UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

CARMEN CARDONA Claimant-Appellant, v. Eric K. Shinseki, Secretary of Veterans Affairs, Respondent-Appellee, and BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES, Intervenor-Appellee.	)	Vet. App. No. 11-3083

APPELLANT'S MEMORANDUM OF LAW IN OPPOSITION TO BLAG'S MOTION FOR ACCESS TO THE RECORD BEFORE THE AGENCY

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INTRODUCTION

In demanding access to the record before the agency (RBA), the Bipartisan Legal Advisory Group (BLAG) seeks nearly 1500 pages of intimate details about Carmen Cardona's medical history and military record. This information is irrelevant to the case before the Court. The sole issue on appeal, and the issue which BLAG has intervened to litigate, is the constitutionality of the statutes which deny Ms. Cardona the dependency benefits her Naval service has earned. BLAG has not established a basis for the extraordinary order it seeks. Moreover, the Secretary has invited BLAG to move for production of the record of proceedings (ROP) at this time. Like the Secretary, Ms. Cardona does not object to such a motion, provided BLAG uses the ROP solely for this litigation and observes this Court's privacy rules. Prompt filing of the ROP will fully enable BLAG to accomplish the objective for which it intervened.

In addition, the Privacy Act precludes the Secretary's release of the RBA to intervenor. Disclosure of Ms. Cardona's RBA does not meet the "congressional exception," as BLAG is not a House, committee, or subcommittee of Congress. Nor is disclosure permissible pursuant to the Privacy Act's "routine use" provision. That provision requires publication of such use in the Federal Register. BLAG fails to advise this Court of that additional statutory requirement, nor does it cite the Court to any such required publication. In any event, Congress directed that Privacy Act disputes be litigated, if at all, in the U.S. District Courts, not before this Court.

ARGUMENT

I. APPELLANT DOES NOT OBJECT TO THE SECRETARY'S OFFER TO FILE THE RECORD OF PROCEEDINGS AT THIS TIME.

The Secretary has advised BLAG that he would not oppose a motion to produce the Record of Proceedings (ROP). VA Resp. at 7; Vet. App. R. 28.1. Nor would Ms. Cardona object to such a motion, provided that BLAG uses the ROP only for the purpose of this litigation and observes this Court's privacy rules. *See* Vet. App. R. 6; E-Rule 4 (locked documents); *see also* VA Br. at 3 (referring to Ms. Cardona's wife as "R.H."). An order sealing the ROP would ensure the privacy of the records therein. Vet. App. R. 48; *Pritchett v. Derwinski*, 2 Vet. App. 116, 121 (1992). Ms. Cardona would consent to a short extension for BLAG to file its brief after production of the ROP.

II. BLAG HAS FAILED TO SHOW CAUSE FOR ACCESS TO THE RBA.

BLAG has not shown cause, let alone good cause, justifying access to the entire 1500 page RBA. First, the ROP is sufficient for BLAG to defend the constitutionality of DOMA and 38 U.S.C. § 101(31), which is the purpose for which BLAG sought leave to intervene. Second, BLAG's arguments for access to the entire RBA so as to test factual findings in favor of Ms. Cardona or to contest the timeliness of her appeal ignore this Court's jurisdictional statute and documents on the Court's public docket. Third, the cases cited by BLAG involving discovery in other DOMA challenges, or access to the record in other agency review proceedings, are inapposite. Tellingly, BLAG cites to no precedent of this Court ordering disclosure of an RBA to a third-party. The motion for

access to the entire RBA, including hundreds of pages of personal medical records that have no relevance to the purely legal issues presented by this appeal, should be denied.

A. The ROP is sufficient for BLAG to accomplish the purposes for which it sought leave to intervene.

BLAG requested leave to intervene "for a limited purpose." Mot. to Intervene at 15; *see also id.* (arguing less stringent standard applies where intervention is sought "for a very limited purpose" (quoting 6 Moore's Federal Practice § 24.11)). Specifically, BLAG requested leave to intervene to "defend[] DOMA Section 3 and 38 U.S.C. § 101(31) against Ms. Cardona's equal protection claims (and litigating related jurisdictional issues, if any)." *Id.* at 1-2. As stated above, Ms. Cardona does not object to an order directing the Secretary to produce and file the ROP at this time, provided BLAG uses the ROP only for the purpose of this litigation and otherwise observes all privacy rules of this Court. With the ROP, BLAG will be able fully and adequately to defend the constitutionality of the statutes at issue in this case. *See also* VA Resp. at 6 ("it is the Secretary's position that the Record of Proceedings (ROP) should suffice to permit BLAG to draft its brief and fully advocate its position.").

