

United States Court of Appeals for the Federal Circuit

EDDIE N. DELA CRUZ,
Claimant-Appellant

v.

**ROBERT WILKIE, SECRETARY OF VETERANS
AFFAIRS,**
Respondent-Appellee

2018-2101

Appeal from the United States Court of Appeals for
Veterans Claims in No. 17-1020, Judge Coral Wong Pi-
etsch.

Decided: July 26, 2019

SETH ALAIN WATKINS, Watkins Law & Advocacy,
PLLC, Washington, DC, argued for claimant-appellant.
Also represented by LOUIS STEFAN MASTRIANI, Adduci,
Mastriani & Schaumberg, LLP, Washington, DC.

MARTIN F. HOCKEY, JR., Commercial Litigation Branch,
Civil Division, United States Department of Justice, Wash-
ington, DC, argued for respondent-appellee. Also repre-
sented by JANA MOSES, JOSEPH H. HUNT, ROBERT EDWARD
KIRSCHMAN, JR., LOREN MISHA PREHEIM; BRIAN D. GRIFFIN,

BRANDON A. JONAS, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before DYK, REYNA, and WALLACH, *Circuit Judges*.

DYK, *Circuit Judge*.

Eddie Dela Cruz appeals from the decision of the Court of Appeals for Veterans Claims (“Veterans Court”) affirming the denial of his claim for a one-time payment from the Filipino Veterans Equity Compensation Fund (“compensation fund”). The Department of Veterans Affairs (“VA”) denied his claim because the Army certified that Mr. Dela Cruz did not have service as a member of the Philippine Commonwealth Army, including recognized guerillas, as “he was not listed in the Reconstructed Guerilla Roster” (“reconstructed roster”). J.A. 5.

We hold that the VA can generally rely on the service department’s determination in deciding eligibility for payment from the compensation fund. But, in this context, the VA cannot rely on the service department’s determination that the veteran is not on the reconstructed roster without giving the veteran a meaningful opportunity to challenge his service record. Dela Cruz’s proper avenue for relief is to seek a correction of his service record from the Army Board for Correction of Military Records (“Corrections Board”). The government has represented that the Corrections Board will consider such an application. We affirm-in-part and remand to the Veterans Court to hold the case in abeyance pending consideration by the Corrections Board.

BACKGROUND

I

On July 26, 1941, President Franklin D. Roosevelt issued an Executive Order to “order into the service of the armed forces of the United States . . . all of the organized

military forces of the Government of the Commonwealth of the Philippines.” Military Order: Organized Military Forces of the Government of the Commonwealth of the Philippines Called Into Service of the Armed Forces of the United States, 6 Fed. Reg. 3,825, 3,825 (July 26, 1941). At the time, the Philippines was a territory of the United States. As a result of the Executive Order, a variety of Filipino military organizations—the regular Philippine Scouts, the new Philippine Scouts, the Guerrilla Services, and more than 100,000 members of the Philippine Commonwealth Army—served the United States during World War II. *See* ARRA § 1002(a)(3).

After the war ended, however, Congress passed legislation—the First Supplemental Surplus Appropriation Rescission Act of 1946, 38 U.S.C. § 107(a) and Second Surplus Appropriation Rescission Act of 1946, 38 U.S.C. § 107(b) (collectively, “the 1946 Rescissions Acts”)—providing that service in these Filipino military organizations “shall *not* be deemed to have been active military, naval, or air service.” *Id.* § 107(a), (b) (emphasis added). As a result, after the passage of this legislation, Filipino veterans were not eligible for the same benefits as the United States veterans they served with during World War II. Instead, the 1946 Rescissions Acts made them eligible only for certain benefits, often at reduced rates. *See* ARRA § 1002(a)(6)–(8) (describing these reduced benefits).

In 2009, Congress enacted Section 1002 of the American Recovery and Reinvestment Act of 2009 (“ARRA”), Pub. L. No. 111–5, 123 Stat. 115, 200–02 (2009), which established a \$198 million fund to provide one-time payments to Filipino veterans who were excluded from full veterans benefits by the 1946 Rescissions Acts. *Compare* ARRA § 1002(d)(1)(A) (defining an “eligible person” for purposes of receiving the one-time payment) *with* 38 U.S.C. § 107. The one-time payment is \$15,000 for U.S. citizens and \$9,000 for non-citizens. ARRA § 1002(e). The statute

required Filipino veterans to apply for this payment within one year of the statute's enactment. *Id.* § 1002(c)(1).

II

Although many Filipino veterans have received payments under this statute, many have not.¹ This is in part due to the VA's requirement that the relevant service department (such as the Army) verify the veteran's service. For many decades, the VA has required that all veterans applying for benefits establish their service in one of two ways: (1) the veteran can submit a "document issued by the service department," 38 C.F.R. § 3.203(a); or (2) the VA will request "verification of service from the service department," *id.* § 3.203(c). "[T]he VA has long treated the service department's decision on such matters as conclusive and binding on the VA," regardless of whatever other evidence documenting service the claimant provides to the VA. *Soria v. Brown*, 118 F.3d 747, 749 (Fed. Cir. 1997). In *Soria*, for example, the claimant applied for the reduced benefits discussed above based on his service in the Philippine Commonwealth Army, but the U.S. Army refused to certify his service. *Id.* at 748. The VA denied benefits based on the Army's determination. *Id.* This court affirmed, explaining that there was "no error" in treating the service department's determination as conclusive, and noting that the proper "recourse lies within the relevant service department, not the VA." *Id.* at 749.

¹ As of January 1, 2019, the VA has granted 18,983 claims for payment from the compensation fund and denied 23,772 claims. See U.S. Dep't of Veterans Affairs, *WWII Filipino Veterans Equity Compensation (FVEC) Fund*, <https://www.va.gov/centerforminorityveterans/fvec.asp> (last visited July 24, 2019).

III

As relevant here, for claims based on Philippine service in World War II, the appropriate “service department” is the U.S. Army. To verify the service of a Filipino guerrilla, the Army relies on the reconstructed roster and treats the roster as authoritative. *See Filipino Veterans Equity Compensation Fund: Examining the Department of Defense and Interagency Process for Verifying Eligibility: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Armed Servs.*, 113th Cong. 9 (2014) [hereinafter *Oversight & Investigations Subcomm. Hearing*] (Statement of Scott Levins, Director, Nat’l Personnel Records Ctr., Nat’l Archives & Records Admin.) (“[T]he roster is the definitive source.”). If an individual’s name does not appear on the reconstructed roster, the Army will refuse to verify service.² Moreover, as explained above, the VA in turn treats the Army’s determination of service as conclusive and binding. The result of this is that a Filipino veteran who does not appear on the reconstructed roster will not receive payment from the compensation fund.

The problem is that the reconstructed roster is not always accurate. This is the result of the methodology employed to create the reconstructed roster. According to a 1949 Army report, many of the original rosters for Filipino units were lost, destroyed, or tampered with. *See Dela Cruz Op. Br. Addendum* at 20–21. After the war ended, “hundreds of unit rosters were missing,” some sets of rosters “were being tampered with,” “a number of guerillas had been processed and paid but no records existed of their having been recognized,” and “no one interested agency possessed a complete set of rosters.” *Id.* at 20. Thus, the

² The Army also requires a Form 23 affidavit, such as the one it had in its files for Dela Cruz, though the affidavit is not sufficient by itself. *See Oversight & Investigations Subcomm. Hearing* at 9.

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