

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 24-4472

ANTHONY GLADNEY-CHASE,

PETITIONER,

v.

DOUGLAS A. COLLINS,
SECRETARY OF VETERANS AFFAIRS,

RESPONDENT.

Before PIETSCH, BARTLEY, and JAQUITH, *Judges*.

ORDER

On June 27, 2024, veteran Anthony Gladney-Chase filed through counsel a petition for extraordinary relief seeking a writ of mandamus. Mr. Gladney-Chase asserted that a writ was necessary because the Board of Veterans' Appeals (Board) had unreasonably delayed docketing his appeals stemming from denials by the Veterans Health Administration (VHA). On the same date, he also filed a Request for Class Certification and Class Action (RCA), seeking to prosecute this matter on behalf of a purported class of similarly situated claimants.

On July 2, 2024, this matter was submitted to a panel of the Court. At the parties' request, the Court stayed proceedings to facilitate alternative resolution of this matter. On March 18, 2025, the parties filed a joint motion to certify a class and appoint class counsel. On the same date, the parties filed a joint motion to terminate the case with an attached stipulated agreement contingent on the Court granting the joint motion to certify.

I. Class Certification

Rule 23(a) of the Court's Rules of Practice and Procedure (Rules) details specific prerequisites that must be met before the Court may certify a class: numerosity, commonality, typicality, adequacy of representation, and that the requested relief affects the entire class as a whole. U.S. VET. APP. R. 23(a)(1)-(5); *see Beaudette v. McDonough*, 34 Vet.App. 95, 105-06 (2021), *aff'd on other grounds*, 93 F.4th 1361 (Fed. Cir. 2024); *see also* FED. R. CIV. PROC. (FRCP) 23(a)(1)-(4), (b)(2). Ascertainability, the ability of the Court to identify class members, though not explicitly listed in Rule 23(a), is generally also considered an implied prerequisite for class certification. *Freund v. McDonough*, 114 F.4th 1371, 1377-78 (Fed. Cir. 2024) (citing *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1302-03 (11th Cir. 2021)). In addition to these prerequisites, the Court must also consider whether class-wide relief is superior to the resolution of a matter through a precedential decision. *Beaudette*, 34 Vet.App. at 107; *see* U.S. VET. APP. R. 22(a)(3).

In the joint motion to certify, the parties request that the Court certify a class consisting of the following: (1) all veterans and dependents who filed Notices of Disagreement (NODs) at the Board within VA's modernized appeal system (AMA) stemming from appeals from VHA decisions; (2) whose NOD was filed more than 180 days prior to the date of the motion (March

18, 2025); and (3) whose appeal remained on the Board's pre-docket queue as of the date of the motion (March 18, 2025). Joint Motion to Certify at 1-2.

Although the parties do not explicitly address the Rule 23(a) prerequisites in the joint motion to certify, *see id.*, Mr. Gladney-Chase addressed those prerequisites in the RCA, RCA at 9-19, which used a class definition that closely mirrors the definition proposed by the parties jointly, *compare* RCA at 9, *with* Joint Motion to Certify at 2. Based on the joint motion to certify employing a similar class definition, the parties implicitly assert that their proposed class definition satisfies the express and implied prerequisites of Rule 23(a). We agree.

The Court's numerosity prerequisite requires that "the class is so numerous that consolidating individual actions in the Court is impracticable." U.S. VET. APP. R. 23(a)(1). In the RCA, Mr. Gladney-Chase asserted that, based on information provided to him through a Freedom of Information Act (FOIA) request fulfilled in May 2024, the proposed class contained over 10,000 members. RCA at 10-11 & Exhibit A. Based on this unrefuted information, the numerosity requirement is met. *See, e.g., Skaar v. Wilkie*, 32 Vet.App. 156, 190-91 (2019) (en banc), *vacated on other grounds sub nom. Skaar v. McDonough*, 48 F.4th 1323 (Fed. Cir. 2022).¹ The Court has no reason to believe that the size of the proposed class has drastically decreased since May 2024, and the Secretary's agreement to the proposed class definition indicates that the numerosity requirement remains met. Thus, the Court concludes that the numerosity requirement is satisfied.

