IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JAMES W. RORIE, SR.,

Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,

Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

SUPPLEMENTAL BRIEF OF THE APPELLEE

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IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JAMES W. RORIE, SR.,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet.App. No. 22-5377
	)	
DENIS MCDONOUGH,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

SUPPLEMENTAL BRIEF OF THE APPELLEE

Pursuant to the Court's Order dated November 20, 2023, Appellee, Denis McDonough, Secretary of Veterans Affairs, respectfully submits the following supplemental brief. In that Order, the Court seeks supplemental briefing with answer to the question:

> (1) What authority does a single judge, or even a panel of judges, have to look past the holding in *Pacheco v. Gibson*, 27 Vet.App. 21 (2014) (en banc), i.e. en banc precedent, concerning 38 C.F.R. § 3.157(b)? If there is no binding authority on that issue in this Court (or the Supreme Court or the Federal Circuit), what persuasive authority addresses this authority?
>
> (2) Specifically, how does *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019) effect (or in appellant's view, undermine) the holding in *Pacheco* concerning the interpretation of § 3.157(b)? For example, is § 3.157(b) "genuinely ambiguous" as the Supreme Court required to proceed to an agency deference analysis? In addition, and assuming there is genuine ambiguity, what in *Kisor* counsel in favor of a different approach to the deference question given the particular analysis in *Kisor*? In other words, *Kisor* has to meaningfully change the analysis the *Pacheco* Court employed. The parties must address this question with specific references to *Pacheco* and *Kisor*.

(3) Assuming the Court revisits the holding in *Pacheco* concerning the interpretation of § 3.157(b), and *Kisor* undermines the deference we must afford to the agency's interpretation of § 3.157(b), how would § 3.157(b) be applied based on the facts here in the absence of deference?

ARGUMENT

1. A Single Judge May Not Render A Decision Which Conflicts Materially With An Earlier En Banc Decision.

In 2014, this Court issued an en banc decision in *Pacheco v. Gibson* creating a binding precedent. 27 Vet.App. 21 (2014) (en banc). Where there is an earlier panel or en banc opinion—as is the case here—"a panel or single judge may not render a decision which conflicts materially with earlier panel or en banc opinion." *Bethea v. Derwinski*, 2 Vet.App. 252, 254 (1992). Only an en banc Court may overturn an en banc decision. *Gordon v. Principi*, 17 Vet.App. 221, 223-24 (2003). And unless the precedential en banc decision of this Court is overturned by this Court en banc, the United States Court of Appeals for the Federal Circuit, or the Supreme Court, "any rulings, interpretations, or conclusions of law contained in such a decision are authoritative and binding as of the date the decision is issued." *Tobler v. Derwinski*, 2 Vet.App. 8, 14 (1991). The Supreme Court in *Kisor* did not overturn this Court's holding in *Pacheco* and therefore, its interpretation of § 3.157(b) remains binding on VA agencies of original jurisdictions, the Board of Veterans' Appeals, and this Court.[1] *See id*. Appellant has not actually cited any

[1] Indeed, this Court continues to follow the holding in *Pacheco*. *See, e.g., Smith-Duckett v. McDonough*, No. 22-1162, 2023 U.S. App. Vet. Claims LEXIS 1660, *12

legal authority to support the argument that the Court must reevaluate the interpretation of § 3.157(b). *See* [Appellant's Supp. Br. 1-14]; *cf.* Vet. App. Rule 35(c).

2. Section 3.157(b) Is Not "Genuinely Ambiguous" And The *Pacheco* Court's Interpretation Of The Regulation Should Still Stand.

A "court should not afford *Auer* deference unless the regulation is *genuinely ambiguous*." *Kisor*, 139 S.Ct. at 2415. And, as Justice Kagan made clear in *Kisor*, "a court cannot wave the ambiguity flag just because it found the regulation impenetrable on the first read" and must "exhaust all the 'traditional tools' of construction." *Id*. However, a regulation is not ambiguous simply because both parties insist that the plain meaning supports his or her position and neither party's interpretation is unreasonable to the court. *Kisor* 139 S.Ct. at 2423. As the Supreme Court explained, before applying *Auer* deference, a court must "carefully consider the text, structure, history, and purpose of the regulation, in all the ways it would if it had no agency to fall back on." *Id*. at 2415. (internal quotation omitted).

(Oct. 27, 2023) (the application of § 3.157(b) is "limited to situations in which a claim was previously disallowed for the reasons that the disability was not compensable to a degree" and the appellant did not argue that his "claims prior to August 2007 were disallowed for this reason") (internal quotations omitted); *Kirkpatrick v. Wilkie*, No. 19-5562, 2020 U.S. App. Vet. Claims LEXIS 2155, *7-8 (Nov. 30, 2020) (explaining that § 3.157(b)(1) "applied only to situations where a claim was 'disallowed for the reason that the disability was not compensable in degree'" and that the appellant was denied service connection and thus, "medical records alone were insufficient to reopen his psychiatric claim").

