

An Army of Many: Veterans' Benefits Class Actions in the U.S. Court of Appeals for Veterans Claims

Updated December 11, 2019

Update 12/11/2019: On December 6, 2019, the U.S. Court of Appeals for Veterans Claims issued a decision in [Skaar v. Wilkie](#) certifying a class action in an appeal of a Board of Veterans' Appeals decision regarding disability compensation based on in-service exposure to ionizing radiation. The majority [reasoned](#) that, "absent any express indication from either Congress or the [U.S. Court of Appeals for the] Federal Circuit" that the court lacked the authority to do so, it would employ class action procedures in appeals. The certified class [includes](#) veterans whose claims have been denied by the U.S. Department of Veterans Affairs (VA); veterans whose claims are pending before VA; and veterans who have not yet filed VA claims. One judge [dissented in part](#), arguing that the majority improperly included veterans who had not yet filed claims, while excluding other veterans who could no longer appeal previously denied claims. Three judges [dissented in full](#), arguing that the court exceeded its jurisdiction and "[seized more power](#) than Congress allotted to it with unsound legal innovations." VA will likely appeal this decision to the Federal Circuit.

The original post from December 3, 2019, is below. A more detailed update of this Sidebar will occur if the Federal Circuit takes action in Skaar or another case concerning the CAVC's class-action jurisdiction.

In September, the U.S. Court of Appeals for Veterans Claims (CAVC) issued a decision in [Wolfe v. Wilkie](#) requiring the U.S. Department of Veterans Affairs (VA) to readjudicate the claims of a group of veterans seeking reimbursement from VA for emergency medical care at non-VA hospitals—claims that [potentially total billions of dollars](#). *Wolfe* is the most recent in a line of decisions beginning with [Monk v. Shulkin](#) in 2017, in which the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) held that the CAVC has the authority to consider class actions. Since then, the CAVC has addressed class action motions on an ad hoc basis while developing formal class action procedures. To date, the CAVC has certified two classes—in [Wolfe](#) and [Godsey v. Wilkie](#).

These cases require the CAVC to break new legal ground to develop class action procedures suited to that court. More tangibly, these decisions may require VA to reallocate its resources to process affected claims that could result in billions of dollars in awards. This Sidebar (1) briefly introduces class actions and the

Congressional Research Service

<https://crsreports.congress.gov>

LSB10376

CAVC; (2) examines the history and scope of the CAVC's emerging class action authority; and (3) discusses several issues for Congress related to that power.

Background

What Are Class Actions?

Class actions have [long served](#) as procedural tools allowing courts to resolve large numbers of similar individual disputes at once, rather than in separate cases. When members of a large group (the “class”) have disputes with the same defendant that [involve common questions of law or fact](#), a single member of the class (the “class representative” or “named plaintiff”) can potentially sue the defendant not only on the individual member's own behalf, but also on behalf of the other class members to resolve those common questions. If the proposed class action satisfies [various prerequisites](#), the court will “certify” the class, and the case proceeds as a class action. The named plaintiff represents the other class members, who do not actively participate in the litigation, though the outcome of the case can affect the legal rights of the entire class.

In the federal district courts, [Federal Rule of Civil Procedure 23](#) (Rule 23) governs the class action process. (For more detail on Rule 23 class actions in the district courts, see [CRS Report R45159](#), *Class Action Lawsuits: A Legal Overview for the 115th Congress*, by Kevin M. Lewis and Wilson C. Freeman.) The district courts, using Rule 23 class action procedures, have heard several class actions related to veterans' benefits, with issues ranging from [whether VA discriminated](#) against conscientious objectors by denying them educational benefits to [whether veterans were entitled](#) to monetary damages arising from the loss of a VA laptop containing their personal information. In *Nehmer v. Department of Veterans Affairs*, for example, a group of veterans successfully challenged VA's implementation of the [Veterans' Dioxin and Radiation Exposure Compensation Standards Act](#), which authorized VA to award benefits for certain disabilities (including several types of cancer) caused by exposure to Agent Orange. In another case, *National Association of Radiation Survivors v. Derwinski*, plaintiffs brought a class action challenging a \$10 statutory cap on the amount an attorney could charge for representing a veteran before VA. (The veterans lost, but Congress later [repealed the \\$10 limit](#).)

