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Important Veterans' Claim Case Is Headed to the Supreme Court

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Update on Sam Wright

11.0—Veterans' claims

***Kisor v. McDonald,* 2016 U.S. App. Vet. Claims LEXIS 73 (U.S. App. Vet. Cl. Jan. 27, 2016), *affirmed sub nom. Kisor v. Shulkin,* 869 F.3d 1360 (Fed. Cir. 2017), *certiorari granted sub nom. Kisor v. Wilkie,* 2018 U.S. LEXIS 7219 (Dec. 10, 2018).**

In 2016, the United States Court of Appeals for Veterans' Claims (CAVC) ruled against James L. Kisor, a Marine Corps veteran, and he appealed to the United States Court of Appeals for the Federal Circuit, which affirmed the CAVC decision. Kisor applied to the United States Supreme Court for certiorari (discretionary review), and the Supreme Court granted certiorari on

[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "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 very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1500 of the articles.

[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 42 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.

12/10/2018. New briefs are being filed in the Supreme Court, and the high court's decision will likely be announced in late June, at the end of the Court's 2018-19 term.

The name of the respondent in this case has changed twice, along with the identity of the Secretary of the Department of Veterans' Affairs (VA). Robert A. McDonald was the Secretary (appointed by President Obama with Senate confirmation) when the CAVC decided the case on 1/27/2016. After President Trump was inaugurated, he appointed David Shulkin (who previously served as the VA Under Secretary for Medical Affairs) as the VA Secretary, and Shulkin was the Secretary when the Federal Circuit decided this case. After Shulkin resigned, President Trump appointed Robert Wilkie to the position. He was confirmed by the Senate and took office in July 2018, and he was the Secretary when the Supreme Court agreed to hear the case.

James L. Kisor served on active duty in the Marine Corps for four years, from November 1962 until November 1966. His active duty service included many months in South Vietnam with the Second Battalion of the Seventh Marines. In Vietnam, he engaged in heavy and sustained combat operations and saw several colleagues killed in action.

In December 1982, Kisor filed a claim with the VA, asserting that he suffered from Post Traumatic Stress Disorder (PTSD) as a result of his combat experiences. The VA Regional Office (RO) in Portland, Oregon ruled against him in May 1983, holding that he had not shown evidence of a current (at the time) medical diagnosis of PTSD. Under the VA regulations in effect at the time, Kisor was required to establish two elements: that he had been exposed to the stresses of combat while on active duty and that he currently suffered from PTSD. Throughout this protracted litigation, the VA has stressed that the first element (combat stress) was never in dispute and that the 1983 RO ruling against Kisor was based solely on the second element (current diagnosis of PTSD).

In 1983, Kisor initiated but failed to perfect an appeal from the RO's unfavorable decision to the Board of Veterans Appeals (BVA) in our nation's capital. As a result, the unfavorable RO decision became final in 1983, when the deadline for perfecting the appeal expired.

Our nation has provided benefits for veterans (including veterans who have suffered disabilities as a result of their service) since the Revolutionary War. In 1930, three separate federal agencies dealing with veterans were consolidated to form the Veterans Administration (VA), an independent agency in the Executive Branch of the Federal Government. In 1989, that independent agency became the Cabinet-level Department of Veterans Affairs.

In its solicitude for those who have laid their lives on the line to protect our country from its enemies, Congress has exempted veterans, with respect to VA claims, from the important

doctrine of res judicata.[3] In the VA system, even a *final* decision can be *reopened.* There remains an important distinction between *reopening a final decision and reconsidering a decision that never became final.*

When the VA reopens a case that had previously become final, and then rules for the veteran-claimant, the veteran-claimant receives benefits that are *retroactive to the date of the reopening of the claim.* When the VA *reconsiders* a decision that had never become final, the veteran-claimant receives benefits that are *retroactive to the date of the original claim,* perhaps many years earlier. As the reader can appreciate, the distinction between a final decision that is reopened and a never-final decision that is reconsidered can be very significant in determining the amount of back benefits that the veteran-claimant receives.

If the VA determines that the earlier unfavorable decision constituted *Clear Unmistakable Error,* the case will be *reconsidered rather than reopened.* That means that the amount that the claimant can receive in back benefits will likely be much greater, if the VA later rules for the claimant.

As the scope of federal laws and federal Executive Branch activities increased exponentially in the 20th Century, Congress found it increasingly difficult to regulate with the necessary level of detail. As a result, Congress in the last century began to enact broad statutes that delegated to federal Executive Branch agencies the authority and responsibility to promulgate regulations to fill in the details.