B. BLAG does not need the RBA to contest factual findings.

BLAG suggests it may want the RBA so as to contest this Court's jurisdiction on the ground that Ms. Cardona may not be married, disabled, or evaluated 80 percent disabled. BLAG Mo. at 2 n. 1; *see also id.* at 5.[1] BLAG appears unfamiliar with the

[1] BLAG also implies that it needs the RBA to review the timeliness of this appeal, BLAG Br. at 3, 5, but this much is evident from the public docket, which contains both the dated BVA decision and Ms. Cardona's timely notice of appeal. *See* Vet. App. R. 4(a).

Board of Veterans' Appeals (BVA) decision in this case, however, which was filed on the public docket last year, as well as with the statute establishing this Court's jurisdiction.

In a section of its opinion labeled "Findings of Fact," the BVA found that Ms. Cardona's "combined disability evaluation for VA compensation benefits is 80 percent"; "[t]he Veteran and R.H., who are both of the same sex, were legally married on May 14, 2010, in the State of Connecticut"; and "[t]he Veteran and R.H. were both residents of the State of Connecticut at the time of their marriage and this is a valid marriage under VA laws and regulations." BVA Decision at 2. None of these findings was disputed before the BVA. *Id*. at 5 (emphasizing "undisputed facts of this appeal"); *id.* at 8 ("the sole issue is a legal issue.").

More to the point, none of the BVA's findings is adverse to Ms. Cardona, and thus each is beyond review by this Court. This Court's jurisdiction is limited to review of "finding[s] of material fact *adverse to the claimant*." 38 U.S.C. § 7261(a)(4) (emphasis added). *See Webster v. Derwinski*, 1 Vet. App. 155, 159 (1991); *Cantu v. Principi*, 18 Vet. App. 92 (2004) (Court may not disturb BVA's favorable findings). BLAG claims it needs the RBA to test certain findings of the BVA, but it has not identified any factual findings *adverse to Ms. Cardona* that are at issue on this appeal, nor demonstrated that BLAG, as an appellee, may lawfully challenge BVA findings *favorable* to the Veteran. Hence, it has failed to demonstrate a need for the RBA.[2]

[2] BLAG has intervened on behalf of the Secretary, but the Secretary may not appeal a BVA decision to this Court, 38 U.S.C. § 5107(a), and BLAG is now arguably bound by the same duty to assist the veteran in developing facts for her claim as the Secretary, *see*

C. BLAG's purported authority is inapposite.

BLAG cites to no authority for the unprecedented order it seeks disclosing hundreds of pages of a veteran's private medical and other information to a third-party intervenor. Nor is appellant aware of any such case.[3] Similarly, BLAG's recourse to decisions of U.S. Courts of Appeals and District Courts, in which ordinary rules of civil discovery apply, BLAG Mo. at 8, miss the mark. The Federal Rules of Civil Procedure do not apply in this Court, just as they generally do not apply in judicial review of agency proceedings in other contexts. The restriction on this Court's jurisdiction providing for review only of factual findings made *adverse* to the claimant, 38 U.S.C. § 7261(a)(4), and the duty to assist now arguably assumed by BLAG as well, see note 2, also distinguish the immigration cases cited by BLAG in support of its claim for access to the entire RBA. *See* 8 U.S.C. § 1252(b)(4)(B) (providing for judicial review of factual findings in immigration proceedings, without limiting review to findings adverse to respondent).

In short, disclosure of the RBA would expose substantial sensitive information to BLAG, which has failed to establish good cause for entry of such an extraordinary order.

Littke v. Derwinski, 1 Vet. App. 90, 91-92 (1990), and may not argue for a reversal of the grant of benefits. *Floyd v. Brown*, 9 Vet. App. 88, 96 (1996); *Williams v. Principi*, 15 Vet. App. 189, 198 (2001); *Cantu v. Principi*, 18 Vet. App. 92 (2004).

