United States Court of Appeals for Veterans Claims

Richard D. Simmons,
Appellant,

v. **Vet. App. No. 16-3039**

David J. Shulkin, M.D.,
Secretary of Veterans Affairs,
Appellee.

Mr. Simmons' Supplemental Memorandum of Law in Response to Order of January 8, 2018.

On January 8, 2018, this Court requested additional briefing on the following questions:

1. Section 7261(c) provides that "[i]n no event shall findings of fact made by the Secretary or the [Board] be subject to trial *de novo* by the Court." What is the proper understanding of the prohibitory scope of this statutory provision, including, but not limited to, the reference to "trial *de novo*," concerning "findings of fact made by the Secretary or the [Board]"?

2. What is the proper standard for the Court to employ in making factual determinations pursuant to a harmless error analysis? Should it find facts *de novo* in all cases, or is there some other more appropriate standard?

3. What is the proper test for making the ultimate determination as to whether an error harmed a VA claimant? Is the test whether the error would affect the judgment, affect the essential fairness of the adjudication, *see Sanders*, 556 U.S. at 407-08; *Vogan*, 24 Vet.App. at 163, or is there another more appropriate test? *See Sanders*, 556 U.S. at 406 (holding that the statute "requires the Veterans Court to apply the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases"); but *see id.* at 412 (noting that the VA "adjudicatory process is not truly adversarial, . . . [which] might lead a reviewing court to consider harmful in a veteran's case error that it might consider

harmless in other circumstances") (internal citation removed).

4. Although the Court normally "may examine the entire record before the Agency," *Vogan*, 24 Vet.App. at 164, would the Court's examination differ in determining whether an error was harmless when a VA claimant asserts CUE given that CUE is adjudicated "based on the record and the law that existed at the time of the prior . . . decision," *Russell v. Principi*, 3 Vet.App. 310, 314 (1992)?

5. In undertaking a harmless error analysis, are there any limitations as to the Court's ability to make factual and legal determinations and to apply the law to the facts found?

In response Mr. Simmons offers the following memorandum of law.

Mr. Simmons's Memorandum of Law

Introduction

While on active duty, the record confirms that Mr. Simmons experienced chronic physical and emotional complaints. RBA 127-128, 129, and 130-131. These persistent complaints resulted in a recommendation that Mr. Simmons be administratively discharged due to his unsuitability for active duty service. In December 1972 Mr. Simmons was awarded a non service-connected pension as a result of polyarthritis in multiple joints, effective September 15, 1972. RBA 69-70.

In June 1974, Mr. Simmons filed an application for disability compensation for rheumatoid arthritis as manifested by his mental depression in service. RBA 52. He was not represented by a lawyer. The VA denied Mr. Simmons's claims for both rheumatoid arthritis and a nervous condition with depressive features. RBA 1448-1449. Mr. Simmons initiated but did not complete his appeal. The VA's decision

denying service connection for rheumatoid arthritis and mental depression became final.

On April 14, 2004, Mr. Simmons raised the issue of clear and unmistakable error in the VA's September 18, 1974 rating decision in a pleading to the Board of Veterans Appeals. RBA 502-517. The Board, in August 2004, referred this issue to the VA regional office for further action. RBA 471-494 at 473. The VA took no action on the Board's referral. On December 21, 2005, Mr. Simmons filed a motion for revision of the September 18, 1974 rating decision in which he set out specific allegations of error. RBA 322-323 and 326-333.

On September 29, 2009, the VA denied revision of the VA's September 18, 1974 rating decision. RBA 313-317. Mr. Simmons appealed. On March 11, 2015, the Board of Veterans Appeals incorrectly determined that the VA's September 18, 1974 rating decision was subsumed by the February 4, 1991 Board decision. RBA 183-192. Mr. Simmons appealed to this Court. *See* Vet. App. No. 15-2566.

On January 20, 2016, the VA agreed to a Joint Motion for Remand asking this Court to vacate the Board's March 2015 decision and directing the Board to adjudicate Mr. Simmons's appeal of the VA's denial of revision. RBA 137-141. This Court granted the joint motion. RBA 142. On May 13, 2016, the Board denied Mr. Simmons's request for revision of the VA's September 18, 1974 decision. RBA 1-21.

