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Supreme Court Case on VA Benefits

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10.2—Other Supreme Court Cases
11.0—Veterans' Claims

***Kisor v. Wilkie,* 588 U.S. ____ (2019).**

As I explained in Law Review 18114 (December 2018), James L. Kisor served on active duty in the Marine Corps in the 1960s, including a year in South Vietnam. He participated in heavy combat and saw several colleagues killed in action. He was honorably discharged in 1968.

In December 1982, he filed a claim with the Veterans Administration (VA), claiming Post-Traumatic Stress Disorder (PTSD). The VA denied his claim. He attempted to appeal but failed to perfect the appeal. The adverse decision became final in 1983.

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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.

In 1989, the VA (an independent agency in the Executive Branch of the Federal Government) became the Department of Veterans Affairs, a Cabinet-level department. It is still called the "VA."

In June 2006, Kisor filed a new VA claim for PTSD he claimed to have suffered during his Vietnam service in the 1960s. In its solicitude for those who have served our country in uniform, Congress has exempted veterans (with respect to VA claims) from the important legal doctrine of *res judicata*.[3] The VA eventually ruled in favor of Kisor, and he received monthly money benefits for the claim, retroactive to the June 2006 reopening of the claim.

VA regulations provide that in this circumstance, when a final claim is reopened and then approved, the claimant receives retroactive benefits to the date he or she filed the original claim, if the VA finds that the original denial constituted *Clear Unmistakable Error.* The VA regulations further provide that the original denial will be considered Clear Unmistakable Error is there were *relevant* records from the veteran's service branch that were not available to the VA when the claim was first denied but which became available when the case was reopened. The dispute in this case is over the meaning of the word "relevant" in the VA regulation.

To prevail in his claim for PTSD, Kisor was required to show two elements. First, he was required to show that he was exposed to the stresses of combat during his active duty service. Second, he was required to show a current medical diagnosis of PTSD.

When Kisor filed his new VA claim in 2006, the Marine Corps found and provided to the VA more comprehensive records of Kisor's Vietnam service, with considerably more detail about the combat stresses he faced while on active duty. The VA claimed that these new records were not *relevant* because, the VA claimed, Kisor's having suffered from the stresses of combat had never been in dispute and his first claim was denied based on the lack of a current medical diagnosis of PTSD.

Kisor countered with the definition of "relevant" in the Federal Rules of Evidence. A piece of information is relevant if it makes more likely any proposition that the claimant is required to prove to prevail. I think that Kisor had the better argument. The VA is conflating "relevant" with "material" and the words are not synonymous.

The United States Court of Appeals for the Federal Circuit[2] held that the VA's interpretation and Kisor's interpretation were "equally plausible." To resolve the conflict, the Federal Circuit

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[3]*Res judicata* is Latin for "the thing has been adjudicated." In all other areas of law, once a judicial or administrative decision has become final, because appeals have been exhausted or because the losing party failed to appeal within the time permitted, the matter is over, closed, and cannot be relitigated. But VA claims are never really over, at least not until the claimant dies. Even a "final" decision can be reopened, and Kisor's claim was reopened in 2006.

relied on two important Supreme Court precedents stating that a court should give great deference to an administrative agency's interpretation of its own regulation.

The Supreme Court agreed to hear *Kisor v. Wilkie* in order to reconsider the *Auer* and *Bowles* precedents. In a confusing series of concurring opinions, the Supreme Court cabined (limited) *Auer* and *Bowles* but did not explicitly overrule them. The Supreme Court did not decide the real issue in the case: Should Kisor get retroactive benefits all the way back to 1982? Or only to 2006?

The Supreme Court remanded the case to the Federal Circuit, which hopefully will decide the question soon, while Mr. Kisor is still with us. We will keep the readers informed of developments in this interesting and important case.

Update – May 2022

Kisor v. Wilkie can be found in the Supreme Court Reporter at 139 S.Ct. 2400 (2019). There is not yet a citation for the case in the United States Reporter.

On August 12, 2020, the Federal Circuit answered the question of whether *Auer v. Robbins*, 519 U.S. 592 (1997) deference applies to the agency interpretation at issue on remand.[4] The Federal Circuit held that *Auer* deference was not appropriate in the case and therefore affirmed the decision of the Veterans Court that affirmed the decision of the Board denying Kisor entitlement to an effective date earlier than June 5, 2006, for his PTSD.

Upon consideration, the petition for a panel rehearing was granted to the extent that the previous precedential opinion and judgment issued on August 12, 2020, was withdrawn and replaced with a modified precedential opinion and judgment.[5] Unfortunately, for Kisor, the modified precedential opinion and judgment affirmed the decision of the Board denying Mr. Kisor an effective date earlier that June 5, 2006 for service connection for his PTSD. Following the modification, the petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit was denied.[6]

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[4]Kisor v. Wilkie, 969 F.3d 1333, 1335—36 (Fed. Cir. 2020).
[5]Kisor v. McDonough, 846 Fed.Appx. 917, 918 (Fed. Cir.) (mem.op).
[6]Kisor v. McDonough, 142 S.Ct. 756 (2022) (mem. op.).

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