

In the United States Court of Federal Claims

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,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

No. 08-899C

Filed August 12, 2010

ORDER

On August 10, 2010, the parties filed a joint status report detailing the progress made by the parties in implementing the expedited process for administrative review of opt-in class members' applications (docket entry 63) ("JSR"). The parties also indicated certain problems with the process and the work that has been or will be undertaken to attempt to resolve such issues. Attached to the JSR were two charts detailing the current status of the cases involving individuals who have already opted in to the class (docket entries 63-1 and 63-2). The second chart ("Chart B") was prepared by Major Jacob G. Wolf, counsel for the Army, and plaintiffs indicate that they "do not yet fully understand what some of the numbers in the chart are intended to represent, and will be communicating further with defendant for clarification." JSR at 1. The parties have not yet been able to propose a mutually agreed-upon date for a further status conference. JSR at 11. In a conversation with chambers, counsel for defendant confirmed that due to his upcoming scheduled surgery and other individuals' vacation plans, it would be unlikely that a further status conference could occur in August.

Additionally, plaintiffs request that the deadline for opting in to the class, which expired on July 24, 2010, be retroactively extended for an additional 90 days from the date of the order. JSR at 6. Defendant opposes extending the opt-in deadline.¹ JSR at 11.

¹ Defendant does not oppose extending the opt-in deadline for two specific sub-sets of the class: (1) individuals whose legal notice was returned by the United States Postal Service ("USPS") as undeliverable in either of the two attempts the parties have made to mail the notice; and (2) individuals who were not among the initial set of 4,370 veterans to whom notice was sent. As to these individuals, defendant agrees that the opt-in deadline should be six months

Plaintiffs raise five arguments in favor of the 90-day extension. First, they assert that the relatively low opt-in rate (approximately 42% of the identified putative class members) indicates that adequate notice has not been given to many of the putative class members. JSR at 6. Second, there is evidence that no legal notice was ever received by more individuals than those for whom the parties have received undeliverable notices from the USPS. JSR at 6. Specifically, plaintiffs undertook a separate independent mailing and received undeliverable notices for individuals for whom no such notice was received after the initial mailing. Plaintiffs assert this is evidence that those persons did not receive the initial notice, though they are not included in the first sub-set of putative class members whose deadlines were extended by consent. JSR at 6-7. Further, plaintiffs have called approximately 600 putative class members, some of whom stated that they never received a notice. JSR at 7. Third, all the putative class members, by definition, suffer from PTSD, including approximately 30% of whom have been rated by the Department of Veterans Affairs (“DVA”) as 70% or 100% disabled. JSR at 7-8. This disability inherently restricts the ability of putative class members to understand the notice and to comply with the requirements to opt in. *Id.* Fourth, certain of the class members have indicated that they did not understand the class notices and required further individualized consultations with counsel. JSR at 9. And fifth, many putative class members “experienced difficulty in effectively exercising their rights to opt in by the July 24th deadline.” JSR at 9-10. Plaintiffs state that 10 notices have already been received after the July 24 deadline. JSR at 10.

Defendant opposes plaintiffs’ request, stating that the July 24 opt-in deadline was a “material term” to the Government’s agreement to the process in the first place. JSR at 11. Moreover, putative class members who do not opt in will still be eligible for the same relief, “albeit using standard procedures rather than the expedited relief class members enjoy.” *Id.* Thus, defendant argues that the benefit of the 90-day extension is minimal, while such an extension would further burden non-class members who have applications pending before the various agencies. *Id.*

Both parties raise legitimate concerns. Ultimately, the Court must balance two competing interests. On the one hand are the interests of the putative class members in gaining access to the streamlined process set up by the parties in this case. On the other hand, for each additional class member who receives “prioritized” review, non-class members find themselves further away from resolution of their claims before the applicable board. This balancing is not an easy task. Counsel have all been diligently engaged in an admirable project, the aim of which was to ensure that individuals who were discharged from military service because of PTSD receive the benefits to which they are entitled. The Court recognizes that there were problems getting the process to work effectively, especially at the outset, which the parties have been productively working together to resolve.

Given these initial roadblocks, the Court believes that plaintiffs’ requested 90-day

after the date notice is sent or re-sent. To the extent that the Court’s approval is sought or required, the parties’ joint request to extend the opt-in deadline for these two classes of individuals to six months after the date notice is sent or re-sent is hereby **GRANTED**.

extension of the opt-in period is a reasonable measure to ensure that as many individuals as possible can opt in to the class if they so desire. Because of the potential effect of extending the opt-in date on non-class members, however, and because individuals who do not opt in will still be permitted to pursue remedies outside of the expedited process created for class members, no further extensions should be anticipated.

In view of the foregoing, the Court hereby **ORDERS** as follows:

(1) Plaintiffs' request to extend the period for opting in to the class is **GRANTED**. The deadline for opting in to the class as defined by the September 21, 2010 Order certifying this case as a class action (docket entry 33) shall run through **Wednesday, November 10, 2010**. The parties should not anticipate that any further extensions will be granted.

(2) The parties are scheduled to file a further joint status report on **Thursday, September 2, 2010**. In this report, the parties shall propose a mutually agreed-upon time or times for a further status conference. The parties shall also indicate whether counsel for defendant has adequately explained Chart B to plaintiffs. Additionally, the parties shall describe any further progress the parties have made with respect to resolving difficulties with the process and any perceived problems that the parties believe need to be discussed at the status conference.

IT IS SO ORDERED.

s/ George W. Miller
GEORGE W. MILLER
Judge