

**UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS
625 INDIANA AVENUE, NW SUITE 900
WASHINGTON, D.C. 20004**

JOHNNY R. MARTINEZ.

Appellant

v.

2021-1029

DENIS MCDONOUGH

Secretary, of Veterans Affairs,

Appellee

**UNREPRESENTED APPELLANT MOTION TO RECALL COURT
10/20/2021 JUDGEMENT AND STAY COURT 01/18/2022 MANDATE
PURSUANT WITH [IOP] V(A)(2) MOTION FOR FULL COURT EN BANC
REVIEW OF SINGLE JUDGE [MEREDITH] 04/28/2020 MEMORANDUM
DECISION AND PANEL OF JUDGES [DYK, O'MALLY, HUGHES]
10/20/2021 PER CURIAM ORDER DISMISSING APPELLANT APPEAL
BASED ON A LACK OF JURISDICTION COURT AFFIRMED NO [CUE]
IN THREE RATING ISSUES DENISD IN BVA 05/17/2019 DECISION**

Unrepresented Appellant (Johnny Martinez) file the following Motion to recall Court 10/20/2021 Judgement and Stay Court 01/18/2022 Mandate pursuant with U.S. Court of Appeals for Veterans Claims Internal Operating Procedures [IOP] V(a)(2) Full Court En Banc review where this case involve an “unrepresented appellant” appeal of a Board denial of “Request for CUE” to reverse or amend three {inextricably intertwined} rating decision(s) from March 1980, February 2009, and October 2019 finding no CUE in presumption of service-connection claims; dismissed by panel of judges; must be referred to a panel (or initially to the en banc Court, for that matter”) for en banc review that involve the need to {resolve a question of exceptional importance} based on contradiction with [IOP] procedures as follow:

Judge(s) October 2021 Per Curiam decision referenced its interpretation of Court's limited jurisdiction to review Veterans Court decisions, citing 38 USC section 7292(c) "permit review of any challenges to the validity of any statute or regulation or any interpretation thereof;" etc., etc.; BUT where [author Court Judge(s)] prejudicially and contradictorily ***conclude contrary with*** [IOP - I(b)(4)] duties of the screening ***judge*** "we cannot review appeals challenging factual determinations" or the "application of a law or regulation to the facts" unless the appeal presents a constitutional issue; citing section 7292(d)(2); **Sanders v. Wilkie**, 886 F.3d 1356, 1360 (Fed. Cir.2018);

WHERE Panel of judges October 20, 2021 Per Curiam dismissal, and reason for dismissal is determined contrary with Court's [own] Internal Operating Procedures I (b)(4) Duties of the screening judge who determines that a case is appropriate for single-judge disposition, the screening judge assumes responsibility for the decision; where same screening judge responsibility is defined by [IOP-II (b)] review Board decision to determined if contrary with [IOP-II(b)] "The Court has adopted the standard enumerated in *Frankel v. Derwinski*, 1 Vet. App. 23 (1990), to decide whether decisions appealed from the Board of Veterans Appeals should be decided by a panel or by the screening judge. ***If the screening judge determines that the "case:"*** Court subsequent dismissal involve an [issue alleged by Judge the veteran contested an RO decision factual determination or application of a law or regulation to fact]; would not have been assigned if screening judge determined involved any of the following:

1. does not [establish] a new rule of law;
2. does not [alter, modify, criticize, or clarify] an existing rule of law;
3. does not [apply] an established rule of law to a novel fact situation;

4. does not [constitute] the only recent, binding precedent on a particular point of law within the power of the Court to decide;
5. does not [involve] a legal issue of continuing public interest; and,
6. the outcome is not reasonably debatable;

[can result in] the decision of the Board of Veterans Appeals [BVA] may be affirmed, reversed, or remanded on motion by either party, or on the *Court's own initiative, by a single-judge order or memorandum decision. This *standard is applied to other matters presented to a judge for decision.

