UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MILITARY-VETERANS ADVOCACY,
Petitioner,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Respondent.

PETITION FOR REVIEW OF VETERANS AFFAIRS RULE MAKING PURSUANT TO 38 U.S.C. § 502

Basis of the Petition

Pursuant to 38 U.S.C. § 502, Federal Rules of Appellate Procedure Rule 15(a), and Federal Circuit Rules 15 and 47.12, Petitioner Military-Veterans Advocacy (MVA) petitions the Court for review of a final rule entitled VA Claims and Appeals Modernization which was issued by Respondents in the Federal Register Vol 84 No. 13 at 138 (January 18, 2019) hereinafter the regulation). The regulation was effective on February 19, 2019.

Petitioner's Standing

Military-Veterans Advocacy, Inc., hereinafter (MVA), is a non-profit corporation organized under the laws of Louisiana who has been granted tax exempt status under § 501c(3) of the Internal Revenue Code. MVA litigates,

legislates and educates on behalf of members of the military and military veterans. This includes pursuing appeals on behalf of veterans who have been improperly denied earned veterans benefits. MVA submitted comments and objections to the Proposed Rule which were not adopted in the final rule.

Jurisdiction

Jurisdiction is alleged under 38 U.S.C. § 502 for judicial review pursuant to Chapter 7 of Title 5 of the United States Code, specifically 5 U.S.C. § 706. This Court has jurisdiction under 5 U.S.C. § 553.

The regulation does constitute final agency action for purposes of a Chapter 7 of Title 5 United States Code review. Review is proper under 5 U.S.C. § 704 since there is no other remedy at law.

FACTUAL BACKGROUND

In the summer of 2017, Congress passed and President Trump signed the Veterans Appeals Improvement and Modernization Act of 2017 (Pub. L. 115-55) (hereinafter AMA). The law was touted as a means to streamline the veterans appeals system and reduce the backlog of 450,000 appellate claims. The statute sets up three dockets at the Board of Veterans Appeals (hereinafter BVA) for appeals consideration. The first docket considers the appeal on the record before the agency. The second docket allows the submission of

additional evidence. The third docket allows for additional evidence and a live or video hearing before a Boardmember, euphemistically and colloquilly known as a "Veterans Law Judge.[1]" The statute also abolished the Decision Review Officer (DRO) process and replaced it with a higher level review that does not allow for the submission of additional evidence. It further strips the veteran of his "duty to assist" rights at the appellate stage. It does authorize submission of a "supplemental claim" based on new evidence. The duty to assist still attaches to supplemental claims, although the Secretary has impermissibly re-defined supplemental claims.

The Proposed Rule was published in the Federal Register Vol. 83 No. 155 at 39818 (August 10, 2018). MVA filed their comments on October 5, 2018. Other comments were filed by several organizations including the National Organization of Veterans Advocates, the Disabled American Veterans, Swords to Plowshares, National Veterans Legal Service Project, Tommy Klepper, Paralyzed Veterans of America, Linerman and Mark and the

[1] Constitutionally, only Congress can establish a judiciary and they have not designated members of the Board of Veterans Appeals as Judges. The VA has unilaterally referred to them as Veterans Law Judges or VLJs, however for purposes of this case they will be referred to by their statutory designation as Boardmembers.

Veterans of Foreign Wars. Some of the recommendations were incorporated into the final rule. Many, including those filed by MVA, were not.

Subsequent to the enactment of the AMA, on October 24, 2017, MVA representatives met with then Secretary David Shulkin, MD, to discuss several subjects including appellate reform. At Secretary Shulkin's recommendation, MVA met with Cheryl Mason, Chairperson of the BVA, on December 11, 2017, to discuss MVA's concerns with the AMA and any subsequent rule.

Despite these efforts on the part of MVA, the Secretary issued a final rule that is arbitrary and capricious and in contravention of their statutory authority and any reasonable interpretation thereof.

Application of the Pro-Claimant Canon of Statutory Construction

It is the Secretary's duty to interpret statutes in the most veteran-friendly manner. The pro-claimant or pro-veteran canon has been repeatedly recognized as an accepted canon of statutory construction. A unanimous Supreme Court re-affirmed "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson ex rel. Henderson v. Shinseki* 561 U.S. 428, 441, 131 S.Ct. 1197, 1206 (2011). The Federal Circuit has also recognized the paternalistic non-adversarial intent of the system designed by Congress. *Gambill v. Shinseki*, 576 F.3d 1307, 1317

(Fed. Cir.2009). The *Gambill* court described the process as uniquely pro-claimant." *Id*. at 1316.

