19-5335

Supreme Court of the United States

ORIGINAL

Petition for Writ of Certiorari

To the United States Court of Appeals for the Federal Circuit

From a final order of the Court dated September 17, 2018

In Case Number 17-2534 in the Matter of

PATRICK BRUNETTE

VS.

ROBERT WILKE

SECRETARY OF THE DEPARTMENT OF VETERANS AFFAIRS

Counsel Representing Petitioner:

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the VA incorrectly discharged its responsibilities under 38 C.F.R. Section 3.156(c) with respect to taking the actions required upon reopening and reconsidering the hearing of the May, 1982 rating board that failed to consider material service records showing a medical discharge awarded by the Army for service connected disabilities.
2. Whether material claims not made in 1982 that would be shown in a required prehearing physical and mental examination should be included in the reconsideration of the veteran's claim.
3. Whether evidence bearing on issues material to the claims that arises after discharge and the ensuing VA rating board decision and before the reopening of and reconsideration of the claim must be considered by the board reconsidering the reopened board hearing.
4. Whether the VA is required to follow the rulings of the U.S. Court of Appeals for Veterans Claims in Pacheco v. Shinsecki,

26 Vet.App. 413 (201 4) and Mayhue v. Shinseki, 24 Vet.App.273, 279 (2011) which are the only two published opinions regarding the application and requirements of 38 C.F.R. 3.156(c).

5. Whether the VA is required to follow the rulings of the U.S. Court of Appeals for the Federal Circuit in Skoczen v, Shinseki, 564 F.3d 1319 (Fed.Cir. 2009) and Davidson v. Shinseki, 582 F. 3d 1313, 1316 (Fed.Cir. 2009) that the VA must give the same weight as any other witness to the testimony of the claimant and that any lay person, including the claimant, can testify as to ordinary medical conditions he is competent to diagnose or describe.

6. Whether the VA is required to follow its own regulation and rate lumbar and cervical disabilities on the basis of yearly prescribed bedrest rather than range of motion when the bedrest rating would exceed the range of motion rating under the provisions of 38 C.F.R. 4-41, Diagnostic Code 5243.

7. Whether the VA has to assign an effective date of March 25, 1982 to the corrected rating of the lumbar and cervical spine injuries

8. Whether Patrick Brunette be rated as totally disabled by depression because he is a danger to himself and others.

9. Whether the BVA exceeded its authority by ordering remand of issues as to which the evidence before it in the C-File and brought to the attention of the board in the briefs and evidence and testimony submitted directly to the Board was clear and uncontroverted and supported each element of the claims.

10. Whether the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit violated Petitioner's constitutional right to due process by failing to properly follow their own regulations regarding hearing and rehearing.

11. Whether the U.S. Court of Appeals for the Federal Circuit must rule with specificity on each issue of law raised involving

the application of statutes and regulations in matters involving mixed questions of law and fact.

12. Whether the VA criteria are met and unopposed for awards of Special Monthly Compensation (SMC) and Total Disability for Individual Unemployability (TDIU), making remand of these issues improper and unnecessary and requiring reversal of the AOJ ruling on these two points.

REQUESTED INFORMATION

Membership in bar of this Court authorizing Petitioner's attorney Edward A. Zimmerman to practice before the U.S. Supreme Court in this case

Edward A. Zimmerman was admitted on the motion of his father Austin M. Zimmerman, who was a member of the Bar of this Honorable Court on April 2, 1973. Edward A. Zimmerman was assigned Bar Number 92,406. He has been a member of the Bar of this Honorable Court authorized to practice before the Court ever since, but has not had occasion to do so in the ensuing 45 years until now.

Names of Parties in this case and Corporate Disclosure Statement

The names of the only two parties involved in this case are set out in the Caption. These are the Petitioner Patrick Brunette and the Respondent Robert Wilke, in his capacity only as Secretary of the Department of Veterans Affairs and not in his individual capacity.

There is no corporation or subsidiary involved in this case. The Veterans Administration and the Board of Veterans Appeals are divisions of the Department of Veterans Affairs, and are not subsidiaries. Patrick Brunette is an individual veteran claimant receiving compensation and under VA care, and is not a corporation.

Citations of the Orders of the BVA, and Appellate Courts in this Case

BVA opinion dated May 8, 2015.

U.S. Court of Appeals for Veterans Claims opinion and judgment dated May 16, 2017.

