

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Leroy O. Williams,
Petitioner,

vs.

United States,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Due Process Clause of the Fifth Amendment protects veterans seeking review of allegations for Clear and Unmistakable Error?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Through writ of certiorari to review the judgment below, Leroy Williams prays for justice.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit appears at Appendix A to this petition and is unpublished. The opinion of the United States Court of Appeals for Veterans Claims appears at Appendix B to this petition and is unpublished.

JURISDICTION

The United States Court of Appeals for the Federal Circuit issued its opinion and judgment on June 7, 2018. A copy is attached at Appendix A. A timely petition for rehearing was denied by the United States Court of Appeals for the Federal Circuit on August 22, 2018, and a copy of the order denying rehearing appears at Appendix C. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall... be deprived of life, liberty, or property without the due process of law.

38 U.S.C. § 7111(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.

STATEMENT OF THE CASE

Mr. Williams served honorably in the United States Army from November 1972 to March 1979. Appx.E-2. Service Medical Records (SMRs) evidence treatment for a concussion in 1975. Id. SMRs also show recurring and weekly psychiatric treatments prior to discharge; the direct result of the traumatic racist behavior of his supervising officer and many fellow soldiers. Id. In 2001, after diagnosing him with Post Traumatic Stress Syndrome (PTSD), the United States Department of Veterans Affairs (VA) granted Mr. Williams service connected veterans benefits and awarded him a 100 percent rating.

Mr. Williams filed numerous unsuccessful applications for mental and emotional disorders. Appx.E-2. In 1982, Mr. Williams applied to the VA for a Seizure Disorder that his then treating physician opined to be the product of mental illness.¹ Appx.E-3,4. The claim was denied the following month without ordering a Veterans Administration (now the Department of Veterans Affairs) examination. Appx.E-2. Instead, the VA relied on private medical records submitted by Mr. Williams. Appx.E-3. In 1984, he reopened the claim for Seizure Disorder but was denied the same month and without providing an examination. Id. In 1985, Mr. Williams appealed his claim to the Board of Veterans' Appeals (Board) and was denied. Id.

¹ Between the years of 1981 and 1984, Mr. Williams was additionally treated for hyperventilation syndrome, heat exhaustion, stomach disorders, and migraine headaches. Appx.E-3.

On motion and in 2014, Mr. Williams requested a revision of the October 1985 Board decision, alleging Clear and Unmistakable Error (CUE) for not providing him his duly required examination in 1984. Appx.E. Specifically, Mr. Williams showed that the private treatment records submitted on his behalf should not have replaced the required VA exam because they did not meet the specific regulatory conditions. Id. at 3-5. Chapter 38 of the Code of Federal Regulations, as it was written at the time, required an examination, however the examination was withheld. Appx.E-3. The motion was denied. Appx.D.

Mr. Williams filed a timely appeal to the United States Court of Appeals for Veterans Claims (Veterans Court) on March 27, 2017. Appx.B. The Veterans Court affirmed the Board's denial, holding that the regulations Mr. Williams contends were misapplied did not apply to his specific claim and only applied to claims for increase; a mistaken conclusion easily contradicted by the plain language of the regulation which states that it applies to "any claim for disability compensation" whether original, reopened, or claims for increases. Appx.B-3.

In October 2017, Mr. Williams appealed the Veterans Court's decision to the United States Court of Appeals for the Federal Circuit (Federal Circuit). Appx.A. The Federal Circuit affirmed the Veteran Court's decision without an opinion. Id. A request for Rehearing En Banc was later denied on August 22, 2018. Appx.C. Mr. Williams now seeks a writ of certiorari from the Court, and justice waits, on this worthy question.

REASONS FOR GRANTING THE PETITION

I.

THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT PROTECTS VETERANS SEEKING REVIEW OF CLEAR AND UNMISTAKABLE ERROR.