What is the CAVC?

Although veterans have used class actions in the [federal district courts](#) to challenge VA policy since at least 1974, the CAVC—the court with exclusive jurisdiction over VA benefits determinations—historically has not employed class action procedures. The reasons for this stem from the CAVC's jurisdiction and its early judges' understanding of the court's powers.

The CAVC is a specialized federal court created by the [Veterans' Judicial Review Act of 1988](#). (For more discussion of the CAVC and its jurisdiction, see [CRS In Focus IF11365](#), *U.S. Court of Appeals for Veterans Claims: A Brief Introduction*, by Jonathan M. Gaffney.) Because it is not a district court, the CAVC is [not bound](#) by the Federal Rules of Civil Procedure. Instead, it has statutory authority under [38 U.S.C. § 7264](#) to prescribe its own rules of practice and procedure.

The CAVC has [exclusive jurisdiction](#) to review decisions of the [Board of Veterans' Appeals](#) (BVA), VA's top-level administrative tribunal, generally involving entitlement to veterans' benefits. The CAVC also has authority under the [All Writs Act](#) to issue writs—special types of court orders—in aid of its prospective jurisdiction. The CAVC uses its writ powers to “[compel action](#) of the Secretary [of Veterans Affairs] unlawfully withheld or unreasonably delayed.” Although the CAVC uses similar [internal procedures](#) to decide appeals and petitions, the two types of cases address very different questions. Appeals of BVA decisions require the CAVC to [address the merits](#) of a benefits claim—that is, whether the BVA correctly denied entitlement to benefits. In contrast, petitions for writs [cannot address the merits](#)

of a claim; instead, the CAVC looks to [whether VA is taking the appropriate steps](#) to decide pending claims without unreasonable delay.

Until recently, the CAVC did not consider class actions. In 1991, the CAVC heard two cases—*Harrison v. Derwinski* and *Lefkowitz v. Derwinski*—in which the appellants asked the court to create class action procedures. In these two opinions, the CAVC held that it would not consider class actions for three reasons: (1) it lacked the power to do so; (2) a class action procedure in an appellate court would be “highly unmanageable”; and (3) the court’s precedential decisions made class action procedures unnecessary because those decisions were binding on VA in all pending and future cases. The CAVC based its conclusion that it lacked authority to consider class actions on three statutes:

- [38 U.S.C. § 7252](#) gives the CAVC exclusive jurisdiction to review BVA decisions but does not otherwise define the court’s jurisdiction.
- [38 U.S.C. § 7261\(c\)](#) prohibits the CAVC from conducting “trial[s] de novo” on the Secretary’s or BVA’s factual findings. Essentially, the CAVC cannot decide, in the first instance, whether a veteran is entitled to benefits; it can only review the BVA’s decision to award or deny benefits.
- [38 U.S.C. § 7266\(a\)](#) requires a person “adversely affected” by a BVA decision to file a notice of appeal (NOA) with the CAVC to obtain review. Unless a claimant files an NOA, the CAVC lacks jurisdiction to review the BVA decision.

Harrison and *Lefkowitz* remained settled law until April 2017, when the Federal Circuit issued its decision in *Monk*.

Monk v. Shulkin

[Conley F. Monk, Jr.](#), served in the U.S. Marine Corps between 1968 and 1970. [He received](#) an other-than-honorable discharge in lieu of a court-martial. [In 2012](#), Mr. Monk filed a claim for VA disability benefits for post-traumatic stress disorder. VA [denied his claim](#) because Mr. Monk’s other-than-honorable discharge barred him from receiving VA benefits. Mr. Monk [appealed](#) to the BVA. [Although](#) VA took steps to develop Mr. Monk’s case, including providing him with a hearing, the BVA had not decided Mr. Monk’s appeal as of April 2015.

