

SEP 18 2021

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No. _____

21-6311

IN THE

SUPREME COURT OF THE UNITED STATES

CURTIS R. GAYLORD — PETITIONER
(Your Name)

DENIS McDDNOUGH^{YS.}
Secretary of Veterans Affairs — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

Curtis R. Gaylord
(Your Name)

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ORIGINAL

QUESTION(S) PRESENTED

- ① Are Veterans' benefits a property right/interest protected under the United States Constitution, Fifth Amendment.
- ② Can 38 U.S.C. Sec. 7291 be used to thwart the Congressional intent of paternalistic, non adversarial VA proceedings.
- ③ Can the Regional Office RO use its arbitrary, subjective discretion in deciding Veterans benefits (disability) claims.
- ④ Are the VA's, that is, the RO and the Boards rules and regulations binding, must they be followed by the VA.
- ⑤ Is the RO, Board, Veterans Court, Federal Circuit, each respectively allowed to ignore Veterans benefits if the benefits are statutorily mandated and nondiscretionary in nature.
- ⑥ Is the narrow limited jurisdiction of the Federal Circuit's 38 U.S.C. Sec. 7292(d)(1), (d)(2) "threshold" of allowing Veterans benefits claims as discretion of what's "in name only" and what's "free-standing" (separate) a violation of the United States Constitution, Fifth Amendment and/or the Congressional intent.
- ⑦ That there is conflict in this petitioner's "Constitutional Challenge" and those of the Federal Circuit's holdings in Cushman and Hudick.
- ⑧ This petitioner contend that the veteran benefits (disability) rights are very important to the honorably served veterans and their families, public policy and society-at-large.

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

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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 _____ 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 United States district 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.

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 February 2, 2021.

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: 04/22/2021, and a copy of the order denying rehearing appears at Appendix H.

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).
Also this Honorable Court extending the deadline to 150 days, in this instant matter (petition), from the 04/22 Order denying petitioner's Panel Rehearing and Rehearing for en banc, see docket at 31a

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

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

38 U.S.C. Sec. 5110(b)(1):

The effective date of an award of disability compensation to a veteran shall be the day following the date of the veteran's discharge or release if application therefor is received within one year from such date of discharge or release.

38 C.F.R. Sec. 3.160(b), (c):

(b) Original claim. The initial complete claim for one or more benefits on an application prescribed by the Secretary.

(c) Pending claim. A claim which has not been finally adjudicated.

38 U.S.C. Sec. 7292(d)(1), (d)(2):

The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The Court shall hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter that the Court

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Of appeals for Veterans Claims that the Court of Appeals for the Federal Circuit finds to be -

(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 in violation of a statutory right; or

(D) without observance of procedure required by law.

(2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.

STATEMENT OF THE CASE

Petitioner, honorably served veteran was discharged from active Service on March 16, 1976 due to his "severe" pes planus (flat feet) condition. On March 22, 1976, petitioner filed his original/initial claim for his "severe" flat feet disability. The Department of Veterans Affairs Regional Office (RO) mailed a "Notice to Report for an Examination" to and incorrect address twice, on both attempts the mail was returned as "MAIL UNDELIVERABLE" petitioner never received the "Notice to Report for an Examination". The original/initial March 22, 1976 claim was never finally adjudicated but remained "pending". If possibly please see Exhibits A-Z evincing said original/initial claim. Those Exhibits were submitted at the Veterans Court. The reason petitioner submitted said Exhibits was to prove the original claim filed within one (1) year of separation from active service. The March 22, 1976 claim is indisputable and undebatable, contrary to respondent's intentional stating that there is no evidence of a claim filed within one (1) year of separation from active service, in the Statement of the case (SOC), which makes the SOC to no effect null and void.

On July 29, 2002 petitioner filed his second claim for his "severe" flat feet condition which was granted on September 10, 2012.

The granting of the flat feet claim in 2012, by all means embraced the original/initial claim in 1976 for flat feet, which was still pending having never been finally adjudicated. One thing for sure is that there is a 1976 claim filed well within the one (1) year period evinced by said 1976 claim date stamped six (6) days after separation from active service. Stevie Wonder can see that there is a March 22, 1976 claim for flat feet, so-to-speak.

Its well-established that a veterans entitlement to disability benefits is a property right/interest, protected by the Due Process Clause. Concisely at this time please see *Cushman v. Shinseki*, 576 F.3d 1290; *Matthews v. Eldridge*, 424 U.S. 319 (1976), there is a property interest, inter alia recognized by this Honorable Supreme Court and

