

## **Sens. Cruz, Lee Brief High Court In Vet's Disability Denial Row**

By **Max Jaeger**

*Law360 (March 8, 2022, 8:28 PM EST)* -- U.S. Sens. Ted Cruz and Mike Lee urged the U.S. Supreme Court on Monday to "enforce the separation of powers" and reject a circuit court ruling that effectively ceded legislative power to a federal agency by conflating the agency's regulation with the underlying statute that gave rise to it.

The U.S. Department of Veterans Affairs denied plaintiff Kevin George's disability application in a 1977 "unelaborated conclusion" it rendered per a 1974 agency regulation, which failed to require evidence supporting the rejection as prescribed in the relevant statute.

The Federal Circuit in 2004 invalidated the regulation, but in March 2021, the appeals court incorrectly said the invalidation amounted to a change in the law, meaning the VA's 1977 decision applied the law "as it was understood at the time" and made no "clear and unmistakable error" necessary to overturn a final benefits decision short of new evidence, according to the senators' brief filed Monday.

"This court should enforce the separation of powers and reject the government's theory of autocratic agency law," the brief says. "The court below improperly credited an impermissible regulation as law, when it should have determined instead that the VA's reliance on the unlawful regulation in denial of a benefits claim was 'clear and unmistakable error.'"

The 1974 regulation could have never been "the law," or even a valid interpretation, because invalid agency interpretations are void and a nullity, the brief said, echoing arguments George also raised in a brief to the high court last month.

George had been forced to leave the U.S. Marine Corps soon after enlisting in 1975, following mental health episodes and a related schizophrenia diagnosis, according to court documents.

The statute underlying his benefits claim had required the VA to rebut a presumption that George's condition was connected to his military service, by providing clear evidence that the condition both preexisted, and was not aggravated by, that service.

George's benefits claim was denied based on a finding that his condition preexisted his service alone and an "unelaborated conclusion" that it was not aggravated by his service, despite opinions from military medical personnel to the contrary, according to his February brief.

"The government's position is that even a void document amounts to an 'interpretation' of the law, but under that position taken to its logical end, even cursory nonbinding statements like VA litigation positions or social media posts could be labeled 'interpretations' with the status of unchallengeable law," the senators' brief warns.

Asked for comment Tuesday afternoon, a representative for the VA referred Law360 to the U.S. Department of Justice, which did not immediately respond.

In December 2021, the government suggested the improper regulation was a "garden-variety error of the sort regularly encountered in administrative law," but not the "very specific and rare kind of error" that Congress intended to overturn a benefits decision.

An attorney for George said the Separation of Powers Clinic at George Mason University's Antonin Scalia Law School authored the brief and connected George to the senators.

"As Sens. Cruz and Lee highlight in their brief, agencies subvert separation of powers principles when they adopt regulations that conflict with the plain meaning of a statute," George's attorney, Mel Bostwick, told Law360 in a statement Tuesday.

"We're grateful to the senators for helping the court understand why this is particularly problematic when it deprives veterans like Mr. George of the benefits Congress intended," she said.

Several other veteran groups filed amici briefs in support of George on Monday.

Military-Veterans Advocacy Inc. and the Legal Aid Foundation of Los Angeles echoed the senators' concerns in a Monday filing, reminding the Supreme Court it has "made clear that when a court interprets the plain meaning of a statute, it is not announcing a change but rather declaring what the statute has always meant."

Their brief noted "most" veterans navigate the disability benefits system without a lawyer, meaning errors like the 1974 regulation "often persist for years before a court finally steps in to correct them."

George is represented by Melanie L. Bostwick, Thomas M. Bondy, Benjamin P. Chagnon, Robbie Manhas, Jonas Q. Wang, Ned Hirschfeld and Melanie R. Hallums of Orrick Herrington & Sutcliffe LLP, and Kenneth M. Carpenter and John Niles of Carpenter Chtd.

The VA is represented by Elizabeth B. Prelogar of the U.S. Solicitor General's Office, and Brian M. Boynton, Martin F. Hockey Jr., Eric P. Bruskin and Tanya B. Koenig of the DOJ's Civil Division.

The senators are represented by Jennifer L. Mascott and R. Trent McCotter of the Separation of Powers Clinic at George Mason University's Antonin Scalia Law School.

Military-Veterans Advocacy Inc. and the Legal Aid Foundation of Los Angeles are represented by Michael E. Joffe and William H. Milliken Of Sterne Kessler Goldstein & Fox PLLC, John B. Wells of Military-Veterans Advocacy Inc., and Louis Truong, Mallory Andrews, Melody Osuna and Tyler N. Smith of The Legal Aid Foundation of Los Angeles.

The case is *George v. McDonough, Secretary of Veterans Affairs*, case number 21-234, in the U.S. Supreme Court.

--Additional reporting by Daniel Wilson. Editing by Lakshna Mehta.

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