

Supreme Court Case on VA Benefits

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11.0—Veterans' claims

***Kisor v. Wilkie*, 588 U.S. ____ (2019).**

As I explained in Law Review 18114 (December 2018), James L. Kisor served on active duty in the Marine Corps in the 1960s, including a year in South Vietnam. He participated in heavy combat and saw several colleagues killed in action. He was honorably discharged in 1968.

In December 1982, he filed a claim with the Veterans Administration (VA), claiming Post-Traumatic Stress Disorder (PTSD). The VA denied his claim. He attempted to appeal but failed to perfect the appeal. The adverse decision became final in 1983.

In 1989, the VA (an independent agency in the Executive Branch of the Federal Government) became the Department of Veterans Affairs, a Cabinet-level department. It is still called the "VA."

In June 2006, Kisor filed a new VA claim for PTSD he claimed to have suffered during his Vietnam service in the 1960s. In its solicitude for those who have served our country in uniform, Congress has exempted veterans (with respect to VA claims) from the important legal doctrine of *res judicata*.¹ The VA eventually ruled in favor of Kisor, and he received monthly money benefits for the claim, retroactive to the June 2006 reopening of the claim.

VA regulations provide that in this circumstance, when a final claim is reopened and then approved, the claimant receives retroactive benefits to the date he or she filed the original claim, if the VA finds that the original denial constituted *Clear Unmistakable Error*. The VA regulations further provide that the original denial will be considered Clear Unmistakable Error if there were *relevant* records from the veteran's service branch that were not available to the VA when the claim was first denied but which became available when the case was reopened. The dispute in this case is over the meaning of the word "relevant" in the VA regulation.

¹ *Res judicata* is Latin for "the thing has been adjudicated." In all other areas of law, once a judicial or administrative decision has become final, because appeals have been exhausted or because the losing party failed to appeal within the time permitted, the matter is over, closed, and cannot be relitigated. But VA claims are never really over, at least not until the claimant dies. Even a "final" decision can be reopened, and Kisor's claim was reopened in 2006.

To prevail in his claim for PTSD, Kisor was required to show two elements. First, he was required to show that he was exposed to the stresses of combat during his active duty service. Second, he was required to show a current medical diagnosis of PTSD.

When Kisor filed his new VA claim in 2006, the Marine Corps found and provided to the VA more comprehensive records of Kisor's Vietnam service, with considerably more detail about the combat stresses he faced while on active duty. The VA claimed that these new records were not *relevant* because, the VA claimed, Kisor's having suffered from the stresses of combat had never been in dispute and his first claim was denied based on the lack of a current medical diagnosis of PTSD.

Kisor countered with the definition of "relevant" in the Federal Rules of Evidence. A piece of information is relevant if it makes more likely any proposition that the claimant is required to prove to prevail. I think that Kisor had the better argument. The VA is conflating "relevant" with "material" and the words are not synonymous.

The United States Court of Appeals for the Federal Circuit² held that the VA's interpretation and Kisor's interpretation were "equally plausible." To resolve the conflict, the Federal Circuit relied on two important Supreme Court precedents stating that a court should give great deference to an administrative agency's interpretation of its own regulation.³

The Supreme Court agreed to hear *Kisor v. Wilkie* in order to reconsider the *Auer* and *Bowles* precedents. In a confusing series of concurring opinions, the Supreme Court cabined (limited) *Auer* and *Bowles* but did not explicitly overrule them. The Supreme Court did not decide the real issue in the case: Should Kisor get retroactive benefits all the way back to 1982? Or only to 2006?

The Supreme Court remanded the case to the Federal Circuit, which hopefully will decide the question soon, while Mr. Kisor is still with us. We will keep the readers informed of developments in this interesting and important case.

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² The Federal Circuit is the federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the United States Court of Appeals for Veterans' Claims.

³ See *Auer v. Robins*, 579 U.S. 452 (1997) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

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