No. _____

In The

Supreme Court of the United States

PAULINE GARCIA,

Petitioner,

v.

ROBERT WILKIE, Secretary of Veterans Affairs,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When should a Veteran be allowed to raise a Constitutional Due Process issue under 38 C.F.R. § 20.1409?

2. Does the reasoning of *Henderson v. Shinseki*, 562 U.S. 428, 131 S. Ct. 1197, 179 L. Ed. 2d 159 (2011) apply to 38 C.F.R. § 20.1409?

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s):

Cases:

Statutes:

Regulations:

Constitutional Provision:

OPINIONS BELOW

1. The Opinion of the United States Court of Appeals for the Federal Circuit appears at Appendix A and is published as *Garcia v. Wilkie*, No. 2018-1038 (Fed. Cir. 2018)

2. The Opinion of the United States Court of Appeals for Veterans Claims appears at Appendix D and is published as *Garcia v. Shulkin*, 29 Vet.App.47 (2017)

3. The October 28, 2014, Decision of the United States Court of Appeals for Veterans Claims appears at Appendix E [*Garcia v. McDonald*, No. 13-2283 (CAVC, 2014)]

4. The December 15, 2011, Decision of the United States Court of Appeals for Veterans Claims appears at Appendix F [*Garcia v. Shinseki*, No. 10-3156 (CAVC, 2011)]

JURISDICTION

This is a direct appeal from the United States Court of Appeals for the Federal Circuit. The date of the Federal Circuit Court decision was November 5, 2018. Jurisdiction of the Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION

United States Constitution, Fifth Amendment: No person shall be . . . deprived of . . . property. . . .without due process of law.

Regulation: 38 C.F.R. § 3.105(a): Previous determinations which are final and binding . . .will be accepted as correct in the absence of clear and unmistakable error.

Regulation: 38 C.F.R. § 20.1409(c): Once there is a final decision on a motion under this subpart relating to a prior Board decision on an issue, that prior Board decision on that issue is no longer subject to revision on the grounds of clear and unmistakable error.

STATEMENT OF THE CASE

This began as a Veterans Administration disability claim in 2002. It involves a Korean War era Army Veteran. (1952-1954) It became a "Clear and Unmistakable Error" claim in 2007.

The Veteran was represented by a non-attorney service agent through 2006. The American Legion focused on the failure of the VA to honor its duty to assist the Veteran, and its procedural due process failure to have the agency of original jurisdiction (Albuquerque) decide the claim in 2005-2006.

After the C.U.E. claim was filed in 2007-2008, on reviewing the electronic record on appeal in 2010, the Veteran's attorney discovered interference by VA staff during the medical evaluation phase prior to the Board of Veterans Appeals (BVA) decision in 2006.

The C.U.E. claim was thereafter amended in 2011 to state: (a) that the complete record was not considered by the BVA in 2006, and (b) that the Veteran was denied a fair hearing because the VA staff told the VA Medical Doctor to change her evaluation.

The United States Court of Appeals for Veterans Claims (CAVC) saw merit in item (a) and remanded the matter twice for a more complete adjudication by the BVA (2011, Appendix F; and 2014, Appendix E) The CAVC saw error in (b), but did not think the claim was timely.

After the BVA's refusal in 2012 and 2015 to comply with the two re-adjudication remands from CAVC, or discuss the Constitutional issue raised in

2011, the matter was finally heard by the CAVC in June 2017. The resulting decision ignored the briefing and the arguments at that hearing, and ruled against the Veteran based on the VA Secretary's interpretation of finality in the filing of C.U.E. claims under 38 C.F.R. § 20.1409. (Appendix D)

The Veteran appealed to the United States Court of Appeals for the Federal Circuit; jurisdiction was pursuant to 38 U.S.C. § 7292. That Court heard the matter in July, 2018. The Court ruled that § 20.1409 controlled, even though the Veteran clearly informed the Federal Court that this was a 38 C.F.R. § 3.105(a) case, wherein a Constitutional Issue may be raised at any time at the Regional Office level. (Appendix A) The Federal Circuit Court was also informed of the logical application of *Henderson v. Shinseki*, supra, but did not address that case.

