Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 17-2574

VICTOR B. SKAAR, APPELLANT,

V.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

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

O R D E R

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

Pending before the Court is the appellant's motion for class certification or aggregate resolution. The Court requires additional information to address the motion. As such, the Court orders the Secretary to provide the Court with the following information:[1]

1. The number of U.S. military personnel who were present at the 1966 cleanup of plutonium dust at Palomares, Spain.

[1] Our dissenting colleagues raise several issues concerning the issuance of this order. We make clear that we are deciding nothing about the substance of the pending motion for class certification. Instead, we merely direct the Secretary to provide the Court with discrete information that we may find useful as we consider the motion on its merits. As such, we do not see the need to respond to our dissenting colleagues' comments as to the merits. The dissent raises the specter that, in issuing this order, we ignore *Monk v. Wilkie*, 30 Vet. App. 167 (2018), and shift the burden of proving numerosity from the appellant to the Secretary. In *Monk*, we noted that Federal Rule of Civil Procedure 23 serves as a "guide" when considering a motion for class certification, and that "the party seeking class action bears the burden of proving that the requirements of the class certification rule have been met." *Id.* (citing *Amchem Products., Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1194 (10th Cir. 2010)). We make clear here that nothing in this order shifts the burden of proof from the appellant to the Secretary. We are not requiring the Secretary to "prove" that Rule 23(a)'s numerosity requirement is *not* met by the moving party; rather, the Court simply attempts to ascertain how many of the 1,600 asserted class members (*see* Appellant's Motion for Class Certification at 2) fall into discrete categories – an exercise that will more effectively help us determine the boundaries of class certification in the appeals context, which is an issue of first impression presented by the case at hand. As to the dissent's attempts to highlight assymetries between this order and precertifcation orders at other courts, these differences are easily explained by the fact that traditional district court discovery is an imperfect analog to discovery at the appellate level, especially where, as here, the administrative agency controls access to virtually all relevant information involving numerosity. Lastly, nothing in this order charts a new course that must be followed by the Court or the parties during the discovery phase of future class-action cases; we simply request further information from VA *in this particular case* to assist the Court in making more informed decisions.

2. The number of veterans who were present at the 1966 cleanup of plutonium dust at Palomares, Spain, who have received a Board of Veterans' Appeals (Board) decision (whether adverse or not) from 2001 to the present addressing any claim dealing with claimed exposure to ionizing radiation concerning the Palomares cleanup.

3. The number of veterans who were present at the 1966 cleanup of plutonium dust at Palomares, Spain, who have received a Board decision from 2001 to the present addressing any claim dealing with claimed exposure to ionizing radiation concerning the Palomares cleanup in which the Board denied the veteran's claim.

4. The number of veterans who were present at the 1966 cleanup of plutonium dust at Palomares, Spain, who have appeals pending before the Board addressing any claim filed from 2001 to the present dealing with claimed exposure to ionizing radiation concerning the Palomares cleanup.

Upon consideration of the foregoing, it is

ORDERED that, within 30 days of the date of this order, the Secretary file with the Court and serve on the appellant a response providing the information requested above.

DATED: November 13, 2018 PER CURIAM.

MEREDITH, *Judge*, with whom PIETSCH and FALVEY, *Judges*, join, dissenting: The majority requires the Secretary to provide precertification discovery without providing transparent and legally compelling reasons for doing so, given this novel and potentially unnecessary undertaking. Therefore, we respectfully dissent.

First, until such time as this Court develops rules governing aggregate actions, the Court's own orders—such as our recent order in *Monk v. Wilkie*, 30 Vet.App. 167 (2018) (en banc)—will serve as the only source of guidance for parties seeking class certification in this Court. Yet, here, the Court breaks entirely new ground—by ordering the production of information potentially necessary to decide the appellant's class action motion—without providing a full explanation for doing so, leaving the current parties and future parties with minimal guidance as to how similar situations may be handled moving forward.

To start, the majority does not address important preliminary matters, such as whether statutory limitations preclude the Court from certifying a class of veterans who have never appealed a Board of Veterans' Appeals (Board) decision, or whether the Court has authority to order this type of discovery or to consider, in an appeal context, any extrarecord materials that may be obtained as a result of this order. *See* 38 U.S.C. § 7252(a), (b); *Kyhn v. Shinseki*, 716 F.3d 572, 577-78 (Fed. Cir. 2013) (holding that the Court is not permitted to consider extrarecord evidence). Nor does the majority indicate whether any Federal Rules or other authorities were relied on as guides in crafting this novel approach. *Cf. Monk*, 30 Vet.App. at 174.

As to the content of the order, the majority requires VA to provide data which may bear on whether numerosity could be satisfied for a class other than that requested by the appellant, without applying our recent decision in *Monk*, which (albeit, in the context of a petition) placed the burden

on the movant to satisfy the requirements of Federal Rule of Civil Procedure 23 (Rule 23), including numerosity. *See Monk*, 30 Vet.App. at 174 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997)). The majority simply notes that VA "controls access to virtually all relevant information involving numerosity," *supra* at 1 n.1, before requiring VA to provide all the requested numerosity information.[2] There is no explanation regarding whether an appellant generally must make some proffer of how joinder would be impracticable before requiring VA to undertake this discovery, or whether the appellant made a sufficient showing here. The majority also does not explain why it is necessary to require the Secretary to answer questions #2 and #3, even though the appellant has acknowledged that a searchable public database includes information about Board decisions that denied Palomares veterans' disability compensation claims. *See* Motion for Class Certification at 7-8 (noting that the Board had denied 11 claims involving ionizing radiation and Palomares veterans).

