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The VA Requires you to ASK for Disability Payments to Resume After a Second (or Subsequent) Stint on Active Duty

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11.0 – Veterans’ Claims

Towards the end of 2022, the Supreme Court rejected to hear the case of *Buffington v. McDonough*, which addressed a Department of Veterans Affairs’ interpretation of a statute that provides for the VA’s retroactive payment of disability benefits.³ This case also addresses the 1984 ruling that created the heavily-debated *Chevron* doctrine, which is of much intrigue to lawyers. Aside from legal doctrine, the Court’s refusal to hear this case has a significant implication for disability benefits for reservists who return from active duty service.

About the Case

Thomas Buffington served in the Air Force where he suffered a facial scar, back injury, and tinnitus.⁴ When he discharged in 2000, he joined the Air National Guard and was concurrently assessed 10% disabled, and awarded benefits, by the VA. As Justice Gorsuch explained in his dissent, “The VA did this pursuant to a congressional promise that “the United States will pay”

¹ We invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2,000 “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.

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³ *Buffington v. McDonough*, 598 U.S. ____ (2022) (Gorsuch, J. *dissenting*).

⁴ *Id.*

compensation “[f]or disability resulting from personal injury suffered or disease contracted in line of duty.” 38 U. S. C. §1131.”⁵

However, Mr. Buffington’s Guard unit was soon after called to service and he entered active duty between July 2003 and June 2004, and November 2004 and July 2005.⁶ While he was on active duty, the VA properly suspended his disability and withheld benefits.⁷

After Mr. Buffington left active duty in 2005, the VA failed to resume benefits – and Mr. Buffington only realized what happened and inquired about the issue in January 2009. At that time, the VA agreed to resume paying benefits, but refused to retroactively pay his benefits beyond February 2008 – meaning that his missed out on three years of disability payments.⁸

Important Takeaways for Service Members who Receive Disability and Transition to Active Duty

This case made its way through the Court of Appeals for Veterans Claims and Federal Circuit before certiorari was denied by the Supreme Court (the Supreme Court decided not to hear the case). Since the Supreme Court decided not to hear the case, that means the decisions of the lower courts stand. Those courts decided that pursuant to VA rule, Mr. Buffington was in fact required to request his benefits be resumed after returning from Active Duty.

Justice Gorsuch explains,

Why did the VA refuse to pay these benefits? According to current agency rules, a veteran must ask for his disability payments to resume after a second (or subsequent) stint on active duty. If a veteran fails to ask for his benefits again, the agency will not provide them. Nor will the agency pay benefits retroactively beyond “1 year prior to the date” of a veteran’s reinstatement request. 38 CFR §3.654(b)(2) (2021).⁹

This quotation above is the important takeaway for non-lawyers. If you are a reservist who rates and receives disability, and later serves on active duty, you **MUST request for your disability payments to be resumed when you leave active duty.**

Important Takeaway for Lawyers: A Majority of the Current Court is not Interested in Reviewing *Chevron*

This case concurrently addressed two separate issues:

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

1) Whether the doctrine of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* permits courts to defer to the Department of Veterans Affairs' construction of a statute designed to benefit veterans, without first considering the pro-veteran canon of construction; and (2) whether *Chevron* should be overruled.¹⁰

When in front of the Court of Appeals for Veterans Claims, Buffington argued that the VA's rules are inconsistent with 38 U.S.C. § 5304(c), in which Congress provided that the VA may *only* suspend disability payments for periods when the veteran "receives active service pay."¹¹ Instead of deciding whether Buffington's interpretation was correct, the court invoked *Chevron* and deferred to the VA's rules, an approach that Justice Gorsuch strongly disagrees with.¹²

Justice Gorsuch argues that the "VA's misguided rules harm a wide swath of disabled veterans."¹³ Discussing the role of *Chevron*, he suggests that the doctrine has been "expanded well beyond its original intent, and as a result gives too much power to bureaucrats, at the expense of "ordinary Americans."¹⁴

Gorsuch concluded his dissent: "the whole project deserves a tombstone no one could miss," and he urged his colleagues to "acknowledge forthrightly that *Chevron* did not undo, and could not have undone, the judicial duty to provide an independent judgment of the law's meaning in the cases that come before the Nation's courts."¹⁵

I recommend that lawyers who work in the veterans' disability space or are interested in Justice Gorsuch's take on *Chevron*, to read his dissent from the denial of certiorari, [here](#).

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¹⁰ SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/buffington-v-mcdonough/> (last visited Mar. 19, 2023).

¹¹ *Id.*

¹² *Id.*; *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).

¹³ *Id.*

¹⁴ SCOTUSBLOG, <https://www.scotusblog.com/2022/11/denials-of-review-in-five-cases-draw-dissents-from-various-justices/> (last visited Mar. 19, 2023).

¹⁵ *Id.*

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