REASONS FOR GRANTING THE WRIT

The Veterans Administration (VA) failed another Veteran because of *Cook v. Principi*, 318 F.3d 1334 (Fed. Cir. 2002).

The VA lost the Veteran's records in 1973.

The VA litigated against the Veteran in 2005.

The United States Court of Appeals for Veterans Claims failed to acknowledge the Veteran's efforts for over 10 years to challenge the failure of the VA to provide a fair hearing.

The United States Court of Appeals for the Federal Circuit did not require the VA to follow Congressional intent, or to apply the correct regulation on appeal, or to follow the caselaw of this Supreme Court.

This case involves a category of VA appeals where a Board of Veterans Appeals (BVA) ruling may be challenged after appeal because of "Clear and Unmistakable Error" in that decision.

In the procedural history of this case, the Veteran, Teofilo Garcia, was systematically denied service connection for his mental health disability because the Government destroyed his records in the St. Louis National Personnel Records Center fire of 1973.

Judge O'Malley (Fed. Cir.) sympathized about those whose records had been destroyed in 1973 fire at oral argument in July, 2018, but did not challenge the Secretary (of Veterans Affairs) on his interpretation of finality in C.U.E. filings.

After many years of medical care, the Veteran filed a disability claim in 2002. After a hearing in 2004, the VA ignored the testimony of the Veteran and his spouse and then caused the Medical (Doctor) examiner in Albuquerque to change her opinion about the origin of the Veteran's disability.

The Federal Circuit Court in 2002 determined that the Secretary of Veterans Affairs could interpret § 20.1409 to limit C.U.E. claims such that all the matters pertaining to a single ruling had to be filed at the same time. *Cook v. Principi*, supra.

This Court in *Henderson v. Shinseki*, supra, determined that not all filing errors are jurisdictional in the world of Veterans law; some are "claim processing rules," unless foreclosed by Congress.

In this case, the Federal Circuit now states that "[it] has approved the Secretary's reading of 20.1409(c), a rule adopted in 1998 to 'permit[] only one CUE challenge to a Board decision on any given disability claim.' *Hillyard v. Shinseki*, 695 F.3d 1257, 1260 (Fed. Cir. 2012) (deferring to agency explanation of 20.1409(c) in *Proposed Rules*, 63 Fed. Reg. 27,534, 27,538 (Dep't of Veterans Affairs May 19, 1998), as a reasonable interpretation, and holding that the regulation barred the claimant from filing a second CUE motion after the Board's decision on the claimant's first CUE motion became final, even though the allegations of error differed)."

This appeal raises the question: when should VA law import rules regarding finality from other types of civil cases?

The statutory duty to assist a veteran imposes a constitutional duty to protect the veteran's property right. *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009) .It also makes sense that the duty to assist, when violated by the agency, as it was in this case, supersedes any notion of "finality," as contained in the Secretary of Veterans Affairs' interpretation of statute. *Cook v. Principi*, supra, J. Gajarsa, dissent, 1350-1358 (n. 1): "For the reasons stated *infra* in this dissent, the Constitution is paramount to statutory exceptions to the rule of finality, and thus the public policy of finality cannot trump a veterans' constitutional right to due process."

The VA Secretary is being allowed to mis-interpret Congressional intent in order to foreclose Constitutional challenges to Due Process violations by the agency itself.

In *Cushman*, the veteran argued "that the burdens of proof applicable to C.U.E. claims do not apply to his free-standing due process claim" and "that the burdens of proof typically applicable to due process claims also apply to such claims raised in the context of veteran's benefits." *Cushman*, 576 F.3d at 1299 n.3.