As recently as last year, Judge O'Malley argued in dissent that there is little logic deferring to agency regulations "promulgated pursuant to statutory schemes that are to be applied liberally for the very benefit of those regulated." *Kisor v. Shulkin*, 880 F.3d 1378, 1379 (Fed. Cir. 2018)(O'Malley, J dissenting). *See also*, *Procopio v. Wilkie*, 913 F.3d 1371, 1382 (Fed. Cir. 2019) (O'Malley, J. Concurring).

Since the days of World War II, the United States, has properly recognized that "legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (citing *Boone v. Lightner*, 319 U.S. 561, 565 (1943). Military veterans have "been obliged to drop their own affairs and take up the burdens of the nation" (*Boone*, 319 U.S. at 575), "subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service." (*Johnson* v. *Robison*, 415 U.S. 361, 380 (1974)). Gone are the days of the veteran amputees squatting along the road to beg for pennies or the bonus marchers being forcibly dispersed by federal troops. Instead the United States

adopted the "long standing policy of compensating veterans for their past contributions by providing them with numerous advantages." *Regan* v. *Taxation with Representation*, 461 U.S. 540, 550-551 (1983). This led to the pro-claimant canon which requires interpretative ambiguities to be resolved in favor of the beneficiaries. See, *e.g.*, *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994); *Hodge* v. *West*, 155 F.3d 1356, 1361-1362 (Fed. Cir. 1998) (use of canon in construing regulations).

Review of the Secretory's actions must take place via this unique pro-claimant, pro-veteran canon of construction,

38 CFR § 20.202(c) is Ultra Vires, Arbitrary and Capricious

The Secretary has interpreted and implemented 38 U.S.C. § 7105(a) (4) in his final rule at 38 CFR § 20.202(c). The statute reads as follows:

> (4) The Secretary shall develop a policy to permit a claimant to modify the information identified in the notice of disagreement after the notice of disagreement has been filed under this section pursuant to such requirements as the Secretary may prescribe.

Although the statute does not prescribe time limitations on amendments, the Secretary has chosen to impose an arbitrary one year limitation. The final rule reads as follows:

> (c)(1) The information indicated by the claimant in paragraph (b) of this section determines the evidentiary record before the Board

> as described in subpart D of this part, and the docket on which the appeal will be placed, as described in Rule 800 (§ 20.800). Except as otherwise provided in paragraph (2) of this section, the Board will not consider evidence as described in Rules 302 or 303 (§§ 20.302 and 20.303) unless the claimant requests a Board hearing or an opportunity to submit additional evidence on the Notice of Disagreement.
> (2) A claimant may modify the information identified in the Notice of Disagreement for the purpose of selecting a different evidentiary record option as described in paragraph (b) of this section. Requests to modify a Notice of Disagreement must be made by completing a new Notice of Disagreement on a form prescribed by the Secretary, and must be received at the Board within one year from the date that the agency of original jurisdiction mails notice of the decision on appeal, or within 60 days of the date that the Board receives the Notice of Disagreement, whichever is later. Requests to modify a Notice of Disagreement will not be granted if the appellant has submitted evidence or testimony as described in §§ 20.302 and 20.303.

Petitioner took the lead in requesting Congress to require the Secretary to promulgate rules to allow a veteran to amend the Notice of Disagreement and to transfer cases between the dockets. http://www.militaryveteransadvocacy.org/sites/default/files/written%20testimony.517.SVAC_.complete.finalwpd.pdf. Liberal amending procedures are the norm in both courts and other federal administrative tribunals. Nothing in the statute, the legislative history or the negotiations between petitioner and the Senate Committee envisioned any time limit on the ability to amend or transfer between dockets.

The reason for liberality is clear. Many veterans become dissatisfied with the Veterans Service Organizations (VSO)s and seek assistance from attorneys. Reviews of the record normally reveals that the case preparation is woefully inadequate. There is a tendency to select a "quicker" avenue without adequately preparing an evidence package. They tend to waive hearings and the right to submit additional documentation. If one year has passed since the denial by the agency of original jurisdiction, the attorney is locked in to the defective choices of the non-attorney.

