

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Pirkl v. Wilkie

Pirkl v. Wilkie, 906 F.3d 1371 (Fed. Cir. 2018) · No. 2017-1916 · Decided October 17, 2018

SUMMARY

In **Pirkl v. Wilkie**, the Federal Circuit held that a finding of clear and unmistakable error (CUE) in a 1953 VA decision reducing a veteran's disability rating from 100% to 70% required the Board of Veterans' Appeals to consider, as part of the remedy under 38 U.S.C. § 5109A(b), whether subsequent rating reductions in 1956 and 1966 would have been proper had the 100% rating continued, including application of the regulation governing reductions of total disability ratings (38 C.F.R. § 3.170 and its successor, § 3.343). The court rejected the government's argument that the regulation only applies when a claimant is actually receiving 100% benefits, ruling that the remedial statute demands restoration to the position the veteran would have occupied but for the error, which may require revisiting later final decisions that were premised on the erroneous lower rating. This case clarifies the scope of corrective relief for CUE, emphasizing that the VA must examine the legal and factual basis of subsequent decisions to determine whether the veteran would have retained the total disability rating under the applicable regulations.

CASE DETAILS

COURT	United States Court of Appeals for the Federal Circuit
WRITING FOR THE COURT	Taranto; Reyna; Chen
JURISDICTION	Federal
DECIDED	October 17, 2018
DOCKET	2017-1916
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Appeal from the United States Court of Appeals for Veterans Claims
STANDARD OF REVIEW	Legal questions reviewed de novo.
PRECEDENTIAL VALUE	published
PARTIES	Regina M. Pirkl v. Robert Wilkie, Secretary of Veterans Affairs

TOPICS

- veterans benefits
- administrative law
- judicial review of agency action
- remedies
- statutory interpretation

PRACTICE AREAS

Veterans Law

Administrative Law

QUESTIONS PRESENTED

1. Whether the Board's implementation of the CUE finding in the 1953 rating decision required it to consider whether the 1956 and 1966 rating reductions remain proper in light of the corrected 100% rating.
2. Whether the regulation governing reductions of total disability ratings, 38 C.F.R. § 3.170 (1949) and § 3.343, applies to the 1956 and 1966 rating decisions when the veteran is deemed to have a 100% rating due to the CUE correction.

HOLDINGS

1. Yes, under 38 U.S.C. § 5109A(b), the remedy for a CUE finding requires the Board to determine what ratings the claimant would have had if the error had not been made, which necessitates considering the impact of the corrected rating on later decisions.
2. Yes, the regulation applies because the CUE correction means Mr. Pirkel is deemed to have had a total disability rating at the time of the later reductions. The plain language of the regulation covers reductions of total disability ratings, and the fact that he was not actually receiving 100% benefits due to the VA's error does not make the regulation inapplicable.

KEY QUOTATIONS

"The CUE finding with respect to the 1953 decision thus requires the Board to revisit these later findings and determine the extent to which the CUE finding changes the legal or factual basis of the later evaluations." (1384)

"Under the plain language of the regulation, that rating could 'not be reduced' except in accordance with the regulation's terms." (1385)

"We hold that the regulation was applicable to Mr. Pirkel's situation in 1956, and a reduction, to be lawful, had to meet the regulation's requirements." (1385-86)

FACTUAL BACKGROUND

Robert Pirkel, a Navy veteran, was awarded a 100% disability rating for a psychiatric condition effective September 30, 1952. In 1953, the VA reduced his rating to 70% without complying with 38 C.F.R. § 3.170, which requires a showing of material improvement before reducing a total disability rating. Further reductions to 50% in 1956 and 30% in 1966 followed. In 2006, the Board found clear and unmistakable error (CUE) in the 1953 reduction, but the VA's implementation limited the 100% rating to the period before the 1956 reduction, treating the later decisions as final.

PROCEDURAL HISTORY

The Board of Veterans' Appeals found CUE in the 1953 rating decision but limited the remedy to 1953-1956. The Veterans Court affirmed. The Federal Circuit previously vacated and remanded in *Pirkl v. Shinseki*, 718 F.3d 1379 (Fed. Cir. 2013). On remand, the Board again dismissed the appeal, and the Veterans Court affirmed. This appeal followed.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Remand for further proceedings consistent with the opinion, specifically for the Board to determine what ratings Mr. Pirkl would have had if the 1953 error had not been made, considering the regulation for reductions of 100% ratings.

CASES CITED

- *Pirkl v. Shinseki*, 718 F.3d 1379 (Fed. Cir. 2013)
- *Reizenstein v. Shinseki*, 583 F.3d 1331 (Fed. Cir. 2009)
- *Wicker v. Hoppock*, 73 U.S. 94 (1867)
- *Missouri v. Jenkins*, 515 U.S. 70 (1995)
- *United States v. Virginia*, 518 U.S. 515 (1996)
- *Milliken v. Bradley*, 433 U.S. 267 (1977)
- *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975)
- *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941)
- *Kerr v. Nat'l Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984)
- *Hamer v. Shinseki*, 24 Vet. App. 58 (2010), *aff'd*, 438 F. App'x 897 (Fed. Cir. 2011)
- *Lillie v. Thompson*, 332 U.S. 459 (1947)
- *Atchison, Topeka, & Santa Fe Ry. Co. v. Calhoun*, 213 U.S. 1 (1909)
- *Milwaukee & Saint Paul Ry. Co. v. Kellogg*, 94 U.S. 469 (1877)
- *Utah v. Strieff*, 136 S. Ct. 2056 (2016)
- *Lowry Dev., L.L.C. v. Groves & Assocs. Ins., Inc.*, 690 F.3d 382 (5th Cir. 2012)
- *Werner v. Carbo*, 731 F.2d 204 (4th Cir. 1984)