Mr. Monk then [filed](#) a petition for extraordinary relief, requesting that the CAVC order the BVA to decide his appeal. Mr. Monk [also sought](#) aggregate relief for himself and all “similarly situated veterans” asking the CAVC to order VA to promptly decide any appeal that had been pending for more than one year. The CAVC [denied](#) Mr. Monk’s request for aggregate action, concluding that, under *Harrison* and *Lefkowitz*, it lacked authority to consider class actions and that, “in the absence of such authority, no other arguments matter.” The CAVC [also denied](#) Mr. Monk’s petition for individual relief, reasoning that he had not shown that BVA’s delay in deciding his case warranted extraordinary relief. Mr. Monk appealed both decisions to the Federal Circuit.

The Federal Circuit [reversed](#) the CAVC’s decisions, [holding](#) that the CAVC had authority to certify and adjudicate class action cases. The court [provided](#) three reasons for its conclusion. [First](#), it explained that the All Writs Act “unquestionably applies” in the CAVC and “has provided authority to aggregate cases in various contexts.” [Second](#), the Federal Circuit held that the CAVC’s broad authority to prescribe its rules of practice and procedure allowed the CAVC to create procedures for class actions or other methods of aggregation. [Third](#), the Federal Circuit reasoned that there was “no persuasive indication that Congress intended to *remove* class action protection for veterans” when it created the CAVC. [Accordingly](#), the Federal Circuit reversed the CAVC’s holding that it could not consider class actions, and remanded the case for the court to address both Mr. Monk’s class action motion and his individual petition for relief.

The Federal Circuit’s decision created a new way for veterans to use class actions to challenge VA decisions. Before Congress created the CAVC, [no federal court could review](#) VA decisions regarding “the provision of benefits.” As a result, veterans’ class actions in the district courts could address [only general challenges](#) to the constitutionality of statutes—plaintiffs could not challenge statutes or regulations as applied to individual veterans’ cases. The federal courts of appeals [are split](#) on whether, after the creation of the CAVC, district courts retain the jurisdiction to decide these types of constitutional challenges or whether claimants must bring such challenges in the CAVC. A majority of the courts to consider the question [agree](#) that, although the CAVC may now decide constitutional challenges to VA statutes, the district courts may continue to do so. But the CAVC has the unique ability to [review VA decisions](#) affecting the [provision of benefits](#). Claimants can therefore bring class actions in the CAVC that they [could not bring](#) in the federal district courts—namely, challenges to VA’s decisions to award or deny benefits and to VA’s processing of those cases.

After the Federal Circuit remanded *Monk*, the CAVC [reconsidered](#) whether to grant Mr. Monk’s motion for class certification. In a [plurality opinion](#) with [several concurring](#) opinions, a majority of judges agreed that the CAVC would use class action procedures in appropriate cases arising from petitions. The court [“anticipate\[d\] that, at some point, it \[would\] adopt a rule on aggregate procedures that is appropriate.”](#) Until it adopts its own rules, the CAVC has [elected](#) to use [Rule 23](#) as a “guide” for its proceedings. Applying Rule 23, an evenly divided CAVC [denied](#) Mr. Monk’s motion for class certification. Mr. Monk appealed the CAVC’s denial of his class certification motion to the Federal Circuit, which heard oral arguments in his case [in early December](#).

Veteran Class Actions After *Monk*

Since the Federal Circuit’s *Monk* decision, the CAVC has received numerous class certification motions and has decided seven, granting two such motions. [sTable 1](#) summarizes these decisions.

