IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

PATRICK M. OVERTON, Appellant,	)	
v.	)	Vet. App. No. 17-0125
ROBERT L. WILKIE, Secretary of Veterans Affairs, Appellee.	)	

MOTION FOR RECONSIDERATION

Pursuant to Rule 35 of the U.S. Court of Appeals for Veterans Claims (Court) Rules of Practice and Procedure, Appellee, Robert L. Wilkie, Secretary of Veterans Affairs (Secretary), respectfully moves for reconsideration of the September 19, 2018, panel decision that set aside the November 1, 2016, decision of the Board of Veterans' Appeals (Board) and remanded the issues of entitlement to service connection for diabetes mellitus, type II, with retinopathy and ischemic heart disease. The Secretary respectfully submits that reconsideration of the decision is warranted because the Panel overlooked the fact that the Secretary expressly asserted in his brief that the distinction between inland and offshore waterways was a reasonable interpretation of 38 C.F.R. § 3.307(a)(6)(iii) and that deference to that interpretation was warranted under settled caselaw.

In relevant part, and central to its decision, the Panel found that the Secretary waived the argument that the Court should defer to his interpretation of 38 C.F.R. § 3.307(a)(6)(iii) because "[t]his argument appears nowhere in the Secretary's brief." *See* Slip. op., at 9-10. However, this finding is factually inaccurate.

On page 8 of the Secretary's brief, filed on December 6, 2017, the Secretary argued as follows:

> As the Federal Circuit recognized in *Haas v. Peake* within the context of 38 C.F.R. § 3.307(a)(6)(iii)—the regulation at issue here—an agency's interpretation of its own regulations "is controlling unless plainly erroneous or inconsistent with the regulations being interpreted." *Haas v. Peake*, 525 F.3d 1168, 1186 (2008); *see United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001) (holding an agency's interpretation of its own regulations is entitled to deference by the Court); *Mulder v. Gibson*, 27 Vet.App. 10, 16 (2014) (holding that where the plain language is ambiguous, the Court should defer to the interpretation of VA so long as the interpretation is not inconsistent with the language of the regulation or otherwise plainly erroneous).

(Sec'y Brief, at 8). Although the Secretary did not cite to *Auer v. Robbins*, 519 U.S. 452 (1997), directly, the Secretary did raise the argument that the Court should defer to his interpretation of his own regulation, citing to three other cases standing for the same proposition, including *Haas v. Peake*, which considers the applicability of deference to the same regulation in question in the instant case. *Id*. Additionally, both *Haas* and *Mulder* cite to *Auer* in their respective analyses regarding deference. *See Haas*, 525 F.3d at 1168; *Mulder*, 27 Vet.App. at 16.

The Secretary further notes that on page 9 of his brief, he pointed out that "Appellant never challenges whether [the Secretary's] interpretation is 'plainly erroneous or inconsistent with the regulations being interpreted.'" *Id*. at 9. This fact remained true throughout these proceedings, up to and including oral argument before this Court.

Accordingly, as the Panel's decision is predicated on a factually inaccurate statement that the Secretary did not raise, and therefore waived, the argument that

the distinction between inland and offshore waterways was a reasonable interpretation of his own regulation, and that the Court should defer to that interpretation, the Secretary respectfully submits that reconsideration of the decision is warranted.[1]

Respectfully submitted,

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[1] Pursuant to the Court's reconsideration of this point, the Secretary further notes that the case of *Procopio v. Wilkie*, No. 17-1821 (U.S. Fed. Cir.), is presently before the United States Court of Appeals for the Federal Circuit *en banc*, with oral argument scheduled for December 7, 2018, and two petitions for certiorari in *Blue Water Navy Vietnam Veterans Associations, Inc. v. Peter O'Rourke*, No. 17-1693, and *Robert H. Gray v. Peter O'Rourke*, No. 17-1679, have been filed with the United States Supreme Court on June 18, 2018 (No. 17-1693), and June 19, 2018 (No. 17-1679), respectively. These cases contemplate issues that will likely have a direct impact on the questions at issue here.