VETERANS LAW JOURNAL

A QUARTERLY PUBLICATION OF THE COURT OF APPEALS FOR VETERANS CLAIMS BAR ASSOCIATION

Court Transitions to Telephonic, then Zoom Oral Arguments, Due to Continuing COVID-19 Pandemic

by Jillian Berner

As most people's daily lives have changed due to the continuing COVID-19 public health emergency, so too has the Court's standard operating procedure for oral arguments. The Court began streaming oral arguments via YouTube in April 2019; now, oral arguments continue to be available via YouTube, but none of the parties are physically in the Court's downtown Washington, DC, location. Following the nationwide emergence of the COVID-19 infection, the Court transitioned to audio-only oral arguments beginning on April 21, 2020. On November 6, 2020, as the pandemic continued, the Court held its first oral argument via Zoom videoconference.

Clerk of the Court Greg Block said that the Court had considered holding more virtual proceedings prior to the pandemic, but that various factors dissuaded progress. "Parties were reluctant to remote in if they knew the other party would be present," Block said, adding that perhaps parties saw a virtual presence as a "disadvantage." However, when the pandemic erupted, Block said that the Court was prepared to make a "wholesale move to remote work," since the Court had been developing technology and hardware to support such a move in support of continuity of operations. While initial efforts in scheduling oral arguments focused on creating "stable environments" for the proceedings, the Court first transitioned to telephonic oral arguments, Block said. In addition to the behind-the-scenes technological efforts of many, the participants also had to become accustomed to the non-technological changes of telephonic arguments, including a lack of visual cues, which often led to

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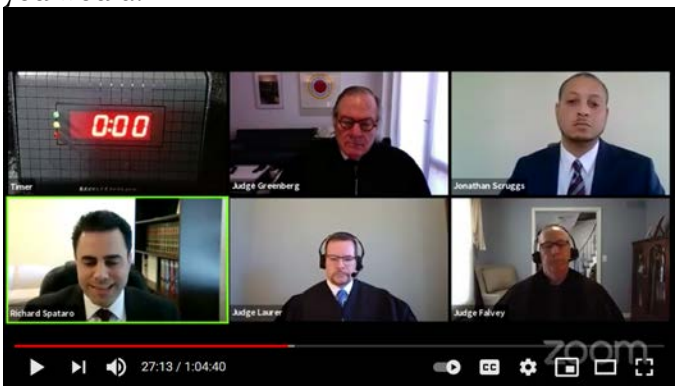
litigants and judges talking over each other. Over time, counsel became more comfortable. Attorney John Niles has participated in multiple virtual arguments during the pandemic by telephone and by Zoom. Niles noted that the telephonic arguments did include challenges, given that it was hard to establish rapport with the judges and "have a conversation with them" without the ability to make eye contact. VA Office of General Counsel attorney Nate Kirschner also missed the "conversationality of regular argument," but also said that he believed that the virtual oral arguments appeared to ensure that the judges asked "the precise questions they wanted to ask."

Soon enough, as parties and judges became more comfortable with Zoom in other circumstances, the Court transitioned to video oral arguments. Prior to the Court's first Zoom oral argument, Block said that he researched how other courts were holding video oral arguments and observed the benefits of structure in videoconference. He also said, "I try to bring some of the things you'd see in the courtroom into the experience on video."

VA Office of General Counsel attorney James Drysdale said that any videoconferencing software caused some technical glitches that require adjustment. "You do have to be prepared to pause, wait, let everyone reconnect, and work through those technical challenges," Drysdale said. "There is a slight bit of a lag between audio and video responses…I tried to create a little space between responses. It's a little difficult to tell sometimes when someone is trying to get a question in."

Prior to the scheduled oral argument, Block and his staff send a guide for attorneys participating in video oral arguments published by the American Academy of Appellate Lawyers. As litigants and audiences of the Court's pre-pandemic oral arguments can attest, Block also typically holds a "pre-conference" before the judges enter the courtroom, to ensure the parties are comfortable and set up. Block does the same via Zoom, including a "tech check" to ensure parties are prepared, focused, and comfortable. Attorneys said that the pre-argument conference was very helpful. "I tremendously appreciated that," Niles said.

Block's tips include ensuring that the camera is at eye level, to allow the viewers to perceive that the speaker is actually looking at them; eliminating distractions in the background of your oral argument; and altering lighting to avoid looking "like you're in a lineup." Kirschner added that he advised litigants to "Be ready, be prepared, keep the kids and cat and dog out and prepare otherwise like you would."



Attorneys Richard Spataro and Jonathan Scruggs argued before Judges Greenberg, Laurer, and Falvey in Andrews v. McDonough *via Zoom in February 2021.*

Attorney Adam Luck, who has argued before the Court via Zoom, said that arguing via Zoom was definitely "different," but that he prepared with mock video arguments with colleagues. Doing so, Luck said, "did prepare [me] a little bit more for the delays and how to acknowledge and respond to questions," including pauses and glitches. Drysdale also prepared with Zoom mooting, to try to "make our mooting as similar to the Court argument as it would be." Drysdale even prepared for a telephonic oral argument by mooting his argument via audio conference call.

Niles praised the Court's transition to virtual oral arguments. "I have been super impressed with how the Court has been so nimble in dealing with the COVID pandemic, and this is just one iteration of it," he said.

VA Office of General Counsel attorney Alexander You, who has also argued before the Court via Zoom, concurred. "There are a lot more things to

worry about going wrong than a traditional oral argument," he said, but "the Court was very accommodating and understanding that you're not in a controlled space like a courtroom."

Block said that the transition to videoconference has been a net positive, allowing for "transparency" for people "around the country and the world" and creating a "meaningful experience—even though it's virtual." Block did not rule out continued virtual proceedings of the Court, noting that it is "a fascinating time to be wrestling with this."

Jillian Berner is Senior Staff Attorney at the UIC John Marshall Law School Veterans Legal Clinic.

Chief Judge Bartley Holds Lunchtime Discussion with Bar Association, Updates Members on Court

by Kenneth Meador

Chief Judge Margaret Bartley joined the the CAVC Bar Association's January 20, 2021, luncheon event to give the Bar an update on recent events at the Court.

Initially, the Chief Judge noted that the Court is still continuing its work-from-home posture in light of the ongoing COVID pandemic. She noted that, like so many places in the veterans law community, the Court is operating at full speed and productivity has been on par with pre-COVID productivity, if not slightly better. She also noted that at the Court's physical space, some of the building is undergoing renovations while necessary operations continue.

With regards to the Court's 2022 budget requests and justifications to Congress, the Chief Judge informed us that the Court is continuing to take record numbers of appeals even as productivity has increased. She expected to report to Congress that in FY 2020, the Court handled approximately 9000 appeals and 300 petitions. Of those appeals and petitions, approximately 8700 were disposed of, including approximately 8400 appeals.

She then took a moment to note the Court's continuing progress on class action matters before the Court. She noted that there were multiple requests for class action certification that had been decided and that there were even more working their way through the Court. She thanked the Bar for its help with the Court's recently promulgated Rule 23, Action on a Request for Class Certification and Class Action. Chief Judge Bartley also noted that she thought that while the rule was an appropriate step in the right direction, the Court and the Bar are both learning how to litigate class actions in a unique area of the law and on-the-job training will continue for all, as everyone learns more about these types of claims.

Meetings of the Court's Board of Judges are ongoing and have included speakers on and discussions of managing class actions in the special master context, the Judicial Advisory Committee, and updating the Court's Internal Operating Procedures. Judge Bartley suggested that the Board of Judges is beginning to consider ways to allow for pro se veteran appellants to participate in the Rule 33 Conference Process, potentially by allowing pro bono attorneys, managed by The Veterans Consortium, to take cases on a rotating basis. As a former clerk who waded through my fair share of pro se briefs, this sounded like a great idea to me and I can attest that it would save considerable Court resources.

Towards the end of the luncheon discussion, the Chief Judge shared some of her priorities moving forward as Chief. First, she discussed reconsidering the Court's internal circulation process. That process requires the Court's judges to circulate non-precedential memorandum decisions and dispositive court orders for an (optional) five-day internal Court review by other chambers. If a judge's memorandum decision is not in accordance with the Court's relevant panel decisions, then the Court's other judges can raise the conflict and, in some circumstances, may even be able to call the case before a panel. The process may have been established to maintain continuity and uniformity of the Court's precedential decisions, but there is some concern (shared by this member of the Bar who witnessed the process firsthand) that the process

can lead judges to drive the litigation process in ways that litigants on both sides of the Bar might not have advocated for or wanted. She emphasized that a priority for her as Chief is to ensure that it is the Court's litigants, not its judges, driving litigation at the Court.

The Chief also suggested that as the Court begins to consider things like changes to the circulation process and pro se Rule 33 Conferences amidst increased productivity at the Court, the Court's leadership may once again tentatively consider changes to the Court's rules against citing non-precedential memorandum decisions.

In her closing comments, the Chief encouraged the Bar to continue to keep lines of communication open. The Chief Judge noted that the move from her long public service career as a litigator to the bench could be a bit isolating. She encouraged the Bar to work hard to keep lines of communication open between attorneys, her office, the Clerk's office, and the Judicial Advisory Committee. She promised to work on her end to ensure the same. On behalf of President Jason Johns and the CAVC Bar Association Board of Governors, I would like to thank Chief Judge Bartley for doing exactly that.

There were a few questions after the Chief's closing comments. First, a participant asked about the impact of Appeals Modernization Act litigation at the Court. The Chief Judge felt that most of the litigation at the Court was still deciding legacy appeals and that the AMA matters coming into the Court seemed to be more of a trickle than a flood, but she also said that the Court expected to see that change in the coming months and years.

Finally, Bar Association President Jason Johns asked the Chief what kind of legacy she hoped to leave behind at the Court. She remarked that her main focus is less on her legacy and more on doing good work every day. In her response, the Chief Judge's passion for the public service work that drives so many of us to our keyboards each day was clear, and that is a legacy to be proud of.

Kenneth L. Meador is a U.S. Army veteran and an Appellate Attorney with NVLSP.

Message from the President

Greetings Colleagues!

I trust you will find this 1stQ edition of the Veterans Law Journal very informative and enjoyable. I have always been impressed by the caliber of the VLJ, especially so because it is a 100% volunteer driven publication. Many thanks to Editor-In-Chief Jillian Berner, the members of the VLJ committee who support this undertaking, and of course to all who contribute their time and knowledge through submissions. It truly is a team effort between the Board of Governors, the VLJ Committee and our members.

There are many exciting changes happening, and soon to be happening, at the Bar Association. As many of you have seen, the BOG's Programming Committee has committed itself to providing programming on a more regular, often monthly, basis. The members of the committee and I have been working feverishly behind the scenes to offer these educational and informative events. In January, we had the honor to hear from Chief Judge Margaret Bartley and in February we joined forces with the CAVC Historical Society to gain a very interesting insight and perspective of the inner workings of the Court since its inception. Our upcoming monthly programming events include advice and recommendations when seeking employment within the Department of Veterans Affairs, discussion of The Veteran Consortium's outstanding pro bono legal assistance for veterans,

panelist advice and discussion on the AMA in practice, in-depth discussion on how recent cases before the Court will impact future ones, and a half-day legal research and writing seminar (you won't want to miss that one). The BOG's hope at this time is that we will conduct our annual membership meeting in-person in late-September/early October. We will of course make it available via live-stream for all members and will take the opportunity to commemorate the 20th anniversary of the CAVC Bar Association! At the annual meeting we will conduct necessary business, hear from founding members of the Bar, followed by long overdue social interaction with friends and colleagues to celebrate this milestone.

In addition to doubling down our efforts on programming, I have been working with your Board of Governors in pursuit of many initiatives that will improve the Bar's administrative capabilities and provide new tools & resources for our membership. First and foremost, I have been working over the past few months to identify the most cost and time efficient avenues for us to completely revamp our website, membership application and renewal process, as well as the manner in which we share information and communicate with our membership. More information will be coming as we decide on the best paths forward and begin implementation. Next, a full review of the Bar's Constitution & Bylaws is underway. In the 20 years since the Bar's inception, the Veterans Benefits and Disability Compensation Law arena has vastly changed, as have the needs of our ever growing membership. It would stand to reason that the documents governing the Bar would also change to represent this. Not everything, mind you, as a fair share of the language set forth by our founding members has stood the test of time, as it was intended to, but many areas require updates and revisions to assure our governance reflects our reality. Finally, membership in the Bar is something everyone should be proud of and promote. To this end, the BOG has authorized allowing our membership to utilize the Bar Bar Association's Logo on electronic media platforms. We hope you will consider showing your pride in being a member to help make others aware of the Bar and help drive others to join us. If you are interested, please email cavcbarassoc@cavcbar.net and we will be in touch regarding the approval process.

