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No. 2007-7037

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JONATHAN L. HAAS,

Claimant-Appellee,

v.

JAMES B. PEAKE, M.D.,
Secretary of Veterans Affairs,

Respondent-Appellant.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS IN 04-4091, JUDGE WILLIAM A. MOORMAN

BRIEF OF *AMICI CURIAE* THE AMERICAN LEGION, MILITARY ORDER OF THE PURPLE HEART, AND UNITED SPINAL ASSOCIATION IN SUPPORT OF CLAIMANT-APPELLEE'S COMBINED PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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June 30, 2008

CERTIFICATE OF INTEREST

Counsel for *amici curiae* certifies the following to the best of his knowledge under Federal Circuit Rule 47.4:

1. The full name of every party or amicus represented by me is:

   The American Legion
   Military Order of the Purple Heart of the USA - A Membership Organization
   United Spinal Association

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

   N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

   None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

   DLA Piper US LLP, Stanley J. Panikowski.

Dated: June 30, 2008

Respectfully submitted,

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STATEMENT OF INTEREST

Amicus curiae The American Legion is a not-for-profit veterans service organization that, among other things, helps war-time veterans and their families. Among its several million members are many veterans who served in the territorial waters of the Republic of Vietnam during the Vietnam era.

Amicus curiae Military Order of the Purple Heart is a not-for-profit organization of combat-wounded veterans that serves all veterans and their families. Its members likewise include many who served in the territorial waters of the Republic of Vietnam during the Vietnam era.

Amicus curiae United Spinal Association is a not-for-profit membership organization founded by paralyzed veterans. Its mission is to improve the quality of life for all Americans, including veterans, who have spinal cord injuries and disorders.

These organizations ("Amici") also provide advocates who represent many claimants for benefits before the Department of Veterans Affairs ("DVA"). By virtue of their missions, Amici have an interest in ensuring that those who serve the United States in time of war receive in a fair and expeditious manner the disability benefits to which Congress has entitled them. This includes ensuring proper application of the presumptions established by Congress in the Agent Orange Act of 1991 to Vietnam veterans who are situated similarly to the claimant here.

A motion for leave to file accompanies this brief. Both counsel for Claimant-Appellee Jonathan L. Haas and counsel for Respondent-Appellant James B. Peake, M.D., Secretary of Veterans Affairs, have consented to Amici's motion for leave to file.

SUMMARY OF ARGUMENT

Amici ask this Court to grant panel or en banc rehearing for the reasons given in Mr. Haas' rehearing petition ("Petition"). Congress has clearly resolved the issue at hand because the plain meaning of "served in the Republic of Vietnam" means that blue-water veterans like Mr. Haas are entitled to the presumptions of exposure and service connection for certain disabilities. *See* Petition at 3-12. To the extent the Court finds the statutory language ambiguous, proper application of the relevant canons of statutory construction requires the same result. *See* Petition at 12-15. The questions presented in the Petition are of exceptional importance both because of their direct impact on disabled veterans like Mr. Haas and because of their broader significance to the administration of veterans benefits statutes enacted by Congress.

This amicus brief amplifies two points raised in the Petition:

First, the panel decision's bypass of the pro-veteran canon of statutory construction warrants rehearing. Once the Court found an ambiguity in a statutory term, the Supreme Court's and this Court's precedent required resolution of the

ambiguity in favor of the veteran. This canon of statutory construction is rooted in the pro-claimant nature of veterans benefits statutes. Its application advances the intent of Congress to help those who answered their country's call to military service in time of need. The panel decision's failure to accord this vital canon its proper place in the construction of veterans benefits statutes is an error of broad concern that should be corrected on rehearing.

Second, the panel decision's grant of *Chevron* deference to a belated, informal agency interpretation also warrants rehearing. The Court's deference to the agency's interpretation rested in part on the incorrect premises that the DVA's interpretation has been "consistent for more than a decade" and was adopted "long before" Mr. Haas filed his claim. Op. at 37-38. Decisions from the Board of Veterans Appeals ("BVA") in the last decade, both before and after Mr. Haas filed his claim in August 2001, confirm that the DVA's present position has not been held consistently during this time. Moreover, to the extent the agency's present view is considered official, that view was ratified only after Mr. Haas had filed his claim. Because the change affected the substantive rights of Mr. Haas and other blue-water veterans, its application to previously-filed claims is tantamount to retroactive lawmaking. For these reasons, the DVA's present interpretation is not entitled to deference. Rehearing is warranted to ensure uniform application of the law governing when deference is due a mutating agency interpretation.