U.S. Court of Appeals for the Federal Circuit opinion dated July 17, 2018.

U.S. Court of Appeals for the Federal Circuit final ruling denying petition for rehearing dated September 17, 2018

Concise Statement of Jurisdiction in this Court

This case is brought by filing a petition for Writ of Certiorari under Title 28 U.S.C., Ch. 81, Section 2350(a), under which jurisdiction lies in this Court, applying the general authority of 28 U.S.C., Section 1254(1).

The opinion to be reviewed was entered on July 17, 2018, and Petitioner filed a motion for panel rehearing.

The final decision denying reconsideration was entered denying rehearing was made and notice sent to Petitioner's Counsel on September 17, 2018. The notice of the final determination of the Circuit Court of Federal Appeals was received by Petitioner's Counsel on September 18, 2018 in the regular delivery for documents filed on September 17, 2018.

The Petitioner delivered the Petition for Writ of Certiorari with Federal Express on December 17, 2018, by sending 10 copies of the petition along with Petitioner's Motion for permission to proceed *in forma pauperis* supported by Petitioner's statement under oath and penalty of perjury and along with the Appearance of Petitioner's Counsel setting forth his bar number and date of admission to the bar of

this Honorable Court on April 2, 1973. The papers were reviewed by Jake Travers, a clerk of this Court, and a letter sent to Petitioner's Counsel dated December 21, 2018, noting corrections needing to be made in the Petition for Writ of Certiorari and the Motion and Appearance papers. The response, by filing the corrected Petition for Writ of Certiorari and corrected Appearance and Motion for permission to proceed *in forma pauperis* with the Clerk of the Supreme and making service by mail or delivery on the Government, is due on Tuesday, February 19, 2019.

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CONCISE STATEMENT OF THE CASE

Patrick Brunette joined the Army to make it his career but was injured severely by slippage of vertebrae in his back in both the lumbar and cervical areas of his spine. The agonizing pain he suffered on a constant basis, worsened by some very strenuous activities and an avulsion fracture or whiplash suffered in a rear-end collision of two Armored Personnel Carriers completely prevented him from performing his MOS of infantryman no matter how hard he tried and even though physicians at AIT and his permanent duty station prescribed bedrest whenever he wasn't working with his unit and was in pain. He took bedrest whenever he could and totaled over 100 hours for each of the three years he was in the Army.

Eventually the doctors convened a medical board, took an MRI, and prescribed a neck brace he wore constantly. They put him on a very restricted P-4 profile and changed his MOS from infantryman to helicopter repair mechanic, which he could do with help from others. However, he continued to worsen and was soon given a medical

discharge from the Army on March 24, 1982. 12 days later he applied for VA Compensation for his back injuries.

Patrick brought copies of his medical discharge with him to the Rating Board hearing which met in May, 1982, but the members of the Rating Board refused to consider them or even look at them. They said he had a congenital condition that was not compensable and the records he brought were not relevant. They told him he couldn't ever get any care or compensation from the VA. Patrick Brunette believed them and didn't go back to the VA for over a decade until he found out he should have gotten VA benefits.

When he finally learned he should have gotten compensation for his back he pursued a claim and took it to the Court of Appeals for Veterans Claims. He couldn't find the record of his medical discharge, but on the last day we could submit a brief we were able to get a copy from the National Personnel Record Center.

We argued that 38 C.F.R. 3.156(c) required the VA to reopen the 1982 Rating Board proceeding, comply with VA regulations in doing so, including rating on the basis of bedrest, conduct a physical and mental

examination, take any new evidence of his condition at discharge, reconsider the decision, and assign an effective date of the date of the rating board's decision adjusted to the day after the date of discharge. The Court remanded the case to the BVA where we submitted a brief with new medical and testimonial evidence.

The BVA made this a part of the claims file and remanded the case to the Regional Office to consider it and hold a new hearing. Shortly thereafter the Regional Office awarded, retroactive to the date of the 1982 Rating Board, the 10% disability the Army had awarded and then scheduled a physical examination and increased this to a retroactive award of 20% disability for the low back based on limitation of range of motion at that time. Despite our arguments and the service records and testimonial evidence, we had submitted in our brief to the BVA on remand, showing extensive prescribed bedrest, the Regional Office and the DRO did not follow 38 C.F.R. 4.41, Diagnostic Code 5243. They awarded only 20% based on range of motion, rather than 60% each for bedrest, with a combined rating of 80% for the neck and low back totaling well over 6 weeks a year, as mandated by 38 C.F.R. 4.41

Diagnostic Code 5243. Furthermore. the BVA and both appellate courts have ignored the mandatory provisions of 38 C.F.R. 4.41, Diagnostic Code 5243 throughout the entire case and not even commented on the regulation or the extensive evidence requiring an 80% combined rating for the spinal injuries.

