

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 22-5377

JAMES W. RORIE, SR.,

APPELLANT,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before ALLEN, TOTH, and FALVEY, *Judges*.

ORDER

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

This case was submitted for panel consideration with oral argument scheduled for June 13, 2024. While the parties should be prepared to discuss any issue that has been briefed, they should particularly ensure that they are prepared to discuss the following matters at oral argument in this appeal:

- Does *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019) undermine the Court's use of the deference doctrine established by *Auer v. Robbins*, 519 U.S. 452 (1997), in *Pacheco v. Gibson*, 27 Vet.App. 21 (2014) (en banc)?
- If the answer to the preceding question is "yes," what is the correct interpretation of 38 C.F.R. § 3.157(b) (2014) using the *Kisor* framework?
 - Is there genuine ambiguity in the regulation after applying all the tools of regulatory interpretation in our colloquial toolbox?
 - If so, does *Kisor* meaningfully change the analysis that the *Pacheco* Court employed or does the Secretary's interpretation still stand? Is there something to which the Secretary can point (i.e., authoritative) that qualifies as something to which a court would defer under the *Kisor* framework?
- If the holding in *Pacheco* that § 3.157(b) is ambiguous is no longer viable, is there an optimal reading of § 3.157(b) that the Court should adopt to resolve the case?

Upon consideration of the foregoing, it is

ORDERED that, in addition to all issues presented in the briefing, the parties be prepared to discuss the foregoing issues at oral argument.

DATED: April 29, 2024

PER CURIAM.

Copies to:

Tracy K. Alsup, Esq.

VA General Counsel (027)