

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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MICHAEL SABO, NICHOLAS WELLS,)	
JUAN PEREZ, ALAN PITTS, BILLY J.)	
TALLEY, AIMEE SHERROD, and TYLER)	
EINARSON on behalf of themselves and all)	
other individuals similarly situated,)	
)	Case No. 08-899 C
Plaintiffs,)	(Judge George W. Miller)
)	
v.)	
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	
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JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT

Pursuant to Rule 23(e) of the Rules of the United States Court of Federal Claims (“RCFC”), the parties hereby jointly request that the Court preliminarily approve the Settlement Agreement and Stipulation and Order of Dismissal (“Agreement”) previously reached by the parties and filed under seal with the Court on July 15, 2011. See Docket Nos. 113, 114. The parties also respectfully request that the Court enter a scheduling order, with the below-proposed dates for additional submissions and proceedings pursuant to RCFC 23.

Although RCFC 23(e) does not explicitly require preliminary approval of a class action settlement agreement, the preliminary approval process is common and well recognized, and provides the Court with an opportunity to determine whether there is reason to notify class members of a proposed settlement and legitimate need to proceed with a fairness hearing to formally consider whether the proposed settlement is fair, reasonable, and adequate under RCFC 23(e). See, e.g., *Armstrong v. Bd. of School Directors*, 616 F.2d 305, 314 (7th Cir. 1980) (citing *Manual for Complex Litigation* § 1.46, at 53-55 (West 1977)); *In re NASDAQ Market-Makers*

Antitrust Lit., 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (noting that preliminary approval is first step in two-step process before class action may be settled); *Manual for Complex Litigation, Fourth*, § 13.14 (Fed. Jud. Ctr. 2004) (court should review settlement proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing).

As explained below, the Agreement reached by the parties is more than fair, reasonable, and adequate. Accordingly, the parties request that the Court preliminarily approve the Agreement. The parties also request that the Court enter an Order setting forth a schedule for the next steps in the RCFC 23(e) settlement process, as described further below.

1. Introduction and Background.

Plaintiffs filed their initial complaint on December 17, 2008, *see* Docket No. 1, and their first amended complaint on September 2, 2009. Docket No. 25. During the interim, and subsequently, the parties devoted substantial efforts toward an interim resolution process, involving review by the Physical Disability Board of Review (“PDBR”) and Boards for Correction of Military Records (“BCMRs”) for the respective services (collectively, the “Boards”). On September 21, 2009, the Court entered an order, certifying the following class:

All individuals who (a) served on active duty in the U.S. Army, Navy, Marine Corps, or Air Force, (b) were found by a Physical Evaluation Board to be unfit for continued service due, at least in part, to the individual’s Post Traumatic Stress Disorder (“PTSD”), (c) were assigned a disability rating for PTSD of less than 50%, and, as a result, (d) were released, separated, retired, or discharged from active duty after December 17, 2002, and prior to October 14, 2008 (regardless of whether such release, separation, retirement, or discharge resulted in the individual’s placement on the Temporary Disability Retirement List).

Docket No. 33 (Certification Order). Following approval of class notice on December 18, 2009, *see* Docket No. 45, the Court, again on joint motion by the parties, then stayed the

litigation until February 3, 2011, pending the anticipated completion of the parties' agreed-upon military review board review process. *See* Docket No. 47.

On January 28, 2011, plaintiffs requested that the Court lift the existing stay. Docket No. 89. Plaintiffs concurrently filed a motion for summary judgment on the merits, on behalf of the class. Docket No. 90. Soon thereafter, the parties commenced negotiations aimed at a final settlement for members of the class. These discussions proved productive, *see, e.g.*, Docket No. 99 (Joint Motion to Stay This Matter), and over the course of several months, the parties were eventually able to reach agreement. The terms of that proposed settlement have been accepted by counsel for plaintiffs and the Authorized Representative of the Attorney General, conditioned upon the Court's approval of the Agreement. *See* Docket No. 114 (Agreement) at ¶ 34.