The BVA remanded the issue of Total Disability for Individual Unemployability (TDIU) to the AOJ (the St. Paul Regional Office), despite the fact that Patrick Brunette has been drawing Social Security Disability for several years. When a veteran is drawing Social Security Disability, then under the provisions of 38 U.S.C. 1502(a)(2), he must be rated as permanently and totally disabled and awarded TDIU by the VA.

On a factual basis, Patrick Brunette has been unable to get or retain a job, has not worked for over 10 years, and is clearly never going to be able to do so again. 38 U.S.C. 1502(a)(4) provides that when a veteran is suffering from "any disability which is sufficient to render it impossible for the average person to follow a substantially gainful occupation . . ." he must be rated as permanently and totally disabled

and awarded TDIU, "but only if it is reasonably certain that such disability will continue throughout the life of the person."

Similarly, with housebound status the BVA and appellate courts ignored evidence that Patrick Brunette was confined to three rooms of his house and only left them to see doctors and the VA. A ruling that this evidence, which is uncontroverted should establish a right to a to a rating of 60% each for service-connected injury to his thoracolumbar spine and his cervical spine, rated separately and combined for a total rating of 80% from the day after his medical discharge from the Army until the present and should establish housebound status right now back dated to the effective date of the filing of the BVA decision in 2013, with the attendant right to Special Monthly Compensation (SMC) back to that same effective date in 2013. Rather than waiting to establish a numeric basis for that status in a ruling that his depression should be rated at 100% for totally disability and his low back and neck should be rated separately and combined to equal a total for the entire back of 80%, it is only necessary to show that the veteran is actually housebound and confined to his house and the immediate premises, and it is

reasonably certain these disabilities will remain throughout the rest of his life, to entitle him to SMC under 38 U,S,C, 1114(s) and 38 U.S.C. 1502(c).

Furthermore, neither the Regional Office nor the BVA, the CAVC, nor the CAFC paid any attention at all to our arguments and evidence concerning the in-service development of the beginning of his depression. In particular, they all completely ignored the affidavit of a health care professional with many years of training and experience working with depressed patients who saw early symptoms of depression in Patrick Brunette while he was still in the Army. There was no evidence at that time of the correct rating, but a rating of 0% would have entitled him to VA care and counseling and might have prevented some of the violent and suicidal events occurring later and avoiding his long police sheet for frequent assault, domestic abuse, and disturbing the peace charges, attacks on and injury to his ex-wife and on his attacks on and injury to several policemen, and others and his numerous suicide attempts.

Among the issues which the BVA remanded to the Regional Office (referred to as the Agency of Original Jurisdiction or AOJ) were Total Disability for Individual Unemployability (TDIU) and Special Monthly Compensation (SMC). We argued on appeal that remand of the two matters was inappropriate and reversal was required instead because at the time of the BVA decision Patrick Brunette was on social security disability, hadn't worked for over ten years, couldn't get or retain a job, and was basically confined to his recliner-bed on the first floor of his girlfriend's house, and that this wasn't likely to ever change. 28 U.S.C. 2106 gives the appellate courts the power to reverse or remand with appropriate instructions as long as the result is just. This Court gives great weight to the requirement of a just result. See, for example, Petite v. U.S., 301 U.S. 529 (1960).

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS, AND CASES INVOLVED IN THE CASE:

5th Amendment to the U.S. Constitution (extract)

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

Fuentes v. Shevin, 407 U.S. 67 (1972), is a landmark decision in 1972 (coincidentally also brought against the VA) in which the Court held that Constitutional due process requires notice and the opportunity for a hearing.

38 C.F.R. 3.156(c) (extract)

"Service department records. TDIU. . (3) An award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later."

38 C.F.R. 3.350 (extract)

Special monthly compensation ratings.

