MOTION GRANTED

Michael P. Allen
Judge
December 6, 2021

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

STEPHANIE L. WATKINS,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 20-5612
	)	
DENIS MCDONOUGH,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

APPELLANT'S MOTION FOR INITIAL REVIEW BY PANEL

Pursuant to U.S. Vet. App. R. 27.1 ("R. 27.1"), Appellant hereby requests initial review by panel.

Under R. 27.1(b)(1), "[a] motion for initial review by panel . . . must be filed no later than 14 days after the reply brief is due or filed." Here, Appellant filed her reply brief on August 18, 2021. However, R. 27.1 was not published, and did not become effective, until November 8, 2021. Consequently, Appellant was unable to file her motion for initial review by panel in accordance with R. 27.1(b)(1).

However, under R. 27.1(b)(3), "[a] motion for review by panel . . . may [also] be filed concurrently with the filing . . . that raises the issue warranting panel review, but no later than 14 days after the last responsive pleading for that action is due or filed." In this case, on September 22, 2021, the Court ordered that the

parties file Supplemental Memoranda of Law. Appellant responded to the Court's order by filing her Supplemental Memorandum of Law on November 29, 2021. Accordingly, Appellant submits that, pursuant to R. 27.1(b)(3), this motion for initial review by panel is timely filed.

Moreover, Appellant submits that several issues involved in her appeal warrant panel review as contemplated by R. 27.1(c)(1). Specifically, resolution of this case may clarify and, indeed, establish a new rule of law concerning the meaning and temporal scope of active duty for training, to include "full-time duty in the Armed Forces performed by Reserves for training purposes" and "[a]uthorized travel to or from such duty." *See* 38 U.S.C. §§ 101(22)(A), 101(22)(E); *see also* 38 C.F.R. §§ 3.6(c)(1), 3.6(c)(6).

Embedded within this issue is the question of whether, or to what degree, VA is bound by holdings from military courts regarding the meaning and temporal scope of active duty for training. Specifically, are findings from military courts regarding the meaning and temporal scope of active duty for training *per se* "service department findings" as contemplated by the Court's interpretation of 38 C.F.R. § 3.203,[1] or does it depend on the facts of each case and the language found in the veteran's service documents? Resolution of this issue would once more

[1] *See, e.g., Soria v. Brown*, 118 F.3d 747 (Fed.Cir.1997); *Duro v. Derwinski*, 2 Vet.App. 530 (1992); *Venturella v. Gober*, 10 Vet.App. 340 (1997); *Laruan v. West*, 11 Vet.App. 80 (1998) (en banc) (reversed on other grounds).

clarify the scope of 38 C.F.R. § 3.203, and indeed may even establish a new rule of law.

Furthermore, resolution of this case by panel may explain the relationship between 38 U.S.C. §§ 101(22)(E) and 106(d). *See also* 38 C.F.R. §§ 3.6(c)(6) and 3.6(e). More specifically, does 38 U.S.C. § 106(d) limit § 101(22)(E), or does it, as Appellant contends, supplement it? Similar to the above issues, resolution of this question would establish a new rule of law, and would certainly clarify the interplay between two apparently conflicting statutory provisions.

Finally, considering the Supreme Court of the United States' holding in *Carr v. Saul*,[2] this case presents an opportunity for the Court to modify or clarify the doctrine of administrative exhaustion as it applies in the veterans' benefits system.

As noted above, resolution of these issues has the potential to not only establish new rules of law and/or clarify existing rules of law, but satisfy each of the other criterion outlined in R.27.1(b)(c)(1). To varying degrees, resolution of the questions involved in this case would apply established law to a novel fact situation; constitute the only recent, binding precedent on a particular point of law; involve legal issues of continuing public interest; and would resolve a case in which the outcome is reasonably debatable.

Finally, the Secretary has advised that he has no position on this motion.

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[2] 141 S.Ct. 1352 (2021).

Accordingly, Appellant respectfully requests initial review by panel.

Respectfully submitted,

/s/ Eric A. Gang

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/s/ Gideon J. Miller

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