New proposed federal regulations are usually published in the *Federal Register* (a daily publication) for notice and comment. An important new proposed regulation can generate thousands of comments from members of the public, especially entrepreneurs and companies that are directly affected by the new regulations. The federal agency considers the comments received and perhaps makes a few adjustments. The final regulations are then published in the *Federal Register* and in the Code of Federal Regulations (C.F.R.). The volume (number of words) of new regulations promulgated in the last year is roughly equal to the volume of all federal statutes enacted by Congress since 1789.

In adjudicating claims and in enforcing statutory and regulatory mandates, federal agencies (including the VA) are routinely called upon to interpret statutes enacted by Congress and regulations promulgated by the agencies themselves. In several cases, the Supreme Court has

[3] Res judicata is Latin for "the thing has been adjudicated." In civil cases generally, a decision becomes final when it is not appealed, within the deadline, to the next higher tribunal or when the highest available tribunal has declined to hear the case or has affirmed the decision below. In civil cases generally, a decision, once final, cannot be reopened or reconsidered, even if new evidence has become available. VA decisions on claims are never final, because they can be reopened at any time, even decades later, if the veteran (claimant) presents new relevant evidence.

held that when an agency interprets its own regulation its interpretation should be given great deference by the courts and should be overturned only if clearly erroneous or clearly contrary to a statute enacted by Congress.[4]

The Supreme Court granted certiorari in the *Kisor* case in order to reconsider the doctrine that federal executive agencies should be given great deference in interpreting their own regulations. The *Kisor* case will have very important implications in administrative law generally, quite apart from the implications for the VA in adjudicating claims for service-connected disabilities.

In our federal appellate system, the final step available to the losing party is to apply to the Supreme Court for certiorari. Certiorari is granted if four or more of the nine Justices vote for certiorari at a conference to consider certiorari petitions. Certiorari is denied in more than 99% of the cases where it is sought, but it was granted in this case.

In applying to the Supreme Court for certiorari, it is not enough to show the Court that the decision of the Court of Appeals was wrong. It is necessary to show the Court that the matter is so important, in the grand scheme of things, that the case is worthy of the attention of our nation's highest court. Certiorari was granted in this case because at least four Justices decided that it is necessary to reconsider the doctrine that federal agencies are entitled to great deference in interpreting their own regulations and that the *Kisor* case is an appropriate vehicle for that reconsideration.

In June 2006, Kisor requested the VA to reopen his case and presented some new evidence. The VA reopened the case and determined that Kisor did suffer from PTSD and that it was a service-connected disability. As a result, Kisor received VA disability benefits retroactive to June 2006, when the case was reopened.

Kisor was not satisfied. He contended that he should receive VA benefits retroactive to December 1982, when he first made a claim to the VA for PTSD. Kisor asserted that the unfavorable RO decision in May 1983 was Clear Unmistakable Error and that his case should have been reconsidered rather than reopened and that he should receive retroactive benefits back to December 1982.

In adjudicating a claim for service-connected disability, the VA typically obtains and relies upon records from the military department in which the veteran-claimant served. For Kisor, the relevant military department was the Department of the Navy, which includes the Marine Corps.

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[4] *See, e.g., Auer v. Robbins,* 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410 (1945).

When the RO ruled against Kisor in May 1983, it had some records from the Department of the Navy, but other records only became available to the VA much later, when it reopened Kisor's case. Kisor claimed that the 1983 unfavorable decision constituted Clear Unmistakable Error because the VA did not have all the Department of the Navy records at the time.

One subsection of the VA regulations is directly relevant to this case. That subsection is as follows:

> Service department records.
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> **(1)** Notwithstanding any other section in this part, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file *relevant* official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding paragraph (a) of this section. Such records include, but are not limited to:
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> **(i)** Service records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name, as long as the other requirements of paragraph (c) of this section are met;
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> **(ii)** Additional service records forwarded by the Department of Defense or the service department to VA any time after VA's original request for service records; and
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> **(iii)** Declassified records that could not have been obtained because the records were classified when VA decided the claim.
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> **(2)** Paragraph (c)(1) of this section does not apply to records that VA could not have obtained when it decided the claim because the records did not exist when VA decided the claim, or because the claimant failed to provide sufficient information for VA to identify and obtain the records from the respective service department, the Joint Services Records Research Center, or from any other official source.
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> **(3)** An award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim.
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> **(4)** A retroactive evaluation of disability resulting from disease or injury subsequently service connected on the basis of the new evidence from the service department must be supported adequately by medical evidence. Where such records clearly support the assignment of a specific rating over a part or the entire period of time involved, a retroactive evaluation will be assigned accordingly, except as it may be affected by the filing date of the original claim.[5]

[5] 38 C.F.R. 3.156(c) (emphasis supplied).