Thank you once again for being a member of the CAVC Bar Association and, if you are reading this and are not yet a member, I highly encourage you to consider joining us by going to www.cavcbar.net/membership and signing up today. The value of membership far eclipses the cost. I wish everyone continued success in achieving justice for our veterans and am extremely honored to be the President of the CAVC Bar Association!

Jason E. Johns
President, CAVC Bar Association

Message from the Chief Judge

Hello Colleagues,

The Court is putting the finishing touches on our FY 2020 Annual Report and here's a spoiler: Last fiscal year the Court averaged 748 appeals filed per month, with a high of 841 filed in January 2020. The final year-end tally was 8,954 appeals filed and 297 petitions. These numbers are the highest in the 30-year history of the Court. In addition, the Court received four requests for class certification and class action, and certified two classes. As far as dispositions, year-end numbers show that the Court concluded 8,430 appeals and 309 petitions, as well as acting on 6,744 EAJA applications and 246 requests for reconsideration/panel decision. Those are amazing stats, although the first quarter of FY 2021 has seen a downtick in incoming appeals numbers.

In other news, I want to share information about a pilot program designed to permit even more cases the opportunity for pre-briefing mediation conferencing. The Board of Judges recently approved a two-year pilot program that creates an opportunity for unrepresented appellants to obtain limited pro bono representation for the purpose of participating in a Rule 33 Conference in their case.

The idea for this pilot program originated with the Court's Judicial Advisory Committee (JAC). A subcommittee of the JAC that included Glenda Herl

of Carpenter Chartered and Glenn Bergmann of the firm Bergmann & Moore collaborated with Judy Donegan of the Veterans Pro Bono Consortium (PBC) and Anne Stygles of the Court's Public Office to develop comprehensive program guidelines and procedures. And the PBC and the Court have together worked on assessment metrics.

Briefly, the pilot will work as follows: In the notice to file an informal brief the Court will offer pro se appellants the opportunity to engage an attorney for the limited purpose of representation in a Rule 33 Conference. If the pro se appellant agrees to limited representation, case materials will be shared with a volunteer attorney, who will then participate in the Rule 33 Conference. If due to conferencing the parties reach agreement regarding the case, typically a stipulated agreement or joint motion for remand will be filed. If no resolution is reached, the limited appearance concludes and the appellant will then file an informal brief—unless, of course, the appellant and the volunteer attorney mutually agree to continue representation beyond the Rule 33 Conference.

Key to this pilot is the efforts of PBC staff, who will be heavily involved, combined with a cadre of experienced volunteer attorneys willing to undertake limited representation of an unrepresented appellant through conferencing. Of course, integral as well will be the mediation efforts of the Court's Central Legal Staff and the docketing and organization endeavors of the Court's Public Office. Thanks to each of the above groups and individuals for current and future work on this pilot. We couldn't do this without your energy and commitment.

And now I have an ask: For purposes of the pilot program, an attorney who has been a member in good standing of the Court's Bar for at least two years, and who has completed at least 50 cases before the Court, is eligible to volunteer. If you're interested in undertaking limited representation of a pro se appellant and participating in the pilot, please send an email, with current contact information, to the Clerk of the Court, Greg Block, at gblock@uscourts.cavc.gov. The Court will ensure that volunteers meet the listed qualifications and share the list of attorney volunteers with the PBC, who will provide program materials and arrange limited representation in a particular case.

I'm excited to see this effort kick off. It's been great to witness the combined efforts of everyone who's had a hand in the thoughtful and thorough development of this program. Thank you all! Please contact Anne Stygles (astygles@uscourts.cavc.gov) or Judy Donegan (judy.donegan@vetsprobono.org) for more information or if you have questions.

All the best,

Meg

CAVC Declines Jurisdiction of Dispute over Veteran's Claims File Request

By Jason Massey

Reporting on *Lawrence v. Wilkie,* No. 20-5697 (Dec. 22, 2020).

In *Lawrence,* the CAVC (Court) issued a precedential order written by Judge Meredith (with Judge Laurer concurring) that held that the Court lacked jurisdiction over a dispute regarding VA's refusal to comply with a veteran's claims file request.

A VA regional office (RO) issued a rating decision in August 2019 denying Mr. Lawrence entitlement to disability compensation for psychiatric disorders. In November 2019, January 2020, and March 2020, Mr. Lawrence requested a copy of his claims file utilizing VA Form 10-5345, Request for and Authorization to Release Health Information. At the time of the Court's order, Mr. Lawrence's counsel still had not received the claims file.

Based on this delay, Mr. Lawrence petitioned the Court to compel VA to forward a copy of his claims file to his counsel. He argued that the Court's jurisdiction to grant the requested relief stems from the All Writs Act (AWA), stating that a mandatory procedure (i.e. request for documents in a veteran's claims file) that had been unreasonably delayed by VA could "potentially result[] in a Board decision over which the [C]ourt would have appellate jurisdiction." Mr. Lawrence further argued that because VA was the sole custodian of his records, he had an indisputable right to his records pursuant to 38 C.F.R. § 1.577 (VA's implementation of the Privacy Act), and he could not properly pursue his disability claims without his claims file.

The Secretary countered that Mr. Lawrence had not shown that the claims file request would lead to a final Board decision that the Court would have jurisdiction over. Indeed, the Secretary stated that Mr. Lawrence did not argue that he sought his claims file beyond a Privacy Act or FOIA request and that his contention was contrary to the Court's precedent (*Struck v. Principi*, 15 Vet.App. 213, 215 (2001) (per curiam order), and *Mangham v. Shinseki*, 23 Vet.App. 284, 289 (2009)) that rejected jurisdiction over matters of VA's compliance with FOIA requests. Furthermore, the Secretary argued that Mr. Lawrence had not demonstrated how a delay in VA providing the claims file would impede the appellate process. Finally, the Secretary argued that, assuming the Court had jurisdiction over this matter, Mr. Lawrence had not demonstrated a clear and indisputable right to the writ, as (i) there had not been complete inaction by VA based on its acknowledgment of the claims file request, and (ii) that Mr. Lawrence had not shown that he lacked alternative means to obtain the requested relief.

While the Court expressed concern over VA's failure to provide a copy of the claims file for more than a year, it dismissed Mr. Lawrence's petition for lack of jurisdiction. The Court explained that AWA jurisdiction required a showing that the requested relief could lead to a Board decision over which the Court would have jurisdiction. However, Mr. Lawrence had not established how VA's failure to act on his Privacy Act or FOIA request affected the provision of benefits by the Secretary, thereby falling squarely within the Board and Court's jurisdiction. The Court further highlighted that (i) VA regulations delegated the authority to make final determinations regarding Privacy Act and FOIA requests to the VA Office of General Counsel, not the Board and (ii) Congress explicitly provided that U.S. district courts, not the Court, jurisdiction over civil actions arising from an agency's refusal to comply with Privacy Act and FOIA requests. The Court further noted that "the AWA is not an independent source of, and may not extend, the Court's statutorily defined jurisdiction."

Judge Toth issued a dissent, acknowledging that neither the Board nor the Court has jurisdiction to hear civil actions concerning VA's compliance with Privacy Act and FOIA requests. However, he argued that that the Court's decision treats a discovery request by Mr. Lawrence as a FOIA request and redirects a discovery dispute from the Board to federal courts that lack jurisdiction to hear it.

Jason Massey is Associate Counsel with the Board of Veterans' Appeals.

Board Decisions Must Include a Discussion of Relevant, albeit Non-Binding, Publicly Adopted Internal Manual Provisions

By Claire Davidoski

Reporting on *Healey v. McDonough*, No. 18-6970 (February 24, 2021).

In *Healey*, the United States Court of Appeals for Veterans Claims (Court) held that the *Purplebook*, which it characterized as an internal procedural guidance manual publicly adopted by the Board of Veterans' Appeals (Board), is analogous to "agency action," and that the Board, as part of its duty to provide adequate reasons or bases supporting its decision, must discuss relevant provisions thereof in its analysis and provide a reasoned basis for any departure from the provisions' guidance. The Court also found that the Board had not provided an

adequate discussion of reasons or bases supporting its decision to rely upon two medical opinions in denying the veteran's claim for service connection as secondary to treatment incurred for the service-connected non-Hodgkins lymphoma (NHL).

James Healey served in the United States Navy from 1965 to 1969, to include service in the Republic of Vietnam, wherein he is presumed to have been exposed to herbicide agents, including Agent Orange. He had subsequent service in the Navy Reserve. In 2009, he filed original claims for service connection for diabetes and NHL, as due to his in-service exposure to herbicide agents; and for hypertension, for which his symptoms began in or around 1978, during his Navy Reserve service. VA granted service connection for diabetes and NHL, as such conditions are presumed to be related to herbicide agent exposure, but denied service connection for hypertension because it began during Reserve service, not active duty. This decision became final.

In 2014, VA published a 2012 National Academy of Sciences (NAS) Update which concluded that "a limited or suggestive" relationship existed between hypertension and herbicide exposure.

Mr. Healey sought to reopen his claim for service connection for hypertension in August 2015, asserting that the disability was a result of treatment for the service-connected NHL. After a 2015 VA examination was conducted and the examiner concluded that the Veteran's benign essential hypertension was not related to treatment for NHL, VA reopened and denied the claim. Mr. Healey filed a notice of disagreement with the denial, asserting that service connection was warranted on a secondary basis, and he submitted a 2016 private medical opinion which stated that his hypertension was "directly related" to his diabetes.

VA obtained an addendum opinion from the 2015 VA examiner to address whether the 2016 private medical opinion affected her prior opinion. She again opined that Mr. Healey's hypertension was not caused or aggravated by his NHL treatment, reasoning that his hypertension pre-existed his NHL and remained "well-controlled and stable" after the onset of his NHL. The examiner also found no relationship between hypertension and Mr. Healey's diabetes, again because his hypertension pre-existed his diabetes and had been well-controlled after diabetes was diagnosed.

In March 2018, prior to deciding Mr. Healey's appeal, the Board published the *Purplebook*, which Chairman's Memorandum No. 01-18-04 (Mar. 29, 2018) indicated was to serve as guidance to Board employees on its internal operating processes, and aimed to allow the Board to produce decisions with consistency and accountability in handling appeals. (The *Purplebook* was removed from the Board's web site and Board staff were instructed not to use it in October 2019. The Chairman's Memorandum was rescinded by the Board's Operations Handbook, which provides, "If there is a conflict between the Handbook and another Board-generated document, this Handbook controls.")

The *Purplebook* contained a section discussing the 2012 NAS Update and how a summary of it was published in the Federal Register, putting VA on notice as to the suggested relationship between hypertension and Agent Orange. The *Purplebook* further discussed how this information established an indication that a current disability of hypertension may be related to in-service herbicide exposure, and directed that the Board should not deny claims for service connection for hypertension when Agent Orange exposure has been conceded without first obtaining a VA medical opinion addressing the possibility of a medical nexus between the disability and the veteran's conceded exposure.

In October 2018, the Board issued a decision denying Mr. Healey's claim for service connection for hypertension on a secondary basis only. The decision contained no mention or discussion of the possibility of a direct service connection for hypertension as related to in-service herbicide agent exposure. The Board relied upon the 2015 and 2017 VA examiner's opinions in concluding that Mr. Healey's hypertension was not caused or aggravated by either treatment for his service-connected NHL or by his service-connected diabetes.

On appeal to the Court, the veteran raised two arguments. First, he argued that the Board was in constructive possession of the information contained in the 2012 NAS Update via its inclusion in the *Purplebook*, and, thus, erred by failing to address the theory of direct service connection between his hypertension and his conceded exposure to Agent Orange in service. Second, Mr. Healey argued that the Board erred by relying upon the 2015 and 2017 VA examiner's opinions in denying his claim on a secondary basis, as the rationales supporting the opinions were insufficient.

As to Mr. Healey's argument regarding Board error in the direct service connection aspect of his claim, the Court narrowed the issue before it to whether the duty to obtain a medical opinion was triggered, acknowledging that neither party disputed whether the theory of direct service connection between hypertension and Agent Orange exposure was raised by the record. Specifically, the parties disagreed as to whether extra-record materials, i.e., the *Purplebook*'s discussion of the 2012 NAS Update, met the third element of the test outlined in *McLendon v. Nicholson*, 20 Vet. App. 79 (2006), which dictates when VA's duty to assist requires the veteran be afforded a VA medical examination or a VA medical opinion be obtained. That test requires there be an indication that the disability "may be associated" with the veteran's service.

