IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

LOUIS R. FRANTZIS, Claimant / Appellant, vs. DENIS McDONOUGH, Secretary US Department of Veterans Affairs, Agency / Appellee.	)	Case No. 20-5236

APPELLANT'S MOTION FOR FULL COURT REVIEW

Appellant, Louis R. Frantzis, pursuant to Rule 35 of the Court's Rules of Practice and Procedure, hereby submits his Motion for Full Court Review after the panel of the Court issued a decision for the case. The Court should grant Mr. Frantzis' Motion for Full Court Review because his case contains a question of exceptional importance.

BACKGROUND

I. THE PROCEDURAL POSTURE AT THE AGENCY.

Mr. Frantzis disagreed with the September 5, 2014 VA decision that granted a noncompensable rating for his service connected headaches. (R. at 2479-2494)(R. at 2476-2477). The VA conducted a Compensation and Pension Exam, and issued a new rating decision that granted a staged rating, with 0% for the period October 15, 2009 to February 10, 2010; 10% for the period February 11, 2010 to November 12,

2014; and, 50% after November 13, 2014. (R. at 2412-2433). On June 23, 2015, Mr. Frantzis submitted another notice of disagreement to disagree with both the amount and the effective dates of the disability award. (R. at 2406-2407). The VA issued a Statement of the Case (R. at 2322-2341); and Mr. Frantzis submitted a VA Form 9 (R. at 2317).

On August 30, 2018, the VA acknowledged Mr. Frantzis' opt-in to the RAMP program. (R. at 109-111). On September 4, 2018, the VA issued a RAMP rating decision. (R. at 87-108). On September 18, 2018, Mr. Frantzis submitted his RAMP notice of disagreement. (R. at 82). On May 6, 2019, Mr. Frantzis testified at a BVA video-conference hearing before Veterans Law Judge James G. Reinhart. (R. at 44-67). On September 11, 2019, a different Veterans Law Judge, Theresa M. Catino, issued the BVA decision to deny Mr. Frantzis' appeal for increased or earlier benefits for his service-connected headache disability. (R. at 7-14).

II. MR. FRANTZIS' BRIEFS TO THE COURT.

The thrusts of Mr. Frantzis' Appellant's Brief and Reply Brief were arguments that the Board of Veterans Appeals committed error when it scheduled one judge to preside over the Veteran's hearing, but switched to a different judge for making the decision on the appeal. Mr. Frantzis focused on the fact that Congress did not revise 38 U.S.C. § 7102 when it enacted the Veterans Appeals Improvement and

Modernization Act of 2017, 115 P.L. 55, 131 Stat. 1105 (August 23, 2017). (Appellant's Brief at 6-9)(Reply Brief at 1-5).

III. PRACTICE BEFORE THE COURT'S THREE-JUDGE PANEL.

On February 14, 2022, the Clerk of the Court notified the counsel for the parties that this case was selected for panel review. On March 15, 2022, the Court entered an order to assign the case to the Panel. On March 22, 2022, the Court entered an order setting the time and place for arguments. On April 5, 2022, the Panel, *per curiam*, ordered that counsel be prepared to discuss Arneson v. Shinseki, 24 Vet.App. 379 (2011); and, "the interplay between fair process and having the same Board member throughout the appeal process, especially when the Board is assessing the credibility of a claimant." See the Court's April 5, 2022 Order. On April 14, 2022, counsel for the parties appeared virtually and argued before the panel. See the Court's April 14, 2022 docket entry.

