

The Administration of Single Judge Decisional Authority by the United States Court of Appeals for Veterans Claims

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The 100th Congress established the United States Court of Veterans Appeals in 1988 under Article I of the U.S. Constitution.¹ In so doing, Congress abolished the long-standing prohibition against review of Veterans Administration, now Department of Veterans Affairs (“VA”), decisions by the Federal Courts. Prior to 1988, VA regional offices decided claims for veterans benefits and one administrative review was available from the Board of Veterans’ Appeals (“Board” or “BVA”). Since the creation of the new court, now renamed the United States Court of Appeals for Veterans Claims (“CAVC” or “Court”), veterans of military service to the United States and their dependents, who together number more than 20 million, have had access to an independent review of the VA’s determinations of their claims.

The Veterans’ Judicial Review Act conferred on the CAVC exclusive jurisdiction over appeals from decisions by the Board. It also granted the CAVC the unique power to “hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court.”² No other federal appellate court may exercise similar power to have a single judge decide an appeal on its merits.

Congress may have given the CAVC this extraordinary authority in part because it was concerned that the new court might initially be overwhelmed by appeals. According to the VA’s 1987 annual report, the agency was adjudicating more than five million claims for benefits each year. Claims included those for service connection of a disability, claims for increased disability ratings, pension benefits and reimbursement for medical expenses incurred by veterans from private healthcare providers for emergency treatment of service-connected disabilities. Claims that were denied resulted in approximately 30,000 to 40,000 appeals to the Board. More than half of all Board decisions affirmed the decision by the VA regional office denying the claim. Some legislative history appears to suggest that Congress feared that the new court would be inundated by as many as 5,000 appeals annually. This fact, and the knowledge that it was only authorizing seven judges for the new court, may have influenced Congress to grant the CAVC single-judge decisional authority.

The CAVC has implemented its single-judge authority primarily by precedent decision and its internal operating procedures. In one of its earliest published decisions, the Court adopted a set of criteria describing when a disposition by a single judge would be appropriate.³ In *Frankel*, the Court established six criteria. A case will

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be held to be one of “relative simplicity” to be disposed of by a single judge if it:

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.⁴

If the Court finds that all six criteria are satisfied, then the decision of the Board may be affirmed or reversed by a single judge. *Frankel* goes on to make clear that not all issues initially decided by the Court require an opinion.

For example, appeals involving decisions of the BVA which are consistent with general federal law, or cases presenting purely questions of law regarding sufficiency of the evidence to support denial of benefits or the application of the clearly erroneous standard . . . are subject to summary disposition without antecedent precedent in our opinions.⁵

The CAVC has supplemented its *Frankel* decision in its Internal Operating Procedures (“IOP”).⁶ According to those procedures, a screening judge first reviews the appeal. If the screening judge determines that the case satisfies the *Frankel* criteria, then the decision of the Board 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.⁷ The screening judge assumes responsibility for the case if he or she determines that it is appropriate for a single-judge disposition. The single judge prepares the dispositive order or memorandum and circulates it to all of the other judges for review. The other judges must submit editorial or substantive comments or requests for panel consideration within five working days. If at least two judges request panel consideration, then the Clerk creates a panel composed of the screening judge and two additional judges. A single judge who decides an appeal will also dispose of any motion for reconsideration of the single-judge decision.

The CAVC’s implementation of its single-judge decisional authority has at least one disadvantage from the point of view of practitioners. The CAVC has no mechanism to allow publication of single-judge dispositions as precedents. Many Federal Courts of Appeals have local rules that provide for the possibility of converting unpublished decisions into precedents. For example, any decision of the United States Court of Appeals for the Federal Circuit may be cited as precedent unless it is issued bearing a legend “specifically stating that the disposition may not be cited”⁸ If someone believes that a decision bearing such a legend adds to the body of law, then within 60 days after the decision was issued a request may be made to the court to

reissue the disposition as a precedent.⁹ Such requests may be made by any person and are not restricted to the parties.¹⁰ A similar practice is not possible under the procedures adopted by the CAVC because judges acting alone cannot create new precedents. In order to make a CAVC single-judge disposition precedential, the matter would need to be referred to a panel of the Court for further proceedings.

Some practitioners who appear before the CAVC on a regular basis have become increasingly concerned that the court does not always follow its *Frankel* precedent. Evaluating this concern is problematic because the last four *Frankel* criteria are subjective. Whether a case presents a novel fact situation, whether the appeal might constitute the only recent, binding precedent on a particular point of law, whether a legal issue of continuing public interest is involved or whether the outcome of the appeal is reasonably debatable are often, if not always, open to reasonable dispute. However, the first two *Frankel* criteria can be tested objectively. It is possible to determine whether a CAVC single-judge decision would, if published, establish a new rule of law or alter, modify, criticize, or clarify an existing rule of law. The following example illustrates the point.