Turning to the question of whether the Board was obligated to consider the *Purplebook* and its contents, particularly its discussion of the 2012 NAS Update when analyzing the merits of a hypertension claim, the Court acknowledged that the *Purplebook* was not substantively binding on the Board as it lacked the force of law. However, the Court noted that its prior decision in *Overton v. Wilkie*, 30 Vet. App. 257 (2018), which dealt with a similar situation where a provision of VA's *Adjudication Procedures Manual* (M21-1), a publication it found analogous to the *Purplebook* for the VA regional office adjudicators, provided a basis to resolve the issue at hand.

In *Overton*, the Court had held that the adoption of substantively non-binding consideration or procedure in a manual constitutes formal agency acknowledgement of the relevance of the consideration or procedure in deciding claims implicating them. As such, as part of the Board's duty to provide adequate reasons or bases, it was required to discuss relevant provisions in the M21-1, but, as they are non-binding, the Board must make its own determination before relying on M21-1 provisions in support of its decision.

Turning back to the present case, the Court noted that, in *Overton*, the Board essentially used a provision from a manual which did not even apply to it as binding, whereas the Board in this case had failed to consider provisions in a manual which did apply to it. Regardless, the Court found that the Board erred in the same fundamental way in both cases, as it "failed to consider adequately and address relevant guidance promulgated for the purpose of facilitating the efficient and proper resolution of claims." Further, because, according to the Court, the Board publicly adopted the *Purplebook* as a collection of its "internal guidelines and procedures," it fell within the rationale of *Overton*. As such, the Court held that the Board must discuss provisions of the *Purplebook* in its analysis when they are relevant to an appeal.

Despite Mr. Healey's current claim for service connection for hypertension being based upon secondary service connection, the Court found that his 2009 claim constituted relevant evidence in the appeal, and, in that claim, Mr. Healey asserted that his hypertension was directly related to Agent Orange exposure. As such, the Court found that the theory had been reasonably raised by the record in Mr. Healey's current claim, as his prior claim was part of the current record. Thus, the Court held that because the Board failed to address relevant *Purplebook* provisions in denying Mr. Healey's claim, its reasons and bases supporting the denial were inadequate and it failed to ensure appropriate development had occurred.

As to Mr. Healey's argument regarding Board error in the secondary service connection aspect of his claim, the Court held that it was unable to ascertain from the Board's denial how it interpreted the VA examiner's description of Mr. Healey's hypertension as being "well-controlled" or how the opinions

adequately supported a denial of service connection. Thus, the Court held that the Board had also not provided an adequate statement of reasons and bases in denying service connection for Mr. Healey's hypertension on a secondary basis.

Judge Meredith concurred with the result of the Court's decision, but disagreed with the majority's analysis. She noted that the majority opinion stated that Mr. Healey asserted his hypertension was related to Agent Orange exposure in his 2009 claim, but, in actuality, he did not assert such, nor had he contended that he explicitly claimed the relationship. She also discussed that the Court's decision did not resolve whether the Board must discuss the *Purplebook* in cases where the veteran does not overtly claim that hypertension is related to Agent Orange exposure or whether the *Purplebook* must be discussed in all hypertension claims in general. Judge Meredith also noted that the majority opinion initially stated that "the duty to sua sponte investigate whether a primary condition is related to service is only triggered when the evidence satisfies the *McLendon* standard," but never explained whether or how it should be applied in Mr. Healey's case. Regardless, she stated that the issue of whether the Board should have discussed whether a medical examination was needed was premature for the Court to decide, as the Board's error was failing to even discuss the merits of service connection for Mr. Healey's hypertension as due to Agent Orange exposure.

In addition, Judge Meredith took issue with the fact that the majority did not discuss *NOVA v. Secretary of Veterans Affairs*, 981 F.3d 1360 (Fed. Cir. 2020), wherein the Federal Circuit found that the M21-1 was binding as to certain adjudicators, thereby being essentially substantive. The Federal Circuit further found that the M21-1 should have been published in the Federal Register in *NOVA*. As such, she felt that the majority opinion should have at least discussed that internal manuals may no longer lack the force of law.

Rather, Judge Meredith wrote that the fact that Mr. Healey's claim was initiated as one for secondary service connection should not have prevented the Board from considering any potential pathways to service connection for his claim. Given that the record contained evidence that VA had granted service connection for other conditions as related to herbicide exposure, the Board should have followed its internal guidance manual, regardless of the binding nature of it, and considered whether the claimed condition could be directly related to his conceded Agent Orange exposure. She reasoned that "VA cannot simply ignore an obvious potential path to benefits that by its own guidance exists."

Claire Davidoski is Associate Counsel with the Board of Veterans' Appeals.

Federal Circuit Clarifies Extent of Constructive Possession Doctrine, Holds that NAS Reports are "Relevant" to Agent Orange Claims

by Jillian Berner

Reporting on *Euzebio v. McDonough*, No. 2020-1072, 2021 U.S. App. LEXIS 6188 (March 3, 2021).

In *Euzebio*, a panel of the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) considered a veteran's arguments regarding the Board of Veterans Appeals's (Board's) constructive possession of a National Academies of Sciences, Engineering & Medicine (NAS) report.

Following the government's settlement with Vietnam veterans, Congress passed the Agent Orange Act of 1991, which required the Secretary of Veterans Affairs (Secretary) to obtain "independent scientific review of the available scientific evidence regarding associations between diseases and exposure to dioxin and other chemical compounds in herbicides." Under the Act, Congress directed VA to contract with the NAS to review, summarize, and assess scientific evidence of association between Agent Orange and certain diseases, transmitting reports to VA at least every two years with NAS's findings. Until September 2015, per the statute, the Secretary was required to determine whether a

presumption of service connection was warranted for the diseases covered in the NAS Reports, within 60 days of receiving a report. If a presumption was to be extended, the Secretary was required to issue proposed regulations, then final regulations. If the Secretary determined that no presumption would be extended, the Secretary was required to publish notice of that decision in the Federal Register.

The veteran was exposed to Agent Orange in his service in Vietnam, which included two tours of duty in Vietnam. He was later diagnosed with thyroid nodules and sought service-connected disability compensation as related to in-service Agent Orange exposure. VA denied his claim because the "available scientific and medical evidence" did not support a relationship between the nodules and in-service herbicide exposure. He appealed. While the veteran's appeal was pending, an NAS Report was published in 2014 that noted that thyroid conditions overall indicated increased risk with herbicide exposure. Despite that report, the Board denied the veteran's claim.

The veteran appealed to the U.S. Court of Appeals for Veterans Claims (Court). At the Court, he argued that the NAS Report was constructively before the Board and, had the Board considered the NAS Report, it would have been required to obtain a medical opinion on his behalf before adjudicating the claim. The Court, in a panel opinion, affirmed the Board decision. The Court's majority held that the NAS Report was not constructively before the Board because constructive possession required not only VA's awareness of the report and the report containing general information about the type of claim, but also a "direct relationship" to the claim in question. The Court cited its jurisdictional limitations, as well as prior case law, in rendering the decision. Judge Allen dissented, writing that the Court's conclusion failed to comport with the "pro-veteran and nonadversarial" nature of the system and that the NAS Reports had a direct relationship to *all* claims based on in-service Agent Orange exposure.

The veteran appealed to the Federal Circuit, where a panel considered the issue. The panel detailed the Court's history of constructive possession, in which the Court had previously held that evidence "within the Secretary's control" and "reasonably expected to be a part of the record" as "constructively…part of the record." *Bell v. Derwinski*, 2 Vet. App. 611, 613 (1992). The *Bell* rule of constructive possession has been upheld over many years. The Federal Circuit agreed with the veteran that the Court incorrectly required a "direct relationship" between the NAS Report and his claim in order to find that the Board constructively possessed the report. While the Court has narrowed the constructive possession doctrine to require a "specific" and "direct relationship" to a claim, the Federal Circuit held that this had led to "absurd results." The failure of a Congressionally-commissioned report, specific to VA's evaluation of the specific type of claim in question, to be included in constructive possession was one such absurd result. The Federal Circuit held that it was "undisputed" that the NAS Report was issued prior to Mr. Euzebio's Board decision, VA and the Board knew of the NAS Report at the time of the appeal, and the NAS Reports were important and relevant to Agent Orange claims. The Federal Circuit clarified that constructive possession was based on "relevance and reasonableness," and that the Board's failure to consider evidence of which it has constructive or actual knowledge "that is 'relevant and reasonably connected'" to the claim renders the Board's decision arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. The Federal Circuit noted that this interpretation of the constructive possession comported with VA's statutory duty to assist veterans with their claims.

The Federal Circuit further discussed the composition of the record of proceedings before the Board. While the "record rule" places some limitations around the evidence upon which a Board decision (and the Court's review of that decision) may be based, the rule is intended to also ensure that new evidence is not used to convert the Court's judicial review into *de novo* consideration of appeals. However, where the record before the agency is "insufficient to permit meaningful judicial review," "extra-record evidence" may be considered by the court. *Axiom Res. Mgmt., Inc., v. United States*, 564 F.3d 1374, 1381 (Fed. Cir. 2009). The reviewing court may also be permitted to consider events occurring

between the agency decision and the appellate decision. Accordingly, the Federal Circuit noted, the Court is not permitted to ignore evidence in its review of agency decisions.

Further, the Federal Circuit held that the Court had misapplied the rule from *Kyhn v. Shinseki*, 716 F.3d 572, 576-78 (Fed. Cir. 2013), when it failed to consider "extra-record" evidence in its review of Board decisions. While the Federal Circuit held in *Kyhn* that the Court could not rely upon extra-record evidence to make a factual finding in the first instance, the Court was not precluded from taking judicial notice of extra-record evidence in its review of agency decisions.

The Federal Circuit disagreed with the government's argument that "direct relationship" and "relevance" were essentially the same standard. "Direct relationship" required the evidence to be specific to the veteran, while "relevance" required evidence to tend to prove (or disprove) a material fact. The Federal Circuit also disagreed with the government's argument that the NAS Report was not relevant to the veteran's claim, which is the Court's role—not that of the Federal Circuit. The Federal Circuit disavowed the government's contention that the Secretary would face an "unworkable standard" and "impossible burden," as VA adjudicators' job is to "evaluate and draw conclusions from record evidence to discern its impact on individual cases." Additionally, the Federal Circuit noted that VA already requires adjudicators to consider NAS Reports in some cases and, further, that "relevance and reasonableness" are already well-established standards for VA review. Finally, the Federal Circuit reminded VA that the benefits system was intended to be "pro-claimant."

Jillian Berner is Senior Staff Attorney at the UIC John Marshall Law School Veterans Clinic.

Thun's First Step and the Totality of the Factors Inquiry

by Andrew Strickland

Reporting on *Long v. Wilkie*, No. 16-1537 (December 30, 2020).

In *Long*, the Court held that the first step of *Thun* is a totality-of-the-factors inquiry into whether a veteran presents symptoms that are truly unusual or exceptional. The Court explained that the inquiry is not reducible to a mere comparison but requires a reasoned assessment of the veteran's full disability picture and capacity of the rating schedule to compensate the same.

Walter Long was awarded service connection for hearing loss and assigned a noncompensable rating. He appealed his rating to the Board asserting that the functional effects of his hearing loss were not contemplated by the mechanical nature of the schedular rating criteria. The functional effects of his hearing loss included: anxiety and depression, decreased self-esteem and personal satisfaction, problems with speech discrimination not helped by hearing aids, interference with his ability to work with his students, difficulty writing lesson plans and preparing for classes, and ear pain from his hearing aids.

The Board denied Mr. Long's request for referral for extraschedular consideration. Significantly, it found that the evidence did not present an unusual or exceptional disability picture because the rating criteria reasonably described his disability level and symptomatology. The Board made the following findings related to Mr. Long's symptomatology: anxiety and depression were less likely than not related to hearing loss as determined by a psychiatrist; speech discrimination not helped by hearing aids was not a factor in the evaluation of hearing impairment; VA examiners fulfilled their duty to fully describe the functional effects of the hearing disability; and the rating criteria reasonably described Mr. Long's disability level and symptomatology. The Board also found that Mr.

Long did not lose considerable time at work or experienced frequent hospitalizations due to his hearing loss. The interference with his ability to work was proportional to the severity of his hearing loss. Thus, the application of the regular schedular standards was not impractical and referral was not warranted.

