ANASTASOFF v. UNITED STATES AND APPEALS IN VETERANS' CASES

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The reasoning of Judge Richard S. Arnold in the Eighth Circuit case of *Anastasoff v. United States*,[1] in which the panel held that all of its decisions must constitutionally be considered precedent by that court, is directly contrary to the attitude of the United States Court of Appeals for Veterans' Claims[2] and the Court of Appeals for the Federal Circuit, the two courts responsible for almost the entire body of the law of veterans' benefits. If these courts reconsider their approach toward unpublished opinions in light of the reasoning of *Anastasoff*, it could cause a profound change in the substance of the law of veterans' benefits.

Veterans' pensions were provided for in 1789 by the First Session of the First Congress,[3] and some form of veterans' benefits have been part of the laws of the United States ever since. In the nineteenth century such benefits sometimes exceeded one-third of the federal budget.[4] They also were significantly expanded by the G.I. Bill of Rights following World War II. Despite this, the case law concerning veterans' benefits was essentially non-existent until the adoption of the Veterans Judicial Review Act on August 16, 1989.[5] The case

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1. 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

2. Formerly the Court of Veterans' Appeals.

3. Ch. XXIV of the 1st Sess. of the 1st Cong., 1 Stat. 95 (1789); *see also* Ch. XXVII of the 2d Sess. of the 1st Cong., 1 Stat. 129 (1790); Ch. XXIV of the 3d Sess. of the 1st Cong., 1 Stat. 218 (1791).

4. *See* Michael J. Bennett, *When Dreams Came True: The G.I. Bill and the Making of America* 40-41 (Brasseys Inc. 1996).

5. 38 U.S.C. §§ 7251-7298 (1991).

law on veterans' benefits has been made in its entirety since January 22, 1990,[6] and—with the exception of one U. S. Supreme Court affirmance[7]—has been made entirely by two courts: the United States Court of Appeals for Veterans' Claims and the Court of Appeals for the Federal Circuit.

With the adoption of the Veterans Judicial Review Act and under Article I of the Constitution, Congress created the Court of Appeals for Veterans' Claims to hear appeals from the Board of Veterans' Appeals, which conducts the final non-adversarial administrative review within the Department of Veterans' Affairs.[8] Under Rule 30 of the Court of Appeals for Veterans' Claims, cases decided by the court may not be cited as precedent in any action before the court if the decision is taken by a single judge, if the decision is not published in the Veterans Appeals Reporter, or if the decision is withdrawn after being published.[9] From December 1989 to July 2000, the Veterans' Claims court considered over 17,000 cases. For the fiscal year 2000 the Court expects to decide about 2,195 cases.[10] Of those opinions, the court recognized only about ten percent as precedential.

The Federal Circuit also limits the citation of its "nonprecedential" opinions and orders. As set forth in *Hamilton v. Brown*,[11] the Federal Circuit has a three-part classification of its cases: those that end with full opinions, those that end with one sentence orders, and those that merit something more than a

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6. *Matter of Quigley*, 1 Vet. App. 1 (1990).

7. *Brown v. Gardner*, 513 U.S. 115 (1994).

8. 38 U.S.C. § 7251 (Supp. 2000).

9. Rule 30 of the Court of Appeals for Veterans' Claims reads:

> (a) A party, intervenor, or amicus curiae may not cite as precedent any action of this Court that is:
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> (1) taken by a single judge;
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> (2) not published in the Veterans Appeals Reporter; or
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> (3) withdrawn after having been published in the Veterans Appeals Reporter.
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> (b) A person may refer to an action described in Rule 30(a)(1), (2), or (3) only when the binding or preclusive effect of that action, rather than its quality as precedent, is relevant. A copy of the action cited must be attached to the document containing such reference.

Vet. App. R. 30 (2000).

10. About twenty-one percent of these cases are decided on procedural grounds and the rest are determined on the merits. Sixth Judicial Conference of the U. S. Court of Appeals for Veterans' Claims, Opening Remarks of the Chief Judge.

11. *Hamilton v. Brown*, 39 F.3d 1574 (Fed. Cir. 2000).

one sentence order and something less than a full opinion.[12] The Court says the cases in this last group "do not represent the considered view of the Federal Circuit regarding aspects of a particular case beyond the decision itself."[13]

During the 1990s, the Court of Appeals for the Federal Circuit decided at least 536 cases on appeal from the United States Court of Appeals for Veterans' Claims. Of those 536 cases, the court published opinions in fifty-five. After those fifty-five cases and between October 1998 and July 2000, the Federal Circuit published an additional twenty opinions in veterans' cases. As of July 2000, these seventy-five cases and one Supreme Court case affirming one of them[14] constitute the entire body of case law concerning the benefits, pensions, and healthcare of veterans and their survivors that the Federal Circuit permits to be cited as precedent.

