EXHIBIT 2

Vet. App. No. 16-2471

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

FELICIANA G. REYES,
Appellant,

v.

DAVID J. SHULKIN, M.D.,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

FELICIANA G. REYES,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet App. No. 16-2471
	)	
DAVID M. SHULKIN, M.D.,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the Court should affirm the Board of Veterans' Appeals (BVA) May 16, 2016, decision which denied entitlement to a one-time payment from the Filipino Veterans Equity Compensation (FVEC) Fund?

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court's jurisdiction in this matter is predicated on the provisions of 38 U.S.C. § 7252.

B. Factual and Procedural History

This appeal stems from Appellant's claim for a one-time payment pursuant to from the FVEC Fund. The Board in this case determined that Appellant did not have recognized active military service, and therefore did not qualify for such a benefit. (R. at 1-8).

In July 2010, the NPRC responded to a request for information that Appellant "has no service as a member of the Philippine Commonwealth Army, including the recognized guerillas, in the service of the United States Armed Forces." (R. at 217).

Appellant's claim was initially denied by the Regional Office (RO) in August 2010. (R. at 194-95). Appellant filed a Notice of Disagreement. (R. at 174-75).

Appellant submitted an Affidavit for Philippine Army Personnel in support of her claim. (R. at 258-61). She has also submitted a Certification from General Headquarters, Armed Forces of the Philippines. (R. at 45).

A Statement of the Case was issued in January 2012. (R. at 111-139). In March 2012, Appellant perfected an appeal to the Board. (R. at 109-10).

In June 2013, the Board issued a decision in this case. (R. at 79-86). Pursuant to a Joint Motion for Remand (R. at 70-73), which was granted by this Court in December 2013, (R. at 69), the Board remanded this case for additional development in March 2014. (R. at 54-59).

In August 2014, the NPRC again confirmed that no change to the prior negative certification was warranted. (R. at 48).

VA also sought verification from the service department, initiating a request to the U.S. Department of the Army to verify the Appellant's military service. However, the November 2015 memorandum response received indicated that the Department of the Army could not change the previous negative service determination based on the evidence before it, and that "we are not able to accept the Certification from General Headquarters, Armed Forces of the Philippines, or affidavits as verification of service." (R. at 33).

A Supplemental Statement of the Case (SSOC) was issued in November 2015. (R. at 25-31).

The Board denied Appellant's claim for entitlement to a one-time payment from the FVEC in the decision currently on appeal, dated May 31, 2016. (R. at 1-8).

III. SUMMARY OF ARGUMENT

The Board's May 31, 2016, decision should be affirmed because Appellant has not carried her burden to show that it should be reversed, remanded, or otherwise set aside. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (*en banc*) (Appellant bears the burden of demonstrating error).

As will be elaborated upon below, the Board's decision has a plausible basis in the record for its determination, and properly applied the relevant statutes, regulations, and case law to the facts of this case. To the extent that

the Appellant argues that the VA's regulations, to include 38 C.F.R. § 3.40(d) and 38 C.F.R. § 3.203, are arbitrary, capricious, an abuse of discretion, or not in accordance with law, and should be set aside, Appellant's contention should be summarily rejected.

The Secretary respectfully asserts that the Board's May 31, 2016, decision should be affirmed, as Appellant has not met her burden to present any argument that merits remand or reversal.

IV. ARGUMENT

I. The Board's decision has a plausible basis, is not clearly erroneous, and should be affirmed.

Generally, in order to qualify for VA benefits, a claimant must demonstrate that he or she is a "veteran." *Cropper v. Brown*, 6 Vet.App. 450, 452 (1994). A veteran is defined, in relevant part, as "a person who served in the active military, naval, or air service." 38 U.S.C. § 101(2); *see* 38 C.F.R. § 3.1(d). Service in the active military, naval, or air service includes, in relevant part, service in the U.S. Armed Forces, *see* U.S.C. § 101(10), (21), (24), or, in certain circumstances, service in the Commonwealth Army of the Philippines, including certain organized guerrilla forces who were called into service of the U.S. Armed Forces. *See* 38 U.S.C. § 101(2); 38 C.F.R. § 3.40.