Question 1: Section 7261(c) provides that "[i]n no event shall findings of fact made by the Secretary or the [Board] be subject to trial *de novo* by the Court." What is the proper understanding of the prohibitory scope of this statutory provision, including, but not limited to, the reference to "trial *de novo*," concerning "findings of fact made by the Secretary or the [Board]"?

The proper understanding of the statutory prohibition preventing this Court from subjecting findings of fact made by the Secretary or the Board to trial *de novo* is that Congress intended the Secretary and the Board to be the fact finders and not this Court. However, in the context of a request for revision of a final regional office decision neither the Secretary nor the Board are required to make factual findings. A request for revision of a final regional office decision based on an allegation of clear and unmistakable error is a collateral attack. *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 696-98 (Fed. Cir. 2000).

To establish that a clear and unmistakable error was made in a regional office decision, the appellant must show

(1) that either the facts known at the time were not before the adjudicator or **the law then in effect was incorrectly applied**,

(2) **that an error occurred based on the record and the law that existed at the time the decision was made**, and

(3) that, **had the error not been made, the outcome would have been manifestly different**.

Grover v. West, 12 Vet.App. 109, 112 (1999)(emphasis added); *Damrel v. Brown*, 6 Vet.App. 242, 245 (1994); *Russell v. Principi*, 3 Vet.App. 310, 313-314 (1992)(*en banc*). The allegation of error made by Mr. Simmons in this matter was that the regional office decision of September 18, 1974 did not consider or apply 38 U.S.C. § 105(a) or 38 U.S.C. §1111 formerly § 311. RBA 328. The allegation made by Mr. Simmons was and is a question of law and not a question of fact. No fact finding was required by either the VA or the Board. Therefore, statutory prohibition in 38 U.S.C. § 7261(c), preventing this Court from subjecting findings of fact made by the Secretary or the Board to trial *de novo* **does not apply.**

Question 2: What is the proper standard for the Court to employ in making factual determinations pursuant to a harmless error analysis? Should it find facts *de novo* in all cases, or is there some other more appropriate standard?

The proper standard for this Court to employ in making factual determinations pursuant to a harmless error analysis was set out by the Supreme Court in *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009). The Supreme Court found that the provisions of 38 U.S.C. § 7261(b)(2) required the same sort of "harmless-error" rule as is ordinarily applied in civil cases as shown by Congress's use of the statutory words "take due account" and "prejudicial error." The Supreme Court relied on Congress's use of the same words it used in the Administrative Procedure Act (APA), 5 U.S.C. § 706, which is an "'administrative law ... harmless error rule.'" *See National Assn. of Home Builders v.*

Defenders of Wildlife, 127 S.Ct. 2518 (2007).

The Supreme Court explained:

> **To say that the claimant has the "burden" of showing that an error was harmful is not to impose a complex system of "burden shifting" rules or a particularly onerous requirement**. In ordinary civil appeals, for example, the appellant will point to rulings by the trial judge that the appellant claims are erroneous, say, a ruling excluding favorable evidence. Often the circumstances of the case will make clear to the appellate judge that the ruling, if erroneous, was harmful and nothing further need be said. But, if not, then the party seeking reversal normally must explain why the erroneous ruling caused harm. If, for example, the party seeking an affirmance makes a strong argument that the evidence on the point was overwhelming regardless, it normally makes sense to ask the party seeking reversal to provide an explanation, say, by marshaling the facts and evidence showing the contrary. The party seeking to reverse the result of a civil proceeding will likely be in a position at least as good as, and often better than, the opposing party to explain how he has been hurt by an error. *Cf. United States v. Fior D'Italia, Inc.*, 536 U.S. 238, 256, n. 4, 122 S.Ct. 2117, 153 L.Ed.2d 280 (2002) (SOUTER, J., dissenting).

Sanders, 129 S. Ct. 1706. (emphasis added). The Supreme Court also noted:

> But the factors that inform a reviewing court's "harmless-error" determination are various, potentially involving, among other case-specific factors, an estimation of the likelihood that the result would have been different, an awareness of what body (jury, lower court, administrative agency) has the authority to reach that result, a consideration of the error's likely effects on the perceived fairness, integrity, or public reputation of judicial proceedings, and a hesitancy to generalize too broadly about particular kinds of errors when the specific factual

> circumstances in which the error arises may well make all the difference. *See Neder*, 527 U.S., at 18-19, 119 S.Ct. 1827; *Kotteakos*, supra, at 761-763, 66 S.Ct. 1239; *Traynor* 33-37.

