

Full Fed. Circ. Says Courts Can Review VA's Manual Rules

By **Melissa Angell**

Law360 (December 8, 2020, 10:53 PM EST) -- The full Federal Circuit on Tuesday allowed a disabled veterans advocacy group to challenge in court U.S. Department of Veterans Affairs rules that alter criteria for veteran disability claims for knee injuries, finding that federal courts have the jurisdictional authority to review VA interpretive rules laid out in its manual.

In a 43-page ruling, the en banc panel determined that the National Organization of Veterans' Advocates has standing to challenge changes to two rules related to knee injuries in an administrative manual, because the group has members who would be negatively impacted if the rule changes are implemented.

"Interpretive rules in the manual have a practical effect on veterans seeking benefits," the opinion said. "Because nearly all veteran benefits claims are resolved at the regional office stage, the manual is effectively 'the last word for the vast majority of veterans.'"

NOVA, an advocacy group for disabled veterans, asked for the full Federal Circuit to hear its case and argued that the circuit court should overturn its 2017 ruling in *Disabled American Veterans v. Secretary of Veterans Affairs*, which held that the court lacks authority to review interpretative rules in the VA manual.

The veteran advocacy group challenged two VA rules that alter the criteria for acceptable knee replacement claims and the disability rating system for knee stability in an agency administrative manual.

The group also argued that the Administrative Procedure Act provides the Federal Circuit with the authority to review rules that are generally applicable — including rules related to veteran disability claims — and so the 2017 appellate decision, which says otherwise, is not correct.

In response, the government argued that NOVA did not meet the requirements to establish standing as an association, and that their petition is not "germane" to the group's purpose.

In May, the Federal Circuit agreed to the en banc hearing to determine if it should overturn the appellate ruling and in October, the full Federal Circuit heard oral arguments in its first remote hearing.

On Tuesday, the full panel determined that it holds the jurisdiction to review the two rules, but let a

three-judge panel decide whether the rule changes should be upheld. The en banc panel also found that the petition was timely since it was filed within six years of the contested agency action.

"Although Congress may wish to amend [the APA] to incorporate a shorter time limit on bringing pre-enforcement claims, that decision is for Congress, and not this court, to make," the opinion said.

Roman Martinez of Latham & Watkins LLP, counsel for the veterans, told Law360 on Tuesday that the ruling is "an enormous victory for our nation's veterans."

"It vindicates their right to obtain prompt judicial review to overturn any illegal rules or policies that the Department of Veterans Affairs promulgates in its administrative manuals," Martinez said. "The decision will help ensure that VA plays by the rules, and that veterans receive the full benefits they are due under law."

Counsel for the government did not immediately respond to Law360's request for comment.

NOVA is represented by Roman Martinez of Latham & Watkins LLP.

The government is represented by Eric P. Bruskin of the U.S. Department of Justice's Civil Division.

The case is National Organization of Veterans' Advocates Inc. v. Secretary of Veterans Affairs, case number 20-1321, in the U.S. Court of Appeals for the Federal Circuit.

--Additional reporting by Sarah Martinson and Britain Eakin. Editing by Emily Kokoll.