Due Process under the Fifth Amendment protects veterans seeking property rights in the form disability benefits. *Cook v. Principi*, 318 F.3d 1334, 1351 (Fed.Cir. 2002) (en banc) (Gajarsa, J., dissenting) (citing *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (“[T]he interest of an individual in continued receipt of [Social Security disability] benefits is a statutorily created property interest protected by the Fifth Amendment.”) (citing *Richardson v. Belcher*, 404 U.S. 78, 80-81, 92 (1971)); (citing *Richardson v. Perales*, 402 U.S. 389, 401-402 (1971); *Flemming v. Nestor*, 363 U.S. 603, 611 (1960); *Arnett v. Kennedy*, 416 U.S. 134, 166 (1974) (Powell, J., concurring in part); *Bell v. Burson*, 402 U.S. 535, 539 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 261-62 (1970)). Yet, through lesser law, the VA Secretary has systematically foreclosed some of the most sensitive and substantive challenges to justice; Clear and Unmistakable Error or CUE. *Cook* at 1344. In opposition to the Constitution, the Secretary stands on *Cook* as its sure CUE estoppel. *Id.* The Secretary does so by statutorily disallowing any CUE challenge based on alleged breaches to the VA’s Duty to Assist. *Id.*

Duty to Assist

Congress has imposed on the VA Secretary several duties to assist veterans seeking disability benefits. *Savage v. Shinseki*, 24 Vet.App. 259 (2011); *See also Shinseki v. Sanders*, 556 U.S. 396 (2009); 38 U.S.C. § 5103A. These duties were established to pragmatically and patriotically lessen the burden and claim development requirements for veterans. *Cook* at 1358. They now serve as the hallmark of the non-adversarial nature of the veterans' disability system. *Id.*

However, breaches of this Duty to Assist cannot constitute CUE. *Cook* at 1344. In fact, this deprivation has been woven into VA regulation, wherein examples of situations that are not CUE are expressly codified. 38 C.F.R. § 20.1403(2) (Duty to assist – The Secretary's failure to fulfill the duty to assist). Yet, because of the non-adversarial nature of the VA adjudication system, "breaches of the duty to assist are at the heart of due process analysis." *Cook* at 1354. And without due process protection, assurances under duty to assist are "illusory and meaningless." *Id.*

In *Cook*, joined by Circuit Judge Newman and Chief Judge Mayer, Circuit Judge Gajarsa dissented ominously:

VA decisions on records that are less than thoroughly and adequately prepared may go unchallenged and the veteran will lose years of unearned benefits that, but for the VA's breach of its duty to assist, he or she would have collected. In an adversarial system, it may be appropriate to dismiss a claimant who does not immediately challenge a decision. But in a paternalistic system, where the claimant is led to believe that his or her claim is being fairly and accurately decided to afford him or her the fullest

compensation he or she is due, it is readily apparent why a decision may not be promptly challenged. The VA is charged with the developments of the merits of a claim and acts as final adjudicator as well; there must be a remedy when it fails in its responsibility. To allow the organization to default in its development of a claim and then to adjudicate it without the possibility of challenge is an injustice.

Cook at 1350.

Due Process violations within the VA system are all the more damaging in effect. *Cook* at 1356 (“The[se] forms of notice... are sufficiently misleading [in] that they introduce a high risk of error into the decisionmaking process, because veteran with valid entitlements might wrongly abandon their claims after an initial denial and not reassert them until their right to appeal is barred by the rule of finality.”). Conversely, even if CUE was found in the 1985 Board decision, neither the Board or the Veterans’ Court reckoned its responsibilities with the procedural rights of Mr. Williams. Appx.C-3, Appx.D-5.

Mr. Williams is already receiving a total disability rating for PTSD, entirely related to the symptoms for which he now claims an earlier effective date. See Appx.E. It is not the position of the Secretary that Mr. Williams was not injured in service, nor is its position that Mr. Williams is claiming benefits to which he is not entitled; it is the Secretary’s position that, even if the VA failed in its duty to assist Mr. Williams, he should have somehow discovered the mistake before the decision became final. *Cook* at 1337-41.

Yet, the Secretary’s position, veiled by *Cook*, strips Mr. Williams, not only of his property rights going back decades, it does not even allow him the opportunity to

have such a claim adjudicated. *Id.* at 1341. Regardless of whether the VA actually committed CUE, or whether the error is merely alleged, it is the veteran who must accept the vast consequences—perhaps to the tune of hundreds of thousands of dollars and decades of healthcare—of the VA’s undertakings and inactions. *Id.* at 1358 (“If breaches that might be prevented inexpensively lie entirely outside the ambit of the Due Process Clause, then the non-adversarial and manifestly pro-claimant character of the veterans’ benefits system would be the cruelest of shams perpetrated upon our veterans.”).

CONCLUSION

Veterans increasing face a glass ceiling to justice and Mr. Williams is only one of many left unprotected by 38 U.S.C. § 7111. On this, the writ for certiorari should be granted.

Year of the Lord,

/s/ Jonathan B. Kelly

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APPENDICES TO THE PETITION