How Much Deference is to be Afforded VA in its Interpretation of the Law?

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Reporting on *Pacheco v. Gibson*, 27 Vet.App. 21 (2014), and *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014).

It is a long-held tenet of administrative law that an agency which is responsible for enforcing or applying a particular law is entitled to great deference in how it interprets such a law. *See Auer v. Robbins*, 519 U.S. 452, 457 (1997); *see also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–43 (1984). Recently, however, judges serving on both the U.S. Court of Appeals for Veterans Claims and the U.S Court of appeals for the Federal Circuit (Federal Circuit) have questioned both how and whether this rule should apply in the veterans benefits system.

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How Much Deference, *continued from page 6.*

In *Pacheco v. Gibson*, an en banc CAVC considered VA's interpretation of 38 C.F.R. § 3.157(b) (2014). VA read the regulation to mean that the date of an outpatient or hospital examination or the date of an admission to a VA or uniformed services hospital could not serve as a request to reopen a claim for service connection and compensation because the previous disallowance of such a claim had not been based on the noncompensive nature of a service-connected disability. *Pacheco*, 27 Vet.App. at 25. In a *per curiam* decision, the majority found VA's interpretation of the regulation to be reasonable and upheld it accordingly. *Id.* at 29.

In a separate opinion, Judge Davis, joined by several of his colleagues, opined that VA's interpretation of the regulation was not entitled to deference because VA is required to resolve interpretive doubt in favor of veterans. *Id.* at 42 (Davis, J., concurring in part and dissenting in part). In a separate opinion, Judge Greenberg agreed with Judge Davis's approach regarding application of the benefit of the doubt. *Id.* at 42-45 (Greenberg, J., concurring in part and dissenting in part). He continued: "In the matter of deference, I would not reward the Secretary for writing an ambiguous, and unintelligible, regulation." *Id.* at 43.

More recently, in *Johnson v. McDonald*, the Federal Circuit considered the scope of 38 C.F.R. § 3.321(b) (2014). The Court held that the plain language of the regulation demonstrated that, in considering the need for an extraschedular referral, VA must not only consider each service-connected disability individually but must also consider the combined effects of a claimant's conditions. *Id.* at 1365.

In a concurring opinion, Judge O'Malley expressed the opinion that, were the regulation not so unambiguous, the case would present the opportunity for continued application of the rule of agency deference. *Id.* at 1366-67 (O'Malley, J., concurring). She noted how several Supreme Court Justices have recently indicated that it may be time to revisit the question of whether administrative agencies should receive such wide latitude in their application of the law. *Id.* at 1367. In particular, she agreed with Justice Scalia's view that "deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government. " *Id.* (*citing Talk Am., Inc. v. Mich. Bell Tel. Co.,* ___ U.S. ___, 131 S.Ct. 2254, 2266 (2011) (Scalia, J., concurring)). She also seemed to agree with the view of Judge Davis and Judge Greenberg expressed in *Pacheco* that the benefit of the doubt trumps agency deference.

Given the tension between the deference principles of *Auer* and *Chevron* and the reasonable doubt to be afforded to veterans, deference to agency interpretation may lose its place among the principles of veterans benefits law if it does not lose its place in administrative law altogether before then.