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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BEVERLY NEHMER, et al., Plaintiffs, v. U.S. DEPARTMENT OF VETERANS AFFAIRS, Defendant.	Case No. 3:86-cv-06160-WHA **DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR ENFORCEMENT OF FINAL JUDGMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

STATEMENT OF THE ISSUE

Whether the Court should order the VA to disrupt its pending rulemaking process and "immediately rescind" the final sentence of 38 C.F.R. § 3.816(f)(3), when the VA interprets that regulation to effectuate the outcome Plaintiffs seek, *i.e.*, to permit payment to newly-identified children payees of deceased veterans before resulting overpayments are recovered from the original payees.

INTRODUCTION

In Plaintiffs' motion to enforce the 1991 Consent Decree in this class action case, *see* ECF No. 495 (Mot.), they have asked this Court not to invalidate a Department of Veterans Affairs (VA) regulation, 38 C.F.R. § 3.816(f)(3), but rather to impose judicial oversight of the VA's rulemaking process—a process which Plaintiffs themselves know is underway and which the VA undertook in response to Plaintiffs' own demands. The VA acknowledges that under the final sentence of section 3.816(f)(3), it has in the past denied payment to newly-identified child payees of deceased Vietnam veterans who are members of the class in this case because it had not yet recovered the resulting overpayment from the other children who were originally paid the full amount of benefits owed to the veteran. But the VA, largely in response to the concerns Plaintiffs expressed, has now changed its approach and interprets its regulation to permit payment to such children *before* the VA recovers overpayment amounts from the original payees. And the VA has initiated a rulemaking process to amend the regulatory text to align with this practice. In short, there is no dispute between the parties concerning how payments to newly-identified children—by any account, a very small proportion of the claimant population—should proceed.

Plaintiffs' ultimate complaint then is one of timing: they maintain that the VA is taking too long to clarify its regulations to reflect the agency's approach to paying this small subset of claimants. But as the VA explains in the attached Declaration of Michael J. Frueh, Principal Deputy Under Secretary for Benefits (Frueh Decl.), a notice of proposed rulemaking (NPRM) is projected for March 2022. Because the change to section 3.816(f)(3) is part of a larger regulatory package regarding herbicide exposure, it cannot readily be broken out from that package for swifter implementation without using considerable VA resources. Even using significant VA resources would likely not yield significant acceleration of the timeline.

More to the point, principles of prudential ripeness counsel withholding judicial review of Plaintiffs' Motion until the VA's rulemaking process is complete. By that time, whatever dispute Plaintiffs might allege to exist may well have been mooted by the VA's revision of section

3.816(f)(3). In the interim, meanwhile, Plaintiffs have not shown that they will suffer any hardship. As already noted, the VA is prepared to pay—and indeed has recently made multiple payments to—newly-identified child payees without first recouping overpayments from the original payees. And Plaintiffs' attempt to manifest some urgency by citing the ongoing readjudications of Blue Water Navy veterans' claim is beside the point. Whether and how newly-identified payees are paid their equal share of an award amount is an entirely separate question from readjudicating a Blue Water Navy veteran's claim in the first instance. Indeed, it is only *after* such a claim has been both readjudicated and fully paid that the issue central to Plaintiffs' Motion—an equal share payment to a later-claiming payee—would even arise (if it were to arise at all).

For all of these reasons, Plaintiffs' Motion should be denied or, in the alternative, stayed pending completion of the VA's rulemaking process to revise section 3.816(f)(3).

BACKGROUND

Plaintiffs filed this class action in 1986 to challenge a VA regulation promulgated under the Veterans' Dioxin and Radiation Exposure Compensation Standards Act (Dioxin Act). Pub. L. No. 98-542, 98 Stat. 2725 (1984). The Dioxin Act directed the VA to establish a framework for granting disability claims on a presumptive basis for diseases shown to be associated with Agent Orange exposure in Vietnam. The VA's ensuing regulation presumed service-connection only for chloracne. 38 C.F.R. § 3.311a(c) (1986). The Court certified a nationwide class of veterans, and their survivors, who were or would become eligible to apply for disability compensation benefits based on exposure to Agent Orange, or who had filed a claim for such benefits that had been denied by the VA. *Nehmer v. U.S. Veterans' Admin.*, 118 F.R.D. 113, 116, 125 (N.D. Cal. 1987). The Court then invalidated the challenged regulation insofar as it provided that no disease other than chloracne was associated with Agent Orange exposure. *See Nehmer v. U.S. Veterans' Admin.*, 712 F. Supp. 1404, 1420 (N.D. Cal. 1989).