Cushman v. Shinseki, supra, was decided 7 years after *Cook*, supra. As briefed and argued to the Federal Circuit Court herein, the denial of certiorari in the same *Cook* case appears superseded by Justice Alito's reasoning in *Henderson*, *supra.* Because of the clear establishment of a property interest in VA disability benefits after *Cushman*, the position of Judge Gajarsa seems correctly reflected in *Henderson*, supra, today.

In its 2011 decision, the CAVC states: "in a report dated February 3, 2005, the VA [medical doctor] examiner states as follows: '. . . as likely as not this disorder started in the service. . .' . . . [then U]pon receipt of this opinion, the [VA] … included more than three paragraphs of what can only be characterized as argument that a different conclusion was in order." (Appendix F) The Medical Doctor indeed changed her opinion.

The Veteran had been represented by the American Legion in 2005-2006, not an attorney. The American Legion focused its attention on the duty of the VA to assist the Veteran in his claim, and the due process failure of the Board of Veterans Appeals to rule on the claim because it had transferred the matter to an alternative Regional Office in Cleveland, Ohio (2006 and 2008), the Appeals Management Center (AMC), where the coercion occurred.

The matter was decided by that same alternative Regional Office in Cleveland in 2006 (not the Board of Veterans Appeals), making 38 C.F.R. § 3.105(a) the operative rule, not 38 C.F.R. § 20.1409(c). This is what the American Legion argued in 2005, and it formed the basis of the C.U.E. motions in 2007 and 2008: C.U.E. matters at the Regional Office level may be brought in series and at any time under 38 C.F.R. § 3.105(a). *See Andre v. Principi*, 301 F.3d 1354 (Fed. Cir. 2002) and *Hillyard v. Shinseki*, 695 F.3d 1257 (Fed. Cir. 2012).

The CAVC ignored the § 3.105(a) posture of the case, and proceeded under § 20.1409(c).

After the coercion, the AMC, continuing to act as a substitute regional office, issued a Supplemental Statement of the Case in February 2006, which responded to the Veteran's original (2002) disability claim. This SSoC incorporated the changed medical opinions of 2005, and so this became part of the Veteran's C.U.E. claim in 2007.

By issuing the "Inappropriate Request for Revision of VA Examination Report" by the AMC rating person in 2005, noted by Judge Davis in 2011 as "three paragraphs of what can only be characterized as argument that a different conclusion was in order," it is clear that the VA's AMC litigated against the Veteran in this instance. (Appendix F)

It is also clear that the Veterans Court was fully aware of the Constitutional challenge, framed as a Due Process violation, but chose to state that a Constitutional issue had not been addressed. (Appendix E and Appendix F)

This failure by the VA system represents the breach of the fundamental duty to provide a fair hearing for a Veteran.

Is the VA (Secretary) truly entitled to this much deference in interpreting 38 C.F.R. § 20.1409, as in *Cook*, supra? Or is this reading too rigid an application of the Chevron-type discretion found in *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997)? *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Is this a correct preference of a civil-plaintiff burden over Congress' mandates to treat Veterans differently? *See* dissent in *Kisor v. Shulkin*, 880 F.3d 1378 (Fed. Cir. 2018).

The Veterans Court's review of a BVA decision denying disability benefits should differ in many respects from the review by a U.S. Court of Appeals of a U.S. District Court's civil judgment. *See Henderson*, supra, 562 U.S. @ 438, citing *Bowles v. Russell*, 551 U.S. 205, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007).

CONCLUSION

Continuing to allow the VA to limit a Veteran's ability to challenge obvious violations of his/her right to a fair hearing is nonsense.

While not discounting the good-faith effort of the courts here, the Congressional philosophy of VA law would best be served by application of *Henderson*, supra, limiting the same-pleading requirement of 38 C.F.R. § 20.1409, at least in the instance where the VA litigates against the Veteran!

RESPECTFULLY SUBMITTED

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