Pertinent Legal Argument

Veterans Court [Meredith] single judge and Panel of Judges [Dyk, O'Malley, Hughes] Circuit Judges {joint} dismissal, to include Federal Court unfavorable affirmation of dismissal of Veterans case, determined prejudicial and unmistakably "presents a constitutional issue" See; ***Harris v. McRae***, 448 U.S. 297, 322 (1980) {right to be free from invidious discrimination in statutory classification and other governmental activity"} ***[IOP impartial application]*** as noted by [panel of judges] citing section 7292(d)(2); *Sanders v. Wilkie*, 886 F.3d 1356, 1360 (Fed. Cir.2018); where in addition the adversely affected appellant provide the following precedential case findings (explaining that) "[i]n all cases before the Court, the parties are under a duty to notify the Court of developments that could deprive the Court of jurisdiction or otherwise affect its decision" and, indeed, that "counsel have a continuing duty to inform the Court of any development which may conceivably affect an outcome." See; ***Solze v. Shinseki***, 26 Vet. App. 299, 301 (2013) (internal citation omitted)

Veterans Court [Meredith] single judge and Panel of Judges [Dyk, O'Malley, Hughes] Circuit Judges accepted a single judge erroneous reasons for dismissal, and additionally resulted in a Federal Court unsubstantiated unfavorable affirmation; failed in their responsibilities contrary with; "Chief Justice John Jay referred to *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410n, 1 L. Ed. 436 (1792) noted: "Judges" desire to manifest, on all proper occasions and in every proper manner their high respect for the national legislature;" This desire to effect congressional intent favorable to veterans has echoed throughout the Supreme Court's decisions on matters that emanated from our Court. See, *Shinseki v. Sanders*, 556 U.S. 396, 416, 129 S. Ct. 1696, 1709 (2009) – (Souter, Jr., dissenting) {"Given Congress's understandable decision to place a thumb on the scale in the veterans favor in the course of administrative and judicial review of VA decisions"}; see also *Henderson v. Shinseki*, 562 U.S. 428, 440, 131 S. Ct. 1197, 1205 (2011) (declaring that congressional solicitude for veterans is plainly reflected in "the singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims," and emphasizing that the provisions "was enacted as part of the VJRA {Veterans Judicial Rights Act} [because] that legislature was decidedly favorable to the veteran").

Justice Alito, Supreme Court judge observed in *Henderson v. Shinseki*, 562 U.S. 428, 440, 131 S. Ct. 1197, 1205 (2011) that the Court's practice of treating panel decisions as "precedential" is unnecessary, particularly since the Court's adoption of class action litigation. See, *Wolfe v. Wilkie*, 32 Vet. App. 1 (2019). Federal Court cite decisions from our Court merely for their guidance and persuasive value. Where in addition:

Court's decision may not overlooked Department of Veterans Affairs [Board, or RO] purpose of a hearing responsibility; as defined by 38

CFR section 3.103(c)(2) Purpose of a Hearing: "It is the responsibility of the Department of Veterans Affairs [Director Evidence Intake Center; Board's Veterans Law Judge; Secretary Attorney] employee or employees conducting the hearing to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position. To insure clarity and completeness of the hearing record, questions which are directed to the claimant and to witness are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence or to discredit testimony. In cases in which the nature, origin, or degree of disability is an issue.

