

No. 24-_____

**IN THE
SUPREME COURT OF THE UNITED STATES**

PAUL WRIGHT,

Petitioner,

v.

DENIS McDONOUGH, SECRETARY OF
VETERANS AFFAIRS,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit**

PETITION FOR A WRIT OF CERTIORARI

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January 23, 2024

QUESTION PRESENTED

The Veterans Judicial Review Act of 1988 affords judicial review of the Article I veteran-benefit administrative process, pursuant to 38 U.S.C. § 7261 in the Court of Appeals for Veterans Claims as an Article I tribunal, and pursuant to 38 U.S.C. § 7292(d) in the Court of Appeals for the Federal Circuit as the Article III court of first instance; those provisions derive operative language from 5 U.S.C. § 706 of the Administrative Procedures Act. The Veterans Judicial Review Act of 1988 also affords appellate review of decisions issued within that Article I process, pursuant to 38 U.S.C. § 7252(a) in the Court of Appeals for Veterans Claims, and pursuant to 38 U.S.C. § 7292(e) in the Court of Appeals for the Federal Circuit.

The Court of Appeals for the Federal Circuit refused to review specified jurisdictional defects in the Article I veteran-benefit administrative process, reasoning that 38 U.S.C. § 7292(a) limits its jurisdiction to reviewing decisions of the Court of Appeals for Veterans Claims.

In relation to those circumstances, the question presented is:

Whether an aggrieved veteran's right to judicial review of the Article I veteran-benefit administrative process, pursuant to the first sentence of 38 U.S.C. § 7292(d)(1) in the Court of Appeals for the Federal Circuit as the Article III court of first instance, is independent of review of decisions issued within that Article I process.

**LIST OF PARTIES
AND RULE 29.6 STATEMENT**

Petitioner Paul Wright was Claimant-Appellant in No. 2023-1360, where Respondent Denis McDonough, Secretary of Veterans Affairs, was Respondent-Appellee. No publicly held corporations are involved in this proceeding.

RELATED CASES

Wright v. McDonough, United States Court of Appeals for the Federal Circuit, No. 23-1360

Wright v. McDonough, United States Court of Appeals for Veterans Claims, No. 20-8732

**IN THE
SUPREME COURT OF THE UNITED STATES**

PETITION FOR A WRIT OF CERTIORARI

U.S. Navy veteran Paul Wright respectfully requests the issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit, dated December 8, 2023.

OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Federal Circuit in Case 2023-1360, dated December 8, 2023, is Appendix A.

The unpublished decision of the United States Court of Appeals for Veterans Claims in Case 20-8732, dated December 22, 2022, is Appendix B.

The unpublished decision of the United States Court of Appeals for Veterans Claims in Case 20-8732, dated July 30, 2021, is Appendix C.

STATEMENT OF JURISDICTION

The Court has jurisdiction to hear this petition pursuant to 28 U.S.C. § 1254(1). This petition is timely filed within ninety (90) days after the judgment to be reviewed.

STATUTORY PROVISIONS INVOLVED

The full text of section 7261 of Title 38 is Appendix D.

The full text of section 7252 of Title 38 is Appendix E.

The full text of section 7292 of Title 38 is Appendix F.

STATEMENT OF THE CASE

Mr. Wright served honorably in the U.S. Navy on active duty from April 1974 to July 1984, and has disabilities resulting from that service. The Secretary withholds a substantial portion of Mr. Wright's benefits, for alleged adjudication.

In an action before the Court of Appeals for Veterans Claims (Veterans Court), Mr. Wright presented adjudicatory acts for 38 U.S.C. § 7261 judicial review,¹ and an error by the Board of Veterans' Appeals (Board) for § 7252(a) appellate review. The Veterans Court set aside the Board error and remanded, but refused to review the process defects: "However, the Court reviews final *Board* decisions, not decisions rendered by a regional office (RO)." Appx C at 3 (emphasis in original). When the Board refused to address jurisdiction on remand, the Veterans Court again refused to hear the jurisdictional challenge but instead construed and denied the petition as allegedly seeking recall of mandate. Appx B.

On appeal to the Court of Appeals for the Federal Circuit (Federal Circuit), the Federal Circuit refused to hear the § 7292(d) jurisdictional challenge: "this court's jurisdiction over appeals from the Veterans Court extends only to decisions of that court, *see* 38 U.S.C. § 7292(a)" Appx A at 7. This petition ensued.

The statutory basis for jurisdiction in the Federal Circuit, as the Article III court of first instance, is the first sentence of 38 U.S.C. § 7292(d)(1).

