UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

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

MOTION OF APPELLANT TO SEAL PORTIONS OF THE CASE AND EXCLUDE THE INTERVENOR FROM ELECTRONIC ACCESS TO THE RBA

Pursuant to this Court's order dated July 17, 2012 and Rules 2 and 27 of the Court Rules of Practice and Procedure, Ms. Cardona respectfully moves for an order (1) sealing the Record Before the Agency ("RBA") pursuant to Rule 48 and (2) excluding the intervenor Bipartisan Legal Advisory Group of the U.S. House of Representatives ("BLAG") from electronic access to the RBA. The Secretary has stated that he is unable to take a position on this motion at this time. Counsel for BLAG has stated that BLAG intends to oppose this motion. Oral argument is not requested.

STATEMENT OF FACTS AND PROCEEDINGS

Ms. Cardona is a disabled U.S. Navy veteran who was granted service-connected disability benefits at an 80 percent disability rating from the Veterans Affairs Regional Office ("RO"). *See* Board of Veterans Appeals ("BVA") Decision at 1-3. The RO denied Ms. Cardona's application for spousal benefits based on the Defense of Marriage Act ("DOMA") Section 3 and 38 U.S.C. § 101(31), which both define "spouse" as "a person of the opposite sex." The BVA affirmed, BVA Dec. at 2-3, noting Ms. Cardona's constitutional challenges to the statutes and explaining that "the disposition of this appeal turns solely on the law...the facts are not in dispute." *Id*. at 3.

Ms. Cardona timely appealed to this Court. After the Secretary agreed that the relevant statutes are unconstitutional, this Court granted BLAG's motion to intervene. In its motion, BLAG emphasized that it sought to intervene for the limited purpose of defending the statutes against constitutional challenge. *See, e.g.*, BLAG Mot. to Intervene at 9. On June 26, 2012, BLAG moved for unrestricted access to the entire RBA. After briefing, the Court issued an order on July 17 directing the Secretary to file the RBA with the Court by today, July 24, 2012, unless appellant or the Secretary moved to (1) seal the case or (2) exclude BLAG from electronic access to the RBA. The Court observed that it had not yet engaged in the balancing of interests outlined in *Pritchett v. Derwinski*, 2 Vet. App. 116 (1992), nor has it yet adjudicated the Privacy Act and other objections raised by the Secretary and Ms. Cardona. *See* App. Mem. of Law in Opp. BLAG Mot. for Access to the RBA. Counsel for Ms. Cardona and the Secretary attempted to resolve this dispute

with counsel for BLAG, but the parties and BLAG were unable to reach an agreement. Accordingly, Ms. Cardona now makes both motions identified by the Court.

ARGUMENT

I. The RBA should be sealed pursuant to Rule 48

Rule 48 of the Rules of Practice and Procedure for this Court provides for the sealing of cases. Vet. App. R. 48. This Court has previously used its discretion to seal records containing sensitive information. *See, e.g.*, *Pritchett*, 2 Vet. App. at 120-22 (invoking the Court's "supervisory power over its own records and files" to seal portions of the record); *Young v. Shinseki*, 07-3630, 2009 WL 1687943 (Vet. App. June 18, 2009) (recognizing that "the right to inspect and copy judicial records is not absolute") (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978)). The Court has also removed sensitive portions of a record and returned them to the U.S. Department of Veterans Affaris ("VA"), "subject to the protections afforded individual veterans' records." *Pritchett*, 2 Vet. App. at 121.

This Court has long recognized the need to balance the right to access to its records with the protection of a veteran's privacy. *Id*. at 120. Privacy considerations are particularly important in this Court, as veterans' VA records are regarded as private and confidential under the Privacy Act and the VA's own confidentiality statute. 5 U.S.C. § 552a; 38 U.S.C. § 5701(a); *see also id*. § 7332 (regarding records relating to drug or alcohol abuse, HIV infection, and sickle cell anemia). Furthermore, Congress recognized the importance of protecting the confidentiality of medical records when it passed the

Health Insurance Portability and Accountability Act ("HIPAA"). Pub. L. No. 104-191, 110 Stat. 1936 (1996); *See also* 45 C.F.R. § 164.502 (HIPAA Privacy Rule).

