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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-1280

CONLEY F. MONK, JR.,

PETITIONER,

v.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS,

RESPONDENT.

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

ORDER

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

On April 6, 2015, Conley F. Monk, Jr., through counsel, filed a petition for extraordinary relief in the nature of a writ of mandamus. The petitioner asserted that a VA regional office denied his claim for disability compensation benefits for post-traumatic stress disorder (PTSD) in August 2012, that he timely filed a Notice of Disagreement (NOD), and that, as of the date that he filed his petition, he had not received a decision. The petitioner requested that this Court order the Secretary to promptly adjudicate both his claim and the applications of similarly situated veterans. He proposed that the Court certify a class of veterans who had applied for disability compensation benefits, had timely filed an NOD, had not received a decision within 12 months, and had demonstrated medical or financial hardship as defined by 38 U.S.C. § 7107(a)(2)(B)-(C).

In July 2015, the Court denied the petition, finding that the Court lacked the authority to certify a class or provide aggregate relief, and the petitioner appealed. In April 2017, the U.S. Court of Appeals for the Federal Circuit reversed the Court's decision, holding that the Court, in fact, has the authority to entertain class action suits.

On August 7, 2017, the petitioner filed a motion for a status conference. On August 10, 2017, the case was submitted to the en banc Court. The same day, the Court stayed proceedings in this matter pending further order of the Court. On September 8, 2017, the petitioner filed a motion for clarification of the reason for the stay.

The Court has determined that oral argument will materially assist the Court in the disposition of the petition. The date for oral argument will be scheduled at the convenience of the Court.

In anticipation of oral argument, the Court will order the parties to submit memoranda of law addressing the following questions:

1. What framework should the Court use to determine whether class/aggregate action is warranted (for example, Federal Rule of Civil Procedure (Rule) 23; an omnibus rule (*see, e.g.*, Office of the Special Masters of the U.S. Court of Federal Claims);¹ or another framework) to reflect the unique nature of this appellate court?
2. If the Court were to follow Federal Rule of Civil Procedure 23 in this case, has the petitioner satisfied the numerosity,² commonality,³ typicality, and adequacy⁴ prerequisites set forth in Rule 23(a)?
3. If the Court were to follow Rule 23(b)(2), has the petitioner satisfied the criteria required to maintain a class action?
4. Are there likely difficulties in managing the putative class, and, if so, should any difficulties be a factor that the Court considers in certifying a class?
5. If the Court decides to certify a class, how should it select counsel for the class? *See* FED. R. CIV. P. 23(g).
6. How should the Court determine whether a putative class member demonstrates medical or financial hardship, as defined by 38 U.S.C. § 7107(a)(2)(B) and (C)?
7. Is this Court able to make the findings necessary to certify a class, given that 38 U.S.C. § 7261(c) prohibits the Court from making factual findings in the first instance? *See Kyhn v. Shinseki*, 716 F.3d 572, 575-76 (Fed. Cir. 2013); *Andre v. Principi*, 301 F.3d 1354, 1362 (Fed. Cir. 2002). Assuming the Court would not be barred from making such findings, what mechanism(s) should the Court use to do so (e.g., mandatory disclosures, preliminary record by the Secretary, discovery, etc.)?

¹ To the extent that a party advocates that the Court adopt an omnibus rule, please address whether there is a common question of causation in this case that could be decided in an omnibus proceeding that could later be applied to other claimants, and whether the Court should consider appointing a special master to oversee the omnibus proceeding.

² The parties should identify the source of any data or statistics on which they rely to address the numerosity prerequisite.

³ The parties should address whether there is a common cause of delay that is caused solely by VA, and is within VA's power to change. *See* FED. R. CIV. P. 23(a)(2).

⁴ Given that Mr. Monk's claim for PTSD has been granted, can he fairly and adequately protect the interests of the class? *See* FED. R. CIV. P. 23(a)(4).

8. If the Court decides to certify a class, should the Court direct any notice to class members? In answering this question, please also address whether class members should have the right to opt out of the class, and, if so, what notice should be provided on that matter. Also should the Court adopt an opt-in approach instead? *See* FED. R. CIV. P. 23(c)(2).

9. How would a class action be superior to a precedential decision from this Court in fairly and efficiently adjudicating the due process claim raised by the petitioner? Does the type of relief the petitioner seeks from the Court play a role in determining whether the Court should issue a precedential decision or certify a class?

10. How should the Court define the "extraordinary" circumstances that warrant the issuance of a writ of mandamus when the petitioner seeks aggregate resolution? *See* All Writs Act, 28 U.S.C. § 1651(a); *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976).

11. How should the Court assess whether VA's delay in adjudicating appeals constitutes a violation of constitutional due process? Does the analysis of whether there has been a deprivation of due process differ from the analysis of whether VA adjudication of appeals has been "unreasonably delayed"? 38 U.S.C. § 7261(a)(2); *cf.* 5 U.S.C. § 555(b)(2).

12. How does the absence of congressionally mandated VA deadlines factor into the Court's due process determination? The parties should address in the context of this question the import, if any, of *Heckler v. Day*, 467 U.S. 104 (1984).

13. If the Court were to certify the class and grant the writ, what is the appropriate remedy? Please identify the sources of law, including specific VA laws, regulations, or policies, if any, that support the grant of the requested relief. Additionally, if the relief requested by the petitioner creates delays for other VA claimants, should this be a factor that the Court considers before granting the requested relief?

14. Would the administration of the relief requested by the petitioner require individual determinations by VA if the class-wide allegations are proven? If yes, what is the Court's role in monitoring compliance with the writ?

The parties' memoranda of law should be no longer than 50 pages, not counting the table of contents, the table of authorities, any appendices, and the certificate of service, and are to be submitted within 45 days after the date of this order. All memoranda should include copies of any legislative history or other authority referred to that is not available on electronic databases such as Westlaw or LexisNexis.

Upon consideration of the foregoing, it is

ORDERED that the Court's August 10, 2017, order staying proceedings in this matter is lifted. It is further

ORDERED that oral argument is scheduled at the convenience of the Court. It is further

ORDERED that the parties submit memoranda of law, as described above, within 45 days after the date of this order. It is further

ORDERED that the August 7, 2017, motion of petitioner for a status conference is denied as moot. It is further

ORDERED that the September 8, 2017, motion of petitioner for clarification of the Court's August 10, 2017, order staying proceedings in this matter is denied as moot.

DATED: October 26, 2017

PER CURIAM.

Copies to:

Michael J. Wishnie, Esq.

VA General Counsel (027)