The Court, in *Thun v. Peake*, 22 Vet.App. 111 (2008), set forth a three-step inquiry to determine whether entitlement to an extraschedular rating is appropriate under § 3.321(b)(1). Importantly, the first step in *Thun* requires a "comparison between the level of severity and symptomatology of the claimant's service-connected disability with the established" rating schedule criteria for that disability to determine whether "such an exceptional disability picture is present" that schedular evaluations are inadequate.

The Court, here, held that *Thun*'s first step is satisfied only when a veteran presents symptoms that are truly unusual or exceptional, which is a fact-bound and highly contextual determination. The Court cautioned that reading the first step too rigidly would result in the adverse effect of the Board engaging in extraschedular analysis in all hearing loss cases, which is inconsistent with the intent of the rating criteria to compensate the average loss of earnings capacity. *See Doucette v. Shulkin*, 28 Vet.App. 366, 369 (2016) (holding that the rating criteria for hearing loss contemplated the full range of symptoms related to decreased hearing even though the diagnostic code failed to list any symptoms). Similarly, reading the diagnostic code too broadly would foreclose extraschedular relief where a veteran presents with truly unusual or exceptional symptoms. Thus, the Court held that *Thun*'s first step is a totality of the factors inquiry into whether a veteran presents symptoms that are truly unusual or exceptional. The inquiry is not reducible to a mere comparison but requires a reasoned assessment of the veteran's full disability picture and capacity of the rating schedule to evaluate the same.

The Court offered a non-exhaustive list of guiding principles in determining whether symptomatology is exceptional: (1) a veteran's symptomatology requires extraschedular consideration only after the rating schedule is deemed inadequate, that is, when it is of such nature or severity that conventional rating tools are not adequate to evaluate symptomatology properly; (2) the functional effects of an exceptional disability picture is relevant to *Thun*'s second step but it is not part of the first step; (3) where alleged psychological conditions without a formal DSM-5 diagnosis are not compensable in the first instance, they do not warrant extraschedular consideration; (4) extraschedular consideration is not warranted for downstream effects that clearly lack a requisite and legally recognized nexus to service or to a service-connected disability; (5) extraschedular consideration requires a reasoned assessment of the disability picture, not a quest to uncover matters only hinted by the record; and (6) the Board's failure to discuss whether extraschedular consideration is warranted for a given symptom does not require an automatic remand.

Accounting for Mr. Long's symptomatology, the Court reaffirmed that the rating criteria for hearing loss contemplate the functional effects of decreased hearing and difficulty understanding speech in an everyday work environment; these are precisely the effects that VA's audiometric tests are designed to measure. Thus, Mr. Long's hearing-related symptoms were contemplated by the rating criteria for hearing loss. The Court then noted that a formal DSM-5 diagnosis for psychiatric symptoms is required for compensation and extraschedular compensation is not a path around a formal DSM-5 diagnosis. As to anxiety and depression, the Court noted that these disabilities were capable of evaluation through conventional means and, thus, are not exceptional. Finally, as to ear pain from his hearing aids, the Court held that Mr. Long did not establish a link between his pain and his hearing loss and, without the same, extraschedular consideration is foreclosed.

The Court also ruled that Mr. Long did not challenge any findings related to *Thun*'s second step, which is fatal to his appeal.

Judge Schoelen concurred in judgment and dissented in part with the majority. She wrote that the majority recasts *Thun*'s steps, to include (1)

requiring a totality of the factors inquiry rather than a mechanical formula for step one and (2) shifting all functional-effects considerations to step two. In a footnote, she explained that she would have dissented in judgment had she endorsed the majority's *Thun* formulation.

Where a Diagnostic Code lists no symptoms or functional effects, Judge Schoelen wrote, any attempt by the Board to compare symptoms and functional effects with nonexistent rating criteria forces the Board to make a medical determination, resulting in a *Colvin* violation. Thus, in the context of Diagnostic Codes without listed symptoms, the Court must create an exception to *Thun* or hold that extraschedular referral is unavailable. Ultimately, she would have held that extraschedular evaluations are unavailable for Diagnostic Codes that require mechanical applications of test results and are devoid of listed criteria, overruling any conflicting jurisprudence.

Judge Meredith filed a dissent, in which Judges Greenberg and Allen joined. Under *Morgan*, a threshold analysis of schedular alternatives must precede any extraschedular consideration. Thus, the Judges Meredith, Greenberg, and Allen would remand because the Board did not consider schedular alternatives to ear pain or Mr. Long's difficulty with confidence, self-esteem, or his teaching duties. Further, remand would also be appropriate under the revised *Thun* framework for the Board to make the predicate factual findings necessary to apply the framework. Finally, the dissenting opinion noted that the majority's decision ultimately provides little clarity because it requires consideration of new and inapt terminology, imposes an additional burden that may not align with how disabilities are generally rated, and may overrule several precedential decisions.

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Federal Circuit Holds It Is Not Unconstitutional to Require War Period Service for Veteran Status

by David Billinger

Reporting on *Perry v. Wilkie,* Fed. Cir. No. 20-1311 (December 17, 2020).

Terry Perry served in the Wisconsin Army National Guard from January 1977 to March 1977, including a period of active duty for training from February 1977 to March 1977. "Active duty for training" is defined, in relevant part, as "full time duty in the armed forces performed by Reserves for training purposes." Upon separation in March 1977, the medical examiner noted incontinence, which he stated began prior to the Mr. Perry's service. Mr. Perry died in 2014 due to cardiac arrest. His record revealed no claims for service connection during his lifetime. Mr. Perry's widow filed a claim for non-service-connected death pension benefits and burial benefits following his death.

Following a decision by the Board of Veterans' Appeals (Board) denying her claim, Mrs. Perry appealed to the U.S. Court of Appeals for Veterans Claims (Court). In its decision, the Court had held that the veteran's service in the state National Guard, including a period of active duty for training, without disability incurred or aggravated in line of duty did not achieve "veteran" status for these purposes. Mrs. Perry appealed to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit).

In its decision, the Board had held that Mrs. Perry was not eligible for non-service-connected death pension benefits because Mr. Perry did not have active duty service during a period of war, nor did he have a service-connected disability, as required by 38 U.S.C. § 1541:

> 1541(a). The Secretary shall pay to the surviving spouse of each veteran of a period of war who met the service requirements prescribed in section 1521(j) of this title, or who at the time of death was receiving (or entitled to receive) compensation or

> retirement pay for a service-connected disability, pension.

The Board held that "active duty for training" does not qualify as the required "active military, naval, or air service for death benefit purposes unless "the individual was disabled or died from a disease or injury incurred or aggravated in line of duty. 38 U.S.C. § 101 (24); 38 C.F.R. § 3.6(a). The Board found that Mr. Perry did not attain veteran status, that he was not service-connected for any disability at the time of his death, and there is no evidence that his death was in any way related to his National Guard service.

The Court affirmed the Board's decision, noting that entitlement to non-service-connected death pension benefits requires wartime service, as provided by 38 U.S.C. § 1521(j):

> 1521(j). A veteran meets the service requirements of this section if such veteran served in the active military, naval, or air service –
>
> 1. for ninety days or more during a period of war;
> 2. during a period of war and was discharged or released from such service for a service-connected disability;
> 3. for a period of ninety consecutive days or more and such period began or ended during a period of war; or
> 4. for an aggregate of ninety days or more in two or more separate periods of service during more than one period of war.

The Court found no evidence of wartime service, as there was no recognized period of war during his service between January 1977 and March 1977.

Mrs. Perry, the surviving spouse, argued that the Board erred in finding that her husband did not have a service-connected disability. She argued that the presumption of soundness upon entering military service should apply, and that his incontinence at the time of separation from the National Guard could have been incurred in or aggravated during his service period of active duty training. However, the Court noted that even if his incontinence had been aggravated during his period of active duty training, his surviving spouse would still not be eligible for death pension benefits as no wartime service exists.

Mrs. Perry argued that the requirement for wartime service is unconstitutional, because it does not provide for equal treatment of veterans. The Court has addressed the constitutionality of this in the past, finding "it is not patently arbitrary and irrational to treat wartime veterans differently than nonwartime veterans for the purposes of awarding pension benefits …" *Burrow v. Nicholson*, 254 F. App'x 972, 974 (Fed. Cir. 2007). In *Burrow*, the Court held that there was no merit to the constitutional challenge to the requirement for service during a period of war in order to qualify for pension benefits. *Id*.

Thus, the Federal Circuit affirmed that Mrs. Perry is not entitled to death pension benefits, and that the statutory requirement for wartime service does not violate the constitutional right to equal protection.

The Board had also denied Mrs. Perry's request for non-service-connected burial benefits, because Mr. Perry did not have active duty service in the Armed Forces or attained veteran status at the time of his death, as discussed above.

The Court affirmed the Board decision, finding that "eligibility for burial benefits is limited to:

1. veterans receiving VA pension or disability compensation;
2. veterans who would have been receiving disability compensation but for receipt of military retired pay; or
3. veterans who had certain pending claims at the time of death." 38 C.F.R. § 3.1705(b).

As Mr. Perry did not meet any of these criteria, the Court held that Mrs. Perry was not entitled to burial benefits. Based upon the facts, the Federal Circuit affirmed the Court's decision.

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CAVC Qualifies Sound Evidentiary Bases for Determining Radiogenic Diseases under 38 C.F.R. § 3.311(c)

by Benton Jay Komins

Reporting on *Skaar v. Wilkie*, No. 17-2574 (December 17, 2020).

In *Skaar v. Wilkie*, Mr. Skaar (the veteran) appealed an April 2017 Board of Veterans' Appeals (Board) decision in which the Board denied service connection for leukopenia (a condition in which the number of white blood cells circulating in the blood is abnormally low). Mr. Skaar also averred that the Board erred for failing to adjudicate a "pending appeal" of a denial of a claim for service connection for skin cancer, to include as due to exposure to ionizing radiation (and exposure to Agent Orange).

But there is far more at stake than the outcome of Mr. Skaar's service connection claims in the Court's decision.

At the base of this case and two preceding cases (*Skaar I* and *Skaar II*) are the facts and alleged health consequences which surround a January 1966 collision of a U.S. Air Force B-52 bomber and another aircraft in the skies above Palomares, Spain. Two of the B-52s' three thermonuclear weapons exploded, spreading plutonium dust over the region. Importantly, these two explosions did not detonate either of the weapons' thermonuclear warheads.

The Court, in its December 2019 decision (*Skaar II*), held "for the first time in its history" that it could certify classes within the context of an individual Veteran's appeal of a Board decision.

Mr. Skaar, according to the Court, had standing to serve as a representative of a class of Veterans (with certain exceptions), who were present at a 1966 cleanup of plutonium dust at Palomares "[w]hose application for service-connected disability compensation based on exposure to ionizing radiation [either was] denied or will [be] denied [...] at least in part on findings of dose estimates requested under 38 C.F.R. § 3.311." Approximately 1400 Veterans, including Mr. Skaar, participated in the 1966 cleanup of the crash debris.

Thus, the Court had occasion to address multiple issues in *Skaar III*.

As to his individual skin cancer claim, Mr. Skaar argued that VA had unlawfully failed to include the 1966 Palomares cleanup as a radiation-risk activity under 38 C.F.R. § 3.309. Here, the Court found that even though Mr. Skaar had requested in a November 2017 letter (and associated new claims form and additional medical evidence) that his skin cancer claim be reopened, VA had timely received this letter (before the applicable March and September 2017 rating decisions had become final). Put differently, the timeliness of Mr. Skaar's November 2017 letter vitiated the legal possibility of "reopening" the skin cancer claim.

Then, whither the status of Mr. Skaar's skin cancer service connection claim?

The Court considered whether Mr. Skaar's November 2017 letter constituted a valid Notice of Disagreement (NOD). Here, the Court held that the November 2017 letter, within the context of the record as a totality, did qualify as a legal NOD, especially in light of Mr. Skaar's *pro se* status at the time. Therefore, as no Statement of the Case (SOC) had been issued concerning Mr. Skaar's skin cancer claim, the Court found that the only remedy was to remand the skin cancer claim for the Board to address it—that is, only upon the Board's remanding the skin cancer issue back to the regional office for issuance of an SOC.

Thus, while the Court found that it had jurisdiction to decide whether the Board erred in failing to address the skin cancer claim, it found that it did not have jurisdiction to evaluate the skin cancer claim on the basis of its merits.

As to his leukopenia claim, Mr. Skaar argued that despite the fact that leukopenia is not an enumerated presumptive disease entity under 38 C.F.R. § 3.309(d), VA should have considered

whether the Palomares cleanup was a radiation-risk activity to allow for his inclusion in the Ionizing Radiation Registry (IRR). The Court noted that the IRR, maintained by the Veterans Health Administration (VHA), grants access to health examinations for Registry participants. Stated differently, Mr. Skaar argued that he should have had, and have, access to "periodic" examinations under the IRR.