Additionally, the ability to amend the notice of disagreement or to transfer to other dockets is cut off if evidence or testimony has been submitted. There is nothing in the statute to authorize such a draconian action.

At a minimum, due process requires that there be a reasonable amount of time for a new power of attorney or attorney to review the case, amend the notice of disagreement, submit additional evidence and if necessary transfer between dockets. While the 60 day post-NOD filing is a slight improvement, it does not solve the problem. To ensure effective representation, attorneys must be able to amend the NOD after they are retained.

The same reasoning applies in examining the Secretary's restriction on amending the NOD if the veteran submits evidence with the original NOD. An

inadequate submission can prevent the new representative from submitting supplemental and possibly dispositive evidence in the veterans case. Abrogation of the duty to assist at the appellate stage complicates the ability of the representative to secure and submit critical evidence.

Agency action amounts to arbitrary and capricious conduct when it contravenes rules "intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion." *See, Am. Farm Lines v. Black Ball Freight Serv.,* 397 U.S. 532, 538-39 (1970). Here the limitations on amendment have gutted the procedural benefit granted by Congress.

Not only is this provision of the Final Rule arbitrary and capricious, it has been adopted without authority. In taking this action, the Secretary has assumed authority that was never delegated by Congress. The plain meaning of the statute is clear. There is no limitation authorized by law. Even if this provision were ambiguous, application of the pro-claimant canon of statutory construction requires it be resolved in favor of liberal amendment. This *ultra vires* action must be set aside.

38 C.F.R. § 3.103(c)(2) is Arbitrary and Capricious as Written

One of the often touted but seldom followed hallmarks of the Veteran's

system is an emphasis on a paternalistic approach to granting benefits. § 3.103(c)(2) belies this non-adversarial approach by failing to notify veterans when evidence submitted will not be considered absent a supplemental claim form. With no notification, a veteran and his representative can be left under the mistaken impression that evidence will be considered when in fact it is filed without action. The solution to this egregious problem would be to issue a notice that a supplemental claim form is required and to provide that form to the veteran.

Here the VA places the burden on the veteran to search through the gargantuan decision papers to determine whether evidence is missing, They also allow a supplemental claim to be submitted at that time, if within one year of the initial denial. If more than one year has passed, the veteran will lose the earlier effective date.

38 CFR § 3.105(a)(1)(iv) is Arbitrary and Capricious and *Ultra Vires*

In the Final Rule, VA posits that clear and unmistakable error does not include the otherwise correct application of a statute or regulation where, subsequent to the decision being challenged, there has been a change in the interpretation of the statute or regulation." Although they claim that this is not a change in existing law, the pertinent statute, 38 U.S.C. § 7111 places no such

limitation on a finding of clear and unmistakable error. The Secretary relies upon 38 C.F.R. § 20.1403 which in itself, was an *ultra vires* action.

The enabling statute for clear and unmistakable error (CUE) is found at 38 U.S.C. § 7111 which states as follows:

> [a] A decision by the Board is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.
>
> [b] For the purposes of authorizing benefits, a rating or other adjudicative decision of the Board that constitutes a reversal or revision of a prior decision of the Board on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.
>
> [c] Review to determine whether clear and unmistakable error exists in a case may be instituted by the Board on the Board's own motion or upon request of the claimant.
>
> [d] A request for revision of a decision of the Board based on clear and unmistakable error may be made at any time after that decision is made.
>
> [e] Such a request shall be submitted directly to the Board and shall be decided by the Board on the merits, without referral to any adjudicative or hearing official acting on behalf of the Secretary.
>
> [f] A claim filed with the Secretary that requests reversal or revision of a previous Board decision due to clear and unmistakable error shall be considered to be a request to the Board under this section, and the Secretary shall promptly transmit any such request to the Board for its consideration under this section.

Conversely, 38 C.F.R. § 20.1403(e) reads as follows:

> [e] Change in interpretation. Clear and unmistakable error does not include the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a change in the interpretation of the statute or regulation.

This provision is an *ultra vires* usurpation of power on the part of the Secretary. Such an action is not only illegal, but goes against the paternalistic and non-adversarial system envisioned by Congress. In applying the canons of construction of veterans statutes, this Court must find that the regulation impermissibly burdens the veteran and must be set aside.

