IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

WARREN B. COOK,	)	
	)	
Appellant,	)	
	)	Vet. App. No. 15-0873
v.	)	
	)	
DAVID J. SHULKIN, M.D.,, Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

APPELLEE'S UNOPPOSED MOTION TO STAY THE PRECEDENTIAL EFFECT OF *COOK V. SNYDER*, 28 VET.APP. 330 (2017)

Pursuant to the Court's decision in *Ribaudo v. Nicholson (Ribaudo I)*, 20 Vet.App. 552 (2007), Appellee, David J. Shulkin. M.D., Secretary of Veterans Affairs (Secretary), respectfully moves this Court to stay the precedential effect of the Court's decision in *Cook v. Snyder*, 28 Vet.App. 330 (2017). On June 14, 2017, the Secretary filed an appeal of *Cook* before the U.S. Court of Appeals for the Federal Circuit (Federal Circuit).

The determination whether to grant a motion to stay the precedential effect of a decision pending appeal lies entirely within the Court's discretion. *Ribaudo I*, 20 Vet.App. at 560. In exercising its discretion, the Court considers the following four criteria: (1) the likelihood of success on the merits of the moving party's appeal; (2) whether the moving party will suffer irreparable harm in the absence of a stay; (3) the impact on the non-moving party of that stay; and (4) the public interest. 20 Vet.App. at 560.

As explained below, consideration of the *Ribaudo* factors weighs strongly in favor of granting a stay in this case.

Likelihood of Success on the Merits of the Appeal

The first criterion is met because there is a strong likelihood of success on the merits. As explained in *Ribaudo v. Nicholson (Ribaudo II*), 21 Vet.App. 137, 142 (2007), the determination of likelihood of success does not require a showing of mathematical probability of success. "To satisfy this requirement, the party seeking to maintain the status quo through a stay need only raise questions on the merits that are 'so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.'" *Id*. at 141 (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2nd Cir. 1953)). When a Court delves into an area with little precedent and interprets layers of legal authority (e.g. a statute and regulation), as this Court did in *Cook*, the chances of a different ruling on appeal, and basis for issuing a stay pending that appeal, increase. *Ribaudo II*, 21 Vet.App. at 142-143. This case presents the following substantial questions of statutory interpretation that have not been addressed previously by the courts.

In this case, the Court misapplied the law in two ways. First, it held that 38 U.S.C. § 7107(b) confers a right to more than one Board hearing

on a claim when the claim reaches another "stage of appellate proceedings," but it failed to address other statutes that delegate authority to the Secretary of Veterans Affairs (Secretary) to regulate hearing rights. Second, it denied *Skidmore* deference based upon a mischaracterization of VA's position.

First, 38 U.S.C. § 7107(b) provides: "The Board shall decide any appeal only after affording the appellant an opportunity to a hearing." Congress delegated to the Secretary of Veterans Affairs broad authority to regulate the benefits claims process. *See* 38 U.S.C. § 501. This authority extends to Board hearings. Section 7105(a) provides, in pertinent part: "Each appellant will be accorded a hearing and representation rights pursuant to the provisions of this chapter [38 U.S.C. § 7101 et seq.] and regulations of the Secretary." 38 U.S.C. § 7105(a). The Board's rules of practice are contained in part 20 of title 38, Code of Federal Regulations. *See e.g.* 38 C.F.R. §§ 20.700(a), (b), 20.1304(a), (b) (all relating to Board hearings).

After finding the use of "a" in section 7107(b) ambiguous, the Court reasoned that the Secretary had not used his authority under section 501(a) "to clarify the ambiguity in section 7107(b)." *Cook*, 28 Vet.App. at 339. However, the Court did not analyze whether section 501(a), on its own, and separate from its potential to clarify section 7107(b), granted the

Secretary the authority to regulate hearings through regulation. *See id*. Furthermore, section 7105(a) is a more specific and explicit designation of authority to the Secretary to regulate hearing rights. *See* 38 U.S.C. § 7105(a). However, the Court cited to section 7105(a) exactly once in its opinion, and only in reference to the general appellate process. *See Cook*, 28 Vet.App. at 342. The Secretary respectfully asserts that the Court's failure to analyze this statutory grant of authority to the Board to regulate the hearing process presents "fair grounds for litigation and thus produce a good reason for maintaining the status quo pending further deliberate review." *Ribaudo II*, 21 Vet.App. at 142.