STATEMENT OF THE CASE (Continued)

the United States Court of Appeals for the Federal Circuit
(Federal Circuit),

This petitioner did demonstrate a property interest entitled to such protections, the March 22, 1976 Original/Initial claim can't be discontinued without due process of the law. The respondent's SOC stating that there is no evidence of a claim filed by petitioner within one (1) year of his separation from service is beyond "obvious error", beyond "clearly erroneous" it's absolutely a "lie", "fraud", without a doubt "egregious" odious and the like, a "subterfuge and stratagem" to preclude petitioner an extraordinary award, thus violating his Fifth Amendment guarantees that an individual will not be deprived of life, liberty, or property without due process of law. There can't be a fair, full, meaningful hearing with the intentional "lie" fraud, similar to the "altered documents in Cushman, supra. Including that petitioner repeatedly provided the VA, i.e., the RO and the Board of Veterans Appeals with evidence of his 1976 claim and other supporting evidence, too numerous to enumerate at this time but see the "record", petitioner was still not allowed afforded an opportunity of "fair procedure", no Statement of the Case (SOC), even after writing the Director of the RO, meeting with the assistant director also writing the Board Chairman, Cheryl L. Mason and presenting numerous "Motions" and more, all to no avail, while the VA continue its "cavalier" attitude and not conceding the March 22, 1976 original claim. Petitioner is not and was never at either of the Courts arguing for an Earlier Effective Date (EED), he rightfully continue to have said 1976 claim conceded and receive "procedural fairness" under the statutes, rules, regulations and the like which are binding upon the VA. Please see Hudick v. Wilke, 755 Fed. Appx. 998. The VA cannot ignore its own internal policies and rules.

STATEMENT OF THE CASE (Continued)

The Federal Circuit in the dismissal on February 2, 2021, was error, abuse of discretion as similarly in the Veterans Court, both violated this petitioner's due process rights.

First, petitioner's writ of mandamus was not an attempt to compel the VA to amend the effective date of disability compensation for his service connected flat feet. The Veterans Court and the Federal Circuit's mischaracterization of what was sought and continuing to be sought is very important and unfortunately was but must not be misconstrued. Petitioner contended a "failure to act" and "unreasonable delay". He was not afforded fairness that his rights had been violated under Cushman, supra. At this time petitioner contends that the RO, Board, Veterans Court and the Federal Circuit violated his due process rights. Under Cushman and others cited hereinabove the property rights/interest are non discretionary, that non discretionary at the RO, at the Board and even at both the Veterans Court and Federal Circuit, There is a 1976 claim for flat feet, which petitioner had a right under Cushman and Hudick to show demonstrate that he had a property right but was again not afforded "procedural fairness". Again, there was no "regular appellate process" the process was, is, and thus far continue to be defective and unfair. The 1976 claim is date stamped by the RO and rightfully need to be recognized and conceded, first.

The Board "hearing" can't be fair with the "lie", "lie" because the VA has all necessary copies in its possession evincing the 1976 claim plus was provided by petitioner, inter alia. As stated repeatedly by petitioner, the RO is held accountable for its due process violation under the Fifth Amendment. So the RO knowing "lie" commit "fraud" knowing that there is said 1976 claim and also not affording a Supplemental Statement of the Case (SSOC), absolutely no "procedural fairness" at the RO. Time is not a factor at the VA but for the VA to stand adamantly on a "lie" since 2013, that is eight (8) years regarding a forty-eight (48) year old claim, and no "procedural fairness" at the RO, a claim that has and was granted when the 2nd 2002 claim was granted in 2012.

STATEMENT OF THE CASE (Continued)

Moreover, pertaining to the hearing(s), the Veterans Court and the Federal Circuit makes assumptions regarding a hearing and that the record does not indicate that petitioner attended a hearing and a second hearing. Actually there were about four (4) "hearings" scheduled but were cancelled and rescheduled by the VFA, not because of a failure to attend. That was not the right thing to do when that facts under Cushman was required to be noticed because of the property right, that interest is not discretionary.

The Federal Circuit's limited jurisdiction. 38 U.S.C. Sec. 7292(d)(1), (d)(2). This petitioner's appeal did present a constitutional issue, contrary to the Veteran Court and Federal Circuit's dismissal and not merely a challenge to the Veterans Court's factual determination that petitioner sought a writ as a substitute for an appeal process, but see Cushman, Hudick. When a veteran challenges a decision by the Veteran Court the Federal Circuit has the authority to "decide all relevant questions of law, including interpreting constitutional and statutory provisions." 38 U.S.C. Sec. 7292(d)(1). This includes the authority to hear "free-standing" constitutional challenges. A free-standing (separate) constitutional challenge is an attack on the "process" followed rather than the result reached or the validity of an interpretation, statute, or rule upon which the result turned. The Federal Circuit had and has jurisdiction over any "free-standing" (separate) constitutional issue, i.e., one not also involving a challenge to the interpretation or validity of a statute or regulation. This petitioner asked and should have been allowed to have considered whether the process followed by the RO and the Veterans Court violated his due process rights. The facts could have been considered "to the extent necessary" because of the separate constitutional challenge, Hudick, Cushman, A veteran's entitlement to disability benefits is a property interest, without discretion. 38 U.S.C. Sec. 7292(d)(2)

REASONS FOR GRANTING THE PETITION

- See herein above, Statement of the Case.
- Petitioner's date stamped March 22, 1976 claim is and has been in the possession of the VA, i.e. RO and Board.
- Petitioner's disability benefits are a property right/interest and protected under the Constitution of America, Fifth Amendment, in which oaths were taken to be upheld by the Most Honorable Supreme Ct.
- The Federal Circuit's February 2, 2021 dismissal was error, and abuse of discretion, a violation of petitioner's due process rights.
- In light of petitioner's "Separate Constitutional issue" the Federal Circuit did have Jurisdiction, under 38 U.S.C. Sec. 7292 (d)(1), (d)(2).
- The RO has used a "lie", "fraud", egregiously precluding a property right/interest.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Curtis Daylord

Date: September 17, 2021