In *Pacheco*, the Court found that the plain language of § 3.157(b) is subject to both parties' proffered interpretations and, accordingly, held that the provisions are ambiguous. 27 Vet.App. at 26. At first blush, it would appear, as Appellant contends, that the *Pacheco* court did not exhaust all traditional tools of construction before affording agency deference. [Appellant's Supp. Br. at 2-4]. But the *Pacheco* court did just that—it considered the text, structure, history, and purpose of § 3.157(b). *See* 27 Vet.App. at 26-27; *see also Kisor*, 139 S.Ct. at 2423 (explaining that "the court must make a conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether the regulation really has more than one reasonable meaning"). And, it is after the Court conducted this analysis that it determined that § 3.157(b) applies only on situations where a claim was previously disallowed for the reason that the disability was noncompensable in degree. *See Pacheco*, 27 Vet.App. at 26-29; *see also Kisor*, 139 S.Ct. at 2414 (explaining that a court should not afford *Auer* deference unless the regulation is found to be genuinely ambiguous after exhausting all the traditional tools of construction).

First, the *Pacheco* Court discussed the history of § 3.157(b) and its predecessor provision, § 3.216(a), explaining that prior to 1951, § 3.216(a) allowed for earlier effective dates for claims for increased ratings based upon the submission of certain medical reports. Subsequently, in 1951, a second sentence was added which allowed earlier effective dates for claims to reopen where the claim had been disallowed for the reason that the service-connected condition was not 10 percent disabling in degree. *Pacheco*, 27 Vet.App. at 26. The Court

determined that the addition of the second sentence "reflected the Secretary's desire to allow earlier effective dates for those whose previously service-connected condition worsened, but not those who had yet to establish service connection." Moreover, the Court acknowledged that the "*specific language* employed by the Secretary reflects his practice at the time that claims for benefits for disabilities that were service-connected yet noncompensably disabling were considered 'disallowed.'" *Id*. At 26-27 (emphasis added). That is, the text and structure of the regulation reflected its purpose and the Secretary's practice at the time. *See Id*.

Next, the Court considered the structure and history of the regulation in determining that construction of the regulation. *See id*. In that regard, the Court found that despite the agency's decision to combine the two separate sentences in 1961 under § 3.216(a), "there is no indication that the logic behind the evolution of this language was abandoned." *Id*. At 27. The Court specifically noted that the Secretary's interpretation of the language of the regulation has remained consistent noting that the Secretary "recently acknowledged in the *Federal Register* that he has *never* departed from an interpretation that the language of § 3.157(b) regarding claims to reopen is paired with the language regarding disability compensation claims that previously had been disallowed for service-connected disabilities being not compensable in degree." *Id*. At 27 (italics in original).

Lastly, the Court found the Secretary's interpretation gives the entire provision meaning. *See id*. At 28. That is, the Court determined that given the Secretary's interpretation, the last phrase of 3.157(b)(1) would be applicable in

instances including where a claimant who had a previous allowance of pension then files for a claim for increase compensation. *Id*.; *see also* [Appellant's Supp. Br. At 5 (arguing that established rules of textual construction "include the rule that a regulation must be interpreted 'so that effect is given to all its provision.'").

Following its analysis of the provision's text, structure, history, and purpose, the Court determined that the Secretary's interpretation "comfortably fits the structure and terms of § 3.157(b) and (b)(1), *particularly in light of the regulatory history and consistent practice of the Secretary*." *Pacheco*, 27 Vet.App. at 29 (emphasis added). The Court's conclusion fits squarely within the analysis provided in *Kisor* and demonstrates that there is no genuine ambiguity in § 3.157(b)—that is, after exhausting the "traditional tools" of construction, the *Pacheco* Court determined the reasonable construction of the regulation is that § 3.157(b) applies only in cases where a disability has previously been service-connected but at a noncompensable rating. *See Pacheco*, 27 Vet.App. at 24; *see also Kisor*, 139 S.Ct. at 2415 ("only when that legal toolkit is empty and the interpretive question still have no single right answer can a judge conclude that it is 'more [one] of policy than of law'").

Therefore, even if *Kisor* undermines the deference that must be given to the Secretary's interpretation, the outcome would not differ. *See* [Court's Nov. 20, 2023, Order)]. That is, the *Pacheco* Court conducted an adequate analysis of § 3.157(b) and exhausted the legal toolkit to arrive at the "single right answer." *See Kisor*, 139 S.Ct. at 2414 ("only when that legal toolkit is empty and the interpretive

question still has no single right answer can a judge conclude that it is 'more [one] of policy than of law.'"). In this case, at the time of Appellant's treatment for tinea pedis in August 1985, he was not service-connected for that condition. *See* [Record Before the Agency [R.] at 20085-96 (Mar. 1985 Board decision)]; *see also* [R. at 20058 (Aug. 1985. Treatment record)]. Because tinea pedis was not a service-connected condition evaluated at a noncompensable rating at the time of the treatment, the receipt of the August 1985 VA treatment record cannot serve as an informal claim to reopen under § 3.157(b). *See* 38 C.F.R. § 3.157(b), (b)(1).