The Court's commonality prerequisite requires that "there are questions of law or fact common to the class." U.S. VET. APP. R. 23(a)(2). Commonality requires a common contention that is "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke." *Wal-Mart Stores, Inc., v. Dukes*, 564 U.S. 338, 350 (2011); *see Godsey v. Wilkie*, 31 Vet.App. 207, 220-21 (2019) (citing *Wal-Mart*, 564 U.S. at 350); *see Skaar*, 32 Vet.App. at 192 ("Where the same conduct or practice by the same defendant gives rises to the same kind of claims from all class members, there is a common question." (quoting *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014))). In the RCA, Mr. Gladney-Chase asserted that all proposed class members have suffered the same injury based on a consistent pattern of VA behavior—unreasonable delay in docketing their VHA appeals. RCA at 12-13. Because resolving that contention will involve a common answer, the Court determines that the commonality prerequisite is met. *Accord Godsey*, 31 Vet.App. at 220-22 (finding the commonality prerequisite met where the common behavior was VA delay in certifying and transferring appeals to the Board).

¹ In *Skaar*, we discussed a rule of thumb that the numerosity factor is generally satisfied with a class of 40 members and that courts generally refrain from certifying classes with 21 or fewer members, 32 Vet.App. at 191 (citing *Celano v. Marriott Int'l, Inc.*, 242 F.R.D. 544, 549 (N.D. Cal. 2007)), but we also noted that the numerosity prerequisite is relaxed for classes seeking injunctive relief, *id.* (citing *Sueoka v. United States*, 101 F. App'x 649, 653 (9th Cir. 2004)). Moreover, we stated that, because our Rules do not expressly allow for joinder, the numerosity prerequisite "would always appear to be answered in the affirmative in proposed class actions before us until we craft such a rule." *Id.* at 191 n.7. Ultimately, the Court certified a proposed class potentially up to 1388 veterans, concluding that, whatever the applicable numerosity standard, it was met. *Id.* at 191-92. Here too, we conclude that the numerosity prerequisite is met under any standard.

Related to commonality,² the Court's typicality prerequisite requires that "the legal issue or issues being raised by the representative part[y] on the merits are typical of the legal issues that could be raised by the class." U.S. VET. APP. R. 23(a)(3). "The test of typicality is whether other class members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same conduct." *Skaar*, 32 Vet.App. at 193 (quoting *Wolin v. Jaguar Land Rover N.A., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010)).³ In the RCA, Mr. Gladney-Chase asserted that he and the proposed class have experienced that same injury—delay in docketing VHA appeals—and thus, "[h]is efforts to pursue his claims are reflective of the class interests." RCA at 14. The Court determines that the typicality prerequisite is met.

The Court's adequacy of representation prerequisite requires that "the representative part[y] will fairly and adequately protect the interests of the class." U.S. VET. APP. R. 23(a)(4). "Adequacy is twofold: the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interest antagonistic to the interests of other class members." *Skaar*, 32 Vet.App. at 193 (quoting *In re Literacy Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 249 (2d Cir. 2011)). In the RCA, Mr. Gladney-Chase averred that he "is both eager and able to vigorously and competently advocate for the interests of the class." RCA at 15 (internal quotation omitted). There is no indication that Mr. Gladney-Chase has any interest adverse to the class that he seeks to represent. *See Godsey*, 31 Vet.App. at 222. The Court concludes that the adequacy of representation prerequisite is met.

The fifth explicit prerequisite under Rule 23(a) is that the requested injunctive or other relief is "appropriate respecting the class as a whole." U.S. VET. APP. R. 23(a)(5).⁴ In the RCA, Mr. Gladney-Chase asserted that this prerequisite is met because the same injunctive relief is appropriate for all class members—requiring the Secretary to transfer VHA files to the Board within a certain timeframe so the Board can render a decision concerning docketing claimants' appeals. The Court determines that this requirement is met. *Accord Godsey*, 31 Vet.App. at 223.