2. The Settlement Agreement.

A. Ratings Adjustment Relief to Class Members. The Settlement Agreement covers 2,161 class members who have opted into the litigation as of July 13, 2011, the date the Agreement was filed with the Court. *See* Docket No. 113 (Agreement) at Exhibit A. In addition, another 57 potential class members are eligible to opt in to the litigation if they exercise their right to do so by August 2, 2011. *See* Exhibit B to Agreement. As such, by shortly after August 2, 2011, the parties should know the total number of class members who would be covered by the Agreement.

The Agreement divides the current class members into nine discrete categories. In general, each class member, regardless of the category they are placed in, will have their military records changed (if necessary) to reflect that they were placed on the Temporary Disability Retirement List ("TDRL") and assigned a disability rating for PTSD of 50% effective for the first six-month period beginning on the date the member was released from active service.

Thereafter, depending upon the applicable category, each class member will receive the additional relief described below, within six months of the date the Court approves the Agreement. Under current law, such relief will include permanent military disability retirement benefits for the rest of their lives if the class member receives a permanent disability rating of at least 30% due in whole or in part to PTSD. The categories are as follows:

1. 782 class members separated with severance pay without first being placed on the TDRL (and who have not received a military review board (“Board”) decision): Exhibit C to the Agreement lists the names of 782 class members who have not yet received a decision from one of the Boards under the previously agreed-to procedures between the parties and who were medically separated for PTSD, in whole or in part, with a less than 30% disability rating. After they were separated from active service, they received a disability rating for PTSD of at least 30% from the Department of Veterans Affairs (VA). For each of the 782 class members listed in Exhibit C, that exhibit lists the disability rating for PTSD (30% or higher) that the class member received from the VA. The Agreement provides that the military records of these 782 class members will be changed to reflect that they received a 50% disability rating for PTSD for the six-month period beginning on the date of separation from active service, followed by a permanent rating for PTSD equal to the VA disability rating for PTSD listed in Exhibit C. Thus, the Agreement provides all 782 class members listed in Exhibit C with lifetime permanent military disability retirement benefits, eligibility to apply for additional monetary benefits in the form of Combat Related Special Compensation, and eligibility to apply for reimbursement of the past medical expenses incurred by the class member, the class member’s spouse, and the class member’s minor children from the date of release from active military service to the present. *See* Agreement, ¶¶ 6, 7, and 24.

2. 83 Class members retired for disability without first being placed on TDRL (and who have not received a Board decision). Exhibit J to the Agreement lists the names of 83 class members who have not yet received a decision from one of the Boards under the previously agreed-to procedures between the parties and who were, upon separation from active service, permanently retired for disability due to PTSD, in whole or in part, with a disability rating for PTSD of 30% or lower. After they were separated from active service, they received a disability rating for PTSD of at least 30% from the VA. For each of the 83 class members listed in Exhibit J, that exhibit lists the disability rating for PTSD (30% or higher) that the class member received from the VA. The settlement provides that the military records of these 83 class members will be changed to reflect that they received a 50% disability rating for PTSD for the six-month period beginning on the date of separation from active service, followed by a permanent rating for PTSD equal to the VA disability rating for PTSD listed in Exhibit J. *See* Agreement, ¶¶ 6, 8.

3. 673 class members placed on the TDRL (and who have not received a Board decision). Exhibit G to the Agreement lists the names of 673 class members who were placed on the TDRL upon separation from active service and have not yet received a decision from one of the Boards under the previously agreed-to procedures between the parties. All of these individuals were placed on the TDRL due to PTSD, in whole or in part, with a disability rating for PTSD of 30% or lower. The Agreement provides that the military records of these 673 class members will be changed to reflect that they received a 50% disability rating for PTSD for the entire period that the class member remained or remains on the TDRL. *See* Agreement, ¶¶ 6, 9.

