Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 18-6091

AMANDA JANE WOLFE AND PETER E. BOERSCHINGER, PETITIONERS,

V.

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

Before GREENBERG, ALLEN, 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.

On September 9, 2019, the Court certified a class of "[a]ll claimants whose claims for reimbursement of emergency medical expenses incurred at non-VA facilities VA has already denied or will deny, in whole or part, on the ground that the expenses are part of the deductible or coinsurance payments for which the veteran was responsible."[1] Two motions remain pending, Petitioners' Motion for Enforcement of the Court's Order of September 9, 2019 and Other Relief (the "Enforcement Motion") and the Secretary's Motion for Issuance of Judgment or, in the Alternative, for Certification of an Interlocutory Appeal (the "Issuance of Judgment Motion"). We resolve these motions in this order. We will assume familiarity with the facts underlying the petition and the procedural history of this matter and provide details only as necessary to address the pending motions.

We begin with the Enforcement Motion. As we explain, we will grant the motion to the extent described in this order and otherwise deny it. There are two aspects of our September 9, 2019, order that are relevant to the Enforcement Motion. The first is our determination that the Secretary must readjudicate the denied reimbursement claims of *Wolfe* class members under the proper interpretation of 38 U.S.C. § 1725 as we articulated in the September 9 order.[2] The second is that the Secretary was to provide notice to those veterans in the class who had received inaccurate information concerning what the law required in terms of the reimbursement of costs for non-VA emergency care.[3] We will refer to the former as the "readjudication requirement" and the latter as the "notice requirement."

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[1] *See Wolfe v. Wilkie*, 32 Vet.App. 1, 41 (2019).

[2] *Id*.

[3] *Id*.

On January 23, 2020, the Court heard oral argument on certain motions. After that argument, we ordered the parties to confer about, among other things, areas of agreement and disagreement between them concerning various unresolved matters.[4] On March 9, 2020, the parties submitted a joint response as we had directed.[5] As relevant to the notice requirement, the parties agreed about which veteran-claimant class members were to receive notice, the means to effect that notice, and the form of notice to be used with respect to these veteran-claimant class members.[6] The Court accepts the parties' agreements on these matters. The parties also agreed that the Secretary would complete the sending of the notices within 100 days of the starting date for sending notice.[7]

It would appear, then, that things were on track with respect to the notice requirement. But the Joint Response informed the Court that the parties disagreed about the timing of when the Secretary would begin to send notice.[8] The parties also informed us that they disagreed about when the Secretary was required to begin readjudications.[9] These disagreements are at the heart of the Enforcement Motion.

Petitioners argue that the Secretary should comply with the notice and readjudication requirements immediately.[10] The Secretary takes a different position. He agrees that our September 9, 2019, order states what the law is.[11] However, he argues that class members are not entitled to enforcement of the order before the Federal Circuit decides his anticipated appeal because they are "parties" to the appeal.[12] As support, he cites our determination in *Tobler v. Derwinski*[13] that "while an appeal of a decision does suspend the finality of any judgment with respect to the parties to that case until the appeal is resolved, the decision, and any legal interpretations, conclusions, or rulings contained therein are the law of the jurisdiction from the date of the decision unless or until overturned."[14]

We are not persuaded by the Secretary's argument. First, *Tobler* itself could not provide a binding rule of decision in this matter because it did not concern class actions. Indeed, the Court

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[4] *See* October 24, 2020, Order at 2.

[5] *See* Joint Response to the Court's January 24, 2020 Order ("Joint Response").

[6] *Id*. at 2-4.

[7] *Id*. at 4.

[8] *Id*. at 5-6.

[9] *Id*. at 6-7.

[10] *See, e.g.,* Enforcement Motion at 1 (Arguing that "the Court should clarify that VA's obligations to provide notice and conduct readjudication[s] [ ] start *now*." (emphasis in original)).

[11] *See* Respondent's Response to Petitioner's Motion for Enforcement of the Court's September 9, 2019 Order (Secretary's Response) at 8. On January 24, 2020, the Court denied the Secretary's motion to stay the precedential effect of the September 9, 2019, order.

[12] *See id*. at

[13] 2 Vet.App. 8 (1991).

