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

No. 18-6091

AMANDA JANE WOLFE AND PETER E. BOERSCHINGER,  
INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED, PETITIONERS,

v.

DENIS McDONOUGH,  
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before GREENBERG, ALLEN, and FALVEY, *Judges*.

**ORDER**

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

On August 11, 2021, the Court docketed a Report and Recommendation (R&R) from the Special Master in this matter concerning petitioners' Request for Improvements to VA's Re-Adjudication and Reporting Procedure (Request).<sup>1</sup> The Special Master recommended that the Court grant the Request. Specifically, the Special Master recommended that the Court order the following relief:<sup>2</sup>

- That the Secretary include the following in all future 45-day status reports:<sup>3</sup>
  - "A copy of each re-adjudication decision and notice letter issued since the last status report;"<sup>4</sup>
  - "A spreadsheet listing the class members, a description of the relief granted and the amount of money owed;"<sup>5</sup> and

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<sup>1</sup> In a March 26, 2021, order, we appointed the Honorable Thomas B. Griffith to serve as the Special Master in this matter.

<sup>2</sup> See R&R at 7-8.

<sup>3</sup> In an April 6, 2020, order, we directed the Secretary to file status reports concerning his re-adjudication efforts every 45 days.

<sup>4</sup> R&R at 7.

<sup>5</sup> R&R at 8.

- "The name of class members VA has been unable to locate for purposes of making the payment required as well as a description of VA's efforts to contact the class member;"<sup>6</sup>
- That with the first 45-day status report submitted after the Court entered its order on the Request, the Secretary shall provide a copy of re-adjudication decisions that pre-dated the issuance of the Court's order concerning the Request; and
- That, as the parties had agreed, the Secretary "shall also amend [VA's] notice to class members to include (1) the amount, if any, that VA has calculated it owes the veteran in the body of the letters and (2) the [Explanation of Benefits] on which the decision was based as an enclosure."<sup>7</sup>

On August 23, 2021, the Secretary timely filed a limited objection to the R&R. The Secretary lodged three objections to the R&R. First, the Secretary objected to the R&R to the extent it altered or expanded the relief the Court had previously ordered before the Secretary filed his appeal with the Federal Circuit. Second, the Secretary objected to the Special Master's recommendation that VA create the spreadsheet described in the R&R. And third, the Secretary objected to providing information concerning the efforts VA had undertaken to contact missing class members.

We will address each objection in turn and then respond to the Secretary's two requests for clarification of certain aspects of the R&R that he also raised in his objection. Before doing so, we note that because the Secretary limited his objections to the three grounds described above, we will adopt all other aspects of the R&R as the order of the Court.

We overrule the Secretary's objection concerning the alteration or expansion of the relief we have previously ordered. The Secretary is correct as an abstract matter that it would be inappropriate to alter or expand the relief we have ordered given that the Secretary has exercised his right to appeal this matter to the Federal Circuit.<sup>8</sup> However, nothing in the R&R is an alteration or expansion of that relief. Rather, as the Special Master recognized, the R&R is focused on procedures designed to implement the relief we have previously ordered and to allow class counsel to effectively monitor compliance with our order.

The Secretary's second objection is that the spreadsheet the Special Master ordered VA to create would overburden the Agency and is unnecessarily duplicative given the Secretary's provision of the re-adjudication decisions and notice letters. We will defer ruling on this objection at this point. The Secretary may well be correct that any incremental benefit of a spreadsheet as contemplated in the R&R is outweighed by the burden on the Agency associated with the creation of such a document. After all, if the information contained in the spreadsheet would be as easy for class counsel to compile from the re-adjudication decisions and notice letters as it would be for the

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<sup>6</sup> *Id.* As shorthand, we refer to class members described in this aspect of the R&R as the "missing" class members.

<sup>7</sup> R&R at 8.

<sup>8</sup> *See Am. Trucking Ass'ns Inc. v. Frisco*, 358 U.S. 133, 145-46 (1958).

Agency to compile, it may be inappropriate to impose any burden on VA.<sup>9</sup> And we note that petitioners indicated before the Special Master that they would be willing to accept the re-adjudication decisions and notice letters in place of a spreadsheet that VA would need to create. In the end, we believe it is advisable to await the Secretary's first submission of the re-adjudication decisions and notice letters so that we are in a better position to assess the benefits and burdens associated with the creation of the spreadsheet. If petitioners believe that the documents VA provides do not contain the information that a spreadsheet would show, they may reassert their request for a spreadsheet and we will address the Secretary's objection at that time.

The Secretary's final objection is to the Special Master's recommendation that the Secretary provide "[t]he name of class members VA has been unable to locate for purposes of making the payment required as well as a description of VA's efforts to contact the class member."<sup>10</sup> He specifically objects to the requirement that VA describe its efforts to locate missing class members. We overrule this objection and will direct that VA provide the information to class counsel. This information could be useful in terms of assisting in efforts to locate class members who are entitled to relief but who cannot be located. And, unlike his argument about the spreadsheet, the Secretary has not asserted that he would be unduly burdened by explaining the steps he has taken to locate the missing class members. We note that to the extent the Secretary has taken the same steps to locate all missing class members, or certain actions with respect to subsets of missing class members, he may comply with this order by describing the efforts he has undertaken as to the group as a whole or to sub-groups.

The Secretary also asked the Court for clarification on two issues. First, he inquired whether the spreadsheet the Special Master had ordered be created was in lieu of or in addition to the 45-day status reports. Because we have deferred ruling on the Secretary's objection concerning the spreadsheet, we will also defer the question of whether, should we overrule that objection, the spreadsheet would be in lieu of or in addition to the 45-day status reports. The Secretary should continue to provide the 45-day status reports until directed otherwise.

The second point of clarification concerned the timing of the Secretary's compliance with the Court's order. With the exception of the requirement that the Secretary create the spreadsheet discussed in the R&R, a matter we have deferred ruling on, the Secretary shall take the actions directed in the R&R no later than the date on which the next 45-day status report is due.

Upon consideration of the foregoing, it is

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<sup>9</sup> This concept is familiar in Federal practice. For example, in standard Federal civil litigation, a party may produce business records in lieu of answering an interrogatory "if the burden of deriving or ascertaining the answer will be substantially the same for either party." FED. R. CIV. P. 33(d).

<sup>10</sup> R&R at 8.

ORDERED that the Secretary's objections based on (1) an alteration or expansion of the relief ordered in this matter and (2) the provision of information concerning VA's efforts to locate missing class members are OVERRULED to the extent described in this order. It is further

ORDERED that the Secretary's objection to the creation of a spreadsheet is held in abeyance pending the Secretary's submission of the next 45-day status report. Petitioners may reassert their request for the creation of a spreadsheet at that time and, if such a request is made, the Court will address the objection at that time. And it is further

ORDERED that the Court otherwise ADOPTS the August 11, 2021, Report and Recommendation of the Special Master on the Request as the order of the Court.

DATED: September 1, 2021

PER CURIAM.

Copies to:

Mark B. Blocker, Esq.

VA General Counsel (027)