Additionally, in the American Recovery and Reinvestment Act of 2009, Publ. L. No. 111-5, § 1002, 123 Stat. 115, ("ARRA") Congress established the FVECF and authorized VA to make one-time payments from the fund to eligible

persons who submitted a claim within the one-year period beginning on the date of enactment. Section 1002(d) of the Act defines the term "eligible person" as any person who served before July 1, 1946, in the organized military forces of the Government of the Commonwealth of the Philippines, including the recognized guerrilla forces, or in the Philippine Scouts organized under section 14 of the *Armed Forces Voluntary Recruitment Act of 1945*, 79 Cong. Ch. 393, 59 Stat. 538, 543. *American Recovery and Reinvestment Act* § 1002(d), Pub. L. No. 111-5, 123 Stat. 200 (February 17, 2009) codified at 38 U.S.C. § 107 note.

To establish entitlement to benefits, VA may accept documents submitted by a claimant as evidence of qualifying service, without verification from the appropriate service department, if the documents were issued by a U.S. service department, contain the needed information, and in VA's opinion are genuine and contain accurate information. 38 C.F.R. § 3.203(a); *Soria v. Brown*, 118 F.3d 747, 749 (Fed. Cir. 1997). If, however, the evidence of service submitted does not meet the requirements of 38 C.F.R. § 3.203(a), VA must request verification of service from the appropriate U.S. service department. 38 C.F.R. § 3.203(c); *Soria*, 118 F.3d at 749. These requirements are not limited to Philippine military service, but apply to all service. *See Capellan v. Peake,* 539 F.3d 1373, 1380 (Fed. Cir. 2008) (noting that section 3.203(c) requires verification from the service department whenever a claimant lacks the kind of official evidence specified in section 3.203(a)). Under section 3.203, service department findings are binding on VA for purposes of establishing qualifying service. *Duro v.*

Derwinski, 2 Vet.App. 530, 532 (1992) ("[t]herefore, VA is prohibited from finding, on any basis other than a service department document, which VA believes to be authentic and accurate, or service department verification, that a particular individual served in the U.S. Armed Forces."). "Thus, if the United States service department refuses to verify the applicant's claimed service, the applicant's only recourse lies within the relevant service department, not the VA." *Soria*, 118 F.3d at 749.

Whether a servicemember has attained "veteran" status for VA benefits purposes is a finding of fact that the Court reviews under the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *See Bowers v. Shinseki*, 26 Vet.App. 201, 204-05 (2013). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)).

In this case, the Board denied a claim of entitlement to compensation from the FVECF because Appellant did not have qualifying service. The Court should affirm this decision, because the Board's decision was plausible based on the evidence of record, and in accordance with applicable law.

The Board clearly explained that Appellant had not submitted a DD-214, a Certification of Release or Discharge from Active Duty, or an original Certificate

of Discharge issued by the United States Army in accordance with 38 C.F.R. § 3.203(a)(1), or other documents that were acceptable proof of the requisite service because they are not official documents of the appropriate U.S. service department. (R. at 5). Further, the National Personnel Records Center (NPRC) twice confirmed that Appellant had no service as a member of the Philippine Commonwealth Army, including the recognized guerillas, in the service of the United States Armed Forces. (R. at 4-5).

As a result, the Board explained that pursuant to 38 C.F.R. § 3.203(c), VA sought verification from the service department, initiating a request to the U.S. Department of the Army to verify the Appellant's military service. However, the November 2015 memorandum response received indicated that the Department of the Army could not change the previous negative service determination based on the evidence before it. (R. at 33).

The Board properly noted that the "VA is prohibited from finding on any basis other than a service department document which VA believes to be authentic and accurate or service department verification that a particular individual served in the United States Armed Forces." (R. at 5). As the Board noted, a service department finding is binding on VA for purposes of establishing service in the U.S. Armed Forces. *Duro v. Derwinski*, 2 Vet.App. 530, 532 (1992).

The Board in this case, properly applied the law to the facts of this case. As such, the Board's decision is plausible, and is not clearly erroneous, and should be affirmed.

Appellant takes issue with the VA's finding that Appellant does not have qualifying service necessary to obtain the benefit that she seeks. Although the NPRC stated in July 2010 that Appellant "has no service as a member of the Philippine Commonwealth Army, including the recognized guerillas, in the service of the United States Armed Forces," (R. at 217), and confirmed this again in an August 2014 response (R. at 48), and the Department of the Army further indicated in 2015 that no change could be made to this finding (R. at 33), Appellant finds disputes these findings.