In 1991, Congress passed the Agent Orange Act of 1991 (AOA), Pub. L. No. 102-4, 105 Stat. 11, which created a presumption of service-connection for three additional diseases—non-Hodgkin's Lymphoma, soft tissue sarcomas, and chloracne—if manifest by a veteran who "served in the Republic of Vietnam." 38 U.S.C. § 1116. The AOA also directed the VA to determine whether additional diseases "warrant[] a presumption of service-connection by reason of having positive association with exposure to an herbicide agent." *Id.* § 1116(a)(1)(B); *see also id.* § 1116(b)(1). Shortly after Congress passed the AOA, the parties to this case entered into a Consent Decree. *See* Declaration of Alessandra M. Venuti in Supp. of Pls.' Mot. (Venuti Decl.), Ex. 1 (Consent Decree), ECF No. 495-1. As this Court has explained, "[t]he purpose of the consent decree was to require, as additional diseases became recognized [by the VA], automatic readjudications by the VA of claims by military personnel who had served 'in the Republic of Vietnam' where those claims had earlier been denied on the ground that the disease in question had not been determined to be service-connected." *Nehmer v. U.S. Dep't of Veterans Affs.*, No. C 86-06160 WHA, 2020 WL 6508529, at *3 (N.D. Cal. Nov. 5, 2020).

Between 1991 and the present, the VA has issued ten final rules recognizing numerous diseases as associated with presumed herbicide exposure in Vietnam. *See* 38 C.F.R. § 3.309(e) (listing diseases); Declaration of Margarita Devlin ¶ 2 n.1, ECF No. 468-2 (listing rules). To implement the Consent Decree, the VA has automatically readjudicated hundreds of thousands of claims that were based on those diseases and previously denied.

Plaintiffs' Motion concerns the distribution of the disability benefits award amount following a favorable readjudication under the Consent Decree. If a readjudication under the Consent Decree is favorable to the veteran, the VA determines the amount of retroactive benefits owed (with the additional benefit of an earlier effective date for the award) and makes payment of those benefits to the appropriate payee(s). If the veteran is living, the VA pays the full amount to the veteran. Nothing in the Consent Decree, however, sets forth a process by which the VA will distribute payments if the veteran is deceased. In April 2003, to resolve a dispute between

the parties over whether the estate of a deceased veteran is an eligible payee in the event that no surviving spouse, child, or parent of the veteran could be located, the Court issued an Order directing the VA to make payments of retroactive benefits "to the first individual or entity in existence listed below:"

> (a) the class member's spouse;
> (b) the class member's children (if more than one child exists, payment of the retroactive benefits owed shall be divided into equal shares, and accompanied by an explanation of the division);
> (c) the class member's parents (if both parents are alive, half of the retroactive benefits owed shall be paid to each parent, and accompanies by an explanation of the division);
> (d) the class member's estate

See Order Denying Defs.' Mot. For Clarification, 6, ECF No. 324. Thus, in the event of a favorable readjudication for a deceased veteran, the VA's task was to identify the eligible payees from this list in descending order of priority. Once a payee—or, in the case of more than one surviving child or parent, payees—was or were identified, the VA was to disburse the award amount—and, if more than one payee, to disburse the award to each payee in equal shares. The Court's Order was silent as to what process the VA should use in the event that a newly-identified child of a veteran sought his or her share of the benefits, but the award had already been fully disbursed to other children.

Following a January 2003 notice of proposed rulemaking, the VA in August 2003 published a final rule that set forth the payment disbursement process in the event of a favorable adjudication for a deceased veteran. *See* Dep't of Veterans Affairs, Final Rule, Effective Dates of Benefits for Disability or Death Caused By Herbicide Exposure; Disposition of Unpaid Benefits After Death of Beneficiary, 68 Fed. Reg. 50,966 (Aug. 25, 2003); Dep't of Veterans Affairs, Proposed Rule, Effective Dates of Benefits for Disability or Death Caused by Herbicide

Exposure; Disposition of Unpaid Benefits After Death of Beneficiary, 68 Fed. Reg. 4,132 (Jan. 28, 2003).