When a court articulates what a statute or regulation has always meant, it is not offering a "new" interpretation. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 278-79 & n. 32 (1994)(noting the "firm rule of retroactivity" for "a new rule announced in a judicial decision"); *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993)("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."); *Halpern v. Principi*, 384 F.3d 1297, 1302 (Fed. Cir. 2004) ("[W]here a court announces the meaning of a statute, the court proclaims what the statute has meant since enactment."). Absent the clear

pronouncement of Congress, the VA is not empowered to limit the ability of the veteran to secure his or her benefits.

38 CFR § 14.636 is Arbitrary, Capricious and *ultra vires*

The intent of Congress in enacting the AMA was to allow attorneys to charge a fee after the original denial. The Congress provided in 38 U.S.C. § 5904(c)(1) that:

> Except as provided in paragraph (4), in connection with a proceeding before the Department with respect to benefits under laws administered by the Secretary, a fee may not be charged, allowed, or paid for services of agents and attorneys with respect to services provided before the date on which a claimant is provided notice of the agency of original jurisdiction's initial decision under section 5104 of this title with respect to the case. The limitation in the preceding sentence does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court.

In their Final Rule, however, the Secretary has limited the ability of an attorney to charge a fee for some supplemental claims. The VA has defined certain supplemental claims as "initial claims" in 38 C.F.R. § 14.636(c)(1)(i),which states as follows:

> However, a supplemental claim will be considered part of the earlier claim if the claimant has continuously pursued the earlier claim by filing any of the following, either alone or in succession: A request for higher-level review, on or before one year after the date on which the agency of original jurisdiction issued a decision; a supplemental claim, on or before one year after the date on which the agency of original jurisdiction

> issued a decision; a Notice of Disagreement, on or before one year after the date on which the agency of original jurisdiction issued a decision; a supplemental claim, on or before one year after the date on which the Board of Veterans' Appeals issued a decision; or a supplemental claim, on or before one year after the date on which the Court of Appeals for Veterans Claims issued a decision.

Nothing in the statute gives the Secretary the power to redefine supplemental claims. What this provision does do is limit the stated intent of Congress. Congress intentional substituted the phrase "claimant is provided notice of the agency of original jurisdiction's initial decision under section 5104 of this title" for the words "notice of disagreement is filed." Under the previous law, the notice of disagreement was the point at which the initial decision was appealed.

The House report on the bill, House Report 115-35 at page 3 reiterates the intent of Congress as follows:

> Moreover, the bill would allow veterans to retain the services of attorneys and accredited agents who charge a fee when the agency of original jurisdiction (AOJ) provides notice of the original decision. Current law allows attorneys and accredited agent to charge a fee for services rendered after the veteran files a notice of disagreement.

As well as being *ultra vires*, this provision is both arbitrary and capricious. It is the initial notice, not the initial decision that actually triggers the right to retain an attorney. The unauthorized modification of the term

"supplemental claim" results in a limitation on the rights granted by Congress.. The Final Rule is designed to limit attorney participation in the supplemental claim process. This will hamper the preparation of a supplemental claim and result in less rather than more supplemental claims being filed. Is forcing attorneys to choose from twp unacceptable options. He or she must either waive the "duty to assist" benefit of the supplemental claim by filing a notice of disagreement or risk being deprived of the right to charge a fee if the supplemental claim is granted.

The Secretary has historically opposed attorney participation in the veterans benefit process. The revision of Congress' definition of supplemental claims is merely another way to undermine the ability of the veteran to secure competent legal assistance.

CONCLUSION

For the reasons delineated herein, the Court should find the portions of the regulation delineated herein as arbitrary and capricious and usupported by substantial evidence and invalidate it pursuant to 5 U.S.C. § 706

Respectfully Submitted,
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Certificate of Service

I hereby certify that two copies of the foregoing Petition for Review of Veterans Affairs Rule Making Pursuant to 38 U.S.C. 502 were mailed, first-class postage prepaid, addressed to Robert L. WIlkie, Secretary of Veterans Affairs Department of Veterans Affairs 810 Vermont Avenue, NW Washington, DC 20420 this 25th day of February, 2019.

//s// John B. Wells
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CERTIFICATE OF COMPLIANCE

The pleading contains 3357 words by computer word count, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a monospaced typeface using Wordperfect 8.0 with 14-point proportionally spaced face.

/s/ John B. Wells
John B. Wells

APPENDIX

FINAL RULE