IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

VICTOR B. SKAAR,	)	
	)	
Appellant,	)	
	)	Vet. App. No. 17-2574
v.	)	
	)	
ROBERT WILKIE,	)	
Secretary of Veterans Affairs,	)	August 3, 2018
	)	
Appellee.	)	

APPELLANT'S REPLY BRIEF IN RESPONSE TO THE COURT'S MAY 21, 2018 ORDER

In this case and others, the Court is considering what rules to apply to proposed class actions. The Court has indicated it is likely to incorporate principles of Rule 23. If so, there is nothing unusual about certifying an injunctive class of veterans who "have been or will be injured" by the Secretary's unitary course of conduct. Nor would there be anything unusual in Rule 23 practice for this Court to amend the proposed class definition to include temporal limitations based on the sort of statutory, regulatory, and sub-regulatory changes at issue in this case, or even to establish subclasses if the Court deemed it necessary.

Here, Mr. Skaar requests certification to address two questions: is it arbitrary and capricious or a violation of due process for the Secretary to (1) exclude Palomares from the list of radiation-risk activities set forth at 38 C.F.R. § 3.309 and (2) rely on the current dosimetry methodology used for Palomares veterans pursuant to 38 C.F.R. § 3.311? Class certification is superior to a precedential decision here because it would better ensure consistency, fairness, and proper enforcement of any decision. By contrast, a remand followed by years of delay at the Board would deny meaningful justice to disabled Palomares

veterans, all of whom are in their 70s or 80s. Appellant Victor Skaar respectfully submits this reply brief in response to the Court's order directing supplemental briefing on class issues.

I. The legal challenges that Appellant brings are common to and typical of the class, and are most effectively redressed on a class-wide basis.

All Palomares veterans may be harmed by the VA's treatment of radiogenic service-connected disability benefits claims in two ways. First, by excluding Palomares from the list of radiation-risk activities under 38 C.F.R. § 3.309, the VA denies every Palomares veteran access to the Ionizing Radiation Registry (IRR),[1] and subjects their claims to a higher burden of proof than similarly situated veterans and civilians. *See* Br. of *Amicus Curiae* Friends of the Earth in Supp. of Appellant, Victor B. Skaar at 5 (Apr. 13, 2018); Br. of Appellant at 10-14 (Apr. 6, 2018). Second, any veteran who develops a radiogenic disease and applies for service-connected disability benefits based on radiation exposure at Palomares is subjected to scientifically flawed dose estimate methodologies under 38 C.F.R. § 3.311. Redressing these legal harms can be achieved on a class-wide basis without considering the merits of any individual claim. This question—whether class adjudication can efficiently answer questions that also arise in class members' individual legal claims—drives the class certification inquiry under Rule 23(b)(2). *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

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[1] Despite that this Court's order asked the parties to assume jurisdiction, the Secretary argues for the first time that this Court has no jurisdiction over Mr. Skaar's exclusion from the IRR. Appellee's Supplemental Br. in Resp. to the Ct.'s May 21, 2018, Order (App. Resp. Br.) at 10. Exclusion from the IRR is a concrete harm, following inevitably from the omission of Palomares from § 3.309, that confirms standing. Appellant's Reply Br. in Supp. of Mot. for Class Cert. at 9 (Mar. 21, 2018).

A. The Rule 23(a) and standing inquiries with regard to "harm" are distinct.

The proposed class of Palomares veterans comprises those whose claims for radiogenic disability benefits have been, or will be, denied. The Secretary's arguments fail to recognize that the "denied" and "will deny" categories, as described in this Court's May 21, 2018 Order, organize *claims*, not potential class members. Ct. Order at 2. If this Court certifies the proposed class without adding any temporal limitation, then all living Palomares veterans whose claims the Secretary has denied would become class members. In addition, any veterans with pending claims, such as those previously identified by Mr. Skaar, *see* Appellant's Supplemental Br. in Resp. to the Ct.'s May 21, 2018 Order (App. Supp. Br.) at 14 n.4 , or who apply for benefits in the future, would be class members (including those veterans previously denied and those not yet been denied). App. Supp. Br. at 7-8, 15-19.