Total plus 60 percent or housebound; 38 U.S.C. 1114(s). The special monthly compensation provided by 38 U.S.C. 1114(s) is payable where the veteran has a single service-connected disability rated as 100 percent and, has additional service-connected disability or disabilities ratable at 60 percent, separate and distinct from the 100 percent service-connected disability and involving different anatomical segments or bodily systems, or

(2) is permanently housebound by reason of service-connected disability or disabilities. This requirement is met when the veteran is substantially confined as a direct result of service-connected disability or disabilities to his or her dwelling and the immediate premises . . . and it is reasonably certain that the disability or disabilities and resultant confinement will continue throughout his or her lifetime.

* * *

38 C.F.R. 4.41, Diagnostic Code 5243 (extract)

"Evaluate intervertebral disc syndrome (preoperatively or postoperatively) either under the General Rating Formula for Diseases and Injuries of the Spine or under the Formula for Rating Intervertebral Disc Syndrome Based on Incapacitating Episodes, whichever method results in the higher evaluation . . . With incapacitating episodes having a total duration of at least 6 weeks during the last 12 months . . . "Rating 60% for low back, 60% for neck, combined rating 80%]

38 C.F.R. 4.130, Diagnostic Code 9434 (extract)

"General Rating Formula for Mental Disorders

Total occupational and social impairment, due to such symptoms as: . . . persistent danger of hurting self or others * * * ." [Rating 100%]

38 U.S.C. 1114(s) (extract) If the veteran has a service-connected disability rated as total, and (1) has additional service-connected * disability or disabilities independently ratable at 60% or more, (2) by reason of such veteran's service-connected disability or disabilities, is permanently housebound, then the monthly compensation shall be $2,993. For the purpose of this subsection, the requirement of "permanently housebound" will be considered to have been met when the veteran when the veteran is or substantially confined such veteran's house . . . or immediate premises due to a service-connected disability or disabilities which it is reasonably certain will remain throughout such veteran's lifetime.

38 . U.S.C. 1503((a)(2) and (3) and (4)(A) and (c)(extract) For purposes of this chapter, a person shall be determined to be permanently and total disabled if such person is any of the following:

* * *

(2) Disabled as determined by the Commissioner of Social Security for purposes of any benefits administered by the Commissioner;

(3) Unemployable as the result of any disability reasonably certain to continue throughout the life of the person for the person.

(4) Suffering from any disability which is sufficient to render it impossible for the average person, but only if it is reasonably certain that such disability will continue throughout the life of the person * * *

(c) For the purposes of this chapter, the requirement of "permanently housebound" will be considered to have been met when the veteran is substantially confined to such veteran's house * * * or immediate premises due to a disability of disabilities which it is reasonably certain will remain throughout such veteran's lifetime.

CONCISE ARGUMENT FOR ALLOWANCE OF THE WRIT

Neither of the two appellate courts reviewing this case nor the BVA addressed the meaning of the VA regulations nor applied them to the resolution of the issues Petitioner-Appellant raised. The Federal Circuit Court of Appeals may have felt limitations in its jurisdiction that prevent it from making factual determinations and treated this as a case of mixed fact and law, but nothing in that restriction prevents interpretation and proper application of the regulations that have been misapplied. This does not require determination of any fact. To call it a question of mixed law of fact begs the question. All questions of law are based on fact when applied to a particular situation, but this does not make them questions of fact.

A complete ruling by this Court is the only way such questions of law can be finally resolved and prevent continued bouncing back and forth between the agency and the courts in this 36-year-old case and other veterans' lengthy litigation. This would eliminate unnecessary appeals and ease the burden on our courts' crowded dockets. It would also provide more prompt and fair treatment for veterans, to whom

justice delayed is justice denied, as this Court noted in its oldest decision on veterans' benefits decided in the second year this Court in the second year of this Court in Hayburn's Case, 2 U.S. (2 Dill.) 408, 410 n. (1792).

The most important regulation involved in this case is 38 C.F.R 3.156(c). It assigns an effective date of the day after Patrick Brunette's medical discharge from the Army. Petitioner has argued this is a 3.156(c) case for the last 12 years, since he obtained the missing medical discharge papers. A significant consequence is the assignment of an effective date the day after his medical discharge. It is the only way an earlier effective date can be assigned than the date of the submission of new and material evidence after a VA decision has become final.

