

MAR 03 2022

OFFICE OF THE CLERK

No. 21-7787

IN THE
SUPREME COURT OF THE UNITED STATES

Faith M. Hibbard PETITIONER
(Your Name)

Denis McDonough, vs.
Secretary of Veterans Affairs RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
The United States
Court of Appeals for the Federal Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Faith M. Hibbard
(Your Name)

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(City, State, Zip Code)

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ORIGINAL

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QUESTION(S) PRESENTED

QUESTION: 1. Whether the court erred in denying benefits based on a theory, called “hypothetical entitlement theory” that has no section or definition under the United States Code Section 38, Veterans Benefits or Code of Federal Regulations Title 38 Pensions, Bonuses, and Veterans’ Relief Chapter 1 Part 3 Adjudication?

QUESTION: 2. Whether the court erred in refusing to apply, *Henderson v. Shinseki*, 562 U.S. 428 (2011) that explains procedural law and substantive law of filing an “initial claim” for service-connected disability(ies)?

QUESTION: 3 Whether the court erred in applying an administrative agencies interpretation of a federal statute in this case - VA’s interpretation of the statute 38 U.S.C. § 1311(a)(2), that the Court admits is ambiguous?

QUESTION: 4. Whether the court erred in applying “the veteran had to file a claim during the veteran’s lifetime” then benefits would have been granted under United States Code Section 38 Veterans Benefits for the “enhanced” for dependency and indemnity benefit, although the veterans death was service-connected and the disability caused the death?

LIST OF PARTIES

- All parties appear in the caption of the case on the cover page.
- All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Petitioner is unaware of any cases related in this court or in the district appellate courts including the lower courts.

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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

- reported at United States Court of Appeals for the Federal Circuit; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

- reported at United States Court of Appeals for Veterans Claims; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

- reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

- reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was December 10, 2021 Federal Circuit

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was January 12, 2021 Veterans Claims

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

38 U.S.C. § 1311(a)(2); 38 C.F.R. § 3.10(c) Appendix A pages 2, 3, 4, 5, 6

38 U.S.C. § 1311(a)(2) Appendix B. pages 1, 2, 3, 4, 5

STATEMENT OF THE CASE

The Department of Veterans Affairs is assigned to thoroughly handle veterans' claims, along with the Board of Veterans Affairs. Both have the duty to apply all applicable laws of statutory, procedural and substantive found in the United States Code Title 38 Veterans Benefits and the Code of Federal Regulations Title 38 Pensions, Bonuses, and Veterans' Relief Chapter 1 Part 3 Adjudication, which includes the veterans medical records, medical experts statements, military service records, and family statements.

When the law becomes too ambiguous for Veterans Affairs to interpret, the agency will creatively make up a term, they are actively using is, "hypothetical entitlement theory" to deny claims, as in this case. The United States Court of Appeals for Veterans Claims and the United States Court of Appeals for the Federal Circuit, agree with this term and affirms the lower court ruling. The term "hypothetical entitlement theory" is an easier solution for an ambiguous law. The Court of Appeals for Veterans Claims or the United States Court of Appeals for the Federal Circuit cannot give the correct interpretation for and rely on an administrative agency to interpret it for them.

This presents the question did the court err in accepting a theory idea of Veterans Affairs, the "hypothetical entitlement theory" instead of applying the applicable laws correctly?

STATEMENT OF THE CASE

I. The Theory Applied As Law

Mr. Hibbard asked the treating physician to file a veterans claim with the Department of Veterans Affairs. The physician told Mr. Hibbard those claims, are not handled through their office. Mr. Hibbard is too weak to submit the veterans claim himself, he dies 78 days later. Ms. Hibbard, mentions the above conversation made by Mr. Hibbard and his treating physician, to the regional office and the Board of Veterans Affairs, as part of the facts surrounding Mr. Hibbard's quick decline in health. The regional office and the Board of Veterans Affairs takes this information and twist its use to imply that Ms. Hibbard is saying, Mr. Hibbard would have received benefits if he had filed a service-connected disability claim before his death. This is the "hypothetical entitlement theory" the regional office uses and how they are using it to deny claims.

