No. 2017-1749

United States Court of Appeals
For the Federal Circuit

LAWRENCE J. ACREE,

Appellant,

v.

DAVID J. SHULKIN, M.D., SECRETARY OF VETERANS AFFAIRS,

Appellee.

Appeal from the United States Court of Appeals for Veterans Claims in Case No. 15-0031

REPLY BRIEF OF LAWRENCE J. ACREE

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CERTIFICATE OF INTEREST

Counsel for the Appellant Lawrence J. Acree certifies the following:

1. **The full name of every party or amicus represented by me is:**

Lawrence J. Acree

2. **The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:**

None.

3. **All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:**

None.

4. **The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:**

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INTRODUCTION

Far from asking this Court to re-weigh evidence, this appeal petitions that the Veterans Court follow *its own precedent* regarding what is required under 38 C.F.R. § 20.204. There is established precedent from the Veterans Court requiring that to withdraw an appeal for veterans disability benefits in the absence of a writing, the claim withdrawal "is only effective where the withdrawal is explicit, unambiguous, *and done with a full understanding of the consequences of such action on the part of the claimant*." *DeLisio v. Shinseki*, 25 Vet. App. 45, 57 (2011) (emphasis added). The VA does not argue that *DeLisio* is not good law and does not deny that the decision interprets § 20.204. The VA does, however, ask for a decision that would implicitly disregard the plain language of *DeLisio* so that the third prong – the claimant's understanding of the consequences – need not be an impediment to the swift dismissal of claims. This Court should act according to its statutory authority to determine the proper interpretation of the regulation and adopt the well-settled legal principles set forth in *DeLisio* to govern instances where a claim is withdrawn during a hearing without a corresponding written request.

ARGUMENT

I. BECAUSE MR. ACREE CHALLENGES THE VETERANS COURT'S INTERPRETATION OF 38 C.F.R. § 20.204, THIS COURT HAS EXCLUSIVE JURISDICTION PURSUANT TO § 7292(C)

The question presented in this case is how to construe a federal regulation that contemplates a specific circumstance (withdrawal in the absence of a writing). Notably, the regulation is silent as to what is required to make the claim withdrawal effective in the contemplated circumstances. The Veterans Court has interpreted § 20.204 – first in *DeLisio* and now in this case – and the interpretation relied on in this case is ripe for review as a matter of law. Indeed, as explained in Mr. Acree's Opening Brief, the Veterans Court departed from *DeLisio* in the decision below and determined that where a veteran's withdrawal of claims was "explicit and unambiguous," the Board need not discuss whether the Veteran understood what was happening during the hearing or whether he understood the consequences of withdrawing the claims at issue. Opening Br. at 16 (discussing APPX3). The Veterans Court offered, for the first time, a new interpretation of the federal regulation that is inconsistent with settled law. This Court is empowered to review such interpretations. Review is especially appropriate where, as here, there is ambiguity in the regulation itself and the Federal Circuit has never before considered how subsection (b)(1) of § 20.204 should be understood when the withdrawal of a claim occurs "on the record at a hearing."

Although the scope of this Court's jurisdiction is limited, it has jurisdiction to review "the Veterans Court's interpretation of certain DVA regulations." *Smith v. Nicholson*, 451 F.3d 1344, 1347 (Fed. Cir. 2006) (explaining that under § 7292, "[w]e review *interpretation of regulations by the Veterans Court de novo* and may set aside any regulation or interpretation of a regulation that we find to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.") (emphasis added); *see also Martin v. McDonald*, 761 F.3d 1366, 1369 (Fed. Cir. 2014) ("This [Court's] jurisdiction allows us to determine whether a Veterans Court decision may have rested on an incorrect rule of law and, moreover, to determine that the correct rule of law requires factual determinations missing from the Board's decision (and perhaps further factual development), thus precluding Veterans Court affirmance of the Board's decision") (internal citations omitted); *Amberman v. Shinseki*, 570 F.3d 1377, 1381 (Fed. Cir. 2009) (exercising jurisdiction over review of the Veterans Court's interpretation of regulation with rating schedule).