ARGUMENT

I. THE MAJORITY OVERLOOKED OR MISUNDERSTOOD A POINT OF LAW.

Mr. Frantzis requests Full Court Review, pursuant to Rule 35(e)(1), because the Majority overlooked or misunderstood the interaction between 38 U.S.C. §§ 7102 & 7107; and moreover, that within the structure of United States Code, each part and

chapter of Title 38 bears a written title. The written title for each section informs the reader of the importance of that section; and therefore, reflects the intent of Congress about what the statute is designed to inform to the reader. 38 U.S.C. ch. 71: Board of Veterans' Appeals, contains this Table of Contents:

> CHAPTER 71—BOARD OF VETERANS' APPEALS
> Sec.
> 7101. Composition of Board of Veterans' Appeals.
> 7101A. Members of Board: appointment; pay; performance review.
> 7102. Assignment of members of Board.
> 7103. Reconsideration; correction of obvious errors.
> 7104. Jurisdiction of the Board.
> 7105. Filing of appeal.
> 7105A. Simultaneously contested claims.
> [7106. Repealed.]
> 7107. Appeals: dockets; hearings.
> 7108. Rejection of applications.
> [7109. Repealed.]
> [7110. Repealed.]
> 7111. Revision of decisions on grounds of clear and unmistakable error.
> 7112. Expedited treatment of remanded claims.
> 7113. Evidentiary record before the Board of Veterans' Appeals.

38 U.S.C. § 7102 is titled: "Assignment of members of Board" while 38 U.S.C. § 7107 is titled: "Appeals: dockets; hearings." The section titles are telling, because they describe what each section means to instruct. Mr. Frantzis' Appellant's Brief and Reply Brief focused on the assignment of the members of the Board rather than the contents of the docket or the conduct of the hearing. Accordingly, the Majority

overlooked or misunderstood that the structure of Chapter 71 requires the reviewing court to focus on 38 U.S.C. § 7102, not § 7107, because the issue is about the Assignment of the Members of the Board; not docketing the appeal or the conducting the hearing. 38 U.S.C. §§ 7102 & 7107.

The facts are not in dispute. Both the Majority and the Dissent acknowledged Mr. Frantzis' testimony about injuries he suffered after he was kicked by a fellow soldier, flew through the air, and struck his head on concrete; and that afterwards, he suffered from headaches. Mr. Frantzis appealed the noncompensable disability rating for his headache condition. The issue on appeal was whether the Board should be permitted to switch judges after holding that hearing, so that one judge hears the case, but a second judge decides the outcome without having heard the testimony of the witnesses. Frantzis v. McDonough, No. 20-5236, 22 U.S. App. Vet. Claims LEXIS 935 **2, 11 (Decided June 21, 2022).

II. JUDGES ON THE COURT'S PANEL DISAGREED ABOUT THE ISSUES OF LAW.

Mr. Frantzis adopts the entirety of the Dissent into his argument, because the points made in the Dissent are germane to the issues before the Court. The Dissent analyzed in detail the structure of § 7102 as guidance for assignment of judges in the appeal process; and, how the fair process procedural process supports this conclusion.

Nevertheless, the Court's panel, voted of 2 to 1, to deny Mr. Frantzis' appeal. The Majority and the Dissent wrote opinions, and the differences in the opinions illuminated the judges' disagreement about the issues of law. The Majority Opinion stated:

> In sum, we hold that nothing in the statutory provisions Congress enacted as [*21] part of the AMA requires that the Board member who conducts a hearing must also decide the appeal.74 And to be clear, the converse is true as well; the statutes don't prohibit VA from allowing a different Board member to decide the appeal than the one who conducted a hearing. Given the statutory structure of sections 7102 and 7107, Congress's removal of the precise language in section 7107 that required the same Board member to decide an appeal when it enacted the AMA is highly significant. The short story here is: Congress at one point mandated what appellant seeks the Court to order here; Congress removed the requirement that provided for what appellant seeks; and that means appellant cannot prevail on his statutory argument.

Id. at **7-8. In addition to forestalling Mr. Frantzis from prevailing on statutory grounds, the Majority Opinion also refused to apply the fair process doctrine. Id. at **8-9.