Ascertainability is met when the Court is able to identify class members at some stage of the proceeding. *Freund*, 114 F.4th at 1378 (citing William B. Rubenstein, 1 NEWBERG & RUBENSTEIN ON CLASS ACTIONS, § 3.3 (6th ed. 2024)). In *Freund*, the U.S. Court of Appeals for

² *See Skaar*, 32 Vet.App. at 192 ("In particular, '[t]he commonality and typicality requirements . . . tend to merge.'" (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982))).

³ In *Beaudette*, the Court reiterated, at least implicitly, that the Court undertakes a traditional typicality inquiry. 34 Vet.App. at 106-07. In that case, the Court rejected an argument that the phrase "on the merits" in Rule 23(a)(3) required typicality with respect to petitioners' underlying benefits claims, stating that "on the merits" instead referred to the focus of the parties' pleadings to the Court. *Id.* Here too, although the proposed class members are awaiting docketing of VHA appeals involving different underlying benefits, the typicality inquiry focuses on the pattern of unreasonable delay in docketing those appeals, as asserted in the RCA. *Accord Freund*, 114 F.4th at 1377 (concluding that a consistent pattern of VA behavior—improperly closing administrative appeals—presented the same injury to proposed class members without regard to the merits of the individual underlying appeals).

⁴ Under FRCP 23(b), a class action must be maintainable under one of three types. This Court's requirement under Rule 23(a)(5) mirrors the type of class action identified in FRCP 23(b)(2). *See Skaar*, 32 Vet.App. at 194; *Godsey*, 31 Vet.App. at 223 (both describing maintenance under FRCP 23(b)(2) prior to promulgation of our Court Rule 23); *see also Furtick v. McDonough*, 34 Vet.App. 293, 298 (2021) (discussing Rule 23(a)(5) and its relation to FRCP 23(b)(2)).

the Federal Circuit (Federal Circuit) employed the traditional test of ascertainability, finding this prerequisite met where the class is defined by objective criteria. *Id.*⁵ Similarly here, the parties proffered a class definition that is based on objective criteria: class members must have filed an AMA NOD appealing a VHA decision and have been waiting in the Board's pre-docket queue for at least 180 days as of March 18, 2025. Joint Motion to Certify at 2.⁶ The Court determines that this definition meets the ascertainability prerequisite.

Finally, this Court's superiority prerequisite is met when "a decision granting relief on a class action basis would serve the interests of justice to a greater degree than would a precedential decision granting relief on a non-class action basis." U.S. VET. APP. R. 22(a)(3). The Court has compiled a non-exhaustive list of factors to be balanced on a case-by-case basis to consider whether the presumption against aggregate action has been rebutted. *Skaar*, 32 Vet.App. at 197.⁷ Balancing these factors, the Court concludes that, although this case does not involve a complex factual record, class action is nonetheless superior to a precedential decision because the challenge is collateral to a claim for benefits, the RCA contained sufficient facts to review the challenged conduct, and, most important, the RCA alleged sufficient facts regarding unreasonable delay suggesting the need for remedial enforcement. *See id.* at 198 (noting that class certification is appropriate "where the facts suggest the need for prompt remedial enforcement"). *Accord Godsey*, 31 Vet.App. at 224 (finding class action superior because "petitions alleging systemic delay are 'best addressed in the class-action context, where the court could consider class-wide relief' that would inure to all similarly situated claimants" (quoting *Ebanks v. Shulkin*, 877 F.3d 1037, 1039-40 (Fed. Cir. 2017))). And to the extent that we consider administrative feasibility, *see Freund*, 114 F.4th at 1379; *see also supra* n.5, VA's May 2024 FOIA response appears to have obviated the need for extensive and individualized fact-finding, *see* RCA at Exhibit A, and the Secretary raises no feasibility concerns. Thus, we conclude that here a decision granting relief to a class would serve the interests of justice more than would a precedential decision providing relief to Mr. Gladney-Chase alone.