With respect to identifying survivor payees, the VA stated as follows in the proposed rule:

> We also propose to state that, before releasing payment to a known survivor, VA will request information from the survivor concerning the possible existence of other survivors with equal or greater priority for payment, unless the circumstances clearly indicate that such a request is unnecessary. For example, if the claims file contained the name and address of a child of the deceased class member, VA would contact the child to inquire whether there is a surviving spouse or any other children of the class member in existence. In seeking to identify appropriate payees, VA necessarily must rely on information in the claims file. VA does not have the resources to conduct independent investigations of estate issues.

68 Fed. Reg. at 4,138. To explain what would become the final sentence of section 3.816(f)(3), and relevant to Plaintiffs' Motion, the VA "propose[d] to state that, after making reasonable efforts to identify the appropriate payee(s), if VA releases the full amount of retroactive payments to a payee, VA generally may not thereafter pay any portion of such benefits to any other individual, unless VA is able to recover any payment previously released." *Id.* The VA received three comments on the proposed rule, including from class counsel in this case. 68 Fed. Reg. at 50,966. None of those comments addressed the final sentence of section 3.816(f)(3), the subject of Plaintiffs' Motion. *Id.* at 50,968 ("The other provisions of proposed 38 CFR 3.816(f) are not affected by the court's [April 2003] order, and we received no comments concerning them. Accordingly, we are adopting them without change.").

This scenario is the subject of Plaintiffs' Motion: when the VA has paid the entire award amount to one or more children of a deceased veteran, but a newly-identified child of that veteran later claims his or her equal share of the award. This is not a common scenario because the VA is generally able to work with a veteran's survivors to identify all existing children of a deceased veteran before it disburses payment(s). Frueh Decl. ¶ 5. To issue payment to any child payee, the VA necessarily must be in communication with that child. The factual situation relevant to

Plaintiffs' Motion would thus arise only when either (1) the existing payee child (or children) of a deceased veteran does not disclose the existence of another child of the veteran; or (2) those children (and the VA) are not aware of the existence of another child of the veteran.

As a general matter, the VA initially applied the final sentence of section 3.816(f)(3) to deny payment to a newly-identified child eligible to receive payment unless the VA could first recover the ensuing overpayments from the original payees. Frueh Decl. ¶ 6. Plaintiffs, however, took issue with that interpretation and sought relief from the VA by letter dated June 8, 2020. *See* Venuti Decl., Ex. 3. As Plaintiffs recount, following receipt of Plaintiffs' June 8, 2020 letter, the VA and Plaintiffs entered into discussions regarding the VA's implementation of the final sentence of section 3.816(f)(3). Mot. 4-5; *see also* Venuti Decl., Ex. 4. Following those productive discussions, the VA had agreed to change its policy toward newly-identified child payees, and indicated to Plaintiffs that it would be modifying section 3.816(f)(3) accordingly. *See* Venuti Decl., Ex. 4. In the course of those discussions, Plaintiffs also brought to the VA the cases of several deceased veterans and made payment claims on behalf of newly-identified children of those veterans. The VA successfully resolved all of those cases and, given its change to the payment process, made payments to newly-identified children before seeking overpayments from the original payees. Frueh Decl. ¶ 7.

As Plaintiffs are aware, the VA has initiated the rulemaking process to revise section 3.816(f)(3), among other regulatory provisions relevant to veteran disability claims for herbicide exposure. Frueh Decl. ¶¶ 8-9. The VA also indicated its willingness, pending issuance of a notice of proposed rulemaking, to revise its M21-1 Adjudication Procedures Manual to eliminate ambiguity concerning payment to newly-identified children of a deceased veteran, provide guidance to VA adjudicators regarding that change, and notify stakeholders of the change. Notwithstanding all of the above, Plaintiffs filed their Motion for Enforcement on September 17, 2021, requesting that the Court order the VA to "immediately" rescind the final sentence of section 3.816(f)(3). Mot. 2, 8.