Because the "injury-in-fact" standing requirements that apply to class representatives in Article III courts do not apply to class members, whether an individual has *already* experienced a direct injury is not dispositive of membership in a 23(b)(2) class. *Neale v. Volvo*, 794 F.3d 353, 367-68 (3rd Cir. 2015).[2] As described further in Section I(B), the risk of injury to "future harm" class members is thus relevant to the efficiency of class treatment under Rule 23(b)(2), not to whether the class may proceed.

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[2] In class certification analysis, the standing inquiry is distinct from whether the class and class representative meet Rule 23(a)'s requirements. 1 William B. Rubenstein *Newberg on Class Actions* § 2:6 (5th ed. 2018). For an example of a court rejecting a defendant's overlapping standing, commonality, and typicality arguments on similar grounds, see *Damus v. Nielsen*, 2018 U.S. Dist. LEXIS 109843, at *28 (D.D.C. July 2, 2018) (provisionally certifying class challenging application of agency rules to individuals seeking immigration benefit).

If this Court orders the relief Appellant seeks, veterans with denied claims would benefit most directly through readjudication. All Palomares veterans would benefit, however, from the assurance that pending and future Palomares-related claims would be protected from the arbitrary and capricious and unconstitutional practices challenged in this case. As discussed in Section III, class actions offer relief that precedential decisions cannot: they promote better consistency, efficiency, fairness, and access to justice, and superior mechanisms for enforcement. *See* Br. of *Amicus Curiae* National Veterans Legal Services Program et al. at 26-28, *Monk v. Shulkin*, Vet. App. No. 15-1280 (Feb. 8, 2018).

B. Commonality and typicality require that all class members face a "substantial risk" of serious harm, not "inevitable" harm.

The Secretary concedes that in a Rule 23(b)(2) class, not all class members must demonstrate "actual injury." App. Resp. Br. at 17. He nevertheless argues, incorrectly, that a legal question regarding unlawful conduct is common to the class "if, but only if, all class members are or inevitably will be subjected to the challenged conduct." App. Resp. Br. at 7 (citing *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014)). There is no such principle. *See, e.g.*, *Hoyte v. D.C.*, 2017 WL 3208456, at *10 (D.D.C. July 27, 2017) (commonality found when 43% of claims conformed to the challenged practice).[3]

Parsons, fully quoted, held that

> although a presently existing risk may ultimately result in different future harm for different inmates—ranging from no harm at all to death—every inmate suffers

[3] *See also Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 823 (7th Cir. 2012) (recognizing that a class will often include persons not already injured by the defendant because "many of the members of the class . . . or . . . the facts bearing on their claims may be unknown" (citations omitted)). For additional pre- and post-*Wal-Mart* examples of "future harm" 23(b)(2) classes certified, including toxic exposure cases, where direct harm to individual class members is not "inevitable," see App. Supp. Br. at 15-16.

> exactly the same constitutional injury when he is exposed to a single statewide . . . policy or practice that creates a substantial risk of serious harm.

Parsons, 754 F.3d at 678. Likewise, the legal errors that Appellant seeks to redress exist already in the VA's refusal to include Palomares in § 3.309 and its use of a scientifically invalid methodology under § 3.311. Appellant has shown that there is "substantial risk" that class members will be denied if they file a Palomares-linked disability benefits claim, *see, generally*, Br. of Appellant at 9-26, and that is sufficient.

C. Factual differences among individual class members do not destroy commonality.

Commonality does not require that class members' circumstances or disability benefits claims be identical. The Secretary's arguments do not fully appreciate that Appellant does not seek to resolve individual class members' disability benefits claims. App. Resp. Br. at 16 (characterizing Appellant as "asking the Court to order the Secretary to inject itself into other veterans' pending claims"). In a recent case challenging adjudication of parole applications made by detained asylum-seekers, for example, the Government also attempted to argue that there could be no commonality or typicality "because the claims require individualized factual determinations." *Damus*, 2018 U.S. Dist. LEXIS 109843 at *30. The court rejected the Government's argument, explaining:

> [T]he asylum-seekers are not asking for this Court to remedy discrete errors in their parole determinations . . . . Plaintiffs ask only that the Court address an alleged systematic harm — the failure [of agency offices] to comply with [its parole procedures]. This departure from [its procedures] is an agency action "generally applicable" to all class members, and a determination of whether that practice is unlawful would therefore resolve all members' claims "in one stroke."