Garry J. Augustine appealed to the CAVC from a March 10, 2000 decision of the Board. The Board had denied Augustine's claim that a 1972 decision by the VA had underrated his disabilities and that the decision should have been revised on the basis of clear and unmistakable error.¹¹ Augustine asserted that a correct application of VA regulations to the evidence in his file in 1972 would necessarily have resulted in a higher disability rating for his service-connected disabilities. In addition to loss of use of his left foot and complete loss of pronation and supination of his left elbow, residuals of the multiple shell-fragment wounds he sustained while serving with the United States Army, Augustine also had other service-connected disabilities independently rated at least 50 percent disabling.

In 1972 the VA had awarded Mr. Augustine disability compensation at the rate intermediate to those provided by 38 U.S.C. § 314(l) and (m) ("1 and ½ rating"). According to Mr. Augustine, his left foot and left elbow disabilities alone warranted the 1 and ½ rating. Augustine claimed that his 1 and ½ rating should have been elevated to the rate provided by 38 U.S.C. § 314(m) based on his other disabilities in accordance with 38 C.F.R. § 3.350(f)(3) (1972) (providing one half step for veterans having additional, independent disabilities rated 50 percent or more). The Board denied Augustine's claim.

The CAVC affirmed the decision of the Board in a memorandum decision issued by a single judge.¹² The CAVC acknowledged Augustine's argument that he was entitled to be compensated at the higher rate provided by § 314(m) as a matter of right pursuant to 38 C.F.R. § 3.350. The Court held that under 38 U.S.C. § 314 the Administrator (now Secretary of Veterans Affairs) had discretionary authority to award

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the higher rating Augustine sought. The CAVC went on to hold that it “could neither review nor compel the Secretary to reach the conclusion the appellant would have us presume he would have reached in the exercise of his discretion in a rating decision 30 years ago. . . .”¹³

Augustine filed a motion with the CAVC in which he sought a panel decision by the court. In his motion, Augustine asserted that the single-judge decision was inconsistent with the standards set out in *Frankel*. Augustine pointed out that while 38 U.S.C. § 314 granted the Secretary discretion to decide in what cases additional compensation should be awarded, the Secretary had exercised that discretion when he adopted 38 C.F.R. § 3.350(f)(3) (1972). That regulation provided that “additional single permanent disability or combinations of permanent disabilities independently ratable at 50 percent or more will afford entitlement to the next higher intermediate rate” of special monthly compensation. No precedent decision of the CAVC had previously held that VA regional office adjudicators or the Board retained discretion to award or deny compensation to veteran claimants where the criteria adopted in the regulation had been satisfied. Augustine’s appeal was therefore not appropriate for single-judge disposition in the CAVC because the first *Frankel* element, i.e., “does not establish a new rule of law,” was not satisfied. Nonetheless, a panel of three CAVC judges, including the judge who decided Augustine’s appeal, held that a “single-judge decision in the instant case was not inappropriate”¹⁴

Augustine is but a single example and may not indicate a more widespread practice by the CAVC of not following its *Frankel* precedent. However, the extensive use of single-judge authority by the CAVC gives cause for concern. The court disposes of the overwhelming majority of its docket through single-judge actions. Volume 16 is the most recent, complete volume of the Court’s reporter. That one volume lists approximately 5,623 actions by the Court. Only 86 of those are published opinions while 1,073 are reported in tables as “memorandum decisions.” The remaining 4,464 actions are orders of various types, including those disposing of appeals. There are large numbers of orders remanding appeals to the Board. The situation is further confused by the fact that a number of the 86 published dispositions are orders.

The CAVC has recently remanded a significant number of appeals to the Board based on its determination that the Board needed to consider application of a newly enacted statute, the Veterans Claims Assistance Act of 2000 (“VCAA”).¹⁵ A majority of those remands have been ordered in single-judge dispositions.¹⁶ These remands appear to be inconsistent with the single-judge disposition requirements of *Frankel*. Some of the appeals remanded by the CAVC for Board violations of, or failure to consider, the VCAA appear to violate both CAVC case law and a statute governing the CAVC. The CAVC has long held that if an appellant fails to present an issue in his or her opening brief, then the court deems the right to raise that issue to have been

abandoned.¹⁷ The CAVC has also made clear that as an Article I court it will adhere to the “Article III case or controversy stricture of the Constitution.”¹⁸ The CAVC must also “take due account” of the rule of prejudicial error.¹⁹

In *Hayslip*, the appellant did not assert any violation of the VCAA in his opening brief. Any right that Hayslip may have had to challenge the Board’s decision before the CAVC with respect to the VCAA was therefore abandoned. The CAVC nonetheless raised the issue *sua sponte*. While Hayslip’s decision not to raise any possible VCAA challenge in his opening brief foreclosed his right to argue the point in the future, his action should not be deemed to bar the CAVC from taking up the matter on its own. The question seems to be: Why would the CAVC do so? In the absence of an assignment of error with respect to the VCAA by a party entitled to challenge the Board’s decision, there was no case or controversy for the CAVC to resolve. The *Hayslip* remand ordered by the CAVC appears to violate both the *Bucklinger* and *Mokal* lines of CAVC precedent and was therefore not appropriate for single-judge disposition.