[3] BLAG's reliance on cases of intervenor-attorneys seeking reimbursement for fees, BLAG Br. at 6-7 (citing *Mason v. Shinseki*, Slip Op., No. 08–2969, 2011 WL 1334420 (Ct. Vet. App. Apr. 8, 2011)), is unavailing. Those intervenors were fiduciary agents of the appellants and already had access to personal information of their clients.

III. THE PRIVACY ACT BARS DISCLOSURE OF THE RBA TO BLAG.

The Privacy Act "prohibits 'agency' disclosure of 'any record which is contained in a system of records' except 'pursuant to ... written request ... or with the prior written consent of [the veteran].'" *In re A Motion For a Standing Order*, 1 Vet. App. 555, 558 (1990) (alteration in original) (quoting 5 U.S.C. § 552). This Court recognizes that the VA is covered by the Privacy Act. *Id*. Therefore, the Secretary cannot disclose the RBA without appellant's prior written consent unless the disclosure falls under one of the Act's statutory exemptions. Even disclosure to the Court itself would be prohibited were it not for a standing order issued in 1990. *Id*. at 560.

A. This Court is not a "court of competent jurisdiction" for Privacy Act purposes

BLAG argues that the exemption for disclosure "pursuant to the order of a court of competent jurisdiction" applies in this case, but it is mistaken. 5 U.S.C. § 552a(b)(11). The Privacy Act states that "the district courts of the United States shall have jurisdiction in [Privacy Act claims]." 5 U.S.C. § 552a(g)(1). The Court of Federal Claims has recognized that "the federal district courts have *exclusive* jurisdiction over [Privacy Act claims]." *Treece v. United States*, 10-380 C, 2010 WL 4780807 (Fed. Cl. Nov. 23, 2010) (emphasis added); *see also Addington v. United States*, 10-83 C, 2010 WL 3835860 (Fed. Cl. Sept. 28, 2010); *Parker v. United States*, 280 F. App'x 957, 958 (Fed. Cir. 2008).

This Court, however, "is a court of limited jurisdiction." *Am. Legion v. Nicholson*, 21 Vet. App. 1, 12 (2007). Congress has authorized this Court only to "review decisions of the Board of Veterans' Appeals." 38 U.S.C. § 7252. Recognizing this limitation, this

Court has previously declined to rule on a Privacy Act claim, suggesting that appellant's claim be filed in federal district court instead. *Apollo v. Principi*, 03-1499, 2003 WL 22438438 (Vet. App. Oct. 6, 2003) ("To the extent that the appellant is seeking to have this Court rule substantively on his motions before VA, and is thus claiming a remedy under the Privacy Act… the Court notes that a U.S. District Court might have jurisdiction to hear such a claim.") (citation omitted). If BLAG believes that the Secretary has misinterpreted the Privacy Act, its remedy lies in an action in U.S. District Court.

B. Disclosure to BLAG is not a "routine use" of the RBA.

The Privacy Act exempts disclosures made for a "routine use." 5 U.S.C. § 552a(b)(3). To qualify as a "routine use," the use must be (i) "for a purpose which is compatible with the purpose for which it was collected" and (ii) must be published in the Federal Register, "including the categories of users and the purpose of such use." 5 U.S.C. §§ 552a(a)(7), 552a(e)(4)(D).

BLAG makes no mention of the second prong of this test. It fails to identify any publication in the Federal Register declaring that production of an RBA to an intervening party in an appeal to this Court is a "routine use," and appellant is unaware of any such publication. *See* 74 Fed. Reg. 29275 (June 19, 2009) (listing routine uses of VA records for Privacy Act purposes). See also VA Resp. at 3-4 (asserting VA has not published disclosure in this circumstance as a routine use).

C. BLAG does not qualify for the Privacy Act's congressional exception.

The Privacy Act also exempts disclosures made "to either House of Congress, or...any committee or subcommittee thereof, any joint committee of Congress or

subcommittee of any such joint committee." 5 U.S.C. § 552a(b)(9). The "clear language of the [Congressional] Privacy Act exemption…applies only to a house of congress or a committee or subcommittee, not to individual congressmen." *Swenson v. U.S. Postal Serv.*, 890 F.2d 1075, 1077 (9th Cir. 1989).

