NATIONAL VETERANS LEGAL SERVICES PROGRAM

July 18, 2024

Lisa L. Reyes
Clerk of Court
United States Court of Federal Claims
717 Madison Place, NW
Washington, DC 20439

RE: Proposed Amendments to the Rules of the United States Court of Federal Claims

Dear Ms. Reyes:

On June 3, 2024, the United States Court of Federal Claims (COFC) announced that it was seeking public comment on a series of proposed amendments to the Rules of the United States Court of Federal Claims (RCFC).[1] The National Veterans Legal Services Program (NVLSP) is pleased to offer these comments on the proposed changes with a particular emphasis on the proposed amendments RCFC 52.1 and the newly-proposed Appendix K "Procedure in Military Pay Cases."

NVLSP is a national nonprofit organization that has worked since 1981 to ensure that the government delivers to our nation's 18 million veterans and active-duty personnel the benefits they have earned through their military service to our country.[2] An important component of NVLSP's work is assisting veterans who have been wrongfully denied medical retirement benefits. That component of NVLSP's mission manifests itself at the COFC through our representation of veterans in military pay cases.

The availability of timely, efficient, and effective judicial review in the COFC of administrative decisions by military records correction boards denying medical retirement benefits is critical to our ability to serve our nation's veterans. Given our deep understanding of the challenges veterans face when litigating military matters before the COFC, we believe we have an important perspective to share on the importance of adopting the proposed changes to RCFC 52.1 and Appendix K and do so in some detail below.

A. Background

Military pay cases in the COFC commonly involve the review of administrative decisions, made by the military, determining whether a service member should be medically retired due to being unfit "to perform the duties of [their] office, grade, rank, or rating."[3] In plain language, the core question at

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[1] https://www.uscfc.uscourts.gov/sites/default/files/24.06.03%20Notice%20of%20Proposed%20Rules%20Amendments_0.pdf

[2] Additional information on NVLSP can be found here: https://www.nvlsp.org/what-we-do/

[3] DoD Instruction 1332.18 "Disability Evaluation System, available at: https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/133218e.PDF?ver=hBMKOYoIHi4EotQiJbezIA%3D%3D

issue is whether a service member's medical conditions prevent them from doing their job. If medical conditions which are sufficiently disabling preclude a service member from doing their job, that individual is entitled to a military medical retirement. This is a highly fact-specific question. For example, a knee injury may not prevent someone with primarily clerical and administrative responsibilities from doing their job but may well make it impossible for an infantry person to perform theirs. Likewise, if that same service member suffers from Post-Traumatic Stress Disorder (PTSD) that is triggered whenever they pick up a gun they are not fit to perform their fundamental combat duties.

The decisions made by the military and, when necessary, the COFC, determining whether a service member is entitled to a medical retirement have a profound impact on veterans. A medical retirement confers substantial benefits, which include lifetime monthly disability retired pay; lifetime military health care for the veteran, spouse, and minor children; access to military commissaries and post exchanges; and other benefits. In contrast, separating without a medical retirement can yield, at best a lump-sum severance payment and no retirement benefits, or at worst no additional benefits at all. Unfortunately, in some cases, when considering disabilities and the appropriateness of a medical retirement, the military reaches the wrong decision. These erroneous decisions are especially troubling when, for example, a veteran is wrongfully diagnosed with an adjustment disorder or personality disorder but actually suffers from a traumatic brain injury (TBI), PTSD, or another serious mental health condition. The military service branch's decisions denying medical retirement are subject to higher administrative and judicial review.

Each of the military services is required by statute to establish a Board for the Correction of Military Records (BCMR), which serves as the highest level of administrative review within the branch. BCMRs are empowered to correct errors or remove injustices from military records and possess the specific authority to retroactively medically retire a veteran who, for example, was administratively separated from the military if it can be demonstrated that the veteran was suffering from one or more mental and/or physical conditions that made the veteran unfit to perform his/her military duties. If a veteran does not obtain relief from a BCMR, a veteran may also seek judicial review at the COFC, which has jurisdiction over such cases pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1) and, among other money mandating statutes, 10 U.S.C. § 1201.[4] For the reasons discussed below, too often that judicial review is delayed by remands to BCMRs, often even before an administrative record is assembled and made available to the veteran. When the record is assembled, it is often incomplete, thereby prejudicing the ability of a veteran to obtain relief. In addition, military pay cases can involve highly sensitive medical information. Yet, the current RCFC offer only limited protection for such information.

In sum, the current RCFC render military pay cases inefficient for litigants, inadvertently prejudice veterans' ability to obtain meaningful judicial review, and miss opportunities to achieve greater judicial economy in these highly fact-sensitive cases. The proposed changes to RCFC 52.1 and the new Appendix K alleviate many of these issues and should adopted as proposed.

B. Proposed Changes to RCFC 52.1

RCFC 52.1 governs the filing of the administrative record in cases appealing the decision of a federal agency. Current RCFC 52.1 does not, however, distinguish between different types of cases

[4] *See Fisher v. United States*, 402 F.3d 1167, 1174–75 (Fed. Cir. 2005) (concluding that 10 U.S.C. § 1201 is a money-mandating statute for jurisdictional purposes.

and lacks specificity as to when or how the government is obligated to file the administrative record. In military pay cases, the lack of specificity around the composition and filing of the administrative record creates real-world challenges for veterans. The proposed amendment to RCFC 52.1 would address those issues by clarifying that the appendices to the RCFC govern the filing of the administrative record in particular types of cases, including (through the establishment of a new Appendix K) military pay cases. The proposed change to RCFC 52.1 that would cause new Appendix K to control issues involving the administrative record in military pay cases is critical to achieving effective and efficient judicial review and should be maintained as drafted. We discuss in detail below why having the newly-proposed Appendix K control issues involving the administrative record is so important to our nation's veterans. NVLSP strongly supports the proposed amendment.