In questioning whether the NPRC and Department of the Army's findings are legitimate, Appellant cites to 247 pages of outside evidence, appended to her brief, which is not contained within the Record Before the Agency (RBA) and which was not before the Board at the time of its decision. (*See* Appellant's Brief, Exhibits A-EE). Exhibits A-DD, comprising 241 of the 247 appended pages, are the subject of the Secretary's Motion to Strike, filed with this Court on March 16, 2017. As delineated in his motion, the Secretary maintains that such Exhibits do not comport with this Court's Rule 28(i), as they are not "superseded statutes, rules, or regulations, or unpublished authorities." R. 28(i). The Secretary also maintains, as articulated in his Motion to Strike, that such documents were

neither actually, nor constructively before the Board, and therefore should not be considered in connection with this appeal.

Importantly, pursuant to statute, "review in the Court shall be on the record of proceedings before the Secretary and the Board." 38 U.S.C. § 7252(b). The documents appended to Appellant's brief were not before the Secretary, or the Board at the time of the Board's decision, and thus, for the Court to consider them in connection with its review of the Board's decision is outside the scope of this Court's review.

In inviting the Court to consider these exhibits and her arguments based thereon, the Appellant essentially asks the Court to conduct a trial *de novo* as to a factual finding, that is, that she purportedly has qualifying service warranting entitlement to the benefit she seeks. This is statutorily impermissible, pursuant to 38 U.S.C. § 7261(c) ("[i]n no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo in this Court."). The Court should decline Appellant's invitation.

The Secretary also maintains that such records were not constructively before the Board at the time of its decision, as delineated in his Motion to Strike.

Moreover, to consider such evidence and argument is a fruitless endeavor, since the question at bar is whether the Board committed error in rendering its decision. The Board did not commit error if it properly applied the extant law. That is, even assuming *arguendo* that the Court were to deny the Secretary's motion to strike and somehow find that such documents were either actually or

constructively before the Board, or properly appended to her Brief, as the Board noted, "VA is prohibited from finding on any basis other than a service department document which VA believes to be authentic and accurate or service department verification that a particular individual serviced in the United States Armed Forces. Furthermore, any such service department finding is binding on VA for purposes of establishing service in the United States Armed Forces." (BVA dec. at 4, *citing Duro v. Derwinski*, 2 Vet.App. 530, 532 (1992)); *see also* 38 C.F.R. § 3.203(a)-(c). Thus, even considering the evidence cited by Appellant, service department findings are binding on VA. The Board's decision was therefore not in error in finding that Appellant did not have the requisite qualifying service needed to obtain the benefit sought, as it was based on service department findings.

To the extent that Appellant argues that the documentation that she provided, to include an Affidavit for Philippine Army Personnel (R. at 258-61), is sufficient to establish that Appellant had qualifying service pursuant to 38 C.F.R. § 3.203(a), (*see* Appellant's Brief 16-23), the Secretary notes that in rendering its determination, the Department of the Army specifically considered this Affidavit, but noted that "under the guidance established by the Department of the Army for the post-war recognition program," certifications from General Headquarters, Armed Forces of the Philippines, or affidavits could not be accepted as verification of service. (R. at 33). The Secretary does not have the authority to review the U.S. Department of the Army's internal policies as to what documents

qualify as service department records that verify service. " As previously noted, if the United States service department refuses to verify the applicant's claimed service, the applicant's recourse lies within the relevant service department, not the VA." *Soria*, 118 F.3d at 749.

For these reasons, the Secretary avers that the Appellant has not met her burden to show that the Board's decision merits remand, reversal, or should otherwise be set aside, as the Board's decision had a plausible basis in the record, and was not clearly erroneous.

II. The applicable regulations, to include 38 C.F.R. § 3.40(d) and 38 C.F.R § 3.203 are not arbitrary, capricious, and abuse of discretion, or not in accordance with law.

To the extent that the Appellant argues that the plain language of ARRA requires that she must be afforded the benefit she seeks, the Secretary disagrees.

Section 1002 of the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 115, created the FVECF and provides for payments to be made to "eligible persons." In order to qualify as an "eligible person" under the FVECF, a person is required to have

(1) served-

(A) before July 1, 1946, in the organized military forces of the Government of the Commonwealth of the Philippines, while such forces were in the service of the Armed Forces of the United States

> pursuant to the military order of the President dated July 26, 1941, including among such military forces organized guerrilla forces under commanders appointed, designated, or subsequently recognized by the Commander in Chief, Southwest Pacific Area, or other competent authority in the Army of the United States; or
>
> (B) in the Philippine Scouts under section 14 of the Armed Forces Voluntary Recruitment Act of 1945 (59 Stat. 538); and

(2) was discharged or released from service described in paragraph (1) under conditions other than dishonorable.

Pub. L. No. 111-5, 123 Stat. 115 (2009).