The regulation is pretty clear. However, it raises important questions for this Court to determine. Does the requirement to reopen the hearing that violated the regulation and reconsider its decision require the VA to afford the veteran all the rights associated with a normal hearing such as a physical and mental examination or the consideration of subsequent evidence showing his condition at the time

of the hearing? Does this include the right to present testimony of persons with knowledge of his condition or relevant facts at time of the errant board? Does the VA have to allow claims not made at the time of the board because they were for conditions that did not become apparent until later? Does the requirement of the mandatory reopening, rehearing, redeciding, and assignment of the earliest possible effective date overcome subsequent procedural violations by the veteran that affect his claim?

These are important questions to answer for this and future cases. They are not answered by the only two court cases that now exist Pacheco v. Shinseki, 26 Vet.App. 413 (2014) and Mayhue v. Shinsecki, 24 Vet.App. 273, 279 (2011).

There are some questions about 38 C.F.R 4.41, Diagnostic Code 5243 this Court should resolve. Does the prescription of bedrest whenever not working at his Army job by two separate doctors at two different clinics at two separate Army forts require periodic renewal when the need for bedrest is determined to be permanent in the

prescriptions of two separate Army posts? The regulation doesn't forbid this and just says the bedrest be proscribed. Does staying in a recliner throughout the day and night constitute bedrest? The regulation doesn't say, but it doesn't require a bed. Does the bedrest have to be continuous? Obviously, the allowance for two weeks, 4 weeks or six weeks over a year is not going to be continuous.

Is there any wiggle room in the requirement to rate on the basis of incapacitating episodes rather than range of motion when the former results in a higher award? No. The regulation is direct and clear and doesn't allow for any exceptions. It is important for this Court to resolve these issues because many veterans need bedrest and the VA, as in this case, may be unaware of the requirements of this regulation. This is another in the many cases in which this Court should require an agency to follow its own regulations.

The application of 38 C.F.R. 4.130, Diagnostic Code 9434 raises a different set of questions. Does the use of the words "such as" require

the VA to consider proof of any of the separate listed criteria as establishing total occupational and social disability? Is the criteria of being a danger to himself and others the clearest criteria for total disability? This is important in this and many cases. The BVA and appellate courts in this case did not apply the testimony or ordinary medical testimony of any of the lay witnesses or the petitioner in this case and probably don't in many other cases as well, although the Federal Circuit Court says they have to.

The procedural cases listed are particularly important and have far-reaching consequences for veterans and other litigants as well as the courts themselves. The BVA is neither entitled nor required to remand to the Agency of Original Jurisdiction time and time again when it has sufficient uncontroverted evidence in the file to support the claim and reverse the AOJ ruling. It has the power and the veteran claimant has the right to provide and consider additional evidence itself, particularly when the veteran has waived further AOJ review in the vain hope this 37-yeqr-old case can finally be resolved. That is three times the delay in Bleak House and, while that Dickens classic may make interesting

reading, it is also about lousy court management. In cases like this where justice delayed is so very much justice denied, it may rise to a constitutional violation of Article III and is an unjust result.

The issues we identify in this case concern the constitutional right to due process. As we discuss above, the U.S. Court of Appeals for Veterans Claims failed to follow its Internal Operating Procedures and rule on Petitioner's motion for reconsideration – a denial of the due process right to a hearing in this case. The U.S. Court of Appeals for the Federal Circuit did not rule on this issue which Petitioner submitted for their consideration. In fact, the court failed to rule on any of the regulatory claims Petitioner raised in his brief although courts are generally required to rule on each substantial claim the petitioner raises and provide a satisfactory explanation of the basis for its ruling to facilitate review of its decision,

The denial of by the U.S. Court of Appeals for the Federal Circuit arises from its failure to give Petitioner notice it was not going to hold oral argument in the case by affirming the rulings of the lower court and BVA without notice to Petitioner, denying Petitioner his constitutional

right to notice and a hearing, under this Court's decision in the Fuentes case. The Federal Circuit Court of Appeals had previously advised Petitioner it scheduled and held oral argument in all or every case. We were waiting for the court's scheduling notice to argue some of the more difficult issues in a give-and take environment rather than a reply brief. Acting contrary to expressed intentions in this way, the court denied Petitioner's constitutional right to notice and a hearing. Fuentes v. Shevin, 407 U.S. 67 (1972). This Court should rule on this practice to prevent courts from making promises to parties those parties act on and not doing what they promise and denying them the expected hearing.

CONCLUSION

For these reasons Petitioner prays that the Court grant this Petition, for Writ of Certiorari.

Respectfully submitted,

Edward A. Zimmerman Date May 6, 2019.

/s/Edward A. Zimmerman