Here, the Veterans Court's decision rested on an incorrect rule of law and fashioned a new interpretation that narrowed the scope of protections available to the Veteran. The Veterans Court erred as a matter of law by reinterpreting the scope of § 20.204 to read out the third *DeLisio* requirement if the Board found the withdrawal to be explicit and unambiguous. The difference in scope between

requiring the claim withdrawal to be *explicit and unambiguous* [as the Veteran's Court did in this case] and being *explicit, unambiguous, and done with a full understanding of the consequences of such action on the part of the claimant* [as required in *DeLisio*] is significant. Under *DeLisio*, § 20.204 was interpreted as offering robust protections to a veteran in Mr. Acree's circumstances. Under the interpretation set forth by the Veterans Court in this case, the § 20.204 protections were drastically reduced. The Veterans Court's decision to narrow a DVA regulation rests on an incorrect rule of law and should be reversed, as this Court is authorized to do.

II. FAILURE TO ANALYZE THE *DELISIO* FACTORS WARRANTS REVERSAL

A. The VA Identifies No Basis for the Veterans Court to Ignore its Own Case Law

The VA emphasizes the position that the Board made a factual finding that Mr. Acree withdrew his claims and the issue is now beyond review. *See* Response Br. at 16-17. The VA seems to argue that if the Board fashions an incorrect legal approach and then draws "factual conclusions" that are the fruit of the incorrect approach, the error of law is beyond review. Here, there were no findings of fact. The Veteran responded "Yes" to the claim withdrawal question and that single word cannot satisfy the standard that should have controlled whether the claim withdrawal was effective (in the absence of a writing).

The *DeLisio* legal standard was controlling at the time of the September 2014 hearing. The decision interpreted 38 C.F.R. § 20.204 to hold that in order for a claim to be effectively withdrawn (without a writing), withdrawal must be (1) explicit, (2) unambiguous, and (3) done with a full understanding of the consequences. *DeLisio*, 25 Vet App. at 57. A single word "Yes" in response to a leading question simply cannot satisfy these three requirements. The VA has no argument as to why one word comports with the legal standard.

It was therefore improper for the VLJ and then the Board to ignore the controlling standard. And the Veterans Court cannot excuse this blatant error by reciting the *DeLisio* standard in its decision and then concluding that the Board was not required to follow it. *See* APPX3 ("Although the appellant asserts that the Board erred by failing to explicitly address the factors set forth in *DeLisio*, as it did not make any finding as to whether his withdrawal was made with a full understanding of the consequences, Apellant's Br. at 6-7, he has not demonstrated that the Board was required to do so in this case."). The record is undisputed. There were *no findings* as to what Mr. Acree understood and there was certainly no confirmation that he understood the consequences of what he was agreeing to. At the hearing, the VLJ presumed the withdrawal was effective, posed a leading question to that effect, and moved on. APPX147-148. The VLJ was required, by the Veterans Court's plain interpretation of the federal regulation controlling

"Withdrawal of an Appeal," to do more. The failure to adduce a record demonstrating the Veteran's full understanding of the consequences of claim withdrawal warrants remand. This is not an adverse factual finding. This is an abdication – a legal error that has been perpetuated throughout the course of this appeal.

Throughout this appeal, the VA's position has essentially been that it is free to ignore *DeLisio* altogether or read out the third requirement that in the absence of a writing, the claim withdrawal is only effective where it is done with a full understanding of the consequences. *DeLisio*, 25 Vet App. at 57. Mr. Acree's position has consistently been that neither the Board nor the Veterans Court is free to unilaterally narrow the scope of the protections afforded to veterans under the *DeLisio* court's interpretation of § 20.204. This appeal is about requiring the Board to follow the law. Abiding by the appropriate procedures may not always be convenient and the VLJ's departure from the appropriate procedures may not have been intentional, but adhering to the controlling legal standard is what is required. It is what every claimant deserves. The VA's position never argues that *DeLisio* was incorrectly decided yet it endorses procedural shortcuts that undercut the holding. These inconsistencies should not be allowed to stand.

B. The VA's Interpretation of *DeLisio* Would Put the Burden on the Claimant to Demonstrate Understanding of the Consequences

The VA does not challenge the three *DeLisio* requirements or that the decision was an interpretation of 38 C.F.R. § 20.204(b)(1), but argues that because "the text of the regulation is *silent* as to what is required for an appeal to be withdrawn on the record at a hearing," there is no requirement that a VLJ assess the degree to which a claimant understands the consequences of his withdrawal. Response Br. at 20. This argument is nonsensical because, if there is no requirement that the VLJ confirm that the claimant understands the consequences of his withdrawal, then the only other possibility would be for the claimant to affirmatively demonstrate his understanding. Given that *DeLisio* was clearly intended to protect a veteran from unknowingly giving up a claim at a hearing, it would be absurd for the burden to also fall to the veteran to show the VLJ he understands the legal significance of claim withdrawal.