ARGUMENT

A. Rehearing Is Warranted to Ensure the Correct and Consistent Application of the Pro-Veteran Canon of Statutory Construction to Veterans Benefits Statutes.

The Supreme Court and this Court require the resolution of interpretive ambiguities in veterans benefits statutes in favor of the veteran. *See* Petition at 12-13; *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Precedent requires application of this canon because "[t]his [C]ourt and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant." *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998).

The pro-veteran canon of statutory construction modifies the traditional *Chevron* analysis of agency interpretations. *See* Petition at 12-13; *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 692 (Fed. Cir. 2000). But in this case, without explanation, the Court simply bypassed the pro-veteran canon and undertook an unalloyed *Chevron* analysis. Op. at 24-46. This direct conflict between the panel decision and precedent warrants rehearing.

The failure to apply the pro-veteran canon not only yielded an incorrect result in this case, but also is an issue of broad concern. Consistent application of this canon to perceived ambiguities in all veterans benefits statutes is necessary to uphold the "strongly and uniquely pro-claimant" character of those laws. *Hodge*, 155 F.3d at 1362. Indeed, Congress is presumed to legislate against the backdrop

of this principle, *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-21 n.9 (1991), to assist "those who left private life to serve their country in its hour of great need," *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). Restoring this principle to its proper place here is a question of exceptional importance affecting the rights of those who serve the United States in time of war.

B. Rehearing Is Warranted to Prevent the Grant of Deference to the DVA's Belated, Informal Construction.

Even if the analysis could proceed past application of the pro-veteran canon, deference to the DVA's views is still unwarranted. The Supreme Court has held that "the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991); *see also Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2349 (2007) (indicating that changes in an administrative agency's interpretation of a rule are not entitled to deference where the changes create "unfair surprise"). Here, no deference is due the DVA's belated, informal interpretations of the statute and regulation. And to the extent the DVA's present view is considered official, it should not be applied retroactively to Mr. Haas' claim because it was not ratified until after his claim had been filed.

The Court deferred to the DVA's present view based in part on the premises that it has been "consistent for more than a decade" and was adopted "long before" Mr. Haas filed his claim. Op. at 37-38. These premises, however, are incorrect.

At the time of the 1993 regulation, the Secretary interpreted the 1991 statute to cover blue-water veterans. *See* Petition at 14. The BVA's formal adjudications between then and Mr. Haas' filing of his claim in August 2001 are mostly consistent with this view. *See, e.g.*, BVA Dec., Docket No. 97-10 050A (Jan. 28, 1999), available at http://www.va.gov/vetapp99/files1/9902470.txt (finding that "[a]s the veteran served with the Navy in or off the coast of the Republic of Vietnam, the Board acknowledges his probable exposure to Agent Orange and/or other herbicides," but denying the claim on other grounds); BVA Dec., Docket No. 97-10 520, (Jan. 27, 1999), available at http://www.va.gov/vetapp99/files1/9902196.txt (stating BVA would concede that a veteran who served in the Navy on a ship in the Gulf of Tonkin "served in the Republic of Vietnam, had Vietnam era service and is entitled to a presumption of Agent Orange exposure," but denying claim on other grounds); BVA Dec., Docket No. 95-62 567 (Jan. 22, 1998), available at http://www.va.gov/vetapp98/files1/9801697.txt (requiring clarification of facts "inasmuch as Thailand, Cambodia, and the southern coast of Vietnam all border the Gulf of Thailand, and thus the veteran's documented service aboardship in this area during that time period could constitute qualifying service in Vietnam which would entitle him to disability compensation benefits under the provisions of 38 C.F.R. §§ 3.307 and 3.309."); BVA Dec., Docket No. 97-23 679 (June 8, 1998), available at http://www.va.gov/vetapp98/files2/9817641.txt (stating that

"[s]ervice in Vietnam includes service in the waters offshore," but remanding for further development because it was unclear whether the veteran's ship ever was "in Vietnam or the adjacent waters as is contemplated under 38 C.F.R. § 3.307(a)(6)"); *see generally* Brief of Claimant-Appellee at 37-41.

Indeed, the government cited only a single, 1998 adjudication to the contrary—one in which the BVA considered itself bound by dicta in a 1997 General Counsel opinion. *See* Appendix to Appellant's Reply Brief. Nor was the availability of the presumption to blue-water veterans the subject of formal notice-and-comment rule-making during this time. Both the 1997 and 2001 rules on which the panel relied addressed other issues; the issue of whether offshore service qualified for the presumption was addressed only in the DVA's responses to public comments tangential to the rule-making proceeding. *See* Op. at 20-22, 36.

