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Not So 'Harmless Error': Supreme Court decides against veteran in claim process case.

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10.2—Other Supreme Court Cases
11.0—Veterans' Claims

***Shinseki v. Sanders,* 556 U.S. ___ (Apr. 21, 2009).**

For well over a century, federal law has provided benefits for veterans of the Armed Forces for injuries and disabilities sustained while on active duty. Claims for such benefits have been adjudicated by the Veterans Administration (VA), an independent federal agency. In 1989, the VA became the Department of Veterans Affairs, a cabinet-level department of the federal government, but that department is still colloquially referred to as the VA.

The process for adjudicating veterans' claims has always been rather informal and non-adversarial. Under a Civil War era statute, an attorney was limited to charging a $10 fee for

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[1]I invite the reader's attention to https://www.roa.org/page/LawCenter. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

[2]BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

representing a veteran in a matter of this kind, and that meant that veterans could not ordinarily obtain legal representation. That statute was repealed only very recently. In most cases, veterans making these claims have not been represented or have had informal representation provided by veterans' service organizations such as the American Legion, Veterans of Foreign Wars, or the Disabled American Veterans.

A veteran initiates his or her claim for compensation by filing a claim with the appropriate VA regional office (RO). The process is very informal and can drag on for years. There is usually no single hearing where the veteran must present evidence and be stuck with that record. The VA has a statutory "duty to assist" the veteran in substantiating his or her claim. If the veteran is not satisfied with the RO's action on the claim, he or she may appeal to the Board of Veterans Appeals (BVA) in Washington, D.C.

BVA is part of the VA. Until 1988, BVA decisions were final and not subject to judicial review in court. The Veterans' Judicial Review Act, Public Law 100-687, established the Court of Veterans Appeals, later renamed the Court of Appeals for Veterans Claims (Veterans Court), which went into business on Nov. 18, 1988. The Veterans Court has seven active judges, each of whom is appointed by the president with Senate confirmation. These judges serve terms of either 13 or 15 years, depending upon the position.

The Veterans Court is what is known as an "Article I" court, meaning that it was established by Congress under constitutional authority conferred by Article I of the Constitution, which deals with the legislative branch. By contrast, the Supreme Court, the Courts of Appeals, and the District Courts are referred to as "Article III" courts, created under Article III of the Constitution, which deals with the judicial branch. One difference between the two kinds of courts is that Article III court judges serve for life; they can only be removed by impeachment by the House of Representatives and conviction by the Senate, while Article I court judges serve for a specific term of years.

Veterans court decisions can be appealed to the U.S. Court of Appeals for the Federal Circuit, an Article III court located in Washington, D.C. As I explained in Law Review 189 (available at www.roa.org/law_review), Congress established the Federal Circuit in 1982. The Federal Circuit is on the same level with the First through Eleventh Circuits and the District of Columbia Circuit, but the Federal Circuit is different from those other appellate courts in an important way. The other federal appellate courts have jurisdictions that are defined by geography. For example, the Eleventh Circuit consists of Alabama, Florida, and Georgia. The Federal Circuit has nationwide jurisdiction, but only as to certain kinds of cases, including review of decisions of the Veterans Court and the Merit Systems Protection Board.

Federal Circuit review of Veterans Court decisions is limited by statute. The review is limited to certain legal matters, including a review of the validity of statutes and regulations or any interpretation of such statutes and regulations relied upon by the Veterans Court in making its determination. 38 U.S.C. 7292.

Woodrow Sanders served on active duty in the Army during World War II and was honorably discharged in 1945. His Army medical record showed that his vision was 20/20 upon enlistment and 20/25 upon discharge, and his medical records showed no evidence of eye problems while he was on active duty. He claimed that in 1944 a bazooka exploded near his face and injured his right eye. In 1948, three years after he left active duty, an eye examination revealed an inflammation of the right-eye retina and surrounding tissue, and that condition eventually made him almost blind in that eye. Soon after the examination, Mr. Sanders filed a claim with the VA. In 1949, the VA denied his claim, holding that he had not shown evidence of a connection between his eye condition and his military service.

In 1991, 42 years later, Mr. Sanders asked the VA to reopen his claim. A VA ophthalmologist stated his opinion that it was "not inconceivable" that Mr. Sanders' eye problems "could have occurred secondary to trauma" as Mr. Sanders claimed. A private ophthalmologist retained by Mr. Sanders stated that his right retina was scarred and that this type of injury "can certainly be concussive in character." The RO denied Mr. Sanders' new claim and the BVA affirmed.

Mr. Sanders appealed to the Veterans Court, which held that the RO had erred in failing to give him complete information as to the information related to claim adjudication that the VA would provide and the information that he himself must provide. The Veterans Court also held that the RO error was "harmless error" because there was no evidence that the error affected the outcome of Mr. Sanders' claim. He appealed to the Federal Circuit, which reversed and rejected the VA's argument that the error was harmless.

The VA applied to the Supreme Court for *certiorari* (discretionary review), which was granted. After briefs and oral arguments, the Supreme Court reversed the Federal Circuit, in a six-three decision written by Justice Stephen G. Breyer. The Court concluded, "In our view, the Federal Circuit's 'harmless error' framework is too complex and rigid, its presumptions impose unreasonable evidentiary burdens upon the VA, and it is too likely too often to require the Court of Appeals for Veterans Claims (Veterans Court) to treat as harmful errors that in fact are harmless. We conclude that the framework conflicts with established law." Justice Breyer's decision contains an interesting and useful discussion as to how appellate courts are to distinguish between "harmless error" and "prejudicial error" when reviewing lower court decisions and administrative determinations.

Update – May 2022

Shinseki v. Sanders be found in the United States Reports at 556 U.S. 396 (2009).

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