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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

PLAINTIFFS' RESPONSE TO DEFENDANTS' RESPONSE TO THE COURT'S PROPOSED INJUNCTION AND JUDGMENT

Complaint filed January 7, 2009

Pursuant to the Court's October 11, 2013 Notice of Intended Amended Order, Injunction and Judgment (Docket No. 541), Plaintiffs hereby respond to Defendants' October 21, 2013 Response to the Court's Proposed Injunction and Judgment (Docket No. 542).

I. INTENDED AMENDED ORDER REGARDING APA MEDICAL CARE CLAIM

In the Court's Intended Amended Order (Docket No. 541-1 at 50), the Court has now "found that AR 70-25 entitles Plaintiffs to medical care for any disabilities, injuries or illnesses suffered as a result of participation in the experimentation program."[1] Despite this unequivocal finding that AR 70-25—promulgated by the Army—creates a duty to provide Plaintiff class members with medical care, the Court states that it will not "enjoin the DOD or the Army to provide health care, because the DVA is required to do so." (*Id.*)

Plaintiffs respectfully submit that the Court's finding of a medical care duty, coupled with the Army's admission that it has not provided such medical care (Docket No. 495 at 39 n.39), require the Court to order the Army to provide such care. Section 706(1) of the Administrative Procedure Act ("APA") does not leave the matter to the Court's discretion; it directs that "[t]he reviewing court *shall* . . . compel agency action unlawfully withheld or unreasonably delayed." *Norton v. S. Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 62 (2004) (citing 5 U.S.C. § 706(1)) (emphasis added). This APA mandate sits in sharp contrast to the court's discretionary mandamus power. 28 U.S.C. § 1361. As the Ninth Circuit has stated, once a court determines that agency action is being unlawfully withheld or unreasonably delayed, the APA *requires* the court to compel agency action. *Brower v. Evans*, 257 F.3d 1058, 1068 n.10 (9th Cir. 2001) ("'Shall' means shall.") (citing *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187-88 (10th Cir. 1999) (the use of the word "shall" means courts "must compel agency action unlawfully withheld")). And it is the Army, after all, that has "withheld" the "agency action" necessary to

[1] In light of the Court's new finding concerning duty, the Court should also add a corresponding declaration to the Intended Judgment (Docket No. 541-2) concerning medical care: "The Court also declares that AR 70-25 entitles Plaintiffs to medical care for any disabilities, injuries or illnesses suffered as a result of participation in the experimentation program."

comply with its own regulation. Plaintiffs have no further burden to establish their entitlement to relief.

The Court's intended decision nevertheless denies Plaintiffs injunctive relief, stating simply, and without legal citation, that "[t]he Court will not enjoin one government agency to provide health care when another agency has been congressionally mandated to do so." (Docket No. 541-1 at 47 (referring to the DVA).) Of course, there has been no "congressional[] mandate[]" to "another agency" (i.e., the DVA) to provide medical care to the class of human test subjects. Nor is there any other reason in the record to refuse the injunction the APA mandates.

In light of the Court's ruling finding a duty, the Court's intended decision that it will not enjoin the Army suggests that it views the DVA as acting on the Army's behalf to provide care pursuant to AR 70-25. But there is no evidence in the record to support such a conclusion. In fact, the evidence is to the contrary. The Army admitted during discovery that it has no agreement with the DVA for that agency to provide such care on its behalf. (Docket No. 359-61 at RFA No. 7 ("neither DoD nor DoA [the Army] has any formalized, written agreements with VA for VA to provide health care specifically to TEST SUBJECTS.").) Furthermore, even if the DVA could somehow be considered the Army's agent in providing the medical care to which the test subjects are entitled under AR 70-25 (which no Defendant has ever argued), the Court has not evaluated evidence or made any determination that DVA is actually providing such medical care. Absent an injunction requiring that the Army provide medical care pursuant to AR 70-25, this regulatory duty would be rendered unenforceable and Plaintiffs will have no remedy for the injury caused by the Army's unlawful failure to act.

The Court continues that "Plaintiffs have not provided any evidence of a material dispute of fact that class members cannot access the DVA health care system or that they are denied compensation for their service-connected injuries." (Docket No. 541-1 at 48.) But Plaintiffs had no such burden at summary judgment. Plaintiffs' motion for partial summary judgment focused exclusively on duty (Docket No. 490). And none of Defendants' arguments on the merits in their summary judgment motion (Docket No. 495 at 28-39) shifted the burden to Plaintiffs to produce evidence that they could not access DVA health care, were being denied compensation for

service-connected injuries, or that DVA was systematically failing to offer them care. Even if those issues had been raised, they are irrelevant to the APA analysis.

Indeed, to prevail on Plaintiffs' APA medical care claim, Plaintiffs needed to show only that the Army has "failed to take a discrete agency action that it is *required* to take." *Sea Hawk Seafoods, Inc. v. Locke*, 568 F.3d 757, 766 (9th Cir. 2009) (quoting *SUWA*, 542 U.S. at 64)). The Army's admission that it is not providing medical care pursuant to AR 70-25 proves that the Army is unlawfully withholding medical care. (Docket No. 495 at 39 n.39 (citing No. 496-58); No. 541-1 at 50 (finding duty under AR 70-25).) Thus, the Court "shall compel" the agency action being "unlawfully withheld." *See* 5 U.S.C. § 706(1); *SUWA*, 542 U.S. at 62; *Brower v. Evans*, 257 F.3d at 1068 n.10. Accordingly, Plaintiffs respectfully request that the Court enter an injunction similar to its Intended Injunction regarding notice (Docket No. 541-3) that compels the Army to provide class members with "medical care for any disabilities, injuries or illnesses suffered as a result of participation in the experimentation program." (*See* Docket No. 541-1 at 50.) Otherwise, the Court has identified an injury, but provided no remedy.