C. Proposed Appendix K

1. Sections 2-4 "Scheduling "

Sections 2-4 of proposed Appendix K address scheduling. Specifically, under the proposed Appendix K, in lieu of the government filing an answer, the parties can instead file a joint motion for entry of a scheduling order, which importantly must contain a deadline for filing the administrative record. This joint motion would be required either within 60 days of the filing of the complaint (when proceeding to remand or to briefing on the merits in lieu of an answer) or within 14 days of the denial of a dispositive motion. These provisions should be maintained as proposed.

In military pay cases with any indicia of merit, it is routinely the government's practice to move to remand the case back to the cognizant BCMR, thereby obtaining a second bite at the apple before any meaningful judicial review occurs. Often, in the event of a remand, the administrative record is never filed or the filing is so delayed as to be prejudicial to the veteran. Requiring the administrative record be filed even in the event of a remand will substantially improve efficiency and conserve judicial resources while ensuring timely access to the record at all relevant stages of the litigation, thereby enhancing procedural predictability and fairness.

The government generally declines to file the administrative record until the case has returned to the COFC following a remand, and the briefing schedule for a Motion for Judgment Upon the Administrative Record (MJAR) has been approved. This results in veterans not having access to the administrative record for motions practice or remand proceedings which take place prior to the MJAR phase of the case and where the administrative record would be relevant. Proposed Appendix K would address these issues. NVLSP strongly supports this proposed revision.

2. Section 6 "Duty to Confer"

Section 6 of proposed Appendix K includes several significant provisions, all of which NVLSP advocates should be retained as proposed.

First, the current RCFC do not impose any obligation on the government to confer with plaintiffs on the contents and completeness of the administrative record. As a result, the government tends not to do so. The practical impact of the lack of a requirement to confer with the plaintiff is an increased incidence of plaintiffs having to file and brief a motion to supplement the administrative record. That is inefficient for litigants and wastes scarce judicial resources. Proposed Section 6(a) of Appendix K addresses that problem by requiring that that the government provide the administrative record to the plaintiff at least 7 days before filing and confer to resolve any disputes concerning its completeness.

This provision will reduce the need for motions practice and associated briefing to resolve such disputes, streamlining the litigation process and achieving greater economy of judicial resources.

Second, proposed Section 6(a) also requires the parties to discuss whether any portions of the administrative record should be redacted to protect personal information. As noted above, military pay cases often involve highly sensitive medical information. Indeed, in a recent NVLSP case, our team had to move to redact or seal the plaintiff's personal medical information. The court did not timely rule on the motion and the government filed the record without any redactions, thereby releasing into the public domain highly sensitive medical information that could harm our client's ability to obtain or maintain a job. The requirement to discuss redactions before the administrative record is filed will both protect the interests of veterans and avoid unnecessary and wasteful motions practice, thereby achieving greater judicial economy.

Third, under the current rules, the Government routinely refuses to include DoD or branch-specific regulations as part of the administrative record despite the fact that they are often not publicly available to the plaintiff or judge. That is a meaningful problem because in military pay cases, the applicable regulations are those in effect at the time of discharge. Military cases can sometimes look back decades. Obtaining the regulation in effect years or even decades ago can be incredibly difficult for a veteran. Moreover, the fluid nature of the regulatory regime in military pay cases can create challenges for COFC judges when reviewing a BCMR decision. For example, in *O'Hare v. United States*, No. 18-1746C (Aug. 27, 2021), the court noted that "[t]he issue is complicated by the fact that both [the plaintiff] and the BCMR relied on the wrong version of the regulation." The military services are in the best position to obtain the relevant regulations and ensure they are included in the administrative record. Proposed Section 6(d) recognizes that by requiring that the parties confer on the identity of any agency-specific rules, instructions, policies, and regulations not codified in the Code of Federal Regulations and imposes on the government the obligation to compile those materials and include them in the administrative record. Without this important provision, veterans' ability to obtain effective judicial review will be prejudiced and scarce judicial resources may be wasted analyzing irrelevant records or piecing together incredibly complex regulatory regimes. *See Keltner v. United States,* No. 19-663C (May 16, 2023) (noting that describing the applicable regulatory regime as "byzantine" was "an understatement"). Maintaining the proposed language of Section 6(d) as drafted will ensure that the record contains the correct regulations, enhance fairness, and protect scarce judicial resources.

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NVLSP appreciates the opportunity to comment on the proposed changes to the RCFC. While the proposed changes may appear to be commonplace procedural revisions, their implementation as drafted will have a significant positive impact on the nation's veterans and their ability to obtain meaningful judicial review of decisions by military service branches and BCMRs that wrongfully deny military retirement status.

Sincerely,

Paul Wright, Executive Director
Rochelle Bobroff, Director of Lawyers Serving Warriors®
Matthew Handley, Equal Justice Works Fellow