

No. 18-7755

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 REHEARING

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PETITION FOR REHEARING

In *Henderson v. Shinseki*, 562 U.S. 428, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011), this Court considered whether a procedural failure to file a notice with the United States Court of Appeals for Veterans Claims (CAVC) had jurisdictional consequences. This Court ruled that it did not.

After sixteen years of adjudication, the CAVC and now the U.S. Court of Appeals for the Federal Circuit (Fed.Cir.) have suddenly determined (since 2017) that a procedural failure to file ALL possible claims in the 2007 C.U.E. ("clear and unmistakable error") motion deprives the courts of jurisdiction to address even a constitutional claim on the merits.

The application by the Secretary of the VA to require this joinder of ALL possible claims [38 C.F.R. Sec. 20.1409], including Constitutional Due Process claims, violates "the review scheme that Congress created for the adjudication of veterans' benefits claims." [op. cit. @ 562 U.S. 440]

This case began as a Veterans Administration disability claim in 2002. It involves a Korean War era honorably-discharged Army Veteran. (1952-1954)

The VA lost his military records in 1973. (St. Louis records fire) The VA litigated against the Veteran in 2005, by having the local VA medical doctor change her opinion about whether the Veteran's disability was service connected.

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.

The C.U.E. sought to remedy the VA's failure to assist the Veteran and to rectify the VA's active opposition to his well-grounded claim.

The CAVC saw merit in the underlying claim and remanded the matter twice for a more complete adjudication by the Board of Veterans Appeals (2011 and 2014).

The Veteran died in 2012.

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. Section 20.1409.

The Veteran appealed to the Fed. Cir. which heard the matter in August 2018. The Court ruled that 38 C.F.R. Sec. 20.1409 controlled, even though the Petitioner informed the Federal Court of the logical application of *Henderson v. Shinseki*, supra. The Fed. Cir. did not address that case. [No. 2018-1038, November 5, 2018]

Petition was filed herein February 4, 2019, and denied March 18, 2019.

Reasons for Granting the Writ:

The United States Court of Appeals for the Federal Circuit did not require the VA to follow Congressional intent or to follow the caselaw of this Supreme Court.

Aside from the obvious injustice to this Veteran and his widow [this is an extremely "harsh consequence", 562 U.S. 441], the ruling below rests on a rule of convenience maintained by the VA which only has the purpose of limiting a veteran's ability to redress obvious constitutional violations of his/her right to present valid claims.

The Federal Circuit Court in 2002 determined that the Secretary of Veterans Affairs could interpret Section 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*, 318 F.3d 1334 (Fed.Cir. 2002).

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.'" [p. 12, Appendix A, Petition filed herein]

Since the Petition was filed in this Court, the Federal Circuit has again applied *Henderson v. Shinseki*, supra, to a matter of timely filing, but did not apply it to this case of another Secretary-made filing rule. *James v. Wilkie*, Fed.Cir.No. 2018-1264, decided March 7, 2019.

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

We understand that the shock of having the process turn against the Veteran's widow after over 15 years of briefing and hearings is not grounds to take up this Court's time for the sake of one individual, but a full briefing on this issue will draw a lot of support from the veterans' groups who have dealt with *Cook v. Principi*, supra, since 2002.

The Congressional philosophy of VA law would best be served by application of *Henderson*, supra, limiting the same-pleading reading of 38 C.F.R. Section 20.1409, at least in the instance where the VA litigates against the Veteran.

RESPECTFULLY SUBMITTED:

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In the Supreme Court of the United States

Pauline Garcia,
Petitioner,

v.

Robert Wilkie, Secretary of Veterans Affairs,
Respondent.

Rule 44 Certificate

Comes now counsel of record and hereby certifies that this petition for rehearing is restricted to the intervening interpretation in the case *Jones v. Wilkie*, Fed.Cir.No. 2018-1264, DECIDED March 7, 2019, and is presented in good faith and not for delay, none being applicable.

RESPECTFULLY SUBMITTED:

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