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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

NO. 15-1280

CONLEY F. MONK, PETITIONER,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before HAGEL, *Judge*.

**O R D E R**

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

On May 8, 2015, the Court issued an order addressing Conley F. Monk's petition for extraordinary relief in the nature of a writ of mandamus. In that order, the Court denied that portion of the petition that sought an aggregate resolution or class action certification and ordered the Secretary to respond to that portion of the petition pertaining to Mr. Monk's individual case.

On May 19, 2015, the Court received, through counsel, notice of Mr. Monk's appeal to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) of that portion of the Court's May 8, 2015, order denying aggregate resolution or class action certification. Because, however, a portion of the May 8, 2015, order is not dispositive, judgment cannot issue, and therefore Mr. Monk's Notice of Appeal to the Federal Circuit is premature. *See* U.S. VET. APP. R. 36 (a) ("Judgment begins the 60-day time period for appealing to the U.S. Court of Appeals for the Federal Circuit."), (b)(1)(B) (judgment is effective when the Court issues an order dismissing, terminating, or remanding a case). The Court, however, recognizes that its order resolving this portion of Mr. Monk's petition *is* dispositive and that delay in issuing judgment as to that portion is not in the interest of efficiency.

Accordingly, the Court will withdraw its May 8, 2015, order and issue two orders in its stead: one that is dispositive and addresses the aggregate resolution portion of the petition, and one that is nondispostive and addresses the petition with respect to Mr. Monk's individual case. The outcome of these issues remains unchanged; this is merely a procedural correction to permit Mr. Monk to pursue his appeal to the Federal Circuit in a more timely manner.

Mr. Monk asserts that his claim for benefits for post-traumatic stress disorder was denied in August 2012 and that he has received no response to his July 2013 Notice of Disagreement. He

contends that the Secretary's failure to respond in the intervening 20 months amounts to "a constructive denial of benefits." Petition (Pet.) at 2. Mr. Monk further argues:

> The Secretary has failed to render a timely decision on the pending disability benefits applications of countless other veterans who, like Mr. Monk, face significant financial or medical hardship and have waited twelve months or more for a decision since timely filing a[ Notice of Disagreement] to initiate the appeals process.
>
> This Court has previously declined to adopt a class action procedure under its organic statute or to aggregate claims through the doctrine of associational standing. In a series of dissenting and concurring opinions, however, its judges have recognized that the Court may, in an appropriate case, exercise its inherent equitable powers or its authority under the All Writs Act, 28 U.S.C. § 1651(a), for aggregate resolution. The Secretary's pervasive and unlawful delay in adjudicating post-[Notice of Disagreement] claims by thousands of veterans like Mr. Monk warrants judicial intervention on an aggregate basis.

*Id.*

Mr. Monk requests that the Court "compel the Secretary promptly to decide his claim and that of thousands of similarly situated veterans who confront significant financial or medical hardship while awaiting a VA decision." *Id.* He argues that, in addition to compelling the Secretary to address his individual claim, the Court should adopt an aggregate resolution procedure for "all veterans who applied for VA disability benefits and (a) have timely filed a[ Notice of Disagreement] . . . and have not received a decision within twelve (12) months . . . ; and (b) can demonstrate medical or financial hardship as defined by 38 U.S.C. §§ 7107(a)(2)(B), (C)." *Id.* at 10.

In his statement of facts regarding "the Aggregate Group [g]enerally," Mr. Monk alleges a series of facts and statistics for which he offers no citation or authority. *See* Pet. at 8-9. The Court will not recount these particular facts; suffice it to say that Mr. Monk alleges that the time from the filing of a Notice of Disagreement to a decision by the Board is, on average, "multiple years," Pet. at 8, and that these "extensive delays" create hardships for claimants, *id.* at 9.

Mr. Monk seeks "extraordinary injunctive relief" for an aggregate group comprised of

> all veterans who applied for VA disability benefits and (a) have timely filed a[ Notice of Disagreement] upon denial of their initial application and have not received a decision within twelve (12) months, whether the veteran elected a [decision review officer] hearing or proceeded directly to a [Board] appeal; and (b) can demonstrate medical or financial hardship as defined by 38 U.S.C. §§ 7107(a)(2)(B), (C).

*Id.* at 10.

Mr. Monk recognizes that the Court has previously declined to permit class actions because to do so would be unmanageable and unnecessary. *Id.* (citing *Lefkowitz v. Derwinski*, 1 Vet.App. 439, 440 (1991)). He also acknowledges that the Court has "declined to address claims on an aggregate basis by applying the doctrine of associational standing." Pet. at 11 (citing *American Legion v. Nicholson*, 21 Vet.App. 1, 8 (2007) (en banc)).