The DVA did not amend its Adjudication Manual M21-1 to reflect its present position until February 2002—approximately six months after Mr. Haas had filed his claim. Op. at 22. But even the agency's formal adjudications since that time have not consistently adhered to its present view. For example:

In 2004, the BVA granted a widow's claim (filed in 2001) for service-connected death benefits based on her husband's fatal lung cancer. BVA Dec., Docket No. 02-22 288 (Feb. 2, 2004), available at http://www.va.gov/vetapp04/files/0402924.txt. In granting the claim, the BVA ruled:

> A veteran is presumed to have been exposed to Agent Orange if he served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975. 38 U.S.C. § 1116(f) (2003). Service in the Republic of Vietnam includes service in the waters offshore. 38 C.F.R. § 3.307(a)(6)(iii) (2003). Although there is no record of the veteran ever actually having set foot in the Republic of Vietnam during his period of active duty, we note that his service records establish that he served aboard the USS Leonard F. Mason during a period when this naval warship operated in the waters offshore from South Vietnam providing close artillery support of ground operations against land targets during July 1965 – May 1966. The applicable laws and regulations therefore presume that he was exposed to Agent Orange during service.

Id. (emphasis added).

Likewise, in a 2002 decision, the BVA relied on the presumption of exposure in ruling that a blue-water veteran was entitled to a finding of service connection for Hodgkin's disease:

> Since the record establishes that the veteran was on board the Oriskany in the waters offshore Vietnam during the relevant period, the Board concludes that the veteran must be presumed to have been exposed to an herbicide agent during his Vietnam era service. 38 C.F.R. § 3.307 (2001).

BVA Dec., Docket No. 95-30 437 (Jul. 23, 2002), available at http://www.va.gov/vetapp02/files02/0208230.txt (emphasis added).

In an October 2001 decision, the BVA also ruled that "[s]ervice in the Republic of Vietnam includes service in the waters offshore. 38 C.F.R. § 3.307(a)(6)(iii) (2001)." BVA Dec., Docket No. 01-00 980 (Oct. 18, 2001),

available at http://www.va.gov/vetapp01/files03/0124897.txt (emphasis added). In that case, there was evidence that the veteran had served on a naval vessel offshore Vietnam. *Id.* Partly for this reason, the BVA remanded the DVA's denial of service connection and stated that the DVA should seek documents "that might clearly document the whereabouts of the U.S.S. Currituck during the time that the veteran was assigned there." *Id.*

And in 2006, the BVA applied the presumption to restore a finding of service connection for diabetes to a veteran who had "served on a Navy vessel in the waters offshore from Vietnam and received the Vietnam Service Medal." BVA Dec., Docket No. 04-15 252 (Sept. 20, 2006), available at http://www.va.gov/vetapp06/files4/0629770.txt (emphasis added).

Even decisions ultimately denying the presumption illustrate the DVA's inconsistency. For example, in 2002, the BVA ruled that a veteran was not entitled to the presumption of exposure to an herbicide agent because "[t]here is no indication in the veteran's service records that he served in Vietnam or in the waters offshore of Vietnam." BVA Dec., Docket No. 96-40 587 (Apr. 12, 2002), available at http://www.va.gov/vetapp02/files01/0203370.txt (emphasis added).

At a minimum, the inconsistency in the DVA's interpretations means its present position should not be granted deference. *See, e.g., Pauley*, 501 U.S. at 698; *Long Island Care at Home*, 127 S. Ct. at 2349. And to the extent the agency's

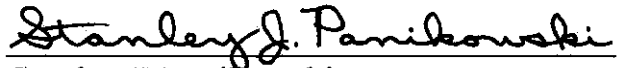
present position is considered official, the weight of the record shows that the agency mostly applied its original position in its formal adjudications preceding the filing of Mr. Haas' claim. Because the later ratification of a different view affected Mr. Haas' substantive rights, that view also merits no deference because it is tantamount to retroactive lawmaking. *Cf. Landgraf v. USI Film Prods. Ltd.*, 511 U.S. 244 (1994). Rehearing is warranted to ensure that no deference is accorded belated agency interpretations like the one at issue here.

CONCLUSION

The panel decision threatens to deprive numerous blue-water Vietnam veterans of needed disability benefits to which Congress has entitled them. It also implicates important legal questions relating to the interpretation of veterans benefits statutes and administrative agency authority. Amici respectfully ask this Court to grant panel or en banc rehearing to resolve these important issues.

Dated: June 30, 2008

Respectfully submitted,



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