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20-1691

IN THE SUPREME COURT OF
THE UNITED STATES

Paul E. Robinson

Petitioner,

v.

Denis McDonough, Secretary of Veterans
Affairs.

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Paul E. Robinson, Pro'se Petitioner

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SUPREME COURT, U.S.

QUESTIONS PRESENTED

Congress has established a veteran- benefits system that is uniquely pro-claimant. In veterans-benefit cases, every statutory and regulatory presumption favors the veteran, this includes (Fed Cir. 2009) finding that "Veteran's disability benefits are non-discretionary, statutorily mandated benefits." These values and requirements are intended to be monitored and maintained thru the process of appeal by the veteran thru the creation under article 1 of the constitution of the Court of appeals for Veterans claims. The questions presented are:

- 1) Did the court of appeals violate constitutional rights of "Due process" and "Equal protection" when it deferred to the BVA and failed to review according to 38 U.S.C.#7261 as petitioned by the veteran.
- 2) Whether the court of appeals erred in accepting a JMR that was rejected by the veteran, leading to the abandonment of issues favorable to the veteran.
- 3) Should "Auer Deference" be repealed when it leads to abuse of discretion.

LIST OF PARTIES

Board of Veterans Appeals/Dept. of Veterans
affairs/July 6, 2018/No.08-31 884

United States Court of Appeals for Veterans
Claims/October 31, 2019/No.18-4296

United States Court of Appeals for the Federal
Circuit/January 8, 2021/No.2020-1969

Paul E. Robinson/Appellant,

v.

Robert L. Wilkie, Secretary of Veterans
Affairs/Appellee

RELATED CASES

Appendix(A)

Robinson v. Wilkie, No. 2020-1969, United
States Court of Appeals for the Federal Circuit.

Judgement entered Jan. 8, 2021.

Appendix(B)

Robinson v. McDonough, No. 2020-1969

United States Court of Appeals for the Federal
Circuit. Petition for rehearing March 1, 2021.

Mandate March 8, 2021

Appendix(C)

Robinson v. Wilkie, No. 18-4296, United States
Court of Appeals for Veterans Claims

Judgement entered Oct. 31, 2019

Appendix(D)

Robinson v. Wilkie, 18-4296, United States
Court of Appeals for Veterans Claims

Panel decision: April 1, 2020

Appendix(E)

Board of Veterans Appeals, No. 08-31 884

Decision date: July 6, 2018

Appendix(F)

Robinson v. McDonald, No. 13-2403, United
States Court of Appeals for Veterans Claims

Decision date: Dec. 31, 2013

TABLE OF AUTHORITIES

Beaty v. Brown,

6 Vet. App.532(1994)

Russell v. Principi,

3 Vet. App.310,313 (1992)

Friscia v. Brown,

7 Vet. App.294,297 (1994)

Roberson v. Principi, No. 00-7009,2001 U.S. App.LEXIS
11008 (Fed. Cir. May 29,2001)

Cushman v. Shinseki,576 F.3d 1290,1298
(Fed.Cir.2009)

Mariano v. Principi, 17 Vet. App. 305,313 (2003)

United States v. U.S. Gypsum Co.333 U.S. 364,395 68
S. ct525,92 L.Ed 746 (1948)

Sanchez-Benitez v. Principi, 259 F.3d.1356,1360(Fed.
Cir.2001)

Thun v. Peake,22 vet. App.111 (2008)

Nolen v Gober, 14 Vet. App.183,184 (2000)

Young v. Wilkie, 31 Vet.App.51 (Mar.11,2019)

Carter v. Shenseki,26 Vet. App. 534 (2014)

Serra v. Nicholson, 19Vet.App. 268,274 (2005).

PTSD: National Center for PTSD

Posttraumatic stress Disorder and Co-Occurring
Substance Use Disorder

Petition for A Writ of Certiorari

Petitioner: Paul E. Robinson, respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit in No. 18-4296 appears at appendix(A) to the petition and can be found at “Robinson v. Wilkie” No.18-4296,2019 WL 5607902 at 1 (Vet.App.Oct.31,2019)

The orders from the United States Court of Appeals for the Federal, petition for Panel rehearing, and appears at appendix (B) and is unpublished.

The opinion of the United States Court of Appeals for Veterans Claims in No.18-4296, appears at appendix (C) and is designated for electronic publication only.

JURISDICTION

The date on which the United States Court of Appeals for the Federal Circuit entered Judgement was January 8th, 2021

A timely petition for rehearing was denied by the United States Court of Appeals for the

Federal circuit on March 1, 2021. A copy of the order denying rehearing appears at appendix ()

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

Constitutional and Statutory provisions involved.