Id. at *33 (quoting *Wal-Mart*, 564 U.S. at 350). The court then enjoined the government from "denying parole to any provisional class members absent an individualized determination,

through the parole process, that such provisional class member [is otherwise ineligible].” *Id.* at *59. Appellant’s requested relief would operate analogously.

As the *Damus* Court emphasized, the Rule 23(b)(2) commonality inquiry assesses “the capacity of a class[-]wide proceeding to generate common *answers* apt to drive the resolution of the litigation.” *Id.* at *30 (citing *Wal–Mart,* 564 U.S. at 350). Justice Scalia characterized *Wal-Mart* as a case that sought to adjudicate “literally millions of [direct supervisor employment] decisions at once,” with no “glue holding the alleged *reasons* for all those decisions together.” 564 U.S. at 338. By contrast, Appellant’s case seeks to answer two questions, each regarding an arbitrary and capricious and irrational agency policy or rule.[4] Class proceedings in this Court can generate common answers to these two questions.

D. Commonality may be satisfied where there are two legal questions.

In his emphasis on the need for class claims to be resolved “in one stroke,” the Secretary suggests that commonality and typicality are not satisfied because Appellant raises two separate legal questions. App. Resp. Br. at 2, 17. The Secretary is wrong. *See* App. Supp. Br. at 8. In fact, although the § 3.309 and § 3.311 claims are based in two different arbitrary and capricious and irrational sets of agency decision-making, they share a common nucleus of fact that provides additional coherence to the class: both rely on unscientific analysis of the effects of radiation exposure at Palomares. *See Gratz v. Bollinger*, 539 U.S. 244, 265 (2003) (merging at the Supreme Court claims against two separate admissions systems where a

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[4] As previously explained, this Court’s scope of review pursuant to 38 U.S.C § 7261(a) is the same as that authorized under the APA. Mr. Skaar has relied on both § 7261 and APA cases. Br. of Appellant at 10; *Henderson v. Shinseki*, 562 U.S. 428, 432 n.2 (2011) (stating that the CAVC’s scope of review under § 7261 “is similar to that of an Article III court reviewing agency action under the [APA].”

university's use of race in "transfer admissions d[id] not implicate a significantly different set of concerns than d[id] its use of race in . . . freshman admissions").

II. Mr. Skaar is an adequate representative of the proposed class.

As explained in Appellant's prior briefing, Mr. Skaar is both typical of and an adequate representative of the proposed class. App. Supp. Br. at 9-11, 17-18. Like all members of the putative class (with the possible exception of anyone who is also a veteran of a recognized "radiation-risk activity"), he has personally suffered the harm of exclusion from the IRR as a result of the exclusion of Palomares from § 3.309. Like many members of the putative class, he has also already had a claim denied under § 3.311 and could have an appeal or claim for a future condition denied under § 3.311 as well.[5] The Secretary nowhere explains his assertion that Mr. Skaar is inadequate because his interests are not aligned with the putative class members. His financial interests do not diverge from those of his fellow class members, for example. *See* App. Resp. Br. at 19-20.

At their core, the Secretary's arguments about typicality and adequacy are about Mr. Skaar's standing to bring these two legal claims. App. Resp. Br. at 9. Unlike putative class members, a class representative must have standing at the time he brings legal challenges on the class's behalf. *See Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974). The question of Mr. Skaar's individual standing, however, goes to the jurisdiction and merits of his individual case, and so will be addressed in Appellants' reply on the merits.

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[5] The parties dispute whether Mr. Skaar's skin cancer claim is properly before this Court. Appellant addresses this point in greater detail in the merits briefing. Br. of Appellant at 15-16.

Even if this Court finds that Mr. Skaar does not possess standing for each legal claim, it could still certify a class by allowing Appellant to name additional class representatives. Courts routinely allow additional named representatives to intervene in a class action; the class can then proceed if any one representative lacks standing on a particular claim, or if a representative's claim becomes moot. 1 *Newberg on Class Actions* § 2:8.

Further, Appellant acknowledges that Palomares veterans with claims denied before April 2001 were not subjected to the dose estimate methodology contested here. Appellant also acknowledges that those claims denied from April 2001 to December 2013, and those denied after December 2013, were subject to slightly different, if similarly flawed, methodologies. If the Court limits the class by date, or establishes subclasses by time period, the class may exclude Palomares veterans whose claims were adjudicated before April 2001.