The approaches of these two courts are in direct conflict with the reasoning expressed by the Eighth Circuit in *Anastasoff* as to the use of unpublished or otherwise "nonprecedential" opinions. There is, of course, an important difference between the Eighth Circuit rule determined in *Anastasoff* to be unconstitutional and Rule 30 of the Court of Appeals for Veterans Claims. Rule 30 is not a judicial usurpation of legislative authority because it is a rule of a court created under Article I, not Article III of the Constitution. There is no constitutional mandate that tribunals created by Congress make an initial examination of claims against the government observe judicial precedents. A rational scheme to determine which decisions of such a tribunal are precedents does not violate the separation of powers the way the rule invalidated in *Anastasoff* did.

However, the broad concept underlying *Anastasoff*—that every case decided by a court must, constitutionally, be considered precedent—would have far-reaching effects if adopted by the Federal Circuit. Under the reasoning of *Anastasoff*, the summary affirmance by the Federal Circuit of an unpublished one-judge order of the Court of Appeals for

12. *Id.* at 1581.

13. *Id.* (noting that "nonprecedential opinions are not citable to this court, . . . and they are not intended to convey this court's view of law applicable in other cases").

14. *Brown v. Gardner*, 513 U.S. 115 (1994).

Veterans' Claims would have the force of precedent and would be controlling in the lower court. Therefore, if the Federal Circuit adopts the *Anastasoff* reasoning, there will be an immediate ten-fold increase in precedential cases.

It has been argued that the Federal Circuit's approach to unpublished opinions actually benefits future veteran parties because the court can publish decisions favorable to veterans in order to give them precedential authority, but write unpublished decisions in cases adverse to the veteran in order to inform the veteran as to the reasons his claim was rejected, without thereby creating a precedent.[15] According to a study done by Professor William Fox of the Columbus School of Law, Catholic University, the Federal Circuit was more likely to reverse in recent years than in the early 1990s, and also more likely to publish its reversals.[16] Of those reversals, Professor Fox determined that nineteen were favorable to veterans, two were adverse to veterans, and two were neutral. These published reversals seem to reflect a strong public recognition by the Federal Circuit that Congress intends for veterans to be assisted in establishing the facts to support their claims and be given "every benefit that can be supported in law."[17] However, to ascertain the true extent to which veterans receive this assistance and these benefits, one must look to both published and unpublished law.

That one class of parties is favored by designating certain opinions as unpublished and nonprecedential is not a justification for the practice. Furthermore, the exclusion of much of the body of veterans' benefits law from precedential effect actually benefits the Secretary of Veterans' Affairs in at least two ways.

First, because the Secretary of Veterans' Affairs is a party to every veterans' benefits case, the office of his General Counsel is completely aware of all unpublished decisions in this field and can evaluate the probability of his success in new cases based on this knowledge. Generally the veteran or his survivor

15. Address of Richard M. Hipolit, Dep. Gen. Counsel, Dept. of Veterans' Affairs, at the Sixth Judicial Conference of the Court of Appeals for Veterans' Claims.

16. Reported at the proceedings of the Sixth Judicial Conference of the United States Court of Appeals for Veterans' Claims.

17. *Collaro v. West*, 136 F.3d 1304, 1309 (Fed. Cir. 1998).

has no such advantage, and as long as it remains strictly forbidden to cite unpublished decisions, is unlikely to acquire such knowledge. As long as these unpublished opinions lack precedential value, no one outside the office of General Counsel to the Secretary of Veterans' Affairs is going to index or digest these opinions or gather them together so that they are accessible to the public.

Second, because of the exclusion of much of the body of veterans' benefits law from precedential effect, the Secretary of Veterans' Affairs has another advantage. He can decide not to appeal a strong (even en banc) decision in favor of the veteran made in the Court of Appeals for Veterans' Claims and instead appeal to the Federal Circuit from a weak non-precedential decision on a similar issue—with a good chance that if he loses in the Federal Circuit, his loss will be non-precedential. For example, in *Russell v. Principi*,[18] the then-Court of Veterans' Appeals held en banc that final decisions of the Board of Veterans' Appeals are subject to correction for clear and unmistakable error.[19] A single-judge court followed *Russell* in *Smith v. Principi*.[20] As set out above, Rule 30 designates single-judge actions as "non-precedential" and prohibits their citation. The Secretary of Veterans' Affairs did not appeal *Russell* but did appeal *Smith,* thereby minimizing his risk. In *Smith v. Brown*[21] the Federal Circuit reversed.[22]

Giving equal authority to the published and unpublished acts of the Court of Appeals for Veterans' Affairs and the Court of Appeals for the Federal Circuit will act to equalize the playing field between the veteran and the Secretary of Veterans' Affairs, to equalize the treatment veteran-appellants receive by the courts, and to make the policies of the court in veterans' cases better known.

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18. 3 Vet. App. 310 (1992).

19. *Id.* at 313.

20. 3 Vet. App. 378 (1992), *rev'd*, 35 F.3d 1516 (Fed. Cir. 1994).

21. 35 F.3d 1516, 1527 (Fed. Cir. 1994).

22. Congress disagreed and nullified the result of *Smith v. Brown* in 38 U.S.C. § 5109A (2000).