service exposure be supported by sound scientific and medical evidence.

For the reasons stated above, the Board denies your request to aggregate as a class those veterans who participated in the clean-up of Palomares, Spain, for the purpose of challenging exclusion of such work from in-service activities presumed to have resulted in radiation exposure.

Sincerely,



Anthony C. Sciré, Jr.
Chief Counsel

cc: Michael J. Wishnie, Attorney