Therefore, the Court concludes that the parties' proffered class definition satisfies the prerequisites for class certification, *see* U.S. VET. APP. R. 22(a)(5), 23(a)(1)-(5), and we will certify a class as defined in the joint motion to certify.

⁵ The Federal Circuit specifically rejected an ascertainability test that would incorporate an "administrative feasibility" component that counsels against class certification if "ascertaining the class requires extensive and individualized fact-finding." *Freund*, 114 F.4th at 1378 (internal quotation omitted); *see id.* (agreeing "with the majority of circuits that there is no basis for finding a lack of ascertainability because it is difficult to identify the class members" (collecting cases)). Nevertheless, the Federal Circuit stated that "administrative feasibility may bear on whether class resolution is superior to individual resolution." *Id.* (citing *Cherry*, 986 F.3d at 1304).

⁶ The proposed class definition in the joint motion to certify differed from that in the RCA by including a specific date (March 18, 2025) upon which to base the temporal aspects of the class definition. *See* Joint Motion to Certify at 2. This change makes the class definition more objective, thus increasing ascertainability. *See Freund*, 114 F.4th at 1378.

⁷ These factors include whether (1) the challenge is collateral to a claim for benefits, (2) litigation of the challenge involves compiling a complex factual record, (3) the appellate record is sufficiently developed to permit review of the challenged conduct, and (4) the putative class has alleged sufficient facts suggesting a need for remedial enforcement. *Skaar*, 32 Vet.App. at 197; *see Beaudette*, 34 Vet.App. at 107.

II. Appointment of Class Counsel

"Unless a statute provides otherwise, the Court must appoint class counsel" when certifying a class. U.S. VET. APP. R. 23(f)(1); *see* U.S. VET. APP. R. 23(c)(1)(B). Class counsel must adequately represent the interests of the class. U.S. VET. APP. R. 23(f)(2). Rule 23(f)(1)(A) provides the guidelines the Court must consider in appointing class counsel. They are the work counsel has done in identifying or investigating potential claims in the action; counsel's experience in handling class actions; counsel's knowledge of applicable law; and the resources that counsel will commit to representing the class. U.S. VET. APP. R. 23(f)(1)(A)(i)-(iv); *see Beaudette*, 34 Vet.App. at 108.

In the joint motion to certify, the parties requested that Mr. Gladney-Chase's counsel (Yelena Duterte, Esq., and Jenny Vanacker, Esq.) be appointed class counsel. Joint Motion to Certify at 2-3. The parties note counsel's knowledge of VA benefit applications, review, and appeals; counsel's current work advocating for Mr. Gladney-Chase and other veterans; and that counsel both represented veterans in prior class litigation before this Court. *Id.* (citing *Hamill v. McDonough*, 37 Vet.App. 65 (2023)).⁸ And they assert that counsel are "willing to commit whatever resources are necessary to adequately represent the class in this petition." *Id.* at 3.

Given the parties' discussion of counsel's skill, expertise, and background; current efforts; and ongoing commitment, the Court is convinced that counsel has the motivation, experience, knowledge, and resources necessary to adequately represent the interests of the class. Accordingly, the Court will appoint Ms. Duterte and Ms. Vanacker jointly as Class Counsel.

III. Proposed Settlement

Once a class is certified, the issues of a certified class may be settled only with Court approval. U.S. VET. APP. 23(e). Rule 23(e) dictates Court procedure regarding proposed settlements filed in class action suits:

- (1) The Court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
- (2) If the proposal would bind class members, the Court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
- (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
- (4) Any class member may object to the proposal if it requires Court approval under this subdivision (e); the objection may be withdrawn only with the Court's approval.

⁸ The Court's *Hamill* order does not identify petitioners' counsel, but Ms. Duterte and Ms. Vanacker are identified on the Court's docket in that case. *See Hamill v. McDonough*, U.S. Vet. App. No. 22-7344.

