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NVLSP

NATIONAL VETERANS LEGAL SERVICES PROGRAM

April 19, 2018

Re: *v. Robert L. Wilkie, Acting Secretary of Veterans Affairs*
Vet. App. 1

Dear Mr.

It was a pleasure speaking with you. As we discussed, the stay or "time out" in your case has ended. We had entered the stay to wait for the outcome of the U.S. Court of Appeals for the Federal Circuit's decision in *Gray v. Sec'y of Veterans Affairs*, No. 16-1782. That decision became final on March 28, 2018, and the Court lifted the stay or "time out" in your case on Tuesday, April 17, 2018.

As we also discussed, we would like to use your case as the lead case in a class action. This means that your case would be the "representative" for other veterans who are situated similarly to you because they also served at Da Nang Harbor in Vietnam. I have attached a draft of the Motion for Class Certification that we will be filing in your case to make this happen.

Once you have had a chance to review the motion, please do not hesitate to contact me at (202) 621-5724 or at Ray@nvlsp.org with any questions or concerns.

Sincerely,

Raymond J. Kim
Staff Attorney

Enclosure

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Appellant,	)	
v.	)	
	)	Vet.App. No.
ROBERT L. WILKIE,	)	
Acting Secretary of Veterans Affairs,	)	
Appellee.	)	

APPELLANT'S MOTION FOR CLASS CERTIFICATION

Pursuant to the Court's inherent authority, the Veterans' Judicial Review Act (Pub. L. 100-687, Div. A, Tit. III, § 301(a), 102 Stat. 4113), 38 U.S.C. § 7264(a), and the All Writs Act, 28 U.S.C. § 1651(a) (*see Monk v. Shulkin,* 855 F.3d 1312 (Fed. Cir. 2017)), Appellant, , hereby moves the Court to certify this case as a class action on behalf of certain Navy veterans who served on ships in the waters of Da Nang Harbor in the Republic of Vietnam. In this case, Appellant challenges on behalf of himself and other similarly situated claimants the Secretary's failure to comply with this Court's binding precedential decision in *Gray v. McDonald,* 27 Vet. App. 313 (2013). In that decision, the Court invalidated the Secretary's instructions that veterans are not entitled to the presumption of herbicide exposure based on service in the waters of the Da

Nang Harbor and ordered the Secretary to determine whether veterans who served in those waters are entitled to the presumption of herbicide exposure based on the likelihood that herbicides were sprayed or otherwise present in Da Nang Harbor during the Vietnam era. In violation of that Order, the Secretary thereafter issued instructions denying the presumption of herbicide exposure to those who served in the Da Nang Harbor without analyzing the likelihood that herbicides were sprayed or otherwise present in Da Nang Harbor and without considering all of the relevant evidence. This violation of this Court's Order adversely affects Appellant and all members of the class whom Appellant seeks to represent.

Summary of the Relevant Facts

Appellant applied for service connection for diabetes mellitus type II in 2009. He appealed the initial decision denying this claim, and in March 2015, the Board of Veterans' Appeals ("Board") affirmed the denial. While the Board recognized that Appellant's ship, the *USS Cone*, docked in Da Nang Harbor and that Appellant was part of the crew at that time, R. at 168-69 (158-73), 293 (Deck log, 12/11/72), the Board ruled that service in the waters of Da Nang Harbor is not entitled to the presumption of herbicide exposure. R. at 168 (158-73).