¹ In 38 C.F.R. § 3.102 the Secretary interpreted the § 5107(b) evidentiary standard to explain, in pertinent part, that adjudicators may not entertain "[m]ere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts." Material evidentiary conflict is thus the sine qua non of jurisdiction to adjudicate a question of fact under § 511(a); § 7261(b)(1) mandates judicial review of the Secretary's compliance with that evidentiary standard. The adjudicatory acts Mr. Wright presented for judicial review confirm the absence of evidentiary conflict, and thus the want of adjudicatory jurisdiction ab initio.

REASONS FOR GRANTING THE PETITION

The decision of the Federal Circuit is incorrect, and conflicts with the rationale in *Army Corps of Engineers v. Hawkes Co.*, 578 U.S. ____ (2016); *Henderson v. Shinseki*, 562 U.S. 428 (2011); and *Leedom v. Kyne*, 358 U.S. 184 (1958). The national importance of the question presented is reflected in the "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986).

In *Hawkes*, the Administrative Procedures Act (APA) afforded judicial review of asserted administrative jurisdiction. The rationale included that aggrieved parties need not endure consequences that flow from assertions of administrative jurisdiction, "while waiting for the [administrative process] to 'drop the hammer' in order for them to have their day in court." *Hawkes*, slip op. at 9. An aggrieved party's right to judicial review of an Article I process is thus independent of review of decisions issued within that Article I process. *See also Leedom* at 188:

This suit is not one to "review," in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather, it is one to strike down an order of the Board made in excess of its delegated powers

While *Hawkes* applied the APA, the rationale applies under the Veterans Judicial Review Act of 1988 (VJRA) as well. The core operative phrase "shall decide all relevant questions of law" – shared by §§ 7261(a)(1) and 7292(d)(1) in the VJRA, and derived from 5 U.S.C. § 706 in the APA – is an independent grant of "the same authority," *i.e.* the same jurisdiction to review the administrative process at issue. *See S. Rep. No. 100-418*, at 60 (1988):

[T]he other major scope of review provisions contained in proposed section 4026(a)(1) through (a)(3) are derived specifically from section 706 of the APA. Thus, it is the Committee's intention that the court shall have the same authority as it would in cases arising under the APA to review and act upon questions other than matters of material fact made in reaching a decision on an individual claim for VA benefits

Henderson held that the deadline in § 7266(a) does not limit jurisdiction; the rationale contrasted the second sentence of § 7292(a), where Congress gave a “clear indication” of intent by adopting a deadline from Title 28 that limits jurisdiction. The first sentence of § 7292(a) includes no such “clear indication,” and is not “cast in mandatory language” as a limit would be. Accordingly, under the *Henderson* rationale, the first sentence of § 7292(a) does not limit the jurisdiction granted in § 7292(d). *See also Leedom* at 190: “This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers.”

Consequences that flow when the Secretary acts in excess of delegated powers, rather than delivering benefits as claimed, are noted in *Martin v. O'Rourke*, 891 F.3d 1338, 1350 - 52 (Fed. Cir. 2018) (Moore, J, concurring):

In short, even when veterans win on appeal, they have lost years of their lives living in constant uncertainty, possibly in need of daily necessities such as food and shelter, deprived of the very funds to which they are later found to have been entitled.

. . . .

It takes on average six and a half years for a veteran to challenge a VBA determination and get a decision on remand. God help this nation if it took that long for these brave men and women to answer the call to serve and protect. We owe them more.

In *Henderson*, at 432, it was noted that the Veterans Court grants veterans relief in appeals of Board decisions at the “remarkable” rate of 79 percent. In *George v. McDonough*, 596 U.S. ___ slip op. at 7-8 (2022) (GORSUCH, J., dissenting), it was noted that the average delay in resolving a claim was seven years and that the Veterans Court affirmed the Board at a rate of only about ten percent. The delay of seven years in *George* is worse than six and a half years as earlier noted in *Martin*; the delay in the instant case approaches nine years as of this petition. The 90 percent error rate in *George* is worse than 79 percent as earlier noted in *Henderson*; the instant case is in that remarkable category as well.

Under the *Hawkes* rationale, aggrieved veterans need not endure those and other consequences of process defects, while awaiting eventual reversals of decisions that are inordinately erroneous and dilatory as a result of such process defects. Instead, as *Hawkes* confirms, the core operative phrase shared in §§ 7261(a)(1) and 7292(d)(1) – “shall decide all relevant questions of law” – grants aggrieved veterans the right to attack defects in the Article I process, as consequences flow therefrom.

CONCLUSION

The Court should decide the question presented.

Very respectfully submitted, January 23, 2024



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