4. 247 class members separated with severance pay without first being placed on TDRL (and who have received a Board decision). Exhibit D to the Agreement lists the names of 247 class members who have received a decision from one of the Boards during the agreed-upon administrative process and who were medically separated for PTSD, in whole or in part, with a less than 30% disability rating for PTSD. After they were separated from active service, they received a disability rating for PTSD of at least 30% from the VA. For each of the 247 class members listed in Exhibit D, that exhibit lists the disability rating for PTSD (30% or higher) that the class member received from the VA. The Board decisions applicable to these class members are presumed final. Nonetheless, the Agreement gives each of these 247 class members the option of having the class member's military records changed to reflect receipt of a 50% disability rating for PTSD for the six-month period beginning on the date of separation from active service, followed by a permanent rating for PTSD equal to the VA disability rating for PTSD listed in Exhibit D. Thus, the Agreement provides all 247 class members listed in Exhibit D with the right to elect lifetime permanent military disability retirement benefits, eligibility to apply for additional monetary benefits in the form of Combat Related Special Compensation, and eligibility to apply for reimbursement of the past medical expenses incurred by the class member, the class member's spouse, and the class member's minor children from the date of release from active military service to the present. *See* Agreement, ¶¶ 6, 10, 11, and 24.

5. 41 class members separated with severance pay without first being placed on TDRL (and who have received a Board decision). Exhibit F to the Agreement lists the names of 41 class members who have received a decision from one of the Boards during the agreed-upon administrative process and were medically separated for PTSD, in whole or in part, with a less than 30% disability rating for PTSD. After they were separated from active service, they received a disability rating for PTSD of less than 30% from the VA. For each of the 41 class members listed in Exhibit F, that exhibit lists the disability rating for PTSD (less than 30%) that the class member received from the VA. The Board decisions applicable to these class members are presumed final. Nonetheless, the Agreement gives each of these 41 class members the option of having the class member's military records changed to reflect receipt of a 50% disability rating for PTSD for the six-month period beginning on the date of separation from active service, followed by a permanent rating for PTSD equal to the VA disability rating for PTSD listed in Exhibit F. *See* Agreement, ¶¶ 6, 10, 12.

6. 11 class members who were retired for disability without first being placed on TDRL (and who have received a Board decision). Exhibit K to the Agreement lists the names of 11 class members who received a decision from one of the Boards under the previously agreed-to procedures between the parties and who were, upon separation from active service, permanently retired for disability due to PTSD, in whole or in part, with a disability rating for PTSD of 30% or lower. After they were separated from active service, they received a disability rating for PTSD of at least 30% from the VA. For each of the 11 class members listed in Exhibit J, that exhibit lists the disability rating for PTSD (30% or higher) that the class member received from the VA. The Board decisions applicable to these class members are presumed final. Nonetheless, the Agreement gives each of these 11 class members the option of having the class member's military records changed to reflect receipt of a 50% disability rating for PTSD for the six-month period beginning on the date of separation from active service, followed by a permanent rating for PTSD equal to the VA disability rating for PTSD listed in Exhibit K. *See* Agreement, ¶¶ 6, 10, 13.

7. 217 Class members placed on TDRL (and who have received a Board decision). Exhibit H to the Agreement lists the names of 217 class members who received a decision from one of the Boards under the previously agreed-to procedures between the parties and who were placed on the TDRL upon separation from active service due to PTSD, in whole or in part, with a disability rating for PTSD of 30% or lower. The Board decisions applicable to these class members are presumed final. Nonetheless, the Agreement gives each of these 217 class members the option of having the class member's military records changed to reflect that they received a 50% disability rating for PTSD for the entire period that the class member remained or remains on the TDRL. *See* Agreement, ¶¶ 6, 10, 14.