In this case, the Court should seal the RBA, except for the portions of the RBA that have already been cited by the Secretary or Ms. Cardona and thus constitute the Record of Proceedings ("ROP"). The RBA is 1451 pages, nearly all of which are personal records, containing private, sensitive information about Ms. Cardona. Seventy-eight pages of the RBA have been cited to by Ms. Cardona and the Secretary and will be included in the ROP, which both parties have agreed to share with BLAG. Of the 1373 remaining pages, 894 consist of military medical records from Ms. Cardona's service in the Navy, including standard but private medical information such as that relating to gynecological health and routine medical testing. Ms. Cardona considers this "intensely personal information" which has "nothing to do with the sole issue on this appeal." Ex. A, Declaration of Carmen Cardona dated July 24, 2012 ("Cardona Dec.") at ¶¶ 3-4. The other 479 pages are from Ms. Cardona's various interactions with the VA, including her initial application for disability compensation and assessment and treatment records. These are irrelevant to this appeal and also replete with personal medical information.

Together, the records in the RBA span nearly twenty-five years of medical treatment. Cardona Dec. ¶ 5. Ms. Cardona would suffer "great emotional distress, frustration, and humiliation" if this information became public. *Id.* ¶ 6. Ms. Cardona did not intend for her personal medical records to be viewed by any member of the public outside of the VA. Cardona Dec. ¶¶ 2, 8. She would have sought to withhold medical information from the RO and her VA healthcare providers had she known that such

profoundly intimate information would be publicly aired. *Id.* ¶ 8. It is appropriate to seal the RBA in this case.[1]

II. BLAG should be excluded from electronic access to the RBA.

BLAG should not have access to the RBA. As set forth in Ms. Cardona's prior opposition to BLAG's motion for access to the RBA, granting such access would be inconsistent with the Privacy Act and HIPAA, and as elaborated above, the records in the RBA implicate significant privacy interests of Ms. Cardona. *See* Cardona Dec. Nor are the records in the RBA relevant to the limited purpose for which BLAG represented to this Court it sought to intervene. *See generally* App. Mem. of Law in Opp. BLAG Mot. for Access to the RBA.

Contrary to its assertions, BLAG is not free to contest the BVA's factual findings unless those findings were adverse to the claimant. 38 U.S.C. § 7261(a)(4). None were. *See* BVA Dec. at 2-3. As elaborated above, the majority of the RBA consists of Ms. Cardona's personal medical history during her military service. This information is neither relevant to the dispute in this case – the constitutionality of the relevant statutes – nor to matters within the jurisdiction of this Court. *See* 38 U.S.C. § 7261.

Nor is BLAG correct that, as a limited-purpose intervenor, it is a full-fledged "party" entitled to the RBA pursuant to Rule 10 of this Court. BLAG Reply Br. at 1. In its own words, BLAG intervened for a limited purpose: "to defend the constitutionality of

[1] Ms. Cardona has no objection to the Secretary filing the RBA with the Court *ex parte*, if the Court wishes to conduct its own *in camera* review of the RBA, provided that the RBA is not made available to the limited-purpose intervenor BLAG.

DOMA Section 3 and 38 U.S.C § 101(31) against Ms. Cardona's equal protection claims, and to litigate related jurisdictional issues, if any." BLAG Mo. to Intervene at 9; *see also id.* at 15 (asking the Court to take into account that BLAG "only seeks to intervene for a limited purpose").

Courts have routinely limited intervenors to the particular questions of law that they intervened to litigate, as well as imposing other constraints on their participation in discovery and other aspects of the case. *See, e.g., Northrop Grumman Info. Tech., Inc. v. United States*, 06-607 C, 2006 WL 3231359 at *413 n.5 (Fed. Cl. Nov. 7, 2006) (noting "the availability of partial intervention…an intervention less than full party intervention."); *Dep't of Fair Employment & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 741 (9th Cir. 2011) ("'[w]hen granting an application for permissive intervention, a federal district court is able to impose almost *any* condition'")(quoting *Columbus–Am. Discovery Grp. v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 469 (4th Cir. 1992)); *Walsh v. Walsh*, 221 F.3d 204, 213 (1st Cir. 2000) ("It was well within the district court's discretion to limit [the intervenor's] intervention, which took place long past trial and judgment [i.e., the factfinding and initial adjudication stages], to a distinct legal issue that required no additional factfinding."); *Garrity v. Gallen*, 697 F.2d 452, 457 (1st Cir. 1983) (when "step[ping] into the shoes of the defendants for purposes of appeal," intervenors are confined to issues raised by defendants in that court).