One month later, on April 23, 2015, this Court issued its decision in *Gray v. McDonald*, 27 Vet. App. 313 (2015). That precedential decision focused on the part of 38 C.F.R. § 3.307(a)(6)(iii) which provides that veterans who serve on "the inland waterways" of the Republic of Vietnam during the Vietnam era are entitled to the

presumption of herbicide exposure. Prior to *Gray,* the Secretary had instructed his adjudicators that service in the water harbor of Da Nang, Vietnam did not qualify as service "in the inland waterways" of the Republic of Vietnam within the meaning of 38 C.F.R. § 3.307(a)(6)(iii). In *Gray,* this Court (a) invalidated the VA's interpretation of the regulation on the ground that it was inconsistent with the regulation's purpose and irrational and (b) ordered the VA to reevaluate its definition of inland waterways as it applies to Da Nang Harbor "in a manner consistent with the regulation's emphasis on the probability of exposure." *Gray*, 27 Vet. App. at 326-27. . The Secretary chose not to appeal this binding precedential decision.

After the April 2015 *Gray* decision, Appellant ppealed the March 2015 Board decision to this Court, and in January 2016, the Court approved a joint motion to vacate the Board decision and remand for consideration of the intervening precedential decision in *Gray.* One month later, on February 5, 2016, in an attempt to comply with the Court's Order in *Gray*, the Secretary issued nationwide instructions in the form of a revision to *M-21-1 Adjudication Procedures Manual*, Part IV, Subpart ii, Chapter 2, Section C, Topic 3, Block m and Chapter 1, Section H, Topic 2, Block a-I (attached hereto as Exhibit A). These instructions of the Secretary, like his instructions prior to *Gray,* provide that the waters of the Da Nang Harbor are not "inland waterways" of the Republic of Vietnam within the meaning of 38 C.F.R. § 3.307(a)(6)(iii).

Instructions of the Secretary are binding on the Board. 38 U.S.C. § 7104(c). On remand from the Court, the Board denied Appellant diabetes claim on May 5, 2016, based on the Secretary's February 2016 instructions. The Board stated that it was

undisputed that Appellant served aboard the USS Cone when it was in the official waters of Vietnam for two months in 1972-1973 and when it was docked at a pier in the Da Nang Harbor, but that the veteran testified he did not get off the ship. Board decision (attached hereto as Exhibit B) at *7. Based on these facts, the Board held:

> In light of the decision in *Gray*, VA amended its VA's Adjudication Procedure Manual . . . . as to how VA defines "inland waterways" and which bodies of water in Vietnam constitute inland waterways. According to the February 5, 2016 amendments to the . . . Manual M21-1, ... [i]nland waterways include rivers, canals, estuaries, and deltas. They do not include open deep-water bays and harbors such as those at Da Nang Harbor . . . . These are considered to be part of the offshore waters of Vietnam because of their deep-water anchorage capabilities and open access to the South China Sea.
>
> Under the amended criteria, consistent with the pre-amended criteria, Da Nang Harbor is considered to be offshore waters of the Republic of Vietnam and is not an inland waterway subject to the presumption of exposure to herbicide agents . . . Therefore, ... the presumption of exposure to herbicide agents, and the presumption of service connection for diabetes mellitus does not attach.

Board decision at 10-11.

ARGUMENT

THE COURT SHOULD CERTIFY THIS CASE AS A CLASS ACTION

This Court may certify classes. *Monk v. Shulkin*, 855 F.3d 1312, 1321 (Fed. Cir. 2017). It should aggregate claims by granting class certification when doing so would "promot[e] efficiency, consistency, and fairness, and improv[e] access to legal and expert assistance by parties with limited resources." *Id.* at 1320.

Appellant requests that the Court certify this case as a class action on behalf of all veterans, or survivors of veterans, who (1) served on ships in the waters of Da Nang Harbor in the Republic of Vietnam during the Vietnam era, (2) applied to the VA for service connection for one or more diseases recognized by VA as presumptively service connected due to its association with herbicide exposure[1] and that claim was pending before VA or filed after April 23, 2015, the date of the *Gray* decision; and (3) have not been awarded service connection for the claimed herbicide-related diseases.[2] This is a case in which class certification is particularly appropriate.