The VA complains that having the VLJ inquire as to the veteran's understanding at the time of the withdrawal would "impose a burden" and that such an inquiry is "contrary to the history and purpose of the regulation. Response Br. at 20. The VA's complaint is unfounded. The plain language of the regulation is silent and the history of the regulation similarly says nothing about claim withdrawal occurring at a hearing in the absence of a writing. Indeed, the VA only points to a prior version of the regulation that is limited to claim withdrawal

occurring *in writing* and the pre-2003 says nothing one way or the other that would bear on the circumstances presented in this case. *See* Response Br. at 20.

The only tool that is in place to guide the Board and the Veterans Court when determining whether the claim withdrawal is effective when it occurs at a hearing is *DeLisio* and related case authority. Contrary to the VA's argument, the regulations do not give the VA *carte blanche* "to determine, on a case-by-case basis," whether a veteran had, in fact, withdrawn an appeal." Response Br. at 21. The regulations have been interpreted by the Veterans Court and the interpretation of the regulation should have been adhered to.

Even when the VA does attempt to grapple with *DeLisio*, it makes the weak point that this case is "factually distinguishable." Response Br. at 23. Of course the two cases are factually distinguishable. No two cases are the same. There is always an opportunity to point out differences in fact. But here, those differences are of no moment and do not exempt the VLJ, Board, and Veterans Court from following *DeLisio*'s three core requirements as a matter of law. When discussing *DeLisio*, the VA again tries to put the burden on the claimant – maintaining that demonstrating a full understanding of the consequences is only necessary where the veteran expresses some uncertainty. Response Br. at 23 (emphasizing that the veteran answered a question about the withdrawn claims with "I think so."). In *DeLisio*, a remand was warranted because there was insufficient indication that the

veteran understood the significance of the events that transpired at the hearing. *See DeLisio*, 25 Vet App. at 58. Based on the undisputed record of this case, the same is true here. Demonstrating full understanding of the consequences of the claim withdrawal is not limited to instances where the veteran suggests he is confused. The burden is on the VA to demonstrate that each veteran who withdraws a benefits claim during a hearing (without memorializing in writing) understands what he is giving up. To conclude otherwise waives any procedural protections for the veteran who is supposed to be proceeding in a non-adversarial scheme "imbued with special beneficence from a grateful sovereign." *Sneed v. Shinseki*, 737 F.3d 719, 728 (Fed. Cir. 2013) (internal citation omitted).

Neither the plain language of the regulation, nor its history, nor the VA's reading of *DeLisio* offers any credible basis to conclude that if a withdrawal is found to be explicit and unambiguous, the VLJ and Board need not satisfy the third requirement that the claim was given up with a full understanding of the consequences.

III. A HEARING OFFICER'S DUTY TO EXPLAIN THE ISSUES IS CLOSELY ALIGNED WITH THE *DELISIO* REQUIREMENTS

The Veterans Court prematurely concluded that the Board need not satisfy the third *DeLisio* requirement and therefore never reached the practicalities of requiring the hearing officer or VLJ to assess whether the claimant fully understood the consequences of the withdrawal. *See* APPX4. As identified in Mr.

Acree's Opening Brief, the procedural due process and appellate rights for veterans involved in VA adjudications under 38 C.F.R. § 3.103 are synergistic with the three *DeLisio* requirements borne out of § 20.204. The VA's primary argument in opposition is that because the plain language of § 3.103 does not provide for the "duty to explain the issues" to extend to requirements under *DeLisio*, the VLJ is not required to explain the consequences of withdrawing an appeal and to create a record demonstrating the claimant's state of mind. Response Br. at 30-31.

The VA does not deny, however, that the VLJ who presides over a hearing where a claim is withdrawn is best positioned to prompt a showing that the veteran has full understanding of consequences of the withdrawal. And, satisfying the three *DeLisio* requirements is an evidentiary issue that remains outstanding at the time of the hearing where the withdrawal takes place. Because there is no burden on the VLJ to inquire as to whether the veteran understands what he or she is giving up and the governing regulations do not prohibit such an inquiry, this inquiry should be encompassed in the proscribed duty to "fully explain the issues." 38 C.F.R. § 3.103(c)(2).