STATEMENT OF THE FACTS

In service **December 17, 1976** Report of Medical History Physician Summary SF-93 listing injury to *left eye, left ear Infection, cavity in teeth; occasional leg cramps; occasional low back pain;* **December 17, 1976** Report of Medical Exam SF-88 *Pain & Discomfort Right hand Radiating pain to elbow; Right wrist – x-ray WNL may have joint sprain;* **March 8, 1977** Record of Medical Care *Wedge 5th digit Left foot, nail Left foot;* **June 5, 1977** *Injury Right hand;* **July 1, 1977** *ingrown toenail left foot, wedged excision to boader great trunk left foot;* **November 22, 1977** *Remove toenail left foot; pain Rt. Wrist;* **April, 1978** *follow-up Group A BETA Hemolytic Strep treated with pen.VK;* **August 9, 1978** *Tow Bar fell on hand pain & swelling (1st & 4th PIP joint, fracture);* **December 13, 1978** *Bruised toe, blueish skin around toe, ROM WNL;* **March 19, 1979** *discomfort left great toe – toenail removed;* **July 5, 1979** *dispense Kaopectate for diarriha;* **December 11, 1979** *change dressing on toenail removed right foot; RO erroneously concluded:*

RO STATED: "service treatment records show no diagnosis of or treatment for: DJD, Left Knee, DJD, Left Ankle, & DJD, Right Hip condition(s);"

BUT failed to weigh {AGGRAVATION} linked to conditions claimed within the {presumptive service-connection} period where Veteran file claim for conditions within the required presumptive one year period after separation from service, and evidence of record verified required severity:

[**] Continued treatment after service for DJD on January 9, 1999 Tri-City Community Hospital Jourdanton, Tx. & Dr. Blair M.D.; treated for pain on December 27, 2003 to March 12, 2007 by Community General Hospital Dilley, TX.;

establish required service connection elements demonstrating RO **wrongfully** denied veteran entitled “presumptive” service connection and secondary service aggravation; etc.;

SUMMARY OF THE ARGUMENTS

Review of the entire Court's of Appeals for Veterans Claims; and [Judge's] present and past similar decision(s) of dismissal referred as: “we cannot review appeals challenging factual determinations” or the “application of a law or regulation to the facts;” has been undoubtedly repeatedly referred to by less than competent {Judge's} [based on internet review of present and prior Court dismissals] verify an established Court “pattern-in-practice” in minimizing unrepresented Veterans success in overall benefits recovery, that additionally exhibit an underlying Judicial intention as to influence the Veteran in the retainer of legal representation.

Court's of Appeals for Veterans Claims; it's [Judge's]; and, entire Court judicial body appointed by Congress {jointly} exhibit a united code of silence in determining [any error] in any subsequent judicial

body member appointed by Congress; regardless of the fact of its impact on past, present and future judicial history, where same questionable judicial member may seek advancement to a potential Supreme Court appointment; or, State/Federal Congressional appointment with history of a demeaning character.

Federal Court is of the knowledge that “dismissal” resorting to a “liberally construed” Veterans Court Judge challenge; [Not advanced by the Board or RO] is intentionally alleged with intent to [deny appellant procedural due process; and deny “adequate notice of the judicial disposition of his claim and adequate opportunity to challenge an adverse ruling];” AND exhibit “Conduct prejudicial to the effective and expeditious administration of the business of the court,” KNOWING that the Veterans Court Judge alleged appellant argument of “application of law to fact challenge” is a [IOP-(b)(4)] pre-meditated reason for dismissal; and would automatically result in dismissal of any [motion for reconsideration] by Federal Court applied {statutory rule} “lack of jurisdiction;” and/or “lack of merit;” in support of Veterans Court Judge dismissal; WHERE even the Federal Court application of its [statutory rule] could be determine prejudicial when advanced in support of a prejudicial judicial dismissal; shown to be contrary with Court precedential decision in **De Perez v. Derwinski**, 2 Vet. App. 85, 86 (1992) based on the Court’s {liberally construing arguments raised in an unrepresented appellant’s informal brief}; AND additionally incorrectly applied Internal Operating Procedures I (b)(4) Duties of the screening judge who determines that a case is appropriate for single-judge disposition, the screening judge assumes responsibility for the decision.