Granting class certification, then class-wide relief, would permit this Court to ensure in one stroke that the similarly situated VA claimants adversely affected by the Secretary's failure to comply with the Court's Order in *Gray* receive the same relief. Appellant is aware that the Court has submitted the appeal in *Overton v. Wilkie*, No. 17-0125 to a panel for decision and that Appellant Overton challenges the failure of the Secretary to comply with the Court's Order in *Gray* without seeking class certification. For several reasons, reliance on the appeal in *Overton* is far inferior to certifying the class here in terms of achieving the important goals of promoting efficiency, consistency, and

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[1] These diseases are set forth in 38 C.F.R. § 3.309(e).

[2] VA claimants are not adversely affected by the Secretary's failure to comply with the Court's Order in *Gray* if their claims for service connection for an herbicide-related disease were awarded on a basis unrelated to service in the waters of Da Nang Harbor. For example, service connection might have been awarded based on secondary service connection or on service on the land mass of Vietnam. Because these claimants are not adversely affected by the actions of the Secretary challenged herein, they should not be included in the class definition.

fairness, and improving access to legal and expert assistance by parties with limited resources.

First, as the Federal Circuit stated in *Monk*, class certification "would help prevent the VA from mooting claims scheduled for precedential review" as the VA has done in other cases. 855 F.3d at 1321. Nothing prevents the Secretary from rendering moot Mr. Overton's appeal by offering him all the benefits he seeks prior to the Court's disposition of the appeal. If this were to occur, no precedential decision would ever be issued in *Overton*.

Second, even if the Court were ultimately to issue a precedential decision on the merits in Appellant Overton's favor, a large number of similarly situated members of the putative class would likely be left without the relief obtained by Appellant Overton. This result derives from the deeply embedded rule in *Tobler v. Derwinski,* 2 Vet. App. 8, 14 (1991), which provides that the VA is bound to follow a precedential Court decision beginning *only* on the date the precedential decision is issued. Assume, for example, that between April 2017 and October 2017, the VA initially denied 200 putative class members service connection for their herbicide-related diseases based on the Secretary's February 2016 instructions. To keep their claims in pending status, these putative class members would have had to file a notice of disagreement (NOD) within one year of the initial denial -- sometime between April 2018 and October 2018. Further assume that in October 2018, four months after the Court's *Overton* oral argument currently scheduled for June 2018, the Court issues a precedential decision invalidating the Secretary's February 2016 instructions. Finally, assume that 150 of the foregoing 200 putative class

members fail to file a timely NOD because the Secretary did not inform them that they should file an NOD in order to help substantiate their claims and they were otherwise unaware that the Secretary's February 2016 instructions were the subject of numerous judicial challenges in both the Federal Circuit and this Court. The net result is that the 50 putative class members who filed a timely NOD would be entitled to the relief obtained by Appellant Overton, and the 150 putative class members who failed to file a timely NOD would not be entitled to such relief.

The bottom line is that certifying this case as a class action would promote efficiency, consistency, and fairness, and improve access to legal and expert assistance by parties with limited resources to a far greater degree than would precedential decision-making in *Overton*. Certifying this action as a class action would grant complete and more accessible relief, consistent with Congress's intent for the veterans' benefit system to function with a "high degree of … solicitude" for all claimants. *Henderson v. Shinseki*, 562 U.S. 428, 431 (2011); *see also, e.g.*, *Barrett v. Principi*, 363 F.3d 1316, 1320 Fed. Cir. (2004) (noting Congress's design to award benefits "to a special class of citizens, those who risked harm to serve and defend their country.").

While this Court has not yet articulated a framework for determining when to certify class actions, this action would satisfy any reasonable criteria. As all parties and *amici* addressing the issue in this Court's *Monk* proceedings agree, this Court should use Federal Rule of Civil Procedure 23 as a guide, pending promulgation of this Court's own class-action rules. The class action criteria for actions like this one seeking injunctive

relief are set forth in Rule 23(b)(2). To certify a class under Rule 23(b)(2), the movant must satisfy the requirements of both Rule 23(a) and Rule 23(b)(2).