Appellant appears to argue that the term "organized guerrilla forces" is unambiguous, and plainly includes guerillas "regardless of whether their service was 'recognized,' 'unrecognized,' 'civilian,' or otherwise." (Appellant's Brief at 24-25). It appears that Appellant argues that the VA's regulation, 38 C.F.R. § 3.40(d), does not comport with the plain language of the ARRA.

The Secretary disagrees. ARRA does not define the term "organized guerilla forces," and it is not clear from the plain language of the Act what the term "organized guerilla forces" means. Presumably, it means guerillas that are "organized," but whether that term includes recognized guerillas, unrecognized guerillas, (and if so, under what circumstances), or civilians claiming to have been guerillas, is simply not evident from the plain language of the Act.

To the extent that the Appellant also argues that the ARRA is plain on its face as to what evidence is necessary to establish guerilla service such that both 38 C.F.R. § 3.40 and 38 C.F.R. § 3.203 conflict with the Act (Appellant's Brief at 29), the Secretary is unable to discern what provisions of the ARRA Appellant believes speak to this issue. The Secretary finds nothing in the plain language of the Act, and Appellant cites to no provision within the Act, that indicates what evidence will satisfactorily establish qualifying service, to include guerilla service.

The Secretary thus maintains that Appellant's contentions that the ARRA's plain language is controlling, and in conflict with 38 C.F.R. § 3.40(d) and 3.203, are without merit.

If a statute is silent or ambiguous with respect to a specific issue, the question for the Court is whether the agency's answer is based on a permissible construction of the statute. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984). Further, "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In

such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.*, at 843-44.

In this case, the agency promulgated 38 C.F.R. 3.40(d) to clarify what would qualify as guerilla service and what certifications would establish such service. 38 C.F.R. § 3.203 also serves to clarify and establish a uniform practice to determine what evidence will suffice to establish qualifying service to merit entitlement to VA benefits. Though the Appellant argues that these regulations, along with 38 C.F.R § 3.203, are arbitrary, capricious, an abuse of discretion, and not in accordance with law, (Appellant's Brief at 25-30), Appellant has not met her burden to show that that is the case.

Appellant alleges that the VA's regulations, to include 38 C.F.R. § 3.40(d) and 38 C.F.R. § 3.203 are unconstitutional, because they are in violation of the Equal Protection clause of the Fifth Amendment. (Appellant's Brief at 25). Appellant alleges that the regulations are discriminatory against women, and against persons of Filipino National Origin. (Appellant's Brief at 26-29). Appellant's contentions are without merit.

To state a claim for an equal protection violation, appellants must allege that a government actor intentionally discriminated against them on the basis of race, national origin or gender. *Berkley v. United States,* 287 F.3d 1076, 1084 (Fed. Cir. 2002). Intentional discrimination may be demonstrated in one of three ways. First, it is demonstrated if a facially neutral statute "was motivated by

discriminatory animus and its application results in discriminatory effect." *Id.* (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977)). Intentional discrimination may also be demonstrated wherein a facially neutral law "is applied in a discriminatory fashion." *Id.* (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886)). Finally, "a law or policy is discriminatory on its face if it expressly classifies persons on the basis of race or gender." (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)).

In this case, Appellant does not allege that the two regulations are facially discriminatory. Appellant instead appears to argue that the regulations were motivated by discriminatory animus, and the application results in a discriminatory effect, and/ or were applied in a discriminatory fashion. (Appellant's Brief at 26).

Appellant first argues that the regulations at issue are intentionally discriminatory against women. (App. Brf. at 26-29). In support of his contention, he points the Court and the Secretary to excerpts of a document which is not part of the record,[1] and does not appear to be part of the legislative or regulatory

[1] This document, along with others, is the subject of Appellee's motion to strike, pending at the time of the submission of this brief. Appellee maintains that Appellant's Exhibit O, along with all of those referenced in his Motion to Strike, should be stricken from Appellant's brief, as well as all references and citations to such document.

history with regard to either of the two regulations. This incomplete document purports to have been prepared by the Philippines Command of the U.S. Army in 1949, in an attempt to provide an overview of the Army's Recognition Program of the Philippine Guerillas. Appellant appears to argue that excerpts from this document indicate a "discriminatory intent"-- on the part of whom is unclear-- that mandates a finding that VA's regulations are unconstitutional. (Appellant's Brief at 27).