Pertinent to Mr. Skaar's claim, 38 C.F.R. § 3.309(d)(3)(ii) defines radiation-risk activity as "onsite participation" [...] involving the atmospheric *detonation* of a nuclear device" (emphasis added).

The Court opined that the IRR's definition of radiation-risk activity mimics those activities as iterated in 38 C.F.R. § 3.309, which is silent as to the 1966 cleanup at Palomares. Here, the Court emphasized that the VHA directive establishing the IRR specifically states that participating Veterans (with health concerns related to ionizing radiation who do not qualify as participating in radiation at-risk activities) are not eligible for inclusion in the Registry's database.

Where did this leave Mr. Skaar's leukopenia claim? In its April 2017 decision, the Board acknowledged that leukopenia does not fall within the ambit of a presumptive disease under 38 C.F.R. § 3.309. The Court also noted that Mr. Skaar did not present argument that he even has a presumptive disease. Thus. as Mr. Skaar failed wholly to address the decision that the Board actually made *vis-à-vis* 38 C.F.R. § 3.309, the Court deemed him to have abandoned an appeal concerning the Board's April 2017 denial of entitlement to service connection for leukopenia.

However, the Court's reasoning concerning the class's claims assumed a far different tack.

Procedurally, an understanding of the Court's holding requires a step backwards chronologically. In February 2019, the Court remanded the issue of whether the Air Force's June 2014 revised radiation dose estimate methodology (which Mr. Skaar raised in argument), constituted new evidence under 38 C.F.R. § 3.311. The Court held that the Board had failed to address this issue in its April 2017 decision.

In pertinent part, 38 C.F.R. § 3.311(c) directs the Undersecretary of Benefits to make a determination as to whether "*sound scientific and medical evidence* supports the conclusion that it is least as likely as not that [the veterans', herein the class's] disease(s) resulted from exposure to radiation in service." *See* 38 C.F.R. § 3.311(c)(1)(i) (emphasis added). Upon such a determination, the regulation requires that the Undersecretary "shall so inform the regional office of jurisdiction in writing, setting forth a rationale for the [conclusions reached).

In a supplemental statement responsive to the Court's February 2019 remand, the Board found that the Air Force's June 2014 revised radiation dose estimate methodology *on its face* constituted sound scientific evidence because it was based upon re-evaluated internal processes—to ensure a comprehensive and consistent approach to radiation dose estimates. However, the Board qualified this point concerning the evidentiary status of scientific evidence by stating that the Board was not permitted to make an independent judgment on scientific matters.

The Court determined that the Board's reasons and bases for concluding that the Air Force's June 2014 revised radiation dose estimate methodology constituted sound scientific evidence were inadequate. In effect, the Court found that the Board's "on its face" declamation amounted to nothing more than a conclusory "because I say so."

Furthermore, the Court found that the Board's reasoning here was internally contradictory. If the Board is not permitted to make an independent judgment on scientific matters, then how can the Board find that the Air Force's June 2014 revised radiation dose estimate methodology *on its face* constitutes sound scientific evidence?

Upon a lengthy disquisition of persuasive cases and gaps in VA regulations, the Court held that 38 C.F.R. § 3.311(c) requires that VA must determine whether the Air Force's June 2014 revised radiation dose estimate methodology constitutes sound scientific

evidence—far beyond that of simply accepting the Air Force's determination on its face.

Therefore, the Court, yet again, determined that a remand was necessary for the Board to provide an adequate and informed analysis as to whether the Air Force's June 2014 revised radiation dose estimate methodology constitutes either sound medical or scientific evidence. Only with this adequate and informed analysis, according to the Court, could it perform a circumspect judicial review and not resort to mere capricious decision-making.

In a partial concurrence and dissent, Judge Meredith agreed with the majority's holding as to Mr. Skaar's individual service connection claim for leukopenia under 38 C.F.R. § 3.311. Likewise, Judge Meredith agreed with the majority's conclusions concerning skin cancer; the IRR; and the abandonment of Mr. Skaar's claim *vis-à-vis* 38 C.F.R. § 3.309. Otherwise, the Judge dissented from the majority's opinion—most notably, with the certification of the class within the context of Mr. Skaar's individual appeal and with the determination that Mr. Skaar's November 2017 letter constituted a legally valid NOD.

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Court Holds that the Use of a Condom to Prevent the Transmission of Hepatitis C does not Amount to Loss of Use of a Creative Organ

by Mathew Galante

Reporting on *Bria v. Wilkie*, No. 19-4625 (January 15, 2021).

In *Bria*, the United States Court of Appeals for Veterans Claims (Court) issued a precedential panel decision, authored by Judge Meredith, holding that the use of a condom to prevent the transmission of hepatitis C—resulting in effective infertility—did not amount to loss of a use of a creative organ for the purposes of entitlement to special monthly compensation (SMC) under 38 U.S.C. § 1114(k).

The Board of Veterans' Appeals (Board) granted entitlement to service connection for hepatitis C in July 2013. At an October 2013 VA examination, it was noted that the veteran was not receiving treatment for hepatitis C, and the condition was noted as active without signs of cirrhosis or liver dysfunction. In an implementing November 2013 rating decision, the veteran was assigned an initial noncompensable rating for his service-connected hepatitis C. The veteran filed a Notice of Disagreement requesting a higher initial disability rating. Pursuant to an updated May 2016 VA examination showing signs of intermittent fatigue, malaise, and anorexia, the Veteran was granted a higher 10 percent rating, effective the date of the VA examination. In the VA Form 9 (Substantive Appeal), along with requesting a higher initial rating for his service-connected hepatitis C and challenging the date that the Regional Office chose to stage this rating, the Veteran alleged entitlement to SMC for loss of use of a creative organ. The Veteran argued that his hepatitis C required him to use a condom during sexual intercourse to protect him from transmitting the virus to his partner, effectively precluding procreative sex. The Board denied entitlement to higher ratings for the Veteran's service-connected hepatitis C and denied entitlement to SMC based on loss of use of a creative organ.

Regarding the increased rating claim for the Veteran's service-connected hepatitis C, the Court declined to exercise its discretion to consider the Veteran's argument regarding the adequacy of the May 2016 VA examination because the Veteran's attorney did not raise the issue when he was representing the Veteran before the Board. Additionally, the Court found that the Board appropriately considered the staging of the Veteran's increased rating claim and weighed the evidence of record. The Court concluded that the Veteran did not carry his burden of establishing prejudicial error.

As to the SMC claim, the Court reiterated its holding in *Payne v. Wilkie*, 31 Vet. App. 373 (2019), that nothing in 38 U.S.C. § 1114(k) precluded entitlement

to SMC based on a multi-link causal chain between a service-connected disability and anatomical loss of use of a creative organ, but emphasized that the text and structure of 38 U.S.C. § 1114(k) make clear that the ability of the creative organ to function must be diminished in order to constitute a loss of use warranting SMC.

The Court rejected the Veteran's contentions that he was entitled to SMC based on loss of use of a creative organ because his condom use (to prevent the spread of hepatitis C) precluded procreative sexual intercourse or resulted in "an impairment of normal sexual functioning." The Veteran admitted that he retained the physical capacity to engage in unprotected intercourse, but chose not to do so. As there was no evidence of a medical impairment, injury, or disease to the Veteran's creative organ, the Court interpreted the Veteran's argument as seeking entitlement to SMC based on a change in behavior resulting from a service-connected disability. The Court noted that Congress only intended SMC benefits to compensate for physical or mental impairments, to include diminished functional ability of a creative organ that is comparably as severe as anatomical loss. The Court stated that the Veteran was not entitled to SMC because he failed to cite to any evidence showing a diminishment in the ability of his creative organs to function, such as erectile dysfunction, infertility, or a mental impairment such as loss of libido. Since the Veteran failed to demonstrate error in the Board's conclusion that he did not suffer the loss of use of a creative organ, the Court did not reach the question of whether use of a condom may serve as an intermediate step in the causal chain between a service-connected disability and loss of use of a creative organ. The Court affirmed the Board's decision in full.

Mathew Galante is Counsel for the Board of Veterans' Appeals.

Court Finds No CUE in Case of Erroneous Autopsy

by Janée D. LeFrere

Reporting on *Bonner v. Wilkie*, 2020 U.S. App. Vet. Claims No. 18-6927 (Jan. 13, 2021).

In *Bonner v. Wilkie*, the Court of Appeals for Veterans Claims (CAVC) affirmed a November 2, 2018 Board of Veterans' Appeals (Board) decision that found no clear and unmistakable error (CUE) in a February 9, 1976, VA regional office (RO) decision that denied service connection for the cause of the veteran's death. The CAVC found that the Board's determination that there was no CUE in the February 1976 RO decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law as it was made with the then-available evidence, and that the subsequent, contradictory evidence presented cannot form the basis of CUE.

This case has an extensive 45-year procedural history that led to two precedential decisions prior to this one. The focus of this appeal is Admiral Bonner, who served on active duty in the U.S. Navy from June 1939 to April 1972. In 1975, the veteran died of cancer. Following the veteran's death, an autopsy concluded that his death was due to Hodgkin's Lymphoma.

Admiral Bonner's surviving spouse, Elizbeth Bonner, sought Dependency and Indemnity Compensation (DIC) for her husband's death due to cancer. In February 1976, the RO denied the DIC claim, determining that Admiral Bonner's Hodgkin's disease was not related to service, as service records were silent for that condition and he was not diagnosed with Hodgkin's disease until after discharge. The RO notified Mrs. Bonner the following month of the denial via mail. Mrs. Bonner did not appeal the February 1976 RO decision and subsequently became final.

In 1995, Mrs. Bonner filed a claim with the Department of Justice (DOJ) under the Radiation Exposure Act (RECA) seeking benefits based on Admiral Bonner's participation in atomic weapons testing. To develop the claim, the DOJ sought a medical opinion from the National Institutes of Health (NIH) regarding Admiral Bonner's cause of death. NIH concluded, based on a review of the veteran's records and autopsy, that while Admiral Bonner's cancer simulated Hodgkin's disease, it "favored" a Non-Hodgkin's Lymphoma (NHL) diagnosis. By this time, VA had issued 38 C.F.R. § 3.313, which authorized presumptive service connection for NHL and authorized VA to award benefits retroactively, effective August 5, 1964, even if the claim had been previously denied.

Following this determination, in November 1995, the RO reopened Mrs. Bonner's DIC claim based on the submission of the June 1995 NIH report as new evidence. The RO then granted Mrs. Bonner's claim, explaining that both diseases, Hodgkin's and NHL, may be caused by exposure to an herbicide containing dioxin, assigning an effective date of December 1, 1995—one month after VA received Mrs. Bonner's claim to reopen. Mrs. Bonner timely appealed the effective date determination, asserting that the effective date should go back to August 1975, "the first day of the month in which [the veteran] died." In July 1996, the RO issued a Statement of the Case (SOC), granting Mrs. Bonner an effective date of November 1, 1994, for DIC benefits, one year before the date VA received her claim to reopen. Mrs. Bonner continued to contest the assigned effective date and ultimately appealed her decision to the Board, CAVC, and the U.S. Court of Appeals for the Federal Circuit. All affirmed the November 1, 1994, effective date, finding that the February 1976 rating decision was not reopened until November 1995, after it became final, and that the effective-date provision set out in 38 C.F.R. § 3.114(a) only allowed for retroactive benefits to be awarded for one year before Mrs. Bonner filed her claim to reopen.

In June 2008, Mrs. Bonner sought to revise the February 1976 RO decision based on CUE, arguing that 38 C.F.R. § 3.13 should have retroactively applied to the February 1976 RO decision and that the evidence clearly showed that Admiral Bonner's cause of death was misdiagnosed. In July 2009, the RO found no CUE in its February 1976 decision because that decision was properly based on the evidence of record available and the laws in effect at that time. The appellant, Mark E. Bonner, the veteran's surviving son and attorney, subsequently became Mrs. Bonner's representative. In October 2009, Mrs. Bonner submitted a Notice of Disagreement (NOD) with the July 2009 RO decision.

In September 2010, Mrs. Bonner died. The following month, Mark Bonner notified VA of her death. VA continued to adjudicate her appeal and, in an October 2010 SOC, continued to find no CUE. The appellant appealed that decision to the Board. In August 2012, the Board dismissed for lack of jurisdiction, explaining that VA had not acted on a December 2010 request for substitution after Mrs. Bonner's death. In September 2018, the appeal was returned to the Board after VA determined that the appellant could be recognized as a substitute for Mrs. Bonner for the purposes of reimbursement.