8. 41 class members who were separated with severance pay or retired for disability without first being placed on the TDRL (and who have not received a Board decision). Exhibit E to the Agreement lists the names of 41 class members who have not received a decision from one of the Boards under the previously agreed-to procedures between the parties and who were separated with severance pay or retired for disability without first being placed on the TDRL. All 41 class members were separated or retired due to PTSD, in whole or in part, with a disability rating for PTSD of 30% or lower. After they were separated from active service, they received a disability rating for PTSD of less than 30% from the VA. The Agreement provides each of these 41 class members the option of (a) applying to a military review board for relief within 60 days of approval of the agreement or (b) having the class member's military records changed to reflect receipt of a 50% disability rating for PTSD for the six-month period beginning on the date of separation from active service, followed by a permanent rating for PTSD equal to the VA disability rating for PTSD listed in Exhibit E. *See* Agreement, ¶¶ 6, 15, 16.

9. 66 class members who were separated with severance pay or retired for disability without first being placed on the TDRL. Exhibit L to this Agreement

lists the names of 66 class members who were separated with severance pay or retired for disability without first being placed on the TDRL. All 66 class members were separated or retired for disability due to PTSD, in whole or in part, with a disability rating for PTSD of 30% or lower. None of the 66 class members have received a disability rating from the VA for the PTSD that led to their separation or retirement for disability. The Agreement provides each of the 66 class members with a 60-day opportunity to apply to the VA for disability benefits for PTSD. If the class member timely applies to the VA, the class member may elect, upon receiving a VA disability rating, to have the class member's military records changed to reflect that they received a 50% disability rating for PTSD for the six-month period beginning on the date of separation or retirement for disability, followed by a permanent rating for PTSD equal to the VA disability rating. *See* Agreement, ¶¶ 6, 17-19.

B. Other Available Relief to Class Members. The Agreement also allows class members who qualify for disability retirement to seek reimbursement for past medical expenses incurred by class members and qualifying family members, from the date of release of the class member from active military service. In addition, class members will have the option of obtaining survivor benefits for qualifying family members, as well as having any benefits due them under this Agreement take into account a class member's receipt of any Combat Related Special Compensation benefits the class members may already be receiving.

C. Releases and Administrative Finality. The parties have negotiated certain releases and waivers regarding potential claims the class members may have with respect to the application of VASRD 4.129 and the specific disability rating they will receive under the provisions of this Agreement.

D. Attorneys Fees. The parties have spent considerable time and effort in reaching this Agreement, but have not yet addressed the issue of attorneys fees. If the parties are not able to resolve that issue, they propose that within 30 days after the Court grants final approval of the Agreement, Plaintiffs may apply for an award of attorney fees, costs, and expenses incurred in connection with the prosecution of this action incurred through the date of approval, with supplementation for fees and expenses incurred after that date if necessary. Within 30 days after

Plaintiffs have filed that application, Defendant shall file any response, opposition, or objection that it may have. Within 21 days thereafter, Plaintiffs may file a reply to Defendant's response, opposition or objection.

3. **The Court Should Preliminarily Approve the Agreement**

Approval of a class action settlement is governed by RCFC 23(e), which provides, in relevant part, that:

The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(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.

The standards for preliminary approval turn on the same considerations for final approval of the proposed settlement. Indeed, as one court has remarked,

[i]n considering preliminary approval, courts make a preliminary evaluation of the fairness of the settlement, prior to notice. Where the settlement appears to be the product of serious, informed, non-collusive negotiations, has no obviously deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted.

In re NASDAQ Market-Makers Antitrust Lit., 176 F.R.D. at 102 (citations omitted). At this stage, however, the Court's role is to determine if there is sufficient reason to notify the class members of the proposed settlement and proceed to a fairness hearing. *Armstrong v. Bd. of School Directors*, 616 F.2d 305, 314 (7th Cir. 1980) (citing *Manual for Complex Litigation* §

1.46, at 53-55 (West 1977)); *Manual for Complex Litigation, Fourth*, § 13.14 (Fed. Jud. Ctr. 2004) (court should review settlement proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing). Moreover, unless the Court's initial examination "disclose[s] grounds to doubt its fairness or other obvious deficiencies," the Court should order that notice of the proposed Agreement be given to class members. *Manual for Complex Litigation (Third)* § 30.41 (1995). Thus, at the preliminary approval stage, the Court should determine whether it is reasonable to believe that the proposed Agreement is fair, reasonable, and adequate, while deferring a final determination until notice is effected and comments and objections considered. *Manual for Complex Litigation, Fourth*, § 21.632 (Fed. Jud. Ctr. 2004).