The CAVC is required to “take due account of the rule of prejudicial error” in making its decisions.²⁰ However, no precedent of the CAVC has interpreted the statute for the purpose of determining what it means to “take due account” of the rule.²¹ In *Hayslip*, the CAVC ordered the appeal remanded to the Board without any indication of how Hayslip had been prejudiced by having been deprived of the benefit of the VCAA. Single-judge action by the CAVC was not appropriate in the absence of either a determination that Hayslip had been prejudiced or case law establishing that the court had taken due account of the rule under the circumstances.

The cases discussed here provide insufficient evidence to reach any reasonable final conclusion with respect to the CAVC’s implementation of its single-judge authority. However, some facts are clear. Since the Veterans’ Judicial Review Act became law in 1988, Congress has not granted any other federal appellate court similar authority to decide appeals by one judge. There are at least some cases that give the appearance that the CAVC does not always strictly adhere to its own requirements for exercising single-judge decisional authority. Single-judge decisions by the CAVC may not serve the public interest as fully as panel decisions under the court’s present rules because the overwhelming majority of opinions have no precedential value. This may result in a lack of uniformity among decisions in similar cases, thereby undermining *stare decisis*. Single-judge decisional authority in the CAVC should be studied fully for the purpose of deciding whether it should be expanded to other federal appellate courts. If the result of that study is that an expansion is not desirable, then Congress should consider why the claims of veterans and their dependents are subject to judicial review that is materially different from that afforded to other classes of citizens.

Notes

- * Ronald L. Smith is Chief Appellate Counsel for the Disabled American Veterans in Washington D.C.
- 1. Veterans' Judicial Review Act ("Act") Pub. L. No. 100-687, § 402, 102 Stat. 4105, 4122 (1988).
- 2. 38 U.S.C. § 4054(b) (1988).
- 3. Frankel v. Derwinski, 1 Vet. App. 23 (1990).
- 4. *Id.* at 25-26.
- 5. *Id.* at 26.
- 6. CAVC Internal Operating Procedures are *available at* www.vetapp.gov/Procedure/IOP2003.PDF.
- 7. Neither the CAVC's rules nor IOPs explain the factors that differentiate a single-judge disposition by an order and one by a memorandum decision.
- 8. Fed. Cir. R. 47.6(a).
- 9. Fed. Cir. R. 47.6(c).
- 10. *Id.*
- 11. See 38 C.F.R. § 3.105(a) (2002) (permitting collateral attacks on final VA decisions on basis of CUE). See generally Russell v. Principi, 3 Vet. App. 310 (1992) (for discussion of CUE claims).
- 12. Augustine v. Principi, No. 00-1160 (U.S. Vet. App. July 2, 2002) (mem. dec.).
- 13. Augustine v. Principi, slip op. at 4-5.
- 14. Augustine v. Principi, No. 00-1160 (U.S. Vet. App. Aug. 28, 2002) (order denying motion for panel decision). The Federal Circuit reversed the CAVC's decision, holding that "[t]o the extent that the [CAVC] concluded that the Secretary retained discretion not to award the next higher rate to Augustine despite the wording of 38 C.F.R. § 3.350(f)(3), its decision was contrary to law." Augustine v. Principi, 343 F.3d 1334 (Fed. Cir. 2003).
- 15. Pub. L. No. 106-475, 114 Stat. 2096.
- 16. *E.g.*, Hayslip v. Principi, No. 01-0269 (U.S. Vet. App. Jan. 2, 2003) (order).
- 17. See, *e.g.*, Tellex v. Principi, 15 Vet. App. 233, 236 (2001); Ford v. Gober, 10 Vet. App. 531, 535-36 (1997); Degmetich v. Brown, 8 Vet. App. 208, 209 (1995); Bucklinger v. Brown, 5 Vet. App. 435, 436 (1993).
- 18. Mokal v. Derwinski, 1 Vet. App. 12, 13 (1990). See, *e.g.*, Redding v. West, 13 Vet. App. 512, 514 (2000); Aronson v. Brown, 7 Vet. App. 153, 155 (1994).
- 19. 38 U.S.C.A. § 7261(b)(2) (West Supp. 2003).
- 20. 38 U.S.C.A. § 7261(b)(2).
- 21. See Conway v. Principi, 353 F.3d 1369 (Fed. Cir. 2004) (indicating "the ultimate conclusion of the effect of the rule of prejudicial error on this case is beyond our jurisdiction and is for the Veteran's Court to determine on remand.").