Mr. Bonner continued to contest VA's findings, arguing that the Board erred when it determined that the February 1976 decision did not contain CUE because the RO "impermissibly narrowed Mrs. Bonner's claim to exclude types of cancer other than Hodgkin's disease, that the misdiagnosis of his father's death constitutes CUE, and that the February 1976 RO decision never became final."

The November 2018 Board decision found that no CUE existed in the February 9, 1976, RO decision that denied service connection for the veteran's cause of death because it had become final and Mrs. Bonner had been properly notified of that denial. Additionally, the Board found in the alternative that even if the February 1976 RO decision had not become final, service connection for the cause of the veteran's death was granted in a November 1995 RO decision and that decision was subsumed by the Board in its 2001 decision. Finally, the Board found no CUE in the February 1976 rating decision for several reasons. First, the Board found that at the time of that decision, 38 C.F.R. § 3.313 had not yet been promulgated and thus could not serve as a basis for finding CUE in that decision. Further, the Board explained that none of the record evidence

available at the veteran's death indicated that he may have had NHL, and that it was not until June 1995 that it was discovered that the veteran almost certainly died from NHL.

In January 2021, the CAVC affirmed and, leaning on the well-established principle of collateral estoppel, asserted that there could be no question as to the finality of the February 1976 decision given its prior decision in *Bonner I,* which was subsequently affirmed by the Federal Circuit in *Bonner II*. The Court found, in the alternative, that even if it was at liberty to disregard its prior decisions, the evidence in the record supports the Board's finding that Mrs. Bonner failed to file a timely NOD following the February 1976 decision.

Mr. Bonner also argued that his mother failed to be properly notified by the Board of its decision. The CAVC examined the evidence in the record and, based on its decision in *Ruel v. Wilkie*, determined that the record shows that Mrs. Bonner was sufficiently notified of the 1976 RO decision. The Court determined that, regardless of the sufficiency of the notice afforded to Mrs. Bonner, the error became moot after the RO reopened and granted Mrs. Bonner's 1995 claim.

Lastly, the appellant argued that the finding of no CUE in the Board's decision was erroneous because, first, the only permissible view of the evidence in 1976 reflected that Admiral Bonner died from NHL and, second, the VA impermissibly narrowed the scope of Mrs. Bonner's 1975 claim when it disregarded other forms of cancer. The Court was not compelled by the appellant's arguments, determining that, since 38 C.F.R. §3.313 had not been adopted when the 1976 decision was made, coupled with evidence showing that Admiral Bonner had only been diagnosed with Hodgkin's disease (which was ultimately determined to be his cause of death per the 1975 autopsy), no CUE occurred in the February 1976 RO decision.

The Court held that even if the 1995 NIH report could be considered when assessing whether CUE existed in the 1976 decision, it did not believe that the decision would have changed, given that the report, per the Federal Circuit's characterization, is ambiguous, as it only stated that it "favored" an NHL diagnosis.

Of note is Judge Greenberg's dissent in this case. Judge Greenberg believed the facts of this case did support a finding of CUE in the February 1976 decision. He asserted that since the evidence clearly showed that Admiral Bonner died of NHL, rendering the 1975 autopsy incorrect, the Board erred when it failed to correct this mistake, despite the fact that the evidence used to make such a determination was available in 1975. According to Judge Greenberg, the Court should have ruled in favor of the appellant based on "constitutional dimension regarding due process, statutory construction of the CUE statute, and the 1976 RO's misapplication of the veteran-friendly regulation."

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Court Holds that State Unemployment Compensation Should Not Be Excluded from Pension-Eligible Countable Income

by Jillian Berner

Reporting on *Cooper v. McDonough*, No. 19-2009, 2021 U.S. App. Vet. Claims LEXIS 323 (Feb. 26, 2021).

In *Cooper v. McDonough*, a panel of the U.S. Court of Appeals for Veterans Claims (Court), comprised of Judges Meredith, Pietsch, and Toth, considered what types of revenue constitute countable income for non-service-connected (NSC) pension purposes.

The veteran was granted entitlement to NSC pension in 2008. In 2013, he told VA that he received Social Security Disability Insurance and VA reduced his monthly benefits payments accordingly later that year. In 2014, VA informed the veteran that it would adjust his countable income due to his past receipt of state unemployment benefits for two years, which created an overpayment. The veteran

requested waiver of the debt and argued that his unemployment compensation should not be considered countable income for NSC pension, because he previously obtained compensation through a VA Compensated Work Therapy (CWT) program; if those benefits did not constitute countable income, neither should state unemployment benefits. Following the issuance of a Statement of the Case, the veteran pursued his claim to the Board of Veterans' Appeals (Board).

The Board denied the veteran's request in February 2019. The Board disagreed with the veteran and found that VA had not counted CWT compensation as income for NSC pension. Regardless, the Board found that there was no similar exclusion under 38 C.F.R. § 3.272 for unemployment compensation, so that income would remain countable. The veteran appealed to the Court.

At the Court, the veteran argued that state unemployment compensation constituted "public relief for the unemployed," rendering it excluded from countable income under 38 U.S.C. § 1503(a)(1). The veteran posited that reading Section 1503 with 38 U.S.C. § 1718(g)(3) (excluding CWT-related income) together requires unemployment compensation to be excluded to avoid an absurd result.

The Secretary argued that the Court previously held in *Walker v. Brown*, 8 Vet. App. 356, 358 (1995), that Section 1503(a) required inclusion of *all* payments, other than those specifically delineated in the statute, as income. Because unemployment compensation is not welfare, not all publicly-funded benefits are "donations from a public relief organization," some Social Security benefits are countable income, and Congress chose not to exclude unemployment compensation, the Secretary argued that the Court should affirm the Board decision. The Secretary averred that CWT is not an unemployment program, but rather a "clinical vocational rehabilitation program" and it would not be absurd to treat CWT-related income differently than unemployment compensation.

The Court first considered the legislative history of Section 1503, noting that Congress intended to limit pension benefits to the "truly needy" and that claimants would be required to obtain income from any other source before pursuing NSC pension.

Considering principles of statutory interpretation, the Court next looked to the exclusion of "donations from public or private relief or welfare organizations" within Section 1503, as well as the Secretary's regulations, 38 C.F.R. §§ 3.271 and 3.272, which also excluded such "donations" from countable income. The Court noted that the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) considered in 2000 whether exit-incentive payments constituted "gross income" for income tax purposes in *Abrahamsen v. United States*, 228 F.3d 1360, 1362 (Fed. Cit. 2000). In *Abrahamsen*, the Federal Circuit considered the Supreme Court's principle that exclusions from income should be "narrowly construed" and subject to only specifically enumerated exceptions.

The Court also considered its own prior decision in *Walker*, in which it held that revenue from the total disability income provision of a National Service Life Insurance policy were counted as income for NSC pension, as that type of income was not specifically excluded by the statute. The Court noted that it had reiterated this principle the following year in *Johnson v. Brown*, 9 Vet. App. 369, 373 (1996). The Court interpreted Mr. Cooper's argument, however, to require broader statutory interpretation, as *Walker* and *Johnson* spoke only to those specific types of income.

The Court first interpreted the language of Section 1503, pursuant to principles of statutory interpretation. The Court held that "unemployment compensation" was not explicitly delineated as an exception in the statute, which both parties conceded. The statute contained no definitions of donations from public relief or welfare organizations, so the Court held that the ordinary meaning would define these payments as "voluntary gifts of, typically, money from one party to another," often involving a charity. The Court also considered Section 1503's limitation of donations from "public or private relief or welfare organizations." The ordinary meaning of those terms was defined by the Court as "a governmental entity providing aid or

assistance to a population in need" or "a governmental entity formed for the purpose of providing financial or other assistance to individuals and communities in need." The Court further noted that the "donation" must be a voluntary or charitable transfer of money to a needy recipient.

Using statutory terms for unemployment compensation and considering case law, the Court held that unemployment compensation, which is triggered by a recipient's joblessness, differs from "public relief." Unemployment compensation is awarded as a matter of right and not on a needs basis, if the claimant is involuntarily unemployed. The Supreme Court has held that Congress intended for unemployment compensation to serve another purpose, separate from "public relief." The Court distinguished unemployment compensation, which is based on the recipient's employment status, regardless of need, from its interpretation of "donations" as voluntary gifts of money to needy recipients. Accordingly, unemployment compensation is not included in the ordinary meaning of the terms in Section 1503(a)(1).

Next, the Court turned to the veteran's argument that an absurd result would ensue if unemployment compensation was included as income, because CWT-provided wages were excluded as countable income. The Court first held that Congress knew how to exclude unemployment compensation from countable income and could have done so—but chose not to. Congress has not amended the Social Security Act to exclude unemployment compensation, as it has done for other types of payments, including educational expenses, income of a dependent child, state veterans' benefits payments, and life insurance policy proceeds. Additionally, the Court determined that the legislative history of the CWT program indicated that Congress intended CWT to differ from "ordinary work," as it included "rehabilitative and therapeutic components." Unemployment compensation includes no similar components. Accordingly, the Court disagreed with the veteran's argument that CWT-derived wages were so similar to unemployment compensation that both should be excluded as income. Because the veteran did not show that unemployment compensation should be excluded as countable income, the Court affirmed the Board decision.

Judge Toth added a brief partial concurrence, noting that he would have excluded legislative history from the opinion. Otherwise, he wrote, he concurred with the panel's judgment and opinion.

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Court Outlines Requirements for Obesity as an Intermediate Step in Secondary Service Connection Appeals

by Freda Carmack

Reporting on *Garner v. Tran*, No. 2018-5865 (January 26, 2021).

In *Garner v. Tran*, the United States Court of Appeals for Veterans Claims (Court) vacated and remanded a decision by the Board of Veterans' Appeals (Board) that denied a claim for entitlement to service connection for obstructive sleep apnea because the evidence of record did not reasonably raise the theory of secondary service connection with obesity as an intermediate step. The Court held that to reasonably raise the theory of secondary service connection with obesity as an intermediate step, the record must contain *some* evidence of an association or relationship between the veteran's obesity, or weight gain resulting in obesity, and a service-connected disability. Incidental references to obesity are insufficient to reasonably raise this theory of entitlement.

Ronald V. Garner served on active duty in the U.S. Air Force from June 1972 to May 1992. In 2010, he was granted service connection for various musculoskeletal disabilities. In June 2012, Mr. Garner was treated for severe chronic depression and anxiety, and he reported that his lack of physical activity due to his service-connected knee and ankle disabilities impacted his mood because he could no

longer do activities that made his lifestyle enjoyable. A VA psychologist opined that Mr. Garner's psychiatric condition was more likely than not related to his service-connected disabilities.

In October 2012, Mr. Garner filed a claim for service connection for a mood disorder as secondary to his musculoskeletal disabilities and, in May 2014, the Regional Office (RO) granted service connection for a mood disorder, not otherwise specified, as secondary to service-connected left shoulder osteoarthritis.

In November 2012, Mr. Garner was diagnosed with mild Obstructive Sleep Apnea (OSA). In February 2014, he filed a claim for service connection, which was denied in June 2014. Mr. Garner timely filed a Notice of Disagreement (NOD), asserting that his OSA was brought on by his service-connected mood disorder.

At a September 2015 VA examination, a VA examiner concluded that Mr. Garner's OSA was less likely than not proximately due to or the result of his service-connected mood disorder because mood disorders are not a known risk factor for OSA. Rather, the VA examiner noted that Mr. Garner's "age, male gender and obesity" were relevant risk factors. In a November 2015 Statement of the Case (SOC), the RO continued to deny service connection for OSA as secondary to a mood disorder. Mr. Garner timely appealed the RO's decision, noting that his symptoms were worsening and that his activity was limited as a result of his OSA.

In August 2016, at a VA mental health diagnostic assessment, a physician noted that "pain and other medical issues" perpetuated and precipitated Mr. Garner's periods of depression, and that pain interfered with his normal daily activities and resulted in decreased physical capacity. The physician noted Mr. Garner's body mass index, which indicated obesity. In June 2017, a VA mental health examiner noted Mr. Garner's report that pain negatively impacted his mood.

Nevertheless, in November 2017, a VA examiner opined that Mr. Garner's OSA was less likely than not aggravated beyond its natural progression by his service-connected mood disorder, noting that, although his mood disorder contributes to his insomnia, it has no effect of the cause or progression of sleep apnea, which is caused by the collapse of the oropharyngeal tissues. In the Supplemental SOC that followed, the RO continued to deny entitlement to service connection for OSA as secondary to a service-connected mood disorder.

