

United States Court of Appeals for the Federal Circuit

VICTOR B. SKAAR,
Claimant-Cross-Appellant

v.

**DENIS MCDONOUGH, SECRETARY OF
VETERANS AFFAIRS,**
Respondent-Appellant

2021-1757, 2021-1812

Appeals from the United States Court of Appeals for Veterans Claims in No. 17-2574, Chief Judge Margaret C. Bartley, Judge Amanda L. Meredith, Judge Michael P. Allen.

Decided: September 8, 2022

CAROLINE MARKOWITZ, Veterans Legal Services Clinic, Jerome N. Frank Legal Services Organization, Yale Law School, New Haven, CT, argued for claimant-cross-appellant. Also represented by MEGHAN BROOKS, MATTHEW HANDLEY, ADAM HENDERSON, JOSHUA HERMAN, MICHAEL JOEL WISHNIE. Also argued by ANTHONY PICCIRILLO, Simpson Thacher & Bartlett LLP, New York, NY. Also represented by LYNN K. NEUNER.

SOSUN BAE, Commercial Litigation Branch, Civil

Division, United States Department of Justice, Washington, DC, argued for respondent-appellant. Also represented by BRIAN M. BOYNTON, MARTIN F. HOCKEY, JR., PATRICIA M. MCCARTHY; BRIAN D. GRIFFIN, JONATHAN KRISCH, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

JONATHAN D. SELBIN, Lieff, Cabraser, Heimann & Bernstein, LLP, New York, NY, for amici curiae Maureen S. Carroll, Zachary Clopton, Brooke D. Coleman, Robin Efron, Maria Glover, Andrew Hammond, Deborah R. Hensler, Helen Hershkoff, Alexandra D. Lahav, Elizabeth G. Porter, Alexander Reinert, Judith Resnik, Michael D. Sant'Ambrogio, Joan E. Steinman, Adam S. Zimmerman. Also represented by YAMAN SALAH, Edelson PC, San Francisco, CA.

DORIS JOHNSON HINES, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, Washington, DC, for amicus curiae National Veterans Legal Services Program.

Before MOORE, *Chief Judge*, NEWMAN and HUGHES,
Circuit Judges.

HUGHES, *Circuit Judge*.

United States Air Force veteran Victor B. Skaar was exposed to ionizing radiation while participating in a cleanup operation in Palomares, Spain. Thirty years later, he was diagnosed with leukemia. He filed a claim with the Department of Veterans Affairs for service-connected benefits, and the Board of Veterans' Appeals denied his claim. Mr. Skaar appealed the Board's denial to the United States Court of Appeals for Veterans Claims. There, he challenged the soundness of the radiation dose estimates provided by the Air Force and relied upon by the Board in denying his claim. By motion for class certification, Mr. Skaar sought to make this challenge on behalf of all

similarly situated veterans who had participated in the Palomares cleanup operation. The Veterans Court certified a class, with Mr. Skaar serving as its representative, that includes veterans who had not received a Board decision and that excludes veterans whose claims had been denied but not timely appealed. *See Skaar v. Wilkie*, 32 Vet. App. 156, 201 (2019) (*Class Certification*). The Secretary of Veterans Affairs appeals, and Mr. Skaar cross-appeals, the Veterans Court's class definition.

On appeal, the Secretary asserts that the Veterans Court lacked authority to certify a class that includes veterans who had not received a Board decision—a statutory prerequisite for the court's jurisdiction pursuant to 38 U.S.C. § 7252(a)—because jurisdiction over Mr. Skaar's individual claim did not create further jurisdiction over a class of similarly situated veterans whose individual claims were beyond the court's jurisdiction. We agree. By certifying a class that includes veterans who had not received a Board decision, the Veterans Court exceeded its jurisdiction. We accordingly vacate the court's class certification and remand for further proceedings.