With respect to issues other than the constitutionality of DOMA and Section 101(31), BLAG's interests, including jurisdictional issues, are well protected by the Secretary. Where a permissive intervenor is "adequately represented...on [certain]

claims," it is "reasonable...for the district court to limit [the permissive intervenor's] intervention in this regard." *Dep't of Fair Employment & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 742 (9th Cir. 2011). BLAG claims only that the Secretary has "abdicated" his duty in defending DOMA against Ms. Cardona's equal protection challenge, not that he has "abdicated" his duty to litigate other issues in the case. BLAG Mot. to Intervene at 1. Therefore, because BLAG intervened for a limited purpose, and the Secretary is adequately protecting BLAG's interest in jurisdictional issues, it is proper for the Court to exclude BLAG from electronic access to the RBA, because it is not relevant to those issues on which BLAG intervened.

CONCLUSION

For all the foregoing reasons, this Court should (1) seal the RBA and (2) exclude BLAG from electronic access to the RBA.

Dated: July 24, 2012
New Haven, CT

Respectfully submitted,

By: /s/ *Michael Wishnie*
Hendrik deBoer, Law Student Intern
Lora Johns, Law Student Intern
Michael Wishnie, Supervising Attorney
Veterans Legal Services Clinic
Jerome N. Frank Legal Services Organization
Yale Law School
P.O. Box 209090
New Haven, CT 06520-9090
(203) 432-4800

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CERTIFICATE OF SERVICE

I hereby certify that, on July 24, 2012, copies of Appellant Carmen Cardona's Motion to Seal Portions of the Case and Exclude the Intervenor from Electronic Access to the RBA 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.

The following parties or counsel were served by electronic means:

Ronen Morris
Appellate Attorney
Office of the General Counsel (027D)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 443-5059/5000

H. Christopher Bartolomucci
Intervenor Attorney
BANCROFT PLLC
1919 M Street, N.W., Suite 470
Washington, D.C. 20036
Telephone: (202) 234-0090
Facsimile: (202) 234-2806
cbartolomucci@bancroftpllc.com

/s/ *Michael J. Wishnie*
Michael J. Wishnie
Supervising Attorney
Jerome N. Frank Legal Services Organization
Veterans Legal Services Clinic
P.O. Box 209090
New Haven, CT 06520-9090
(203) 432-4800
michael.wishnie@yale.edu

EXHIBIT A

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STATEMENT OF CARMEN CARDONA

1. My name is Carmen Cardona. I am the appellant in this case.
2. I submit this Declaration in support of my request that the Court order the sealing of the Record Before the Agency ("RBA") in my case and prevent the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("BLAG") from electronically accessing the RBA, except for the portions cited by me or the Secretary and which will constitute the Record of Proceedings ("ROP").
3. The RBA contains my military medical records from my enlistment in 1988 to my honorable discharge in 2000, including standard medical records such as gynecological health, HIV testing, and other intensely personal information. It

also contains VA medical records relating to diagnosis and treatment for my disability, carpal tunnel syndrome of the right and left hands.

4. My personal medical care while in naval service has nothing to do with the sole issue on this appeal, nor does the VA's diagnosis and treatment of my service-connected disability. The issue in this appeal is whether I may receive additional dependency benefits based on my marriage.
5. Much of the information I gave to the VA is very personal and private. It includes sensitive medical information collected in the course of routine medical care over nearly twenty-five years.
6. If this information becomes a matter of public record, it would cause me great emotional distress, frustration, and humiliation.
7. I would be very upset if anyone could look at or make copies of my medical information. These records are personal and private and I feel that the public has no right to see them.
8. I do not want this information to be shared with the intervenor in this case. I shared this information with the VA so as to obtain the disability benefits which I believe my honorable service in the Navy has earned for me and my family. If I had known these records might be exposed to public view, I would have sought to withhold some of them from the VA or to exclude some of them from the RBA.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 7-24-12

Signature: _____
[Carmen Cardona]