Sanders, 129 S. Ct. 1706. In applying a harmless error analysis, this Court should find facts *de novo* in all cases. However, having said that, there clearly are some cases in which fact finding by this Court is not required because the prejudice to the appellant is obvious. One such case is when the RO or the Board fails to correctly apply an applicable provision of law or regulation. A manifestly different outcome occurs because of the existence of an obligation under an applicable provision of law or regulation to act. It is the statutory or regulatory obligation to act which constitutes the manifestly different outcome.

Question 3: What is the proper test for making the ultimate determination as to whether an error harmed a VA claimant? Is the test whether the error would affect the judgment, affect the essential fairness of the adjudication, *see Sanders*, 556 U.S. at 407-08; *Vogan*, 24 Vet.App. at 163, or is there another more appropriate test? *See Sanders*, 556 U.S. at 406 (holding that the statute "requires the Veterans Court to apply the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases"); but *see id.* at 412 (noting that the VA "adjudicatory process is not truly adversarial, . . . [which] might lead a reviewing court to consider harmful in a veteran's case error that it might consider harmless in other circumstances") (internal citation removed).

The proper test for making the ultimate determination as to whether an error harmed a VA claimant must be a totality of the circumstances test which considers

whether the error made prevented the appellant from receiving the full benefit and consideration of the law. Specifically, if the error made concerns a statutory or regulatory obligation which was not met by the VA, then such an error was necessarily harmful because it prevented the appellant from receiving the full benefit of the law or regulation. A totality of the circumstances test must also consider whether the error would have affected the judgment made in the matter as well as having affected the essential fairness of the adjudication.

In *Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998), the Federal Circuit in the context of veterans' benefits where the system of awarding compensation is so uniquely pro-claimant, the importance of systemic fairness and the appearance of fairness carries great weight. To this extent, the ability of the VA or the Board to have render a fair, or apparently fair decision may depend on the statutory or regulatory obligation imposed. *Hodge*, 155 F.3d 1364. It is the systemic fairness as well as the appearance of fairness which dictates the harm of the failure to comply with a statutory or regulatory duty.

For example, in a case whether the VA or the Board failed to meet its obligation under the provisions of 38 C.F.R. § 3.156(b) to assess new and material evidence received during an appeal period or while an appeal is pending is necessarily prejudicial because the obligation is mandatory and not permissive. This Court's consideration is not to determine the outcome of the assessment of the new and

material evidence but rather to recognize that the error is the failure of the VA to have met its obligation as imposed by § 3.156(b).

Because the VA "adjudicatory process is not truly adversarial, . . . [which] might lead a reviewing court to consider harmful in a veteran's case error that it might consider harmless in other circumstances," this Court's test must be dependent upon the totality of the circumstances. Such broad consideration is required due to the uniquely proclaimant non-adversarial system of veterans benefits in which the error was made by either the VA or the Board. In other words while § 7261(c) "requires the Veterans Court to apply the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases" but that application is tempered by the nature of the system in which the error occurred.

Question 4: Although the Court normally "may examine the entire record before the Agency," *Vogan*, 24 Vet.App. at 164, would the Court's examination differ in determining whether an error was harmless when a VA claimant asserts CUE given that CUE is adjudicated "based on the record and the law that existed at the time of the prior . . . decision," *Russell v. Principi*, 3 Vet.App. 310, 314 (1992)?

This Court in *Vogan v. Shinseki*, 24 Vet.App. 159 (2010) held that in assessing the prejudicial effect of **any** error of law or fact, this Court was not confined to the findings of the Board. This Court's examination would not differ in determining whether an error was harmless when a VA claimant asserts a clear and unmistakable error was made by the VA because a request for revision is a procedural device used

to correct errors of law. Therefore, in the context of a motion for revision, while the error alleged must be "based on the record and the law that existed at the time of the prior . . . decision," it is not the controlling factor in a prejudicial error analysis.