BLAG is created by the Rules of the House of Representatives, which establish an Office of General Counsel (OGC) to provide legal assistance and representation to the House. H.R. Rules, 112th Congress, II 8. The OGC "consult[s] with a Bi-partisan Legal Advisory Group, which shall include the majority and minority leaderships." *Id*. BLAG claims it constitutes the House for purposes of this litigation. Motion to Intervene at 9-10. But BLAG has not identified any authority allowing the group to embody the entire House for litigation purposes. *See also* VA Resp. at 2-3 (noting that BLAG failed to supply Secretary with authority demonstrating that House had approved request for RBA). The House Rules merely establish BLAG as a consulting body to the OGC. H.R. Rules, 112th Congress, II 8. Furthermore, BLAG is not listed as a Senate, House, or joint committee or subcommittee in the Congressional Directory, the official directory of the U.S. Congress. Congressional Directory, www.gpoaccess.gov/cdirectory/index.html (last visited Jul. 3, 2012). Because BLAG is not a house of Congress, committee, or subcommittee, disclosure of the RBA to BLAG would violate the Privacy Act.

Even if the Court finds that disclosure of the RBA to BLAG falls under one of the Privacy Act's exemptions, the Secretary is not compelled to disclose the record. The Privacy Act's exemptions merely identify the situations in which disclosure is permissible, not mandatory. 5 U.S.C. § 552a(b).

In addition, the RBA is protected by VA statute. 38 U.S.C. § 5701(a) ("All files, records, reports, and other papers and documents pertaining to any claim under any of the laws administered by the Secretary… in the possession of the Department shall be confidential and privileged, and no disclosure thereof shall be made except as provided in this section."). Disclosure is allowed "[w]hen required by process of a United States court to be produced in any suit or proceeding therein pending." 38 U.S.C. § 5701(b)(2). However, VA regulations governing disclosures in response to Federal court process clarify that "where the records sought are maintained in a VA Privacy Act system of records, and are retrieved by the name or other personal identifier of a living claimant who is a citizen of the United States… a Federal court order is the process necessary for the disclosure of such records." 38 C.F.R. § 1.511. Thus, absent a court order, disclosure of the RBA is not required by the process of this Court and therefore barred by the VA statute. See also VA Resp. at 5-6 ("[D]isclosure of the RBA to BLAG is not authorized on the basis that such disclosure is required by a process of the Court").

Finally, the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule also bars the Secretary from disclosing certain information in the RBA to BLAG. The Privacy Rule prohibits certain entities from disclosing an individual's protected health information. *Citizens for Health v. Leavitt*, 428 F.3d 167, 173 (3d Cir. 2005). Among these entities are "health care provider[s]," including "anyone who furnishes…health care in the normal course of business." 45 C.F.R. § 160.102; 42 U.S.C. § 1320d(3). Health care includes "assessment[s]…with respect to the physical or mental condition, or functional status, of an individual." 42 C.F.R. § 160.103.

The Veteran Benefits Administration (VBA) meets these criteria, as the medical examinations it administers for the purposes of assessing disability compensation and pension claims fit the above definition. 38 C.F.R. § 3.326; 38 C.F.R. § 3.321; *But see* OGC Advisory Opinion, VAOPGCADV 3-2003 (Mar. 17, 2003)http://www.va.gov/ogc/docs/ADV3-2003.pdf(concluding that VBA exams are not "assessments" for purposes of HIPAA). As a result, the Secretary is barred from disclosing medical information contained in the record, including the disability assessment cited by the BVA. BVA decision at 5.

CONCLUSION

For the reasons set forth above, appellant respectfully requests that this Court deny intervenor's motion.

Dated: July 3, 2012
New Haven, CT

Respectfully submitted,

By: /s/ *Michael Wishnie*

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	)	
Appellant,	)	
	)	
v.	)	
	)	
ERIC K. SHINESKI,	)	Vet. App. No. 11-3083
	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

CERTIFICATE OF SERVICE

I hereby certify that, on July 3, 2012, copies of Appellant Carmen Cardona's Response to Motion of Intervenor for Access to the Record Before the Agency were filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF system.

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