Moreover, the majority does not acknowledge the Secretary's contention that it is the Department of Defense (DoD)—a non-party—that would have the information specified in question #1, and that, because it normally would be the movant's burden to show that Rule 23 is satisfied, the appellant—not VA—should obtain any necessary information from DoD. *See* Oral Argument at 1:39:38-1:40:29, *Skaar v. Wilkie*, U.S. Vet. App. No. 17-2574 (oral argument held Sept. 25, 2018); *see also* MANUAL FOR COMPLEX LITIGATION § 21.14 (4th ed. 2004) ("Discovery relevant to certification should generally be directed to the named parties.").

In addition, the Court itself determined what should be included in this discovery order, without specifying how the Court concluded that these specific questions required answers and without allowing or requiring the parties to weigh in. *See* FED. R. CIV. P. 16, 26;[3] *see, e.g.*, *Burton v. Dist. of Columbia*, 277 F.R.D. 224, 231 n.8 (D.D.C. 2011) (rather than finding the plaintiffs entitled to their class action discovery request and ordering the defendant to comply with the request, directing that *the parties* negotiate the scope of discovery with the assistance of a magistrate judge, if necessary).

In sum, if the Court intends to proceed with class actions prior to adopting formal rules, it is in our view incumbent upon the Court not only to have reasoned answers for all these questions but to disclose to the parties and our broader constituency the parameters we are setting for handling class action motions. Those parameters should not be known only to the judges deciding these types of motions.

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[2] It also is unclear how ordering production of data regarding broad categories of Palomares veterans who have filed claims—without requesting information on whether the claims were denied under either of the regulations potentially at issue here, 38 C.F.R. §§ 3.309 and 3.311—will allow the majority to determine how many Palomares veterans fall into "discrete categories" relevant to the proposed class. *Supra* at 1 n.1; *see* Motion for Class Certification at 1-7 (appellant seeking classwide relief recognizing Palomares as a radiation-risk activity under 38 C.F.R. § 3.309 and finding that the scientific methodology used for processing claims under 38 C.F.R. § 3.311 is flawed).

[3] MANUAL FOR COMPLEX LITIGATION § 21.11 ("Initial case-management orders in a class action guide the parties in presenting the judge with the information necessary to make the certification decision and permit the orderly and efficient development of the case."), § 21.14 ("It is often useful under Rule 26(f) to require a specific and detailed precertification discovery plan from the parties. The plan should identify the depositions and other discovery contemplated, as well as the subject matter to be covered and the reason it is material to determining the certification inquiry under Rule 23.").

Further, to the extent that the discovery order relates to how many Palomares veterans' claims were considered under § 3.311, we would reiterate the discussion at oral argument that the appellant is seeking to assert a classwide claim challenging whether the scientific methodology used for purposes of that regulation is sound. *See* Oral Argument at 16:09-17:45, 1:05:32-06:12. However, the decision of the Board that is before us for review contains no findings with respect to the validity of that process. Record (R.) at 1-14. This Court is prohibited from making factual findings in the first instance. *See* 38 U.S.C. § 7261; *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013). Thus, it may have avoided unnecessary expenditure of government resources in fulfilling this portion of the discovery order if, first, the Court had addressed whether it may provide the requested relief on the merits as to this classwide issue, and, if not, what bearing that may have on the motion for class certification as to this issue.[4] *See, e.g.*, *Curtin v. United Airlines, Inc.*, 275 F.3d 88, 91-93 (D.C. Cir. 2001) (holding that the district court did not abuse its discretion when it granted the defendant's motion for summary judgment and denied the plaintiff's motion for class certification prior to classwide discovery because "a court is [not] barred from rendering an easy decision on an individual claim to avoid an unnecessary and harder decision on the propriety of certification" to "spare[] both the parties and the court a needless, time-consuming inquiry into certification," especially when there are "fatal flaws in plaintiffs' claims").

Similarly, to the extent the order relates to how many Palomares veterans were denied presumptive service connection under § 3.309, the discovery order may have been deemed unnecessary if the majority first addressed whether the appellant has standing to pursue that issue. *See Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 n.6 (2016) (explaining that, if the class is to have standing, the class representative must meet the Article III standing requirements, and "'[t]hat a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong'" (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976))); *see also Rosinski v. Shulkin*, 29 Vet.App. 183, 192 (2018) (per curiam order) (denying motion for class certification in part because the named representative lacked standing to bring the classwide claim). Specifically, the appellant seeks to represent a class requesting that VA recognize Palomares as a radiation-risk activity in 38 C.F.R. § 3.309(d)(3)(ii). Motion for Class Certification at 3, 7. Yet, the Board denied the appellant presumptive service connection under § 3.309 because leukopenia, the only condition for which he was seeking service connection, "is not listed as a disease specific to radiation-exposed veterans," R. at 6, not on the basis that *Palomares was excluded* as a "radiation-risk activity" in § 3.309(d).

For these reasons, we respectfully dissent.

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[4] *See generally* MANUAL FOR COMPLEX LITIGATION § 21.14 ("[In determining whether precertification discovery is required, a] preliminary inquiry into the merits may be required to decide whether the claims . . . can be presented and resolved on a class[wide] basis."), § 21.133 (explaining that, prior to its certification determination, a court may dismiss classwide claims for lack of jurisdiction or for failure to state a claim upon which relief may be granted when "[e]arly resolution of these questions may avoid expense for the parties and burdens for the court and may minimize use of the class action process for cases that are weak on the merits").

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