U.S. VET. APP. R. 23(e). Because the terms of the parties' stipulated agreement would bind all class members, *see* U.S. VET. APP. R. 23(c)(3), Rule 23(e) proposed settlement procedures must be followed.⁹

A. Notice of and Right to Object to Proposed Settlement

The Court will direct the parties to provide the requisite notice under Rule 23(e)(1). Although the parties contemplate classwide notice in their stipulated agreement, *see* Stipulated Agreement at ¶ 8, that notice does not satisfy Rule 23(e)(1), principally because the proposed stipulated agreement notice would occur *after* the Court approves the proposal, which would not allow for a Class Member to object to the proposed settlement. *Cf.* U.S. VET. APP. R. 23(e)(4).

Therefore, the Court will direct the parties to provide notice under Rule 23(e)(1) within 30 days after the date of this order. The parties' notice should be conveyed to Class Members in a manner that is reasonably expected to inform all Class Members. This notice shall, at a minimum, inform Class Members that (1) they are a Gladney-Chase Class Member and identify the names of and contact information for Class Counsel; (2) a proposed settlement that will bind all Class Members has been filed and describe its terms; (3) Class Members have the right to object to the proposed settlement by emailing GladneyChaseObjections@uscourts.cavc.gov or mailing to 625 Indiana Ave, NW, Suite 900, Washington, D.C., 20004, an explanation of the objection; (4) any objection, which should include the objector's full name and identify Docket No. 24-4472, must be filed with the Court within 30 days after the date of the parties' notice; and (5) the Court will hold a hearing to determine if the proposed settlement is fair, reasonable, and adequate. The notice must be sufficient to ensure that Class Counsel is contacted should Class Members have questions and to ensure that the Court email and mail addresses are used solely for the purpose of lodging objections to the proposed settlement.

After Rule 23(e)(1) notice compliant with this order is provided to Class Members, the parties shall inform the Court by filing a joint notice. At that time, the parties shall provide the Court with a list of Class Members.

B. Hearing to Determine Whether the Proposed Settlement is Fair, Reasonable, Adequate

Once notice under Rule 23(e)(1) and compliant with this order is complete and Class Members have been provided time to file written objection to the proposed settlement, the Court will hold a hearing pursuant to Rule 23(e)(2). The Court will provide additional information to the parties in advance of the hearing to facilitate the Court's consideration of the proposed settlement.

Upon consideration of the foregoing, it is

ORDERED that the stay of proceedings is lifted. It is further

⁹ Based on the parties' joint motion to terminate and the terms of the stipulated agreement, the Court concludes that the parties satisfied their responsibility under Rule 23(e)(3). *See* Joint Motion to Terminate at 3; Stipulated Agreement at ¶¶ 21-22.

ORDERED that the parties' March 18, 2025, joint motion to certify a class is granted. The Gladney-Chase Class is certified as (1) all veterans and dependents who filed AMA NODs at the Board stemming from appeals from VHA decisions; (2) whose NOD was filed more than 180 days prior to March 18, 2025; and (3) whose appeal remained on the Board's pre-docket queue as of March 18, 2025. *See* U.S. VET. APP. R. 23(c)(1)(B). It is further

ORDERED that the parties' March 18, 2025, joint motion to appoint class counsel is granted. Yelena Duterte, Esq., and Jenny Vanacker, Esq., both of the University of Illinois Chicago School of Law's Veterans Legal Clinic, are appointed Class Counsel. *See* U.S. VET. APP. R. 23(c)(1)(B), (f). It is further

ORDERED that the parties provide, within 30 days after the date of this order, notice to Gladney-Chase Class Members that complies with this order. *See* U.S. VET. APP. R. 23(e)(1). It is further

ORDERED that the parties should inform the Court once notice has been provided and, with such notice, the parties shall provide the Court a list of Class Members. And it is

ORDERED that a hearing pursuant to Rule 23(e)(2) will be scheduled as business of the Court permits, but no earlier than 60 days after the date of this order.

DATED: April 24, 2025

PER CURIAM.

Copies to:

Yelena Duterte, Esq., and Jenny Vanacker, Esq.

VA General Counsel (027)