To the contrary, as this Court observed in *Vogan*, "The wording of the statute [38 U.S.C. § 7261(c)] itself places no limitations on the scope of the Court's inquiry regarding prejudicial error." *Vogan*, 24 Vet.App. 163. The scope of the Court's inquiry regarding prejudicial error in a case involving an allegation of clear and unmistakable error must be driven by the nature of the error alleged as well as specific obligation of the VA at issue. For example, in this case, the error concerns the failure to afford Mr. Simmons the benefit of a statutory presumption of service connection. Such an allegation of clear and unmistakable error must be considered based on the function and purpose of a presumption.

A "presumption" is a procedural tool that shifts the burden of proof on a substantive issue: if a basic fact is established, a court accepts a conclusion on the issue unless the presumption is rebutted with evidence that meets the presumption's associated standard of proof. 1–301 Weinstein's Federal Evidence § 301.02 (2015). The factual predicate demonstrated by the presumptions has an important evidentiary value and, to that extent, is the functional equivalent of evidence. *see Smith v. Derwinski*, 1 Vet. App. 178, 180 (1991) and *Corpuz v. Brown*, 4 Vet App 110, 113 (1993). The Federal Circuit in *Routen v. West*, 142 F.3d 1434, 1440 (Fed. Cir. 1998),

cert. denied, 525 U.S. 962, 119 S. Ct. 404, 142 L. Ed.2d 328 (1998) explained: "The presumption affords a party, for whose benefit the presumption runs, the luxury of not having to produce specific evidence to establish the point at issue. When the predicate evidence is established that triggers the presumption, the further evidentiary gap is filled by the presumption." *Routen*, 142 F.3d 1440.

As such, the inquiry relevant to prejudicial error by this Court must be based on the harm done to a veteran when the VA fails when required to afford a veteran the benefit of a presumption. This Court should not attempt to determine what would have occurred had the VA afforded the presumption. But rather, based on the purpose of the presumption, the Court should determine whether the failure to afford the veteran the benefit of a presumption was itself harmful.

Question 5: In undertaking a harmless error analysis, are there any limitations as to the Court's ability to make factual and legal determinations and to apply the law to the facts found?

This Court in undertaking its harmless error analysis has no limitations as to the Court's ability to make factual and legal determinations and to apply the law to the facts found. In this case, the Board erred regarding § 105(a) and incorrectly determined that any such error was nonprejudicial because the Board incorrectly determined that the record does not show a manifestly changed outcome. When, as here, the VA fails to correctly apply a statutory presumption or any other mandatory statutory or regulatory obligation there is a manifestly different outcome

because Mr. Simmons in this case was entitled as a matter of law to the benefit of the presumption. The application of the presumption is the manifestly different outcome. In the original adjudication, Mr. Simmons was entitled to and did not receive the benefit of the presumption of service connection under 38 U.S.C. § 105(a).

If the VA had, as required by law, afforded Mr. Simmons the benefit of the presumption of service connection, then the only remaining element of his claim to be established would have been evidence of a nexus between his current disability and service. In this case, at the time of the VA's September 18, 1974 rating decision the record included a medical opinion from Jeffress G Palmer, M. D. dated June 4, 1974 which provided that nexus. RBA 49. The VA's failure to afford Mr. Simmons the benefit of the presumption of service connection was both prejudicial and would have resulted in a manifestly different outcome. Had the presumption been afforded -- based on the evidence of nexus in the record, an award of service connected compensation would have been required.

The concept of a manifestly different outcome can not be limited to consideration of whether the failure to apply the applicable law, itself would have resulted in an award of the benefit sought. A manifestly different outcome must consider the totality of the circumstances of the failure to consider and apply the applicable provision of law or regulation. A broad and not a narrow consideration is

is necessary to ensure the essential fairness of the adjudicatory process. If the concept of a manifestly different outcome were to be limited only to the failure to correctly apply the law, then the VA would be permitted to ignore mandatory provisions of law and regulation and the totality of the adjudication process would be insulated from review and revision. Such a limitation of the scope of the concept of a manifestly different outcome renders the remedy of revision based on a clear and unmistakable error unreasonably narrow. More importantly, such a limitation is at odds with an adjudication process which was designed by Congress to be veteran friendly and nonadversarial.

Respectfully submitted by:

/s/ Kenneth M. Carpenter
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