To the extent that this document is not part of the record on appeal, is not part of the legislative or regulatory history of the regulations at issue, and is incomplete and unverified as to its authenticity, the Secretary objects to consideration of this document as the basis of an equal protection challenge. Even assuming for the sake of argument, that the Court were to consider the document in the context of Appellant's challenge to the Constitutionality of the regulations, the Secretary would submit that the document does not establish discriminatory intent on the part of the agency in enacting this regulation, or otherwise present prima facie evidence of an equal protection violation on the part of the Secretary.

At the outset, the excerpted document purports to be a historical "overview" of an *Army* Program and chronicles actions related to military operations in a time of war. Appellant appears to find fault and allege that the *Army's* actions were discriminatory. The Secretary does not have the authority to speak to or comment on the intent of the Department of the Army in enacting its

programs and policies pertaining to military operations during a time of war. The issue in the case at bar is whether the Secretary's regulations contain such discriminatory intent. The Secretary submits that they summarily do not.

The regulations at issue were enacted to provide uniform standards as to what constitutes qualifying military service such that a claimant is eligible for VA benefits pursuant to the laws enacted by Congress and administered by the Secretary, and to determine what documentation would be acceptable as verifying such service. 38 U.S.C. § 501, 38 C.F.R. § 3.203, 38 C.F.R. § 3.40(d).

Military service departments maintain official records of the circumstances of each individual who commits to such service, to include the dates of such service, the whereabouts, and function performed, as is seen, for example, in the Form DD-214. It is axiomatic that the VA would look to the records maintained by these service departments, which are charged with maintaining such records, as well as its official determinations and verifications, to determine whether an individual does indeed have qualifying military service, and as such, meets the threshold requirements necessary for eligibility for military veterans' benefits. Reliance on such evidence provides uniformity and consistency in application in determining who is eligible for VA benefits. To rely on service department documents to determine eligibility for VA benefits is not arbitrary, capricious, unlawful, nor an abuse of discretion; to the contrary, it ensures that uniform standards are provided and that military service is verified by an agency independent of the VA or the claimant.

To the extent that the Appellant believes that the Army's determinations as to qualifying military service are discriminatory, the Secretary again notes that, "if the United States service department refuses to verify the applicant's claimed service, the applicant's only recourse lies within the relevant service department, not the VA." *Soria*, 118 F.3d at 749.

Appellant next argues that VA's regulations are intentionally discriminatory against persons of Filipino national origin. (Appellant's Brief at 28). Appellant's argument is again concerned with the finding of the service department that Appellant does not have qualifying military service. Appellant apparently believes that this determination was made employing practices discriminatory to Filipinos. Appellant avers specifically, that the Army's determination that the Affidavit for Philippine Army Personnel (R. at 258-61), is insufficient evidence of qualifying military service with U.S. Forces, discriminates against Filipinos. (Appellant's Brief at 28). Appellant effectively argues that the VA should ignore the determination of the service department, and independently adjudge that evidence considered and rejected by the service department as insufficient, is in fact, sufficient and acceptable proof of service. (Appellant's Brief at 28-29).

The Secretary again notes that to the extent that the Appellant believes that the Army's determinations as to qualifying military service are discriminatory, "if the United States service department refuses to verify the applicant's claimed service, the applicant's only recourse lies within the relevant service department, not the VA." *Soria*, 118 F.3d at 749.

Further, the Secretary notes as an aside, that pursuant to VA's regulations, persons of Filipino and non-Filipino national origins are subject to the same standards, in that their service with the U.S. military must be verified by a service department. 38 C.F.R. § 3.203 and 3.40(d). There is no indication that VA's regulations were enacted with, or are applied with any discriminatory intent.

The Appellant finally argues that the two aforementioned regulations at issue conflict with 38 U.S.C. § 5107(b) and 38 C.F.R. § 3.102, and are thus not in accordance with law. Appellant's contention is without merit.

The "benefit of the doubt" doctrine contained in 38 U.S.C. § 5107(b) and indicates that when there is an approximate balance of positive and negative evidence as to an issue material to the determination of a matter, the claimant will be given the benefit of the doubt. Neither 38 U.S.C. § 5107(b) nor 38 C.F.R. § 3.102 require that the VA determine, independent of the service department and its findings, whether Appellant has qualifying military service.

The Secretary asserts that 38 C.F.R. § 3.40(d) and 38 C.F.R. § 3.203 are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, to include 38 U.S.C. 5107(b) and 38 C.F.R. § 3.102.

For the foregoing reasons, the Secretary respectfully requests that the Court affirm the Board's May 31, 2016, decision.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, the Secretary respectfully requests that the Board's May 31, 2016, decision should be affirmed.

Respectfully submitted,

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