The VA argues that requiring a hearing officer to probe a veteran as to his intention towards and understanding of withdrawing claims would be "complicated," Response Br. at 21, but it need not be. The inquiry could be as simple as (1) asking the veteran if he or she is impaired by any substances, (2)

briefly explaining the consequences of claim withdrawal, and (3) inquiring as to whether the veteran fully understands the consequences and whether he or she has any questions. The entire colloquy would likely take less than a minute in the few instances where a withdrawal occurred at a hearing.[1] The administrative burden is non-existent and the alternative is to compromise the procedural protections the claimant is entitled to.

The VLJ is the most natural check to ensure that the three *DeLisio* requirements are satisfied. In the majority of instances, a claim will be withdrawn in writing and the circumstances being discussed in this appeal will not be relevant. However, for those few instances where a claimant does not submit a written withdrawal and elects to withdraw a claim during a hearing, the appropriate procedural mechanisms should be in place to ensure a fair adjudication and to ensure the case law interpreting § 20.204 is being adhered to.

IV. ANY ARGUMENT REGARDING MR. ACREE'S HEARING REPRESENTATIVE IS WAIVED

Lastly, the VA now discusses—for the first time—the role of Mr. Acree's representative, Mr. Belak. *See, e.g.*, Response Br. at 24, 29-30 ("Even when Mr. Acree and his representative were given the opportunity to discuss any additional issues before the hearing was terminated, the withdrawn claims were not discussed

[1] There would be no reason for the claimant "to testify. Response Br. at 22.

. . . At no point did Mr. Acree or his representative say anything inconsistent with the notion that the seven claims were withdrawn. . .”). Again, the VA is suggesting that the burden lies with the veteran to demonstrate confusion or uncertainty and that absent such an expression, the VA is not obligated to satisfy the third *DeLisio* requirement. Setting aside the unfortunate blame-the-victim mentality of this position, the role of Mr. Acree’s representative is not a live issue in the appeal.

The VA had the opportunity to raise Mr. Belak’s role to the Veterans Court (including what he did, what he did not do, or what he should have done), but the veteran’s representative was not meaningfully discussed in the proceedings below. Any arguments relating to Mr. Acree’s representative before this Court have been waived. *Gant v. United States*, 417 F.3d 1328, 1332 (Fed. Cir. 2005) (“Arguments not made in the court or tribunal whose order is under review are normally considered waived.”); *Henry v. Dep’t of the Navy*, 902 F.2d 949, 953 (Fed. Cir. 1990) (generally arguments not raised before the administrative judge or the Board may not subsequently be raised before this court); *Cecil v. Dep’t of Transp., FAA*, 767 F.2d 892, 894 (Fed. Cir. 1985) (discussing waiver of new issues that generally cannot be raised for the first time on appeal).

CONCLUSION

For the foregoing reasons, Mr. Acree respectfully requests a reversal of the Veterans Court's decision to affirm the Board's dismissal of Mr. Acree's claims for:

1. Increased rating for degenerative arthritis with tendonitis of the left shoulder.
2. Earlier effective date for the award of service connection for degenerative arthritis with tendonitis of the left shoulder.
3. Earlier effective date for the award of service connection for a lumbar strain.
4. Earlier effective date for the award of service connection for post-traumatic stress disorder.
5. Earlier effective date for the award of service connection for sinusitis.
6. Entitlement to service connection for exposure to Gulf War hazards.
7. Entitlement to a total disability rating based on individual unemployability.

Appellant requests that this case is remanded to the Board for further factual development as to whether Mr. Acree is withdrawing the above-listed claims and, if so, whether the withdrawal is effective by satisfying the criteria of being "explicit, unambiguous, and done with a full understanding of the consequences." Appellant further requests instructions on remand that it is the duty of the hearing officer to, when faced with a veteran withdrawing an appeal during a hearing (1) explain the consequences of claim withdrawal to the veteran and (2) develop a record demonstrating that the veteran understands those consequences with demonstrated clarity of mind before the withdrawal is found effective.

Dated: October 27, 2017

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed Appellant's Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on October 27, 2017.

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CERTIFICATE OF COMPLIANCE

1. This brief compiles with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains 3,102 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(A)(7)(B)(iii) and Federal Circuit Rule 32(b).

2. This brief compiles with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point font.

Dated: October 27, 2017

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