Table 1. CAVC Disposition of Class Certification Motions

Case	Date of Decision	Proposed Class	Result
Rosinski v. Shulkin	January 26, 2018	Attorneys seeking access from VA to their clients’ draft VA rating decisions	Denied
Monk v. Wilkie	August 23, 2018	VA claimants who had waited more than 12 months for a VA decision after an initial appeal	Denied
Thompson v. Wilkie	October 24, 2018	VA claimants who “faced significant financial or medical hardship” and had waited more than 12 months for a VA decision after an initial appeal	Denied
Prewitt v. Wilkie	November 30, 2018	Veterans who did not receive notices of appellate rights in VA decisions issued between January 1980 and February 1983	Denied
Godsey v. Wilkie	June 13, 2019	VA claimants who had waited more than 18 months for VA to certify their appeals to the BVA	Granted; VA ordered to act on all class members’ claims within 120 days
Ward v. Wilkie	June 14, 2019	Veterans who “are or will be subject to” VA’s erroneous interpretation of whether a disability has worsened	Denied

Case	Date of Decision	Proposed Class	Result
Wolfe v. Wilkie	September 9, 2019	Claimants whose reimbursement claims for non-VA emergency care were denied (or will be denied) because the expenses were deductible or coinsurance payments	Granted; all VA denials of class members' claims invalidated; VA ordered to develop a plan to adjudicate the claims

Several other class certification motions remain pending, including [motions to certify classes arising out of appeals](#), rather than petitions.

Although the CAVC only recently decided *Godsey* and *Wolfe*, some effects of those decisions have already emerged. Since *Godsey*, VA has processed 2,544 cases that met the requirements of the certified class, either forwarding those cases to the BVA for a decision or ordering additional evidentiary development. And VA estimates that nearly 600,000 veterans may be affected by *Wolfe*, which could potentially require VA to reimburse billions of dollars of expenses. Although VA has started to notify the veterans affected by *Wolfe*, the Secretary has asked the CAVC to suspend its order so that VA can appeal the decision, asserting that full compliance with the order would unnecessarily strain VA's resources.

Congressional Considerations

Because the CAVC's class action authority is still taking shape, Congress could guide the CAVC as it develops its procedures. Congress could, for example, clarify the court's jurisdiction and authority as they relate to class actions or develop other ways to aggregate VA benefits claims.

CAVC Authority

In *Monk*, the Federal Circuit relied on the CAVC's All Writs Act authority, the lack of contrary statutory authority, and the CAVC's power to create its own rules to hold that the CAVC could certify classes in cases arising out of petitions for writs. The two classes the CAVC has certified to date also arose from petitions and concerned VA's alleged failure to take certain actions. Neither court has decided whether the CAVC has authority to certify classes in cases arising out of appeals of BVA decisions, which would address the merits—rather than VA's processing—of veterans' benefits claims (though at least one such case is pending before the CAVC). Nor has either court discussed who could be a member of such a class. Likewise, the CAVC has not addressed whether the prudential reasons it gave in *Harrison* and *Lefkowitz* for not certifying classes in appeals—that classes would be unmanageable and unnecessary because the CAVC's decisions are precedential—still counsel against doing so.

Congress could help answer these questions in several ways. First, because the Federal Circuit's decision in *Monk* was based, in part, on the lack of any contrary congressional intent, Congress could explicitly authorize or prohibit the CAVC from considering class actions, either generally or in certain cases (e.g., only in petitions). Likewise, Congress could clarify whether the CAVC could certify a class including members without final BVA decisions (over whom the CAVC would ordinarily lack jurisdiction).

Agency Aggregation

Besides defining the CAVC's class action authority, Congress could create—or authorize VA to develop—a mechanism for addressing VA benefit claims on an aggregate basis. Allowing VA to aggregate claims at the agency level could sidestep some of the questions about the CAVC's jurisdiction and authority. Aggregation could also help VA decide common questions of fact across a large number of claims, potentially saving agency resources. Other federal agencies, including the Equal Employment Opportunity Commission, the Merit Systems Protection Board, and the Consumer Financial Protection Bureau, already have such aggregate procedures in place.

Author Information

Jonathan M. Gaffney
Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.