The Secretary also suggests that subclasses may be necessary. App. Resp. Br. at 2, 17. Subclasses are mandatory only to remedy intraclass conflicts, not to address multiple legal questions in a class case. *See* App. Supp. Br. at 4-5. Subclasses would unnecessarily complicate adjudication of Palomares veterans' claims. However, if this Court determines that subclasses would be useful, it has the authority to certify them at any time. Wright and Miller's Federal Practice and Procedure, Civil § 1790. If this Court were to further determine that Appellant does not adequately represent each subclass, the Court should facilitate the appointment of a lead claimant for each subclass. *See, generally*, 3 *Newberg on Class Actions* § 7:30 (noting many cases presuming subclass representatives will be named).

III. The due process advantages of class adjudication here outweigh any disadvantages.

A. Class certification would ensure due process is satisfied for absent class members.

Certification of injunctive classes protects class members' due process rights by guaranteeing adequate representation. *See* App. Supp. Br. at 12-13. The Secretary argues that certification of the proposed class would offend due process, because, in the event of a negative decision, "class members would be bound by [this court's] judgment and foreclosed from bringing generalized attacks against the two policies at issue here." App. Resp. Br. at 14. The Secretary misconstrues how class relief would affect class members' due process rights. As a preliminary matter, class members would be able to make disability benefits claims, regardless of this case's outcome, because this case does not seek individual adjudications of class members' claims and because a denial does not preclude future applications. *See Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985) (holding that "a denial of [VA] benefits has no formal *res judicata* effect").

Moreover, the Secretary's misreading of *McDowell v. Brown*, 5 Vet. App. 401 (1993) causes him to misstate the effect of an unfavorable decision. *McDowell* does not "[foreclose] class members from bringing [any] generalized attacks against the two policies at issue," it merely prevents them from raising issues that "were or could have been raised" in the present class action proceeding. *McDowell*, 5 Vet. App. at 406. Thus, while *McDowell* would prevent class members from renewing the same legal challenges to §§ 3.309 and 3.311 at issue in this appeal, it would not preclude claims that "could not have been raised."

B. Class counsel would represent class members as to the legal claims brought by Appellant without affecting individual autonomy over benefits claims.

The Secretary argues that certification of the Appellant's class would create a "dual representation" problem, in violation of 38 C.F.R. § 14.631. This is incorrect. It is common in class practice for class counsel to represent members of the class only as to the class

issues, with individual members represented by their own, separate counsel as to the underlying merits of their individual case. *See Hiser v. Franklin*, 94 F.3d 1287, 1291 (9th Cir. 1996) ("A class action suit seeking only declaratory and injunctive relief does not bar subsequent individual damage claims by class members, even if based on the same events."); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2012 WL 273883, at *3 (N.D. Cal. Jan. 30, 2012) ("[A] Rule 23(b)(2) judgment, with its one-size-fits-all approach and its limited procedural protections, will not preclude later claims for individualized relief.").

Further, as the Secretary explains, there is a clear distinction between a legal claim in the Rule 23 context and a claim for benefits at the VA. *See* App. Resp. Br. at 2. The Secretary confuses the meaning of legal claims versus benefits claims. Section 14.631(e)(1), as the Secretary concedes, describes representation as to a claim for benefits. *See* App. Resp. Br. at 16. By contrast, Appellant's class claims seek to resolve two legal issues that, by the Secretary's own definition, *cannot* be the same as an individual benefits claim.

Thus, class treatment would not impede other Palomares veterans' ability to pursue (or decline to pursue) their individual benefits claims with their own counsel. On the contrary, it would ensure that their benefits claims are evaluated in a fair and rational way, and that Palomares is properly recognized as a radiation risk activity.

C. The Court may also permit opt-outs.

Appellant agrees with the Secretary that this Court has the authority to allow class-members to opt out of the class. *See* App. Supp. Br. at 12-14. If the Court is concerned that some absent class members may be unfairly prejudiced by class treatment, it may establish an opt-out mechanism, even in a (b)(2) class. 2 *Newberg on Class Actions* § 4:36.

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Respectfully submitted,

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