ARGUMENT

The VA now interprets section 3.816(f)(3) to permit it to make payments to a newly-identified child payee of a deceased veteran *before* it recovers the resulting overpayments made to the original child payee(s). As a result, there is no actual dispute between the parties on the central issue presented in Plaintiffs' Motion—*i.e.*, whether and how such children should be paid—and thus no need for the Court to impose Plaintiffs' requested remedy that the VA immediately rescind the final sentence of section 3.816(f)(3). Even if the Court were to identify a dispute warranting judicial review, prudential ripeness principles counsel against reaching a decision while the VA's rulemaking process is underway. Indeed, that rulemaking process, once complete, may well obviate any conceivable need for judicial review. Plaintiffs, moreover, will have the opportunity to comment on the regulatory revision that the VA proposes as part of the rulemaking process. And in the interim, Plaintiffs have not persuasively shown that they will suffer any hardship from withholding consideration of the Motion. Plaintiffs' Motion should be denied or, in the alternative, the Court should stay consideration of the Motion pending completion of the VA's rulemaking process.

I. The VA implements section 3.816(f)(3) to permit equal share payments to newly-identified children before recovering any overpayments

On the central issue presented by Plaintiffs' Motion—whether the VA should pay the child (or children) of a veteran who did not identify themselves before the agency previously issued payment to other children of that veteran—there is no dispute. The VA interprets the final sentence of section 3.816(f)(3) to permit payment to the child of a deceased veteran of his or her equal share of the total benefit award amount before the VA recoups the overpayments made to the original payee(s). The VA thus agrees to pay—and, as Plaintiffs are aware, has in the past paid—the newly-identified claimant child of a veteran (so long as he or she qualifies for payment) their equal share of the award amount, *even if* the VA has already paid out the full amount to other qualifying children. That is because the VA retains the statutory right to recoup the resulting

overpayment that was previously made to the original payees. *See* 31 U.S.C. § 3711(a)(1); 38 C.F.R. § 1.910(a) ("VA will take aggressive collection action on a timely basis, with effective follow-up, to collect all claims for money or property arising from its activities."). Accordingly, even after initially making payment of the full award amount to the children of a veteran, the VA remains "able to recover the payment previously released" and can therefore pay a "portion of [a benefit award] to any other individual"—*e.g.*, a newly-identified child—so long as that individual is a qualified payee. 38 C.F.R. § 3.816(f)(3).

Plaintiffs are correct that at the time they sent their June 8, 2020 letter to the VA, the agency had not been interpreting section 3.816(f)(3) in this fashion. Yet, over the course of the parties' discussions following that letter, as Plaintiffs acknowledge, the VA agreed to change its implementation of the regulation to enable payment to late-claiming children of a veteran. *See* Mot. 5. It is for that reason that the VA readily agreed to make equal share payments to a number of newly-identified children that class counsel had brought to the VA's attention. Indeed, it did so as recently as last month. Frueh Decl. ¶ 7 & Ex. A (Sep. 7, 2021 DOJ letter to Plaintiffs' counsel). And in each of those instances, the VA did not await actual recovery of overpayments from the original payees before issuing payments to the newly-identified claimant. It is thus hardly surprising that Plaintiffs characterize those discussions as "productive," Mot. 5, since the agency agreed to the very outcome Plaintiffs sought.

As Plaintiffs are aware, the VA has also begun the process of proposing a clarification and revision of the final sentence of section 3.816(f)(3) so that it better aligns with the VA's current approach. Frueh Decl. ¶¶ 8-9. This forthcoming proposed rule, currently scheduled for March 2022, is part of a larger VA regulatory package addressing different issues related to herbicide exposure. *Id.* The VA intends to eliminate ambiguity in the existing language of the regulation and make clear in this proposed rule that the VA will issue payments to newly-identified qualifying payees, without regard to whether the full award amount has already been paid. (The VA will propose to retain the right to recoup the resulting overpayments to the original payees

wherever it is able to do so.) So far as the VA can tell, this is the outcome that Plaintiffs are seeking, and there is accordingly no need for this Court to intervene and disrupt the pending rulemaking process.