In August 2018, the Board issued its decision denying service connection for OSA as secondary to a service-connected mood disorder, finding that there was no link between these two conditions. The Board noted that both VA examiners concluded that mood disorders are not a risk factor for OSA; rather, relevant risk factors include age, male gender, and obesity.

On appeal to the Court, Mr. Garner argued that the Board erred in failing to consider the reasonably raised theory that obesity was the intermediate step between his service-connected mood disorder and musculoskeletal conditions and his OSA. He asserted that his service-connected knee and ankle conditions reduced his physical activity levels and that his mood disorder left him lacking motivation to engage in weight loss activities. His service-connected conditions therefore caused or aggravated his obesity, which in turn caused or aggravated his OSA. In response, the Secretary argued that there was no evidence of record that connected Mr. Garner's weight gain after service to any service-connected disabilities.

To determine whether the issue of obesity as an intermediate step was reasonably raised at the Board, the Court used as guidance a VA Office of General Counsel precedential opinion addressing the role of obesity in service connection claims. VA. Gen. Coun. Prec. 1-2017 (Jan. 6, 2017). The OGC opinion notes that obesity cannot be service connected on a direct basis because it is not a disease or injury per se, but it may be an "intermediate step" between a service-connected disability and a current disability that may be service connected on a secondary basis under 38 C.F.R. 3.310(a). In such cases, the Board must address three questions: (1) whether the service-connected disability caused the veteran to become obese; (2) if

so, whether obesity, as a result of the service-connected disability, was a substantial factor in causing the claimed secondary disability; and (3) whether the claimed secondary disability would not have occurred but for obesity caused by the service-connected disability. If these questions are answered in the affirmative, secondary service-connection for the claimed disability may be granted. In *Walsh v. Wilkie*, 32 Vet. App. 300, 305-07 (2020), the Court endorsed this approach and determined that the Board must consider aggravation, in addition to causation, for claims where a theory of secondary service connection with obesity as an intermediate step is explicitly raised by the veteran or reasonably raised by the record.

In the present case, the Court noted that neither the OGC opinion nor *Walsh* addressed what factual circumstances would give rise to claims for secondary service connection under this theory of entitlement, and it provided a non-exhaustive list of considerations based on a review of the Court's nonprecedential opinions. They include: mobility limitations or reduced physical activity as a result of a service-connected physical disability (in particular, orthopedic conditions or chronically painful conditions); reduced physical activity or inability to follow a course of exercise or diet as a result of a service-connected mental disability; side effects of medication (e.g., weight gain), where the medication is prescribed for a service-connected disability; treatise evidence suggesting a connection between all or some combination of obesity, service-connected disability, and the claimed condition; lay statements by a veteran attributing weight gain or obesity to the service-connected disability; and statements by treating physicians or medical examiners attributing weight gain or obesity to the service-connected disability.

The Court determined that in all decisions where obesity as an intermediate step is reasonably raised by the record, "there is *some* evidence in the record which *draws an association or suggests a relationship* between the veteran's obesity, or weight gain resulting in obesity, and a service-connected condition." Thus, incidental references to the veteran's weight or weight gain are insufficient.

In the instant appeal, the Court found insufficient evidence to determine that the theory of secondary service connection with obesity as an intermediate step is reasonably raised by the record. While there is evidence showing Mr. Garner gained weight since service and is obese, there is no evidence linking his physical disabilities or mood disorder with that weight gain. There are no lay statements by Mr. Garner associating his service-connected conditions specifically with his weight, and Mr. Garner's treatment records do not indicate any such connection. Mere incidental references to Mr. Garner's weight gain are insufficient to reasonably raise this theory of entitlement.

The Court nevertheless agreed with Mr. Garner's argument that his September 2015 and November 2017 VA examinations were inadequate for adjudication purposes because they did not provide a sufficient rationale for the conclusion that Mr. Garner's service-connected mood disorder did not aggravate his OSA. Thus, vacatur and remand were warranted on this basis.

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CAVC Orders VA to Issue an Appealable Decision Adjudicating Veteran's Claim for Benefits after VA Declines to Process Claim Because of a Prior Final Decision Finding Dishonorable Character of Discharge

by Rakhee Vemulapalli

Reporting on *Harris v. McDonough,* No. 20-2547 (February 16, 2021).

In *Harris v. McDonough,* the United States Court of Appeals for Veterans Claims (Court) granted Mr. Harris's petition for a writ of mandamus, which he filed after a claim for benefits was not processed. The Court determined the facts of the case

warranted the extraordinary relief of mandamus, considering Mr. Harris lacked adequate alternative means of obtaining an appealable VA decision.

Mr. Harris was discharged from the U.S. Marine Corps under other than honorable conditions by reason of a pattern of misconduct. In April 2010, the regional office (RO) issued an administrative decision finding Mr. Harris's character of discharge (COD) was considered dishonorable for the purpose of VA benefits based on willful and persistent misconduct. The RO indicated there was no evidence or allegation that Mr. Harris was insane at the time of his offenses.

In June 2015, Mr. Harris filed a claim for service connection for post-traumatic stress disorder (PTSD). The following month, the RO informed Mr. Harris that it was unable to process his claim for benefits because the April 2010 determination that his COD was a bar to VA benefits was final. In July 2015, Mr. Harris submitted additional evidence pertaining to his claim for PTSD.

In January 2018, Mr. Harris submitted a claim for service connection, which included a claim for a mental health condition. He provided accompanying statements asserting his service stressors were seeing Iraqi soldiers on fire and dead bodies. He also stated he started having trouble with stress, distrusting others, and feeling that everyone was against him after he deployed to Kuwait. Additionally, he reported feeling anger toward his command and explained he started missing time because he was worried about what he might do.

In February 2018, the RO notified Mr. Harris it was unable to process his claim for VA benefits because the April 2010 determination that his COD was a bar to VA benefits was final. In October 2018, Mr. Harris submitted a notice of disagreement (NOD), stating he disagreed with the COD determination and explained he should be eligible for benefits. After first informing Mr. Harris that it would issue a statement of the case, the RO then notified Mr. Harris in January 2020 that it would not accept his October 2018 NOD because the one-year time limit to appeal the April 2010 COD determination had passed and that determination was final. The RO explained that if Mr. Harris disagreed with its decision not to accept his NOD, he had the option to file a supplemental claim, request higher-level review, or appeal to the Board of Veterans' Appeals.

In February 2020, counsel for Mr. Harris contacted VA and explained that Mr. Harris had attempted to reopen the April 2010 COD determination, but that VA refused to process that claim and had cancelled a pending appeal on the matter. Counsel noted that VA has a nondiscretionary duty to process claims and that even if VA believes that new and material evidence has not been submitted, Mr. Harris has the right to challenge the determination.

In determining whether to invoke the remedy of mandamus, the Court assessed the factors discussed in *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004): (1) the petitioner must demonstrate the lack of adequate alternative means to obtain the desired relief, thus ensuring the writ is not used as a substitute for the appeals process; (2) the petitioner must demonstrate a clear and indisputable right to the writ; and (3) the Court must be convinced, given the circumstances, that issuance of the writ is warranted.

The crux of the dispute in this case focused on the first factor. Amongst its arguments, VA contended that any new evidence Mr. Harris submitted regarding his claimed psychiatric disability was not material with respect to the April 2010 COD determination. VA further argued that because the February 2018 notification letter was not a decision regarding Mr. Harris's COD, VA could not accept the October 2018 NOD because it was not timely as to the April 2010 decision or any other COD determination. VA also argued that Mr. Harris had alternative remedies available such as appealing the January 2020 determination that the October 2018 NOD was untimely, submitting new and material evidence as to his COD, or filing a motion for revision of the April 2010 decision on the basis of clear and unmistakable error (CUE).

The Court did not deem these arguments persuasive. Instead, the Court accepted Mr. Harris's arguments that his January 2018 claim for benefits,

when read in conjunction with the other evidence submitted since April 2010, included a request to reopen the April 2010 COD determination and that VA refused to adjudicate the matter.

The Court specified that in granting the writ, it was not directing VA to find that new and material evidence had been submitted, that a request to reopen the April 2010 determination was within the scope of Mr. Harris's January 2018 claim, or that his October 2018 NOD was an adequate expression of disagreement with VA's failure to consider whether he had submitted new and material evidence to his COD. According to the Court, those questions were premature because the Veteran had not been issued a decision, to which he was entitled, addressing the provision of VA benefits.

The Order requires the Secretary to direct the RO to issue a decision adjudicating Mr. Harris's January 2018 claim, which he contends included a claim to reopen the 2010 COD denial and will allow him the opportunity to exercise his right to a decision affecting the provision of benefits and one review of that decision on appeal.

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CAVC Panel Clarifies that, Once Presumption of Regularity is Rebutted, VA Bears Burden of Demonstrating that it Discharged Official Duties by a Preponderance of the Evidence

by Emily Woodward Deutsch

Reporting on *Romero v. Tran*, 2021 U.S. App. Vet. Claims LEXIS 78 (Jan. 25, 2021).

In *Romero v. Tran*, the United States Court of Appeals for Veterans Claims (CAVC) addressed the presumption of administrative regularity, ultimately limiting its breadth vis-à-vis VA mailings. The CAVC initially released the opinion on November 20, 2020, and then reissued it with clarifying points of law on January 25, 2021.

Romero arose from a dispute over whether a VA regional office (RO) had mailed United States Army veteran Patricia L. Romero a Statement of the Case (SOC) regarding her claims for service connection, increased rating, and unemployability. Ms. Romero, who was unrepresented when the SOC was purportedly mailed, claimed that she never received it and that this was why she failed to perfect an appeal within 60 days of its release. In fact, only after Ms. Romero enlisted representation from a law firm, Chisholm Chisholm & Kilpatrick, was the SOC discovered through a review of her electronic claims file.

On identifying the filing, Ms. Romero and her attorney submitted a VA Form 9 (substantive appeal), which the RO rejected as untimely. Ms. Romero appealed that adverse determination to the Board of Veterans' Appeals (Board) and submitted the following evidence to demonstrate that the SOC had not, in fact, been mailed:

1. a 2017 U.S. Government Accountability Office (GAO) report, which criticized VA for "not managing its mail program effectively" and for being "unable to determine the extent to which its mail operations are efficient and effective;"

2. an affidavit from her attorney, Robert Chisholm, Esq., attesting to at least 863 instances between July 2015 and May 2018 where VA failed to mail him a copy of a case-related document: and

3. an affidavit from the executive director of the National Organization of Veterans' Advocates, Inc. (NOVA), describing her experience with hundreds of similar failures involving VA's mail operations.

In weighing the merits of Ms. Romero's appeal, the Board acknowledged her evidentiary submissions and, in particular, conceded that the GAO report

"reflect[ed] a widespread problem with VA not mailing correspondence." Nevertheless, the Board determined that VA was entitled to the presumption of regularity with respect to its mailings. The Board further reasoned that Ms. Romero had not succeeded in rebutting this presumption, as she had failed to submit "any evidence specific to [her claims] file or [to] the mailing practices as applicable to the handling of [her]case."

On appeal to the CAVC, Ms. Romero presented a two-part argument: First, she averred that the Secretary had not provided the requisite "predicate evidence" to establish that the presumption of regularity applied to the SOC. Second, she maintained that, even if the presumption *had* attached, it had been rebutted through the submission of the affidavits and the GAO report. Conversely, the Secretary argued that the presumption had not only attached, but that Ms. Romero had also failed to rebut it with evidence specific to the facts of her case. Nevertheless, at oral argument on October 15, 2020, counsel for the Secretary conceded that VA had "no record evidence" to "conclusively" demonstrate that the SOC had been mailed.

Prior to addressing the parties' arguments, Judge Michael Allen, who authored the Court's opinion, joined by Judges Meredith and Falvey, offered a history of the presumption of regularity, which originated in English common law and evolved in the United States as a tool to preserve the balance of powers and prevent administrative waste. Judge Allen cited the Supreme Court's holding in *United States v. Chemical Foundation, Inc.,* that "[t]he presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they then emphasized that, "while this reflects Federal courts' deference to the other branches of Government and efficiency concerns . . . .it is not a not a *carte blanche*" presumption, but is, instead, rebuttable. And, indeed, he and the rest of the three-judge panel found it to be so in this case.

