New Civil Liberties Alliance

NCLA and CVAF Ask Dept. of Veterans Affairs to Amend Regulation Denying Benefits to Disabled Vets

Petition to Amend 38 C.F.R. § 3.654(b)(2) to Correct an Inconsistency Between the Regulation and the Underlying Statute, and to Ensure Disabled Veterans Receive the Disability Benefits to Which They Are Entitled

Washington, DC (January 11, 2023) – The New Civil Liberties Alliance and Concerned Veterans for America Foundation (CVAF) filed a petition today asking the U.S. Department of Veterans Affairs (VA) to amend its controversial regulation regarding the payment of benefits to veterans who have been deemed eligible for disability benefits but who later return temporarily to active duty. The current regulation denies many disabled veterans the benefits to which federal law entitles them. NCLA and CVAF urge VA to do the right thing: amend the rule to reinstate disability benefits due veterans who return to active duty the moment they leave active duty.

NCLA represented Thomas Buffington, who, after serving with distinction in the U.S. Air Force for over nine years and becoming disabled in the course of that service, was denied benefits based on the VA's decision to create an arbitrary rule with no grounding in the statutory text. VA awarded Mr. Buffington substantially lower disability benefits than those to which he was statutorily entitled. His lawsuit, *Thomas H. Buffington v. Denis McDonough*, reached the U.S. Supreme Court, but was denied review.

Supreme Court Justice Neil Gorsuch sharply criticized the regulation challenged by Mr. Buffington. In an opinion dissenting from the denial of Buffington's petition for a *writ of certiorari*, J. Gorsuch stated, "The VA's misguided rules harm a wide swath of disabled veterans. … [T]hose who have served in the Nation's Armed Forces deserve better from our agencies and courts alike." Revealingly, not a single judge involved in the *Buffington* litigation agreed with VA's contention that the current rule reflects the best reading of the underlying statute.

Even VA itself only justifies the regulation on dubious policy grounds. VA asserted in the *Buffington* litigation that the threat of benefit forfeiture for those who delay seeking resumption of benefits incentivizes veterans to file timely applications after leaving active service. But such arguments do not justify ignoring the plain language of the statute. Besides, VA's policy arguments are ill-considered, as disabled veterans already have an incentive to notify VA as soon as their active service ends. VA cannot resume making payments until it knows someone's active service has ended, so veterans must quickly notify VA to avoid delayed receipt of their accrued benefits.

NCLA and CVAF propose that VA repeal and revise its imprudent regulation to more closely mirror one adopted by the Veterans Administration in 1961, which mandated immediate resumption of disability payments following a veteran's release from active duty.

NCLA released the following statement:

"The courts have deferred to VA's interpretation of the statutes at issue, ruling that VA's interpretation is 'reasonable' even if it is not the best reading of the words adopted by Congress. But VA should not adhere to a flawed and ungenerous interpretation that denies benefit payments to deserving veterans like Mr. Buffington.

VA's obligation is to adopt the *best* reading of the statute; in this case, that means resuming disability payments to veterans as soon as they are released from active service."
— **Rich Samp, Senior Litigation Counsel, NCLA**

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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