Out of an abundance of caution, the VA will also modify its guidance to agency adjudicators in *Nehmer* cases and suspend that portion of its M21-1 Manual which implements section 3.816(f)(3). *See* Frueh Decl. ¶ 13 (citing M21-1 Manual, Part VIII, Subpart I, Chapter, 2, Section C.1.e ("Once benefits have been awarded in full to a payee, do not pay any portion of the benefits to any other individual, unless the payment previously released can be recovered.")). Insofar as that provision of the VA's M21-1 Manual would previously have been read to preclude payment to the late-claiming child of a veteran, the VA will suspend its application and inform adjudicators that non-recovery of an overpayment is not a bar to paying such a child. Frueh Decl. ¶ 13.[1]

Plaintiffs on reply may argue that the VA's timetable for the rulemaking process is too protracted and that they cannot wait until 2022 for the NPRM to be published. But Plaintiffs' dissatisfaction with the VA's proposed timetable is not an adequate basis for the Court to order their requested relief. As noted above, there is no provision of the Consent Decree which sets forth whether and, if so, how newly-identified children of a deceased veteran should be paid. Plaintiffs tacitly concede as much by failing to cite any such provision in their request to "enforce" the Decree. It is moreover neither practical nor efficient for the VA to break out its proposed revision of section 3.3816(f)(3) from the larger rulemaking package. Frueh Decl. ¶¶ 10-12. Indeed, doing so would not likely result in a substantial time-savings, given the need to rewrite significant portions of the rulemaking and to have any standalone rulemaking dedicated to section 3.816(f)(3) undergo its own separate inter-agency review process. *Id.* ¶¶ 11-12. In these

[1] The VA was also willing to modify the pertinent provisions in the M21-1 Manual, train VA adjudicators on the newly modified provisions, and notify stakeholders of this change. Plaintiffs allude to this option and unilaterally conclude that, in their view, it is not "an adequate substitute" but fail to explain why that is so. Mot. 5.

circumstances, the Court should not disrupt the rulemaking process that the VA has initiated, particularly when "agencies have 'significant latitude as to the manner, timing, content, and coordination of [their] regulations.'" *City of Portland v. United States*, 969 F.3d 1020, 1047 (9th Cir. 2020) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007)), *cert. denied sub. nom. City of Portland v. FCC*, 141 S. Ct. 2855 (2021).

In sum, there is no dispute between the parties for the Court to resolve. Plaintiffs' Motion is simply an attempt to have this Court restructure the VA's rulemaking docket to place the narrow interest Plaintiffs identify, which the VA is already accommodating, at the head of the line above all else. The VA and Plaintiffs agree that section 3.816(f)(3) should be interpreted to permit payment to a newly-identified child payee prior to recovery of an overpayment from the original payees. And the VA has already communicated to Plaintiffs its intention to clarify the regulation's text to eliminate any ambiguity. Plaintiffs' mere dissatisfaction with the VA's timetable is not a sufficient basis for the Court to oversee the rulemaking process, particularly when the Consent Decree imposes no contrary obligation on the VA. Plaintiffs' Motion should be denied.

II. If the Court identifies a judicially cognizable dispute, it should nonetheless decline to decide Plaintiffs' Motion under the doctrine of prudential ripeness

Even if the Court identifies some dispute that warrants judicial consideration, the Court should nonetheless decline to decide Plaintiffs' Motion under the doctrine of prudential ripeness. The ripeness doctrine is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148-49 (1967). A court assesses prudential ripeness by evaluating "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149; *see also Ass'n of Irritated Residents v. EPA*, 10 F.4th 937, 944 (9th Cir. 2021). Prudential ripeness concerns have led courts to refrain from deciding challenges

to agency regulations when, as here, the agency is in the process of rulemaking to modify the challenged provision.

A. The issues are not fit for judicial decision at this time

Considering the fitness of the issues for decision, courts have refrained from deciding the validity of an agency regulation when the agency has "commenced rescinding that same regulation," *Wyoming v. Zinke*, 871 F.3d 1133, 1142 (10th Cir. 2017), or when "judicial intervention would inappropriately interfere with further administrative action," *Farrell-Cooper Mining Co. v. U.S. Dep't of Interior*, 728 F.3d 1229, 1234-35 (10th Cir. 2013) (citation omitted). Although the VA has not yet issued a formal NPRM, its rulemaking process to modify section 3.816(f)(3) is well underway and judicial intervention at this stage would disrupt the very administrative action—revision of section 3.816(f)(3)'s final sentence—that Plaintiffs are seeking. Frueh Decl. ¶¶ 10-12. Even though the VA and Plaintiffs share a common interpretation of section 3.816(f)(3), to the extent there is any continuing disagreement about that regulation, it would likely be put to rest once the VA completes its rulemaking process. To impose a judicial intervention at this premature juncture would deny the VA "full opportunity to apply its expertise and to correct errors or modify positions in the course of [its rulemaking] proceeding." *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 387 (D.C. Cir. 2012) (citation omitted). At bottom, once the VA finalizes its intended clarification of section 3.816(f)(3) to reflect its policy for paying newly-identified claimants, "this [motion] goes away without the need for judicial review." *Id.* at 388.