Under these standards, the parties' proposed Agreement is more than fair, reasonable, and adequate:

- As the Court is aware, the ultimate settlement reached here was the product of serious, arms-length negotiations that began almost immediately after Plaintiffs filed their original Complaint in December 2008. These discussions, which initially resulted in the attempted streamlined administrative review process and were renewed after Plaintiffs filed their motion for summary judgment, were cordial but adversarial, with each side exchanging multiple proposals and drafts before reaching the final Agreement that has been presented to the Court.
- As the brief explanation of the Agreement's terms above makes clear, no class member receives any preferential treatment under the Agreement. Instead, the Agreement treats all class members the same by implementing benefits under VASRD 4.129 for the first six months after each member's separation from active duty, with any permanent change to a class member's military record a result of a

more recent evaluation of each member's PTSD. Thus, although some members may receive a higher permanent disability rating for PTSD under the Agreement than others, such ratings stem directly from consideration of each member's post-separation medical condition.

- The relief afforded under the Agreement is as comprehensive as the relief that might be ordered by this Court after ruling on Plaintiffs' pending motion for summary judgment or after conclusion of trial, with the benefit of avoiding delays and uncertainties of continued litigation, including appeals.

For these reasons, the parties request that the Court grant preliminary approval to the proposed Settlement Agreement.

4. Proposed Schedule for Approval Process

In anticipation of the Court granting preliminary approval to the Agreement, the parties propose the following schedule for the issuance of class notice, submission of objections, and the fairness hearing under RCFC 23(c):

- a. Within 14 days of the Court's preliminary approval of the Agreement: the parties shall submit to the Court a draft Notice of Proposed Class Settlement to the Class.
- b. Within 14 days after the Court approves the draft Notice of Proposed Class Settlement to the Class, the parties shall mail such Notice to each class member at the class member's last known mailing address.
- c. Class members may express to the Court their views in support of, or in opposition to, the fairness, reasonableness, or adequacy of the proposed Agreement. Such submissions shall be considered only if the class member mails to the Clerk of the Court a statement describing their views postmarked no later

than 45 days following the date the Notice of Proposed Class Settlement was mailed.

- d. A briefing schedule and final approval hearing date shall be set at the Court's convenience. However, the motion for final approval shall be scheduled no sooner than 21 days after close of the objection period and the hearing shall be set no sooner than 30 days after the close of the objection period.
- e. Pending the Court's decision on final approval, the Service Branches will in the interim change the military records of each class member listed on Exhibits C, J, and G of the Agreement in accordance with the terms of the Agreement, in order to expedite relief to these class members in the event the Court gives final approval to the Agreement. In the event the Court disapproves the settlement agreement the parties will jointly evaluate how to proceed with claims from class members listed on these exhibits.
- f. Following a Final Approval of Settlement Agreement Order and entry of judgment, the parties will, if necessary, submit briefs regarding the attorneys' fees and cost application as indicated above.
- g. In accordance with Paragraph 6 of the Agreement, within six (6) months of Final Approval, Defendants shall take all steps necessary to execute the actions outlined in Paragraph 6 of the Agreement.

CONCLUSION

For the foregoing reasons, the parties request that the Court give preliminary approval to the parties' proposed Settlement Agreement, and enter an Order outline the next steps in the class action settlement process as outlined in Section IV above.

Respectfully submitted,

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July 28, 2011

CERTIFICATE OF FILING

I hereby certify that on this 28th day of July 2011, a copy of the foregoing was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s Brad Fagg