- 1) U.S. Constitution, 5th amendment “No one shall be “Deprived of life, liberty or property with-out due process of law.”
- 2) U.S. Constitution, 14th amendment “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, with-out due process of law; nor deny to any person with-in its jurisdiction the equal protection of the laws.
- 3) 38 USC # 5107 (Benefit of the Doubt) “The Secretary shall consider all information and lay and medical evidence of record in a case before Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.
- 4) 38 USC # 7261 (4) “In the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary, hold unlawful and set aside or reverse such findings if the finding is clearly erroneous, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

- 5) 38 CFR* 3.321(b)(1) "An extra-schedular evaluation is to be applied to an individual service connected disability when the disability is so exceptional or unusual that it makes application of the regular rating schedular impractical" "The governing norms in these exceptional cases is a finding by the Director of Compensation Service or delegate that application of the regular schedular standards is impractical because the disability is so exceptional or unusual due to such related factors as marked interference with employment or frequent periods of hospitalization."
- 6) 38 CFR*20.1403 "A clear unmistakable error is a very specific and rare kind of error. It is the kind of error, of fact or law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the results would have been manifestly different but for the error."
- 7) 38 CFR 4.10 "The basis of disability evaluation is the ability of the body as a whole or of the psyche, or of the body to function under the ordinary conditions of daily life including employment." "It will be remembered that a person may be too disabled to engage in employment although he or she is up and about and fairly comfortable at home or upon limited activity.
- 8) M21-1, part 1, Chapter 5, Section G (June 23, 2015) "If the Board of Veterans Appeal (BVA) grants a motion for reconsideration (MFR), a motion to vacate, or a motion for revision based on clear unmistakable error (CUE), the action has the effect of vacating BVA's original decision(s) on the issue(s)
- 9) Administrative Procedures Act: The APA directs reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed" and to "hold unlawful and set aside agency action, finding, and conclusions" that are:
 - A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

- B) Contrary to constitutional right, power, privilege, or immunity.
- C) In excess of statutory jurisdiction, authority or limitations or short of statutory right.
- D) Without observance of procedure required by law.

Statement of the Case

Total disability has been an issue in this case since 2000, when documentation of total disability was granted by the SSA. VA claims were initiated in 2000 for PTSD, Knee pain, and GERD. I served honorably on ADT (Active duty for training) from Dec. 1976 to April 1977, and from May 1978 to Aug. 1979 as a Clinical Specialist. TDIU was first granted in 2009 along with Major depressive disorder rated at 50%, an earlier effective date has been in dispute since then, though the VA has only acknowledged an appeal of earlier effective date for major depressive disorder, the reality is, if I am unaware of such things as "Inextricably-intertwined" or "not a stand-alone claim" it would not be mentioned, if I fail to bring up these issues in this process, it will be considered abandoned or not for consideration. PTSD was denied by the VA in 2005 with-out a comp. and pension exam, however there were 3 Medical professionals that diagnosed PTSD in 2000, as did the SSA.

In 2013 my claim first went to the CAVC (No. 13-2403). I had an Attorney. Dec. 11, 2013 he was part of a "Briefing conference" that same day he wrote a letter of With-drawl in 30 days, however, didn't mail it until Jan. 17, 2014. On Feb. 7, 2014 the BVA issued a decision

on the issue of "Earlier effective date" for the MDD, considered a CUE, and simply referred to it as "Extra-schedular". On Feb. 11, 2014 my Attorney with-drew, leaving me with the challenge of appealing the TDIU, or loosing it as considered abandoned, this attorney decided to withdraw rather than advocating the joint nature of MDD and TDIU. (intertwined/not stand alone claim).

This would be repeated in 2018, the second time my claim is before the CAVC, a new attorney would have a conference on Jan. 9, 2018, he would have this conference after not responding to me for 30+ days. On Jan. 10, 2018 I would receive a copy of a JMR, that would narrow the scope of the remand, (Carter v. Shinseki, 26 Vet.App. 534 (2014) ignoring the issue of the CUE, and possible abandonment of this issue .My attorney was aware of my health issues, and I reminded him that this kind of claim won't survive me. (Serra v. Nicholson, 19 Vet.App. 268, 274 (2005). That attorney was given notice, on that day, his services were not need. I rejected the JMR. A JMR could set this claim back another 10 years. If he was willing also to ignore issues that were in my favor, it was unacceptable. The CAVC should not be honoring a JMR that was rejected by me.

The CUE issue: (38 CFR #20-1403-Rule 1403) (Russell v. Principi, 3 Vet.App. 310, 313-14 (1992) (En banc) The Board remanded the issue of earlier effective date for the MDD (With-out TDIU) on April 16, 2013. What the examiner came back with was evidence of treatment for PTSD in 1977 (active duty) and referenced MDD as chronic and permanent. In the intro by the AMC (3/6/14) states "the BVA made their decision on your appeal" On page 6 of the AMC decision, the Board acknowledges that the issue of MDD has remained pending since 2000, there-fore not a un-appealed final decision eligible for a CUE claim. The only issue that could be a CUE (Clear unmistakable error) is the final PTSD, RO (Regional Office) decision in 2005, and it is

this decision that is characterized as "Extra schedular" with-out specifying a PTSD rating.

The Board and Examiners would frequently attempt to attack my character by mentioning drugs and alcohol and 5 hospitalizations for depression and SUD (Substance Use Disorder) which is frequently associated with PTSD and has higher comorbidities with poorer treatment outcomes, however they ended up defining "Extra-schedular" at 100% for the period in question, at the very least it indicated that "Benefit of the doubt"(38 CFR *4.7) was clearly established in my favor. Complicating this issue is that a CUE can only be claimed once for each decision. (Hillyard v. Shinseki, 24 Vet. 343, 354 (2011); CFR. #20.1409 (c).