The Department of the Navy records that were available to the VA in 2007, when it considered Kisor's reopened claim, but were not available in 1983, when it considered Kisor's initial claim, related to the details of his combat service in South Vietnam. As has been stated, a veteran claiming service-connected PTSD (like Kisor) must meet a two-pronged test to prevail. First, he or she must show exposure to combat stresses while on active duty. Second, he or she must show a current medical diagnosis of PTSD.

The VA contended that Kisor's exposure to combat stresses was never in dispute and that the new records, showing additional detail about Kisor's combat service, were not *relevant.* The Board of Veterans Appeals (BVA), in its decision dated 4/29/2014, held that the new records were not relevant, because they did not include a medical diagnosis of PTSD, and that Kisor was therefore not entitled to retroactive benefits back to 1982.

Before 1989, the decision of the BVA was the final word for the veteran-claimant. In 1989, Congress created the United States Court of Appeals for Veterans' Claims (CAVC) as an Article I court.[6] Kisor appealed the unfavorable BVA decision to the CAVC, and the CAVC affirmed the decision of the BVA.

Congress has provided for judicial review of CAVC decisions by the United States Court of Appeals for the Federal Circuit, an Article III court.[7] Kisor appealed the unfavorable CAVC decision to the Federal Circuit, which affirmed the CAVC.

The outcome of the *Kisor* case depends upon the interpretation of one word (the word "relevant") in 38 C.F.R. 3.156(c)(1). Through his attorney, Kisor strenuously argued that "relevant" means "tending to make more likely any element of the case that the party offering the evidence needs to establish." Kisor's argument relied upon the definition of "relevant" in the Federal Rules of Evidence.

In the CAVC and the Federal Circuit, the VA just as strenuously argued that the new evidence from the Department of the Navy, available in 2007 but not in 1983, was not relevant because

[6] The term "Article I court" refers to Article I of the United States Constitution, which provides for and governs the Legislative Branch (Congress). The United States Supreme Court, the federal Courts of Appeals (including the Federal Circuit), and the federal District Courts are "Article III courts," referring to Article III of the Constitution. The Justices and Judges in the Article III courts are appointed by the President and confirmed by the Senate and serve for life, unless they resign or unless they are impeached by the House of Representatives and convicted by the Senate. Judges in Article I courts, including the CAVC, do not have lifetime appointments. The CAVC judges serve 15-year terms.

[7] Congress created the Federal Circuit in 1982, merging the former Court of Claims and the former Court of Customs and Patent Appeals. The Federal Circuit is a specialized federal appellate court that sits in Washington, DC and has nationwide jurisdiction over appeals about customs and patent matters, appeals about contract claims against the Federal Government, appeals from final decisions of the CAVC, and appeals from final decisions of the Merit Systems Protection Board (MSPB).

it related to the prong about Kisor having been exposed to the stresses of combat while on active duty, and the fact of those stresses was never in dispute.

The Federal Circuit held that the word "relevant" was ambiguous (capable of more than one reasonable interpretation) and that the VA's interpretation and Kisor's interpretation were equally plausible. In ruling for the VA and against Kisor, the Federal Circuit relied on the Supreme Court case law to the effect that the courts should give deference to Executive Branch regulations when an agency interprets its own regulation. The Federal Circuit decision includes the following instructive paragraph:

> At the heart of this appeal is Mr. Kisor's challenge to the VA's interpretation of the term "relevant" in 38 C.F.R. 3.156(c)(1). As a general rule, we defer to an agency's interpretation of its own regulations "as long as the regulation is ambiguous and the agency's interpretation is neither plainly erroneous nor inconsistent with the regulation. *Gose v. United States Postal Service,* 451 F.3d 831, 836 (Fed. Cir. 2006) (citing *Gonzales v. Oregon,* 546 U.S. 243; *Christensen v. Harris County,* 529 U.S. 576, 588 (2000); *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 413-14 (1945). *See also Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158, 171 (2007).[8]

If the Supreme Court uses *Kisor* as the opportunity to overrule the case law to the effect that federal agencies should be given deference when interpreting their own regulations, the Court will likely remand the case to the Federal Circuit to decide the interpretation of "relevant" in 38 C.F.R. 3.156(c)(1) without the benefit of the *Auer-Bowles* deference to the VA's interpretation of its own regulation. The Federal Circuit will likely remand the case to the CAVC to let it have the first crack at reinterpreting the word "relevant."

In other words, this case will likely drag on for several more years. This case arose more than half a century ago, when Kisor was exposed to combat stresses in South Vietnam. I hope that Kisor lives long enough to see this case come to an end. We will keep the readers informed of developments in this interesting and important case.

[8] *Kisor,* 869 F.3d at 1367.