Second, the Court misstated VA's position throughout its decision, including at the crucial point when it found that VA's interpretation of section 7107(b) was not "considered and consistent," and therefore unworthy of *Skidmore* deference. *See Cook*, 28 Vet.App. at 343 (applying *Skidmore v. Swift v. Swift & Co.*, 323 U.S. 134, 140 (1994)). The Court mischaracterized VA's interpretation of section 7107(b) as "limit[ing] a claimant to only one Board hearing during the entire course of appellate proceedings." *Id*. Although VA does read section 7107(b) as entitling claimants to only one Board hearing, VA made clear throughout that the provision of subsequent Board hearings (that is, any number of hearings after that first hearing) was discretionary. The Court largely ignored the

Secretary's actual position, and it never used the word "discretionary" in its decision. *See generally Cook*, 28 Vet.App. 330. Similarly, other than in a parenthetical citation to *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam order), the Court never discussed 38 C.F.R. § 20.1304(b), which sets out limitations on timing for requesting hearings and the Board's ability to grant good cause exceptions. *See Cook*, 28 Vet.App. at 343-44; 38 C.F.R. § 20.1304(b). Importantly, unlike in this case, the Court in *Kutscherousky* never held that claimants were statutorily entitled to post-remand Board hearings in all cases. *See Kutscherousky*, 12 Vet.App. at 344. The Secretary respectfully asserts that the Court's mischaracterization of the Secretary's position also presents "fair grounds for litigation and thus produce[s] a good reason for maintaining the status quo pending further deliberate review." *Ribaudo II*, 21 Vet.App. at 142.

Irreparable Harm

The Secretary respectfully asserts that he will suffer irreparable harm in the absence of a stay. *Ribaudo II*, 21 Vet.App. at 142. The Court's holding results in significant delay at the Board in affording Veterans their *first* hearing on appeal. It causes appellants requesting their second hearing to skip in line ahead of those who are still awaiting their first hearing. The Board is mandated by statute to conduct hearings in docket order. Section 7107(a)(1) states, with limited exceptions, that a

case on appeal "shall be considered in regular order according to its place on the docket." 38 U.S.C. § 7107(a). This section mandates that when an appellant's case is sent back to the Board it will be considered in docket order. *See* 38 U.S.C. § 7107(a). This includes the provision of a hearing. So, when a case returns to the Board for provision of a second hearing, those appeals originating later than the initial, returned appeal will all be sent further down the line. This is due to the statutory mandate of section 7107(a). *See also* 38 U.S.C. § 7112 (requiring "expeditious treatment" for claims remanded to the Board by this Court). This delay will not affect only one Veteran, but likely thousands, or even tens of thousands.

As of May 6, 2016, the date of the Secretary's Supplemental Memorandum of Law in this case, the Board had scheduled 67,500 hearings. In fiscal year 2016, this Court remanded 3,196 appeals to the Board. Under the Court's interpretation of section 7107(b), each of those 3,196 appellants has a mandatory right to a hearing before the Board upon request, even if they have already had one. Under the Court's holding, the Board does not have discretion to deny those requests, and those requests must be considered in docket order. Each appellant who requests a second hearing will, by statute, be placed in line ahead of a veteran who is waiting for their first hearing but has a later docket number. And they will hold those places in line until they have had their second

hearing. Thus, the delay caused by provision of second hearings to some veterans on the basis of the Court's decision causes irreparable harm in the form of further delay to potentially tens of thousands of veterans awaiting their first Board hearing, to which they are statutorily entitled. The grant of a stay would prevent harm to those veterans awaiting their first hearings and should be in place until there is a final judgment in this matter.

Impact on Non-moving Party

The impact on the non-moving party is "judged by the group that is defined by the law being interpreted,"[1] and in this case would constitute appellants who have entered a new "stage of appellate proceedings," specifically having secured a remand from this Court. *See Ribaudo II*, 21 Vet.App. 143. The worst-case-scenario impact on those individuals would be the potential denial of second hearing requests, assuming that the Board exercises its discretion to deny such requests (of course, as the Secretary has consistently argued, the Board could also *grant* requests for second hearings at its discretion).

[1] VA does not believe the stay would affect Appellant because his case will not be returned to the Board until after the Federal Circuit appeal is resolved.

Public Interest

The public interest supports the granting of this stay. "[T]he members of the public that are particularly interested in the outcome of the type of stay motions presented here are the millions of current and potential veterans benefits claimants." *Ribaudo II*, 21 Vet.App. at 143. As noted above, the *Cook* decision impacts thousands of claimants. In the absence of a stay, veterans across the system will unavoidably experience delay in being afforded their statutorily guaranteed first hearing on appeal to the Board.

Appellant does not oppose this motion.

WHEREFORE, Appellee, David J. Shulkin, M.D., Secretary of Veterans Affairs, respectfully moves the Court to stay the precedential effect of *Cook*, 28 Vet.App. 330.

Respectfully submitted,

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