Over the course of many years the claims process, to a pro'se claimant is an ever evolving learning process, where-as the issue of the "CUE" and "Extraschedular" were clear, the layers which seem deceptive were not understood until now ;e.g. (PTSD being the actual CUE, and considered "Extra-schedular"(38 CFR *3.321 (b) not to mention being ignored by failing to Rate). The July 6, 2018 BVA decision ignores the impact of the "CUE" or any "Extra-schedular" decision addressing the PTSD, and there is no mention anywhere in this document. The resulting rating would have been "Total disability" if not demonstrating greater disability in 2000 than was acknowledged in 2009. Entitlement to total disability or TDIU was clearly demonstrated at this time, and the Secretary has unlawfully-withheld this benefit since that time, (6 years ago)

The CAVC: It is an established (and acknowledged by the BVA) fact that there was very little medical documentation during the period 2000-2008. What the BVA chooses not to acknowledge is that the VA refused me treatment between 1999 and 2007. No contemporaneous comp. and pension exam was triggered for the claim of PTSD in 2000. The VA cannot overcome these errors, VA examiners cannot produce any evidence, as distinguished from mere conjecture. (Frischia v. Brown, 7 Vet. App. 294 (1994). Evidence

before 2000, 5 hospitalizations/Depression and SUD, (38 CFR3.321(b)(1)"provides for an extra-schedular evaluation to account for an exceptional or unusual disability" involving "Marked interference with employment or frequent periods of hospitalization"., and upon re-examination in 2009 TDIU was granted. The Board also fails to acknowledge that the surgery on my bilateral knee's wasn't until 2008, surly a factor in my disability between 2000 and 2008.

These facts are important to prove "Entitlement" to "Non-discretionary, statutorily mandated benefits" (Cushman v. Shinseki,576 F.3d 1290 (2009) and a right to "Due process" This also is to say that this veteran is negatively impacted by the CAVC failure to review according to (38 U.S.C.*5107), APA. The CAVC actions could also be seen as a violation of "Section 242 of Title 18 (U.S.C.) It is a crime for a person acting under color of law to willfully deprive a person of a right or privilege protected by the Constitution or laws of the United States".

Reason for Granting The Petition

This case is over 20 years old, numerous errors by the VA has hindered the resolution of this claim. When the Federal courts defer to agency action it is under the presumption that the agency has greater knowledge about technical policy details than judges, however blind deference can lead to abuse and injustice in the adjudication of claims. In this case the CAVC makes a statement to justify a JMR, the statement "Vacatur and remand were warranted because the board decision relied on evidence of (Sedentary work) prior to July 1, 2008". No-where in the board decision does this statement appear, as a matter of fact the board

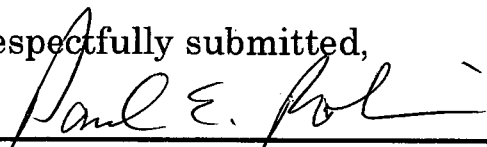
states on page 14 of its decision "even though the record reflects that the veteran has not worked 2000- 2008". The intent of appealing to the Federal circuit is because the Agency decision is questioned. "To remand is not to prevail, it is to repeat" Congress states "Final decisions of the BVA may be appealed to the U.S. Court of Appeals for Veterans Claims which is an independent federal court, entirely separate from the VA". Auer deference negates this separation. In this case it might be reasonable to question whether this was "Deference" or "Abuse of discretion" the court has a responsibility to a "Claimant" as well as an agency, and cannot arbitrarily follow the lead of an agency with no consideration of the pleadings of a claimant. Acts of impunity can become common when the Federal courts fail the congressional intent of judicial review. To quote the Federal Court in "Elkins v. Gober" ~ "a veteran who depends on an award as a substitute for lost wages will be seriously harmed during the delay" and this can be said of unnecessary remands. One issue for review is the most significant that is the "CUE" and "Extra-schedular" issue of 2014, the court has a responsibility to offer guidance on the impact of that CUE and agency responsibility if it is truly "Pro-claimant" and "Non-adversarial" to acknowledge evidence favorable to the veteran, and as the Federal Circuit stated "Veterans benefits are non-discretionary, statutorily mandated then it has a responsibility to grant them. In a case where errors and delays have been numerous, where questionable decisions

are made by claimant's counsel, an exceptional burden has been placed on this veteran, the substance of a CUE and denial of a Constitutionally protected entitlement for over 20 years, has also been a burden, and to now contemplate that frivolous remands might lead to a case being decided (dismissed) if I don't survive. How many Veterans have been impacted by this type of bias, and how many more will be impacted when the courts defer to an administrative agency willing to go to this extent to deny benefits established by evidence. "Auer" must be overturned.

CONCLUSION

The Writ for Certiorai should be granted.

Respectfully submitted,



Paul E. Robinson *pro'se*

June 1, 2021