In any event, the record does contain substantial evidence that DVA has systematically denied testing program related claims and devised a differential adjudication scheme which prejudices test subject's claims. (*See, e.g.*, Docket No. 502 at 24-35 (Plaintiffs' Reply in Supp. of Sum. Judg. Mot.); No. 503-17 (J. Salvatore Tr.); No. 503-18 at 497:5 (D. Abbot Tr. ("I'm sure it was [denied]")); No. 503-20 at 4 (As of January 2010, only "two of the 86 decisions . . . include a grant of service connection"); No. 503-21 at 12 ("two of the 86 decisions"); No. 503-22 at 10 ("two of the 79 decisions"); No. 503-13 at 2 (Training Letter inaccurately instructs that there are "no significant long-term health effects in Edgewood Arsenal test participants"); No. 503-14 (draft Training Letter); No. 386 (T. Josephs Decl.); No. 389-2 at 57:5-21 (W. Blazinski Tr.); No. 376 (W. Blazinski Decl.); No. 389-5 at 77:25–78:19 (D. Dufrane Tr.).) The Court did not address this evidence in reaching its conclusion that the existence of the DVA scheme relieves the Army from providing medical care as required by AR 70-25. The Court merely relies on the existence of the DVA system without any review of the DVA's performance (or lack of performance) of the AR 70-25 duty.

Even if DVA could somehow fulfill the Army's medical care duty (which Plaintiffs respectfully submit it cannot), there is at least a genuine issue of material fact concerning whether the DVA is fulfilling the Army's duty. If the Court is going to base its decision on these grounds, Plaintiffs are at least entitled to a trial-type evidentiary hearing regarding DVA's purported performance of the Army's regulatory duty (or unlawfully withholding thereof).

II. INTENDED INJUNCTION & DEFENDANTS' RESPONSE

Defendants' Response to the Court's Proposed Injunction and Judgment (Docket No. 542) is really a motion for reconsideration in disguise that recycles numerous arguments the Court has already rejected. Defendants once again argue that "the 'duty to warn' language in the 1988, 1989 and 1990 versions of AR 70-25 is not properly the subject of a section 706(1) claim in the first instance" (*id.* at 1), and reargue that the "duty to warn" under AR 70-25 cannot form "the basis for a prospective injunction" (*id.* at 2). But the Court has already rejected these same arguments when issuing its July 24, 2013 Summary Judgment Order (Docket No. 537 at 21-44).

The Court has carefully crafted a minimally intrusive injunction requiring the Army to comply with its notice duty (Docket No. 541-3)—a duty which even now the Army refuses to acknowledge. Defendants have offered no compelling reasons to justify the Court reversing its decision in Plaintiffs' favor ordering the Army "to provide test subjects with newly acquired information that may affect their well-being that it has learned since its original notification, now and in the future as it becomes available." (Docket No. 537 at 44, 72.)

Defendants also mention in passing that "the Court should not retain continuing jurisdiction 'to enforce the terms of this Injunction and Order,' as such enforcement would necessarily involve oversight into the adequacy of the Army's efforts." (Docket No. 542 at 5.) But this is standard and uncontroversial language for any injunction; of course the Court may retain jurisdiction to ensure that its injunctive order is followed. *See, e.g.*, *Sierra Club v. Penfold*, 857 F.2d 1307, 1321-22 (9th Cir. 1988) (court did not abuse discretion in retaining jurisdiction to review environmental studies as part of injunctive relief under APA); *Colorado Envtl. Coal. v. Office of Legacy Mgmt.*, 819 F. Supp. 2d 1193, 1225 (D. Colo. 2011), *amended on reconsideration*, No. 08-cv-01624, 2012 WL 628547, at *6 (D. Colo. Feb. 27, 2012) (issuing

injunctive relief under the APA "subject to the Court's continuing jurisdiction to enforce full compliance" with the injunction). Otherwise, even flagrant violations of the Court's order would require filing a new separate lawsuit.

Defendants also ask the Court to enlarge the proposed time periods in the Intended Injunction to 90 days and 120 days. (Docket No. 542 at 5.) Plaintiffs are flexible and defer to the Court's judgment concerning these deadlines. In light of the advanced ages of the Plaintiff class members and the fact that this lawsuit has been pending since January 2009, however, time is of the essence. Defendants have also been aware for three months that the Court was going to enter an injunction concerning notice.[2] (*See* Docket No. 537 at 44, 72.)

III. INTENDED JUDGMENT

Along with adding a declaration that AR 70-25 entitles Plaintiffs to medical care, as explained above, Plaintiffs also request that the Court add the following sentence to the final judgment: "The issues of fees and other awardable expenses will be reserved until after appeal." Pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1), "a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action," subject to exceptions. Plaintiffs request, and assume Defendants would not object, that these issues be reserved until post-appeal. *See* Civil L.R. 54-5(a); 10 Moore's Federal Practice § 54.151 (Matthew Bender 3d Ed.).

Dated: October 25, 2013

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[2] Plaintiffs believe there is a small typo on page 2 of the Court's Intended Injunction. Plaintiffs assume that the Court meant to write the word "acquired," not "required." (*See* Docket No. 541-3 at 2:6.)