Rule 23(a) requires that:

1. the class is so numerous that joinder of all members is impracticable,
2. there are questions of law or fact common to the class,
3. the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
4. the representative parties will fairly and adequately protect the interests of the class.

This action easily meets these requirements. As to numerosity, there are hundreds, if not thousands of putative class members. The undersigned counsel themselves represent more than a dozen members of the putative class in appeals currently pending before this Court. That does not include the large number of putative class members whose administrative claims have not reached this Court. Further evidence that the number of putative class members is large derives from the part of the VA's website that makes Board decisions publically available. *See* https://www.index.va.gov/search/va/bva_search.jsp (last accessed April 17, 2018). When that website is searched using the search term "Da Nang Harbor," the website identifies 447 Board decisions involving veterans who sought disability compensation based on service in this location. *See* Declaration of Raymond J. Kim (attached hereto as Exhibit C). The size of the class is more than enough to meet the numerosity requirement. *See, e.g.*, *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (more than forty people).

As to commonality, "even a single [common] question" suffices to show commonality under Rule 23(a). *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) (second alteration in original). This action presents two common questions of both law and fact:

- whether the Secretary's February 2016 instructions were based on an analysis of the likelihood that herbicides were sprayed or otherwise present in Da Nang Harbor during the Vietnam era within the meaning of the Court's Order in *Gray;*

- whether, in reaching his conclusions on the presumption of herbicide exposure for those who served in the Da Nang Harbor, the Secretary failed to consider the existing body of evidence that herbicides were sprayed or otherwise present in that area during the Vietnam era, such that Secretary's February 2016 instructions are arbitrary, capricious, contrary to law, and in violation of the Court's Order in *Gray.*

As to typicality, Appellant's claims are typical of the claims of the putative class. All putative class members have been adversely affected by the Secretary's failure to comply with the Court's Order in *Gray* and Secretary's February 2016 instructions denying the presumption of herbicide exposure to those who served in the waters of the Da Nang Harbor.

As to adequacy, Appellant has no interests adverse to the putative class, and he and his counsel would fairly and adequately represent the interests of the class. Appellant's undersigned counsel has represented approximately 4,000 appellants before this Court. They are experienced in litigating class action disputes, and counsel has the resources to litigate this case vigorously on behalf of the putative class at no charge to its members.

When the requirements of Rule 23(a) are satisfied, Rule 23(b)(2) authorizes certification when a defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Here, the Secretary has issued instructions that do not comply with the Court's Order in *Gray* and these instructions apply generally to and adversely affect all members of the putative class. This unlawful conduct can be remedied by final injunctive (or analogous) relief. Accordingly, any reasonable certification requirements are satisfied.

No other considerations weigh against certification of a class. For instance, the Secretary has possession of the information and records necessary to identify the members of the putative class. *See, e.g., In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 229 (2d Cir. 2006) (noting that "determining class membership would be simple" when "defendants possess records" conclusive of membership).

Finally, this Court need not require notice to putative class members in this case. Rule 23 requires notice only for damages classes under Rule 23(b)(3). *See Wal-Mart*, 564 U.S. at 362. Because this case would proceed by analogy to Rule 23(b)(2), it should not require notice. *See id.* ("Rule [23] provides no opportunity for ... (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice ... ."). In any event, it is difficult to imagine that any claimant would have reason to object to membership in a class seeking to enforce the terms of the Court's Order in *Gray*.

CONCLUSION

The proposed Class satisfies any reasonable criteria for certification that this Court might adopt—including the criteria that the Class would need to meet for certification under Rule 23(b)(2). Certifying the Class and granting class-wide relief would promote efficiency, consistency, and fairness, and improve the Class members' access to legal and expert assistance better than any alternative. For these reasons, Appellant's motion to certify this action as a class action should be granted.

Respectfully submitted,

Counsel for Appellant