Nevertheless, Mr. Monk argues that any relief he obtains individually as a result of his petition "would not benefit similarly situated veterans unless each one filed a petition for extraordinary relief in this Court." *Id.* He contends that "the potentially unmanageable volume of cases necessitates an aggregate procedure here" and that fashioning an aggregate resolution procedure under these circumstances "would be a less burdensome way to address the systemic and recurring problem" of post-Notice of Disagreement delays. *Id.*

Mr. Monk contends that the Court has the discretion under the All Writs Act, 28 U.S.C. § 1651(a), to entertain class actions in appropriate circumstances and that the Court has the equitable power to adopt an aggregate resolution procedure. He notes, too, that the Court is authorized to make its own rules of practice and procedure. Pet. at 12 (citing 38 U.S.C. § 7264(a)). He concludes that, "[f]or practical and policy reasons," it is necessary for the Court "to 'compel correction of a systemic error' unaddressed by VA." *Id.* at 12-13 (quoting Lawrence B. Hagel and Michael P. Horan, *Five Years Under the Veterans' Judicial Review Act: The VA Is Brought Kicking and Screaming Into the World of Meaningful Due Process*, 46 ME. L. REV. 43, 65 (1994)).

Mr. Monk notes that Rule 23 of the Federal Rules of Civil Procedure serves as "the standard for class actions in civil suits in the U.S. District Courts" and asserts that even where–as in this Court–the Federal Rules of Civil Procedure do not apply, Rule 23 "has served as a basis for collective action procedures." Pet. at 11. In that light, Mr. Monk contends that the requirements of Rule 23 are met by the proposed aggregate group in this case.

Mr. Monk then argues that his petition should be granted as to the aggregate group, a discussion into which the Court need not delve, given its determination that he has not demonstrated that a class action or aggregate resolution is permitted here.

Even assuming Mr. Monk's statistics regarding the number of potential class members are correct, or that his proposed class meets the dictates of Rule 23, Mr. Monk fails to appreciate the Court's long-standing declaration that it does not have the authority to entertain class actions. *See Harrison v. Derwinski*, 1 Vet.App. 438 (1991) (en banc); *Lefkowitz*, 1 Vet.App. at 440; *see also American Legion*, 21 Vet.App. at 3-4; *Henderson v. Brown*, 10 Vet.App. 272, 278 (1997) ("[T]his Court determined, en banc, in *Lefkowitz* . . . and *Harrison* . . . that it lacked the authority to establish

a class action procedure and that to do so would be both unwise and unnecessary."). In the absence of such authority, no other arguments matter.[1]

Accordingly, the Court will deny that part of Mr. Monk's petition that seeks class action or aggregate status for a group of similarly situated veterans. Upon issuance of this order, which will act as the Court's judgment, the Court will forward Mr. Monk's Notice of Appeal to the Federal Circuit.

As a final matter, the Court notes that, on April 9, 2015, veteran Harold William Van Allen, who is self-represented, filed a motion styled as one to "Reopen/Consolidate/Join Petition for Immediate Mandamus Relief as a Similarly Situated Class Member in 15-1280." That motion contains no substance, but its intent is clear from its title.

Mr. Monk filed a response to that motion on April 20, 2015, stating that, at this time, he opposes joinder of Mr. Van Allen "or any other individual veteran in this case." Response at 1. Nevertheless, Mr. Monk notes that, since filing his petition, his counsel "has received inquiries from a very substantial number of veterans" interested in becoming part of any class action or aggregate group that may result from this petition. *Id.* at 1-2.

In light of the Court's disposition of this portion of Mr. Monk's petition, the Court will deny Mr. Van Allen's motion to join.

The Court notes that, on May 20, 2015, the Court received notice of Mr. Van Allen's appeal to the Federal Circuit of that portion of the Court's May 8, 2015, order denying his motion to join. Upon issuance of this order, which will act as the Court's judgment, the Court will forward Mr. Van Allen's Notice of Appeal to the Federal Circuit.

Upon consideration of the foregoing, it is

ORDERED that the Court's May 8, 2015, order is withdrawn. It is further

ORDERED that the portion of Mr. Monk's April 6, 2015, petition seeking certification of a class action is DENIED. It is further

ORDERED that Harold Van Allen's motion to join is DENIED. It is further

ORDERED, pursuant to Rule 36(b)(1)(A), that this order is the judgment of the Court. It is further

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[1] The question of associational standing is irrelevant here, as Mr. Monk filed his petition on his own behalf and not as a member or representative of any organization or association. Moreover, the Court has held that it is "not permitted to go beyond the jurisdictional statute set forth by Congress and allow for associational standing." *American Legion*, 21 Vet.App. at 2-3 (petition filed by American Legion on behalf of numerous veterans).

ORDERED that the Clerk of the Court forward Mr. Monk's and Mr. Van Allen's Notices of Appeal to the Federal Circuit.

DATED: May 27, 2015

BY THE COURT:

/s/ Lawrence B. Hagel
LAWRENCE B. HAGEL
Judge

Copies to:

Michael J. Wishnie, Esq.

VA General Counsel (027)

Harold Van Allen