B. Plaintiffs fail to identify any harm from the current version of section 3.816(f)(3) as the VA interprets it

There is likewise little, if any, potential hardship to Plaintiffs from withholding decision—if a judicial decision is necessary at all—until after the VA has completed the rulemaking process. To establish hardship, a plaintiff "must show that postponing review imposes a hardship on them

that is immediate, direct, and significant." *Colwell v. Dep't of Health & Hum. Servs.*, 558 F.3d 1112, 1128 (9th Cir. 2009) (citation omitted). Plaintiffs here cannot meet that standard.

Plaintiffs admit that the VA has "paid full shares of benefits to the survivors identified" by class counsel once the VA confirmed those survivors' eligibility. Mot. 5. Further, Plaintiffs acknowledge that the VA will be modifying the regulatory language of section 3.816(f)(3) to effectuate how it implements that provision. *Id.* Plaintiffs do not, however, identify any cases in which a newly-identified child has been denied benefits as a result of the allegedly improper implementation of section 3.816(f)(3). Indeed, as recently as last month, the VA paid a newly-identified child his share of an award amount before it had recovered any recoupment from the original payees. Frueh Decl. ¶ 7 & Ex. A. And though Plaintiffs allude to "some cases" and "a number of children of *Nehmer* class members" they do not identify any of these cases, or otherwise claim that in any of these cases the child claimant in question remains unpaid. Mot. 4. Put differently, it is unclear what harm the allegedly improper sentence of section 3.816(f)(3) is causing or why it needs to be rescinded "immediately" as Plaintiffs demand. Mot. 2, 8.

In an effort to generate urgency for their demand, Plaintiffs allude to a wholly separate *Nehmer* process now underway: the ongoing readjudications of the claims of over 60,000 Blue Water Navy veterans. Mot. 5, 7. Plaintiffs claim a "pressing need" for the immediate rescission of the final sentence of section 3.816(f)(3) is necessary so that it does not "adversely affect" those readjudications. *Id.* Yet there is no "pressing need" for judicial intervention because the final sentence of section 3.816(f)(3) has no bearing on the Blue Water Navy readjudications now underway. As detailed above, section 3.816(f)(3), if it applies at all, applies only *after* the VA has completed a readjudication, only *after* the VA has identified all payees for the readjudicated award amount, only *after* the VA has paid all such payees to deplete the entire award amount, and only *after* a newly-identified child payee comes forward to claim his or her share of that award, assuming one comes forward at all. Frueh Decl. ¶ 14. The readjudication process is wholly separate from the (comparatively rare) process of paying claimants who come forward after the

full award amount has already been disbursed—the issue addressed by Plaintiffs' Motion. Indeed, the readjudications, by necessity, must be completed and the payment amounts be fully disbursed before any newly-identified payee could come forward to assert an entitlement to his share of the award. *Id.* In short, despite Plaintiffs' effort to link the timing of the Blue Water Navy readjudications and the purported need for immediate judicial relief, there is no connection between those readjudications and any eventual claims by newly-identified claimants.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion should be denied or, alternatively, the Court should stay consideration of Plaintiffs' Motion pending the VA's completion of the rulemaking process for section 3.816(f)(3).[2]

Respectfully submitted,

Dated: October 15, 2021

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[2] If the Court is inclined to afford judicial rescission relief to Plaintiffs, given the above-noted burdens associated with a standalone rulemaking for section 3.816(f)(3), the Court should simply invalidate the final sentence of section 3.816(f)(3) rather than ordering the VA to immediately rescind it.

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of October, 2021, I electronically transmitted the foregoing document, with attachments, to the Clerk of Court using the ECF System for filing.

/s/ M. Andrew Zee
M. ANDREW ZEE