[14] Secretary's Response at 4-5 (citing *Tobler*, 2 Vet.App. at 11).

at that time had held that it lacked the authority to entertain class actions as a categorical matter.[15] Second, the Secretary's position is at odds with how enforcement in class actions is effectuated in the district courts under Federal Rule of Civil Procedure 23.[16] While Rule 23 does not apply to this Court,[17] we have used it as a guide in the past[18] and see no reasons to chart a different course now. And third, if the Secretary's position were correct, we don't see how a class action could ever be certified as a practical matter. If being a member of a class means that you are not entitled to relief at the same time that a non-class member is so entitled, it is difficult to understand why a class action would ever be appropriate. That result is inconsistent with the decisions of the Federal Circuit[19] and this Court[20] favorably discussing class certification in appropriate situations.

Given all of this, we will grant the motion to enforce in part. Specifically, we will order that the Secretary (1) within seven days of the date of this order, begin sending notices under the notice requirement as set forth in the Joint Response; (2) inform the Court that he has begun the process of sending notice, at which time the Court will enter judgment within two days of receiving this notification; and (3) within 45 days of the date on which he informs the Court that he began his notice obligations, begin readjudications under the readjudication requirement pursuant to the terms of the September 9, 2019, order.

In their Enforcement Motion, petitioners also request that the Court order the Secretary to provide status reports every 14 days until all the *Wolfe* class members' claims have been readjudicated.[21] We do not believe doing so is appropriate in this situation. The Court will be entering judgment as set forth above and if the Secretary appeals as he has indicated he will do, we would likely lack jurisdiction to actively manage this class action. However, we do believe that class counsel should be able to monitor the Secretary's compliance with the relief we have ordered in this matter. So we will order that every 45 days after the Secretary has begun readjudications under the terms of this order, he shall serve a status report on class counsel providing an update on the readjudication of class members' claims using the categories of claimants the parties set forth in their Joint Response.[22]

This brings us to the Issuance of Judgment Motion. We will deny that motion as moot. As described above, the issuance of judgment in this matter is now in the Secretary's hands as a practical matter. We will enter judgment within two days of receiving notification that he has begun sending the notice we have ordered. Because that is the case, no action on the motion to enter judgment is necessary as it will be rendered moot.

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[15] *See Harrison v. Derwinski*, 1 Vet.App. 438, 438-39 (1991) (en banc order).

[16] *See Lado v. Wolf*, 952 F.3d 999 (9th Cir. 2020); *see also* 20 MOORE'S FED. PRACT. – CIVIL § 308.11.

[17] *See* FED. R. CIV. P. 1 (providing that the Federal Rules of Civil Procedure apply in United States District Courts).

[18] *See, e.g., Wolfe*, 32 Vet.App. at 27; *Godsey v. Wilkie*, 31 Vet.App. 207, 209 (2019); *Monk v.Wilkie*, 30 Vet.App. 167, 170 (2018) (en banc).

[19] *Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017).

[20] *Monk v. Wilkie*, 30 Vet.App. 167 (2018).

[21] *See* Enforcement Motion at 10.

[22] *See* Joint Response at 2-3.

One final point regarding the unique circumstances in which this order is issued. We are keenly aware that all of us are living in an extraordinary time given the national – indeed, global – public health situation. We understand that institutions and the people who make them up will face difficulties in performing their duties. Should the Secretary conclude that the time frame we have provided for beginning his compliance with the notice requirement is not sufficient, he may make a motion to extend that time for a reasonable period. However, judgment will not enter until the notice process has begun and the Secretary has informed the Court that it has started.

Upon consideration of the foregoing, it is

ORDERED that Petitioners' Motion for Enforcement of the Court's Order of September 9, 2019 and Other Relief is granted to the extent set forth in this order and otherwise denied. It is further

ORDERED that the Secretary's Motion for Issuance of Judgment or, in the Alternative, for Certification of an Interlocutory Appeal is prospectively denied as moot. It is further

ORDERED that within seven days of the date of this order, the Secretary begin to send notice to class members as described in the Joint Response. It is further

ORDERED that the Secretary inform the Court that he has begun the process of sending notice, at which time the Court will enter judgment within two days of receiving this notification. It is further

ORDERED that within 45 days of the date on which the Secretary informs the Court that he began his notice obligations, the Secretary begin his readjudication requirement under the terms of the September 9, 2019, order in this matter. And it is further

ORDERED that every 45 days after the Secretary has begun readjudications under the terms of this order, he shall serve a status report on class counsel providing an update on the readjudication of class members' claims using the categories of claimants the parties set forth in their Joint Response.

DATED: April 6, 2020 PER CURIAM.

Copies to:

Mark B. Blocker, Esq.

VA General Counsel (027)