

Fed. Circ. Sides With Vietnam Vet In Record Change Bid

By **Rae Ann Varona**

Law360 (January 25, 2023, 10:06 PM EST) -- The U.S. Court of Appeals for the Federal Circuit on Monday undid a Court of Federal Claims refusal to let a Vietnam veteran change his military records for retirement purposes, saying the court misunderstood what the veteran was challenging.

In vacating the claims court's decision, U.S. Circuit Judge Raymond T. Chen said on behalf of a three-judge panel that he agreed that a 2017 U.S. Department of Defense memo required a "liberal consideration" standard be applied to requests to discharge relief that challenge the reason a veteran was discharged.

He disagreed, however, with the claims court's finding that Navy veteran Robert L. Doyon wasn't actually challenging a reason.

"Mr. Doyon requested the [Board for the Correction of Naval Records] change the narrative reason on his DD-2214 form to reflect that he was discharged due to physical disability (i.e., PTSD) rather than personality disorder," Judge Chen said in his opinion. "Mr. Doyon thus challenged his narrative reason for discharge, and such challenge is entitled to liberal consideration under the Kurta Memo."

Doyon had served from mid-1966 to about the end of 1968 and was assigned to the aircraft carrier USS Intrepid, where he rose to the rank of Navy airman and received numerous decorations such as the Vietnam Service Medal, the Vietnam Campaign Medal and the National Defense Service Medal, according to Judge Chen's opinion.

While serving, Doyon witnessed numerous casualties including more than 130 deaths and 160 injuries resulting from an explosion and fire caused by a rocket misfire in 1967, according to the opinion.

During his service, Doyon had gone AWOL for two days, Judge Chen said. Upon his return, Doyon found himself being transferred to the naval base at Subic Bay to be medically evaluated for his "inability to get along with his peers," among other things, and was diagnosed with "passive-aggressive personality disorder."

According to Judge Chen's opinion, a commanding officer had reprimanded Doyon after his parents reached out to then Sen. Edward Kennedy, D-Mass., about Doyon's mental health. Doyon had claimed to have been harassed and threatened by shipmates for being friendly with two Intrepid crewmen who went AWOL following the 1967 explosion, according to the opinion.

When Doyon returned to the Intrepid a few months later, he witnessed another casualty while standing duty at a video recording console — this time including the dismemberment of a fellow airman due to a fatal plane crash.

His commanding officer on the Intrepid later recommended the Navy discharge Doyon for being unsuitable for service, citing his passive-aggressive personality disorder diagnosis.

Doyon, however, was diagnosed in 2013 with post-traumatic stress syndrome due to his experiences in the Navy, with the U.S. Department of Veterans Affairs granting his application for disability compensation.

But when Doyon went to the Board for the Correction of Naval Records for changes to reflect that he retired from the service due to a physical disability and PTSD, and to remove any reference to his unsuitability due to a personality disorder, the board refused to make the changes.

Doyon then brought this challenge to the claims court, which affirmed the board's denial, saying that Doyon wasn't challenging the narrative reason for his discharge from the Navy but was rather seeking a determination regarding his fitness for duty in 1968.

But Judge Chen said the claims court mischaracterized Doyon's claim as not being a challenge to the reason for his discharge and thus wrongly determined that the "liberal consideration" standard wasn't applicable.

Doyon had argued that a statute covering the correction of military records that was enacted after he filed his application to the BCNR required the board to use liberal consideration in his request. The government, for its part, argued that the statute couldn't retroactively be applied to his application.

Judge Chen settled the disagreement, siding with Doyon and saying the statute didn't impair Doyon's rights, nor did it increase his liability for past conduct or impose any new duties on him.

Michael Clemente of Latham & Watkins, who argued the case before the Federal Circuit on Doyon's behalf, told Law360 that they were grateful for the court's ruling and for the opportunity to help Doyon pursue his benefits.

"This decision is critically important, not only for Mr. Doyon, but also for all veterans who have suffered PTSD and been wrongly discharged on some other basis," Clemente said.

The U.S. Department of Justice, which represents the United States, did not respond to a request for comment.

U.S. Circuit Judges Chen, Pauline Newman and Richard Linn sat on the panel for the Federal Circuit.

Doyon is represented by Michael Clemente, Eugene R. Elrod and Adam Michael Greenfield of Latham & Watkins LLP; Remington Lamons of Law Offices of Bradley N. Etter APC; and Rochelle Bobroff of the National Veterans Legal Services Program.

The government is represented by Elizabeth Anne Speck, Brian M. Boynton, Steven John Gillingham and Patricia M. McCarthy of the U.S. Department of Justice.

The case is Doyon v. U.S., case number 21-02095, in the U.S. Court of Appeals for the Federal Circuit.

--Editing by Andrew Cohen.

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