ARGUMENT

Veterans Court [Meredith] single judge and Panel of Judges [Dyk, O'Malley, Hughes] Circuit Judges Per Curiam conceded to the following important Title 38 regulatory October 2021 Background facts:

“Mr. Martinez served on active duty in the U.S Army from February 1977 to February 1980;

“He subsequently filed {38 CFR section 3.400(b)(2)} three formal applications {date entitlement arose} for disability compensation, the first in February 1980, concede {date claims received}; then conceded {inextricably intertwined with} the second September 2008 rating decision; and conceded {inextricably intertwined with} the third in February 2012.

Veterans Court [Meredith] single judge and Panel of Judges [Dyk, O'Malley, Hughes] Circuit Judges Per Curiam conceded inextricably intertwined claimed issues, stated: Veterans 1980 [presumptive service-connected] claims not limited to the right wrist and included disabilities reflective in his SMRs, rendering the RO's failure to adjudicate them in 1980 erroneous; the Court Per Curiam then {erroneously} found the error was not prejudicial - because the RO subsequently in February 2009 adjudicated and denied all the claims; failed to properly weigh prejudicial error involving denial of presumption of service-connection for subsequently denied multiple conditions claimed shortly after veteran separation from service, where evidence on record verified severity of the claimed conditions:

The RO March, 1980; 2009; 2012 inextricably intertwined rating decision(s) denied veteran service

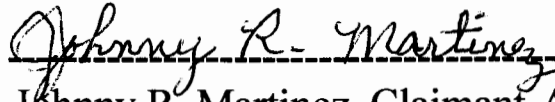
connection for: hearing loss, tinnitus, low back pain, erectile dysfunction, asthma, degenerative joint disease, right hip, left ankle, left knee; and GERD; denied Residuals of right wrist disability – because the RO determined no evidence of in service complaints related to wrist pain or dislocation. Court reasons and bases affirmed Board denial that {incorrectly applied 38 CFR section 3.307} where RO stated: presumption of service connection did not apply. [contrary with 38 CFR section 3.400(b)(2) date of receipt of claim]

Standard of Review

“When there is an approximate balance of evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving each such issue shall be given to the claimant. See, 38 USCA section 5107 (West Supp. 2002); 38 CFR section 3.102. In *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990), the United States Court of Appeals for Veterans Claims (the Court) stated that “a veteran need only demonstrate that there is an ‘approximate balance of positive and negative evidence’ in order to prevail.” To deny a claim on its merits, the evidence must preponderate against the claim. See, *Aleman v. Brown*, 9 Vet. App. 518, 519 (1996), citing *Gilbert*, 1 Vet. App. at 54.

WHEREFORE the Court is required by the cited facts and conclusions [IOP - V(A)(2)] En Banc review; and [IOP - I(b)(4) & II(b)] Screening Judge responsibilities; to correct its “Conduct prejudicial to the effective and expeditious administration of the business of the court” determined “abuse of office, and violation of jurisprudence oath.”

Respectfully Submitted

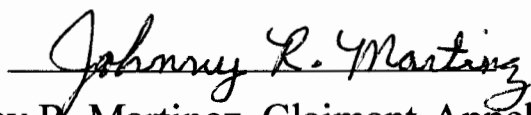


Johnny R. Martinez, Claimant-Appellant
16861A W. FM 117
Dilly, Texas 78017

CERTIFICATE OF SERVICE

I certify that on this 27th day of January, 2022 Appellant file the following MOTION TO RECALL Court January 18, 2022 [Mandate] and Judgement entered October 20, 2021 denying Appellant En Banc motion for full-Court review; filed with the U.S. Court of Appeal for Veterans Claims, 625 Indiana Avenue, N.W., Suite 900, Washington, D.C. 20004; with copy to the Office of the General Counsel 810 Vermont Avenue, N.W., Washington, D.C. 20420 sent by certified mail.

Respectfully Submitted



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Cc: Washington Post – Fax: 202-496-3883
Houston Chronicle – Code of Silence
White House – 1600 Pennsylvania Ave.
Judicial Conference of U.S. - Misconduct

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