On cross-appeal, Mr. Skaar contends that the Veterans Court should have equitably tolled the appeal period for veterans whose claims had been denied but not timely appealed and thus should have included such veterans as members of the certified class. We disagree. The Veterans Court rightly declined to equitably toll the appeal period for claimants who had not timely appealed their denied claims since none of the claimants had alleged, let alone established, the requisite due diligence in pursuing their rights. *See Toomer v. McDonald*, 783 F.3d 1229, 1237–38 (Fed. Cir. 2015). Thus, should the Veterans Court choose to reconsider on remand whether class certification is appropriate, the court shall confine the proposed class to include only Palomares veterans who had timely appealed, or were still able to timely appeal, Board decisions denying their radiation exposure claims.

I

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In January 1966, a United States Air Force B-52 bomber carrying four thermonuclear weapons collided mid-air with another aircraft. Two of the weapons crashed into the ground near Palomares, Spain, and released “radioactive plutonium dust over the area, contaminating soil and crops, and spreading radioactive debris for miles.” *Class Certification*, 32 Vet. App. at 168. “Mr. Skaar, along with nearly 1,400 other U.S. military personnel,” assisted in the cleanup. *Id.* They also provided urine and nasal swab samples while on site “to assess possible radioactive exposure.” *Id.* A group of service members “determined to be among the most exposed,” including Mr. Skaar, were monitored for signs of radiogenic conditions for 18 to 24 months after the accident. *Id.*

Monitoring efforts for Mr. Skaar continued until December 1967, when the Air Force concluded that his health was not in “jeopardy from retention of radioactive materials as a result of participation in the [Palomares cleanup] operation.” *Id.* (alteration in original) (citation omitted). Three decades later, in 1998, Mr. Skaar was diagnosed with leukopenia, a blood disorder characterized by a decrease in white blood cell count. His doctor opined that exposure to ionizing radiation “appear[s] to be the positive agent” that historically causes leukopenia, but “concluded [that] ‘we have been unable to prove this.’” *Id.* Mr. Skaar subsequently filed a claim for service-connected benefits, which the agency denied in February 2000.

Mr. Skaar moved to reopen his claim in March 2011, and the regional office requested a radiation exposure opinion. The Air Force—the service branch responsible for providing the agency with exposure data and dose estimates for Palomares veterans—estimated “that Mr. Skaar’s maximum total effective dose during the Palomares cleanup was 4.2 rem with a bone marrow committed

dose of 1.18 rem, compared to annual dose limits of 5 and 50 rem, respectively, for occupations typically involving radiation exposure.” *Id.* at 169. Relying on these estimates, the Under Secretary for Benefits found it unlikely that Mr. Skaar’s leukopenia was caused by radiation exposure while in military service and shared these findings in a dose estimate opinion provided to the regional office in May 2012. Shortly thereafter, the regional office denied Mr. Skaar’s claim, and he appealed the denial to the Board.

“In October 2013, a private physician opined that Mr. Skaar’s leukopenia ‘is likely related to exposure to heavy radioactive material in [1966].’” *Id.* at 170 (alteration in original) (citation omitted). Two months later, while Mr. Skaar’s appeal was still pending before the Board, the Air Force discovered errors in its radiation dose methodology, which was underestimating doses for some individuals including Palomares veterans. Consequently, “the Air Force intended to ‘formally standardize [its] response methodology for radiation dose inquiries involving Palomares participants’ by establishing dose estimates based on each veteran’s specific duties.” *Id.* (alteration in original) (citation omitted).

After reevaluating its dose estimate methodology, the Air Force provided the agency with revised dose estimates for Mr. Skaar, “assigning him a new maximum total effective dose of 17.9 rem and a bone marrow committed dose of 14.2 rem.” *Id.* The Board found that these revised dose estimates amounted to new and material evidence warranting another dose estimate opinion and remanded the claim. The regional office obtained and considered a new dose estimate opinion from August 2016. Nonetheless, the regional office again found it unlikely that Mr. Skaar’s “leukopenia was caused by exposure to ionizing radiation during military service,” and denied his claim. *Id.* Mr. Skaar appealed to the Board.



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