Ms. Hibbard clarified with the court, Mr. Hibbard did not file an "initial claim" for the service-connected disability that took his life. Mr. Hibbard did not need to file an "initial claim". The service-connected disability took Mr. Hibbard's life resulting in a service-connected death. Ms. Hibbard cited Henderson v. Shinsek, 562 U.S. 428 (2011), this Court clarifies the "initial claim" and makes it clear, there are no restrictions on when a veteran needs to file an "initial claim" during the veterans lifetime. The United States Court of Appeals for the Federal Circuit ignores

STATEMENT OF THE CASE

Henderson, supra, and completely refuses to acknowledge any legal analysis within Henderson, supra, that clarifies veterans benefits.

II. The Law Is Ambiguous

The courts have struggled for years with this ambiguous law and term “was entitled to receive” under 38 U.S.C. § 1311(a)(2). The United States Court of Appeals for the Federal Circuit has stated in this case:

“We observed that the phrase “entitled to receive” as it appears in 38 U.S.C. § 1311(a)(2) was ambiguous, and we held that VA’s new interpretation was reasonable and hence lawful.”

The Court has expressed in the above statement that VA has a new interpretation for the federal law 38 U.S.C. § 1311(a)(2), “entitled to receive.”

This presents a question of whether the law should be interpreted by the judicial branch and not the executive branch for the correct interpretation of the law.

When Ms. Hibbard asks the court to apply Henderson, supra, the legal analysis that speaks about the “initial claim,” the court instead states that “if or had” the veteran filed a claim during the veterans lifetime, then benefit would have been granted under United States Code Section 38 Veterans Benefits.

REASONS FOR GRANTING THE PETITION

There is a lack of judicial oversight; a competent legal interpretation of the law(s) that apply to the “was entitled to receive” at 38 U.S.C. 1311(a)(2).

The United States Court of Appeals for the Federal Circuit admits, the law is ambiguous, then simply applies a non judicial agencies interpretation, knowing the interpretation of the agency has been changed numerous times. There have been numerous misapplied interpretations surrounding the veterans service-connected disability that resulted in a service-connected death where the veteran was too weak to file an initial claim for benefit before the veterans death.

There are numerous veterans in our nation that have given the ultimate sacrifice to this country, that when a family member files a claim under their veteran, the correct interpretation of the laws should be applied correctly and not a theory made up by an administrative agency for them to deny the claim, then be affirmed by the Veterans Court and Federal Circuit Court.

When Ms. Hibbard asked the Federal Circuit Court to apply Henderson, supra, which Henderson, petition this Court for the correct interpretation of the 120 days to filing a Notice of Appeal in the Veterans Claims Court, this Court elaborated on the rule of law in other areas in Henderson, supra, which included the “initial Claim” and make it clear “that a veteran seeking benefits need not file an initial claim within any fixed period after the alleged onset of disability or separation from service.”

REASONS FOR GRANTING THE PETITION

If a veteran files a claim for disability during his lifetime, then dies before a decision is made, the claim is terminated at the time of death. See Richard v. West, 161 E. 3d. 719,723 (Fed. Cir. 1998). The veteran's widow will file an "initial claim" for benefits. If Mr. Hibbard filed the service-connected disability claim 78 days before his death as the Veterans Claims Court and the Federal Circuit Court has stated, the claim would be terminated at the time of Mr. Hibbard's service-connected death. The "initial claim" does not grant the "was entitled to receive" at 38 U.S.C. § 1311(a)(2), but the veterans service-connected disability(ies) and the veterans service-connected death does.

CONCLUSION

For the foregoing reasons, Ms. Hibbard respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

Faith M. Hibbard

Date: April 19, 2022