3. Even Assuming § 3.157(b) Is Genuinely Ambiguous, *Kisor* Does Not Change The Deference Approach Taken In *Pacheco*.

Even if 3.157(b) were to be found genuinely ambiguous thereby requiring a finding that the Secretary's interpretation warrants deference, *Kisor* does not change the outcome. As the *Kisor* Court provided, even where careful consideration of the text, structure, history, and purpose of a regulation leaves genuine ambiguity, "the agency's reading must still be 'reasonable.'" *Kisor*, 139 S.Ct. at 2415. That is, the agency's reading "must come within the zone of ambiguity the court has identified after employing all its interpretive rules." *Id*. at 2416. Pursuant to *Kisor*, an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight include consideration of: (1) the regulatory interpretation must be one actually made by the agency; (2) the agency's interpretation must in some way implicate its substantive expertise; and (3) the agency's reading of a rule must reflect "fair and considered

judgment." *Id*. at 2416-17. And contrary to Appellant's contention, the *Pacheco* Court did, in fact, undertake an independent inquiry. *See* [Appellant's Supp. Br. at 5-7]; *but see Pacheco*, 27 Vet.App. at 27-29.

First, the *Kisor* Court explained that the regulatory interpretation must be "authoritative" or the "official position" of the agency. *Kisor*, 139 S.Ct. at 2416. In this regard, the *Pacheco* Court determined explained that the Secretary has maintained in the *Federal Register* that § 3.157(b) has never applied to claims that were previously denied because the claimed injury was not service connected. *Pacheco*, 27 Vet.App. at 27. And although Appellant argues that the Secretary's interpretation is post ho rationalization, he ignores that the Court, after careful analysis of the regulatory history, recognized that the Secretary's interpretation and application of the regulation remained consistent. *See* [Appellant's Supp. Br. at 12-13]; *but see Pacheco*, 27 Vet.App. at 27, n.2 ("the Secretary has maintained consistency in interpreting and applying his own regulation"); *see also Kisor*, 139 S.Ct. at 2416 (explaining that the Court has, in the past, deferred to official staff memoranda that were published in the Federal Register). Specifically, the *Pacheco* Court explained that, although in 1993, the Secretary explained that it has been "consistent practice to assign a noncompensable rating for service-connected disabilities not compensable in degree, *Zero Percent Disability Evaluations*, 58 Fed. Reg. 28,808, 28,808-09 (May 17, 1993, in no way contradicts the Secretary also acknowledging that there was a historical practice of considering such claims

disallowed for purposes of reopening." *Pacheco*, 27 Vet.App. 27, n.3; *see also* [Appellant's Supp. Br. at 13].

Second, pursuant to *Kisor*, the agency's interpretation must implicate its substantive expertise because "[a]dministrative knowledge and experience largely 'account [for] the presumption that Congress delegates interpretive lawmaking power to the agency.'" *Kisor*, 139 S.Ct. at 2417. To this point, the *Pacheco* Court found that under 38 U.S.C. § 501(a), the Secretary is authorized to promulgate rules and regulation, and under this authority, he is "entitled to acknowledge informal claims and authorize earlier effective dates based on those informal claims." *Pacheco*, 27 Vet.App. at 29.

Lastly, the *Kisor* Court explained that the agency's interpretation of the rule must reflect "fair and considered judgement." *Kisor*, 139 S.Ct. at 2417. In *Pacheco*, the Court considered this and found no application of the provision by the Secretary that is inconsistent with the Secretary's proffered interpretation and thus, reflects fair and considered judgment. *Pacheco*, 27 Vet.App. at 29. The Court explained that the Secretary "has maintained consistency in interpreting and applying his own regulation." *Pacheco*, 27 Vet.App. at 27 n. 2. And "this consistency reflects the Secretary's interpretation is his fair and considered judgment on this matter." *Id*.

As shown above, the analysis conducted by the *Pacheco* Court is consistent with the deference approach provided in *Kisor*. *See Pacheco*, 27 Vet.App. 26-29; *see also Kisor*, 139 S.Ct. at 2416-18. Therefore, even if there is genuine ambiguity

in the provision, the deference analysis completed by the Court in *Pacheco* is consistent with the approach provided in *Kisor*.

CONCLUSION

WHEREFORE, Appellee, Denis McDonough, Secretary of Veterans Affairs, respectfully responds to the Court's November 20, 2023, Order.

Respectfully submitted,

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