The Dissent disagreed with the Majority, and wrote to emphasize why this Veteran should receive fair process for his appeal. Id. at **12-16. The Dissent applied the fair process doctrine to its interpretation of the statutes; and, he recommended remanding rather than denying Mr. Frantzis' appeal. Id. at **12-18. In addition, the Dissent acknowledged that Appellant's Counsel did comply with the Court's April

5, 2022 order that he be prepared to discuss Arneson v. Shinseki, 24 Vet.App. 379 (2011) and the interplay between fair process and having the same Board member throughout the appeal process, especially when the Board is assessing the credibility of a claimant. The Dissent further acknowledged that, at oral argument, Appellant's counsel argued that:

> Arneson and its "fair practice" discussion "should stand as the law;" the new version of section 7107 doesn't say that the Board is allowed to switch judges—section 7107 doesn't address who presides at all; section 7102 still applies and the member who was assigned to the proceeding, which would include the hearing, did not make a determination, as required; Smith [v. Wilkie, 32 Vet.App. 332 (2020)] says that fair process requires the Board, when it "changes its position in a way that's material to the outcome of the case," to give the veteran notice and an opportunity to respond; Arneson discusses fair process in a situation the same as the situation here and says it is very important "that the individual who makes the decision has the opportunity to see and hear the veteran" and witness and "can assign credibility determinations from that testimony"; "the entire point of the of the fair process discussion in the Arneson decision was that it still falls on the fact that the person who . . . writes [the decision] should be a person who got to see the witness for [himself or herself]"; and if the Board switches judges it must give "notice to the veteran with [an] opportunity to respond and if the veteran asks for a new hearing then the hearing will be held."

The Dissent went on to say:

> So the majority's allegation that this dissent "asks the Court to . . . step into the shoes of the advocate and advance a theory not raised by the appellant" is wrong. The veteran met or exceeded the majority's standard by raising "some semblance of an argument."

Frantzis, 22 U.S. App. Vet. Claims LEXIS 935 ** at 24-25.

III. RULE 35(e)(3) STATEMENT.

Pursuant to Rule 35(e)(3)(B), as counsel for Appellant, Louis R. Frantzis, I hereby state the following:

> Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance:
>
> 1. The issue presented is: Whether the enactment and implementation of the Veterans Appeals Improvement and Modernization Act of 2017 so changed the structure of the VA claims and appeals processes; that the Board of Veterans Appeals is now permitted to switch judges after the BVA holds its hearing with the veteran, so that one can judge preside over the hearing but a different judge can render the decision for the Board.
>
> 2. The precedent from this case will affect every future appeal that veterans will file. The gulf of the difference between the Dissent and the Majority's opinions shows that informed minds differ on what the correct outcome should be. The conflict between the Dissent and the Majority's Opinion indicate that the full Court needs the opportunity to cast votes about this issue; because ultimately, the outcome will affect Veterans' Law jurisprudence into the future. Accordingly, this case does present a question of exceptional importance.
>
> /s/ Robert C. Brown, Jr.
>
> ATTORNEY OF RECORD FOR Louis R. Frantzis

CONCLUSION

Appellant, Louis R. Frantzis, prays that the full court of the United States Court of Appeals for Veterans Claims, will vote to grant Mr. Frantzis' motion for full court

review. The Court should grant Mr. Frantzis' motion because his case contains a question of exceptional importance. The precedent from this case will affect almost every future appeal that veterans will file.

The Majority was wrong to focus on the statute about docketing the appeal and conducting the hearing, and it should have focused on the statute about the assignment of the members of the Board. The gulf of the difference between the Dissent and the Majority's opinions shows that informed minds differ on what the correct outcome should be. The conflict between the Dissent and the Majority's Opinion indicates that the full Court needs to cast votes about this issue; because ultimately, the outcome will affect Veterans' Law jurisprudence into the future.

Respectfully submitted;

/s/ Robert C. Brown Jr.
Robert C. Brown Jr., OBA #21113
Email - bobbrown@tommyklepperlaw.com
TOMMY KLEPPER & ASSOCIATES, PLLC
702 Wall Street, Suite 100 (73069)
Post Office Box 721980
Norman, Oklahoma 73070
Telephone: 405/928-5055
Facsimile: 405/928-5059
Attorneys for Appellant