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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-2574

VICTOR B. SKAAR,

APPELLANT,

v.

ROBERT L. WILKIE,
ACTING SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before DAVIS, *Chief Judge*, and SCHOELEN, PIETSCH, BARTLEY, GREENBERG, ALLEN,
MEREDITH, TOTH, and FALVEY *Judges*.¹

ORDER

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

The appellant Victor B. Skaar appeals through counsel an April 14, 2017, Board of Veterans' Appeals (Board) decision that denied service connection for leukopenia, including as due to radiation exposure. On December 11, 2017, the appellant filed a motion for class certification, requesting that the Court certify a class of veterans "who were present at the 1966 cleanup of plutonium dust at Palomares, Spain[,] and whose application for service-connected disability compensation based on exposure to ionizing radiation [VA] has denied or will deny." Appellant's Dec. 11, 2017, Motion at 1; *see Monk v. Shulkin*, 855 F.3d 1312, 1318 (Fed. Cir. 2017) (in the petition context, holding that this Court has the authority to entertain class actions).

The appellant has clarified that the proposed class includes all veterans with claims for service-connected disability benefits related to ionizing radiation exposure at Palomares that VA has denied at any level, including regional offices (RO) and the Board, "except for those who have appealed to this Court and received a decision for which the mandate has issued." Appellant's April 13, 2018, Response at 1-2 ("Class Clarification"). He also stated that the proposed class "includes all veterans whose claims have already been filed at the RO and have not yet been the subject of an RO decision, as well as veterans with claims that have not yet been filed at the RO." *Id.* at 2.

The appellant also filed a motion for oral argument, which the Court granted on March 7, 2018, and on March 13, 2018, the Court determined to proceed en banc. Oral argument has been scheduled for Tuesday, September 25, 2018, at 10:00 A.M. This order sets forth the scope and

¹ Judge Falvey did not participate in the consideration concerning or issuance of this order.

procedures for the oral argument in this matter. In addition, the Court will order that the parties submit supplemental briefs as described below.

Oral Argument

Each party may structure their presentation at oral argument in the manner the party deems most effective in setting forth their arguments. The focus of the oral argument will be devoted to the question of class certification in the instant appeal, including any relief the Court might order, and this Court's authority to entertain class actions in the appeal context generally. Additionally, the parties should particularly be prepared to discuss whether the Court could appropriately certify a class in an appeal when the class would include claims that have not yet been the subject of a Board decision. The merits of the appeal will be considered only the extent necessary to determine whether the class certification motion should be granted.

Given the complexity and novelty of the arguments, the Court will extend the time for oral argument, allotting one hour to each party to present their arguments. U.S. VET. APP. R. 2. The format of oral argument will proceed in accordance with Rule 34 of this Court's Rules of Practice and Procedure.

Supplemental Briefing

The Court will order the parties to submit supplemental briefs concerning the appellant's response to the Court's order seeking clarification of the proposed class in this matter. As directed below, the parties will submit supplemental briefs addressing the following issues:

1. Assuming that the Court has jurisdiction to adjudicate the category of "denied" claims encompassed within the proposed class definition as described in the Class Clarification, whether the requirements of Federal Rule of Civil Procedure 23(a)(2)-(4) and the Due Process Clause of the Fifth Amendment to the United States Constitution are satisfied with respect to those claims.
2. Assuming that the Court has jurisdiction to adjudicate the various categories of "will deny" claims encompassed within the proposed class definition as described in the Class Clarification, whether the requirements of Federal Rule of Civil Procedure 23(a)(2)-(4) and the Due Process Clause of the Fifth Amendment to the United States Constitution are satisfied with respect to those categories.
3. As part of this response, the parties should specifically address the applicability, if any, of *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), with respect to both the "denied" and "will deny" claims.

Upon consideration of the foregoing, it is

ORDERED that the parties be prepared to discuss at oral argument the matters set forth above. It is further

ORDERED that the appellant submit a supplemental brief not exceeding 20 pages addressing the matters set forth above within 30 days of the date of this order. It is further

ORDERED that the Secretary submit a responsive supplemental brief not exceeding 20 pages addressing the matter set forth above within 30 days after the appellant has submitted his supplemental brief. It is further

ORDERED that the appellant may submit a supplemental reply brief not exceeding 10 pages within 7 days after the Secretary submits his responsive supplemental brief.

DATED: May 21, 2018

PER CURIAM.

Copies to:

Michael J. Wishnie, Esq.

VA General Counsel (027)