In a two-part holding, the CAVC judges disagreed with Ms. Romero that VA was required to produce "predicate evidence of [its] sound mailing practices and procedures" to trigger the presumption of regularity. However, they accepted her theory that the presumption had been rebutted by her evidentiary submissions—particularly, the GAO report. The panel observed that the Board itself had found this report to be "substantial evidence . . . of widespread problems" with VA's mail system—a favorable finding that the Court could not disturb. While the judges conceded that, but for that finding, their ruling might have been different, they rejected the Secretary's position that "evidence that clearly rebuts the presumption should be specific to the facts of the case." Accordingly, the panel reversed the Board's finding that the presumption had *not* been rebutted and remanded the case for a determination as to whether Ms. Romero's substantive appeal was, in fact, timely.

Two months after issuing the initial opinion, Judge Allen and the rest of the CAVC panel clarified that, following the rebuttal of the presumption of regularity, the burden had shifted to the Secretary "to establish actual mailing or receipt by a preponderance of the evidence." The panel then emphasized that "the Secretary ha[d] made no effort to carry that burden on appeal," and concluded that, given his counsel's concession at oral argument, it would be "pointless" to require him to make the requisite showing on remand.

Emily Woodward Deutsch is an appellate attorney at the National Veterans Legal Services Program.

Treating Transferees of Education Benefits "In the Same Manner" as Veterans

by Freda Carmack

Reporting on *Carr v. McDonough*, No. 2016-3438 (February 19, 2021).

In *Carr v. McDonough*, the Court of Appeals for Veterans Claims (Court) invalidated 38 C.F.R. § 21.9635(y) because it conflicted with its enabling

statute by arbitrarily restricting the manner in which a transferee is entitled to education benefits. Specifically, the regulation denied transferees use of a statutory extension enjoyed by veterans.

Air Force veteran Robert Carr earned 45 months of education benefits under Chapter 34. After using 41 months and 11 days, he returned to active duty. Although he was eligible to earn up to 36 months of additional benefits under Chapter 33, his actual entitlement was capped at 48 total months pursuant to 38 U.S.C. § 3695, which limits the total accumulation of education benefits to 48 months. He therefore earned only 6 months and 19 days of education benefits under Chapter 33. Mr. Carr transferred his Chapter 33 benefits to his daughter, Samantha Carr, who paid for two semesters of university. In the fall of 2013, Ms. Carr began a new semester with a single day of entitlement remaining. She sought to extend her benefits until the end of the semester by invoking 38 C.F.R. § 21.9635(o) (2020), which grants veterans an extension in benefits if entitlement is exhausted during the course of an educational term.

The Board of Veterans' Appeals (Board) issued a decision, determining that 38 C.F.R. § 21.9635(y) prohibited a transferee from receiving an extension, even though a veteran in the same situation would be entitled to it. The regulation specifies that the "ending date of an award of educational assistance to a dependent who exhausts the entitlement transferred to him or her is the date he or she exhausts the entitlement."

On appeal to the Court, Ms. Carr challenged the validity of the regulation, arguing that it was inconsistent with its authorizing statute, 38 U.S.C. § 3319 (2018). However, the Court affirmed the Board's decision in 2019, finding that the 48-month cap mandated by § 3695 prevented any individual from receiving more than 48 total months of educational benefits.

The Federal Circuit disagreed. It reasoned that the 48-month cap referred only to an initial calculation of a veteran's entitlement and not the actual amount the veteran may ultimately receive. Rather, extensions beyond that original calculation are permitted, and a person who used 48 months from multiple chapters can receive an extension in benefits until the end of the semester. The Federal Circuit determined it lacked jurisdiction to address Ms. Carr's regulatory challenge to section 21.9635(y) because the Court did not address it. It remanded the case back to the Court in 2020 to consider its validity.

In the present case, the Court recognized that § 21.9635(y) imposes a limitation on benefits for dependents that is not applied to veterans. As stated above, § 21.9635(y) provides that the discontinuance date for a dependent's education benefit award is the date he or she exhausts the entitlement, whereas § 21.9635(o) provides an extension for veterans whose benefits are exhausted during an educational term. This disparate treatment conflicts with 38 U.S.C. § 3319(h), which provides that "in the case of entitlement transferred to a child under this section, the child is entitled to educational assistance under this chapter in the same manner as the individual from whom the entitlement was transferred as if the individual were not on active duty." After noting that no regulatory caveats were relevant to the present case, the Court found that "in the same manner" meant that if a veteran is entitled to a discontinuance date for benefits that is later than the date those benefits are exhausted, the veteran's transferee is also entitled to it.

On this basis, the Court determined that Section 21.9635(y) arbitrarily restricts a transferee's entitlement to educational benefits because it prevents the transferee from using the statutory extension provision available to veterans. It therefore conflicts with its enabling statute and is invalid. As such, the Court set aside § 21.9635(y) as "in excess of statutory jurisdiction, authority, or limitations" under 38 U.S.C. § 7261(a)(3)(C), and it remanded the case to VA to determine the benefits owed to Ms. Carr.

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Unaccredited Paralegals and Staff Working with an Accredited Attorney Do Not Have a Statutory or Regulatory Right to Read-Only Access to VBMS

by Kerry Hubers

Reporting on *Carpenter v. McDonough*, No. 19-1136 (Vet. App. Feb. 24, 2021).

In *Carpenter v. McDonough*, a precedential decision issued February 24, 2021, the Court of Appeals for Veterans Claims (Court) upheld, in consolidated appeals, Board decisions that denied remote, read-only access to the Veterans Benefits Management System (VBMS) for unaccredited paralegals and staff of private attorneys representing veterans.

In separate cases which were ultimately consolidated on appeal, two law firms challenged VA decisions to deny access to VBMS by their paralegals and support staff. The law firms contended that a note to 38 C.F.R. § 14.629 requires VA to provide read-only access to automated VA claims records for unaccredited paralegals and staff of the law firms. The law firms also contended that VA's bar against remote access to VBMS for accredited attorneys' unaccredited paralegals and support staff violates 38 U.S.C. § 5904(a) and due process. The law firms further contended that the addition to and omission from the appellants' claims files of some documents constituted statutory and due process violations.

Importantly, there was a prior, precedential decision by the Court which held that attorneys representing claimants before the Court do not have a statutory or regulatory right to remote, read-only access to claimants' VBMS files. *See Green v. McDonald*, 28 Vet. App. 281 (2016). In *Green*, the Court held that "automated VBA claims records" and "automated claimants' claims records" as used under 38 C.F.R. §§ 1.600-1.603 do not include VBMS files or a claimant's electronic claims folder.

The *Carpenter* Court rejected each of the law firms' arguments. Specifically, the Court held that sections 1.600-1.603 had not been rendered void by technological advancements and, as held in *Green*, do not provide a right of remote access to claimants' VBMS files. The Court further held that, because sections 1.600-1.603 do not apply to VBMS, a categorical bar of access by unaccredited paralegals and staff did not violate 38 C.F.R. § 14.629. The Court also rejected the argument that the bar on remote, read-only access for unaccredited paralegals and staff inhibited the law firms' ability to provide competent and diligent representation. The Court noted that the law firms had only posited hypothetical situations and speculative harms, so the denial of access did not violate 38 U.S.C. § 5904(a) which, in pertinent part, requires the Secretary to prescribe regulations "consistent with the Model Rules of Professional Conduct of the American Bar Association." The Court also rejected the law firms' due process arguments.

The Court noted that while there might be more efficient ways for VA to protect and advance its interests, its refusal to allow access to VBMS to unaccredited paralegals and staff did not violate any rights of the law firms or their clients under the pertinent regulations and statutes.

Kerry Hubers is Counsel at the Board of Veterans' Appeals.

Psychoses and Chronicity under 3.309(a) and 3.303(b)

by Gillian Slovick

Reporting on *Giles v. McDonough*, Fed. Cir. No. 2020-1096 (February 17, 2021).

In *Giles*, United States Circuit Court of Appeals for the Federal Circuit (Federal Circuit) addressed whether two separate psychosis diagnoses could serve to demonstrate chronicity of "psychoses" for the purpose of service connection under 38 C.F.R. §§ 3.303(b) and 3.309(a).

Seeking an earlier effective date based on clear and unmistakable error (CUE), Mr. Giles argued that "psychoses" under 38 C.F.R. § 3.309(a) was meant to describe a single disorder encompassing distinct diagnoses and that a showing of *any* psychosis could demonstrate chronicity. More specifically, the veteran argued that a diagnosis of acute organic delusional syndrome and a later diagnosis of bipolar disorder demonstrated chronicity of "psychoses" warranting service connection. Of note, the applicable law considered here predated 38 C.F.R. § 3.384, which excluded bipolar disorder from the disorders identified as psychosis.

Mr. Giles served in the Army between 1976 and 1982. In March 1984, he filed a claim for service connection for a nervous condition. While the veteran's claim was pending, in June 1984, he entered active duty for training (ACDUTRA). On the first day of training, the veteran was hospitalized for psychiatric symptoms and the veteran was discharged from the Reserves in November 1984. A Medical Board provided a diagnosis of organic delusional syndrome, acute, in September 1984.

In December 1984, the Regional Office denied Mr. Giles' claim. In December 1986, following hospitalization, the veteran was diagnosed with chronic bipolar disorder, manic. He then requested his December 1984 claim for a nervous condition be reopened; the request to reopen was denied in April 1986. The veteran appealed that decision, and the decision was affirmed in an April 1987 Board of Veterans' Appeals (BVA) decision wherein the BVA determined that the veteran's bipolar disorder did not have its onset in service and did not meet the requirements for presumption. The veteran did not appeal this decision, and it became final.

In March 1995, the veteran filed a claim for service connection for posttraumatic stress disorder. Ultimately, service connection for chronic bipolar disorder with psychosis was granted, effective the date of his March 1995 filing.

In July 2012, the veteran sought to revise the BVA's April 1987 decision denying service connection based on his assertion that CUE had been committed because the BVA did not consider his June 1984 diagnosis of organic delusional syndrome on a presumptive basis under 38 C.F.R. § 3.303(b). The BVA denied the Veteran's CUE motion on two grounds: the first ground was based on a finding that the veteran did not have "veteran" status during his ACDUTRA service, which the Court of Appeals for Veterans Claims (CAVC) and the Federal Circuit declined to review on the merits. The other, considered in this case, was that the April 1987 record before BVA did not show a chronic disease during his ACDUTRA service.

Mr. Giles appealed the decision and CAVC remanded the appeal based on a finding that the BVA did not sufficiently explain the "veteran" status issue.

The BVA denied the veteran's CUE motion again in a July 2017 decision. The veteran appealed to CAVC which, in July 2019, affirmed the BVA's decision. In its decision, CAVC found that there was no CUE in the BVA's 1987 denial of service connection based on chronicity because organic delusional syndrome and bipolar syndrome were different, and the evidence did not show the manifestation of a chronic disease during ACDUTRA.

The Federal Circuit affirmed CAVC's decision for three main reasons: First, "psychoses" is plural, suggesting that multiple disorders were meant to be covered by the regulation; otherwise, the regulation would enumerate "psychosis" in 38 §3.309(a). Second, the reading endorsed by Mr. Giles would improperly broaden the regulation "by eviscerating the requirement that the disease be the 'same' or chronic,' incorporating anything considered a psychoses into § 38 C.F.R. 3.309." Third, context weighs in favor of the Secretary's argument that "psychoses" is meant to describe separate and distinct diagnoses.

Regarding its final rationale, the Federal Circuit noted that under § 38 C.F.R. 3.309(a), there is another example of a category of diseases, "other organic diseases of the nervous system." The Federal Circuit observed that this was similarly plural and was found to encompass numerous varied diseases, citing *Standfield v. Wilke* and *Fountain v. McDonald*, which found that migraines and

sensorineural hearing loss were organic diseases of the nervous system, respectively. The Federal Circuit stated that, adopting the veteran's reading of 38 C.F.R. §3.303(b), one could argue that these two disorders enumerated under the umbrella of "other organic diseases of the nervous system" were the same due to that classification. Similarly, the Federal Circuit cited *Boggs v. Peake* to demonstrate that claims based on different diagnoses were treated as separate claims in the context of a claim to reopen.

Ultimately, the Federal Circuit held that the term "psychoses" under § 38 C.F.R. 3.309(a) must be interpreted as a category of diseases, rather than a single disorder as a legal matter. Finally, the Federal Circuit held that a dispute as to whether organic delusional syndrome was chronic or related to bipolar disorder was a factual determination outside the bounds of its jurisdiction.

Gillian Slovick is a Counsel at the Board of Veterans' Appeals.

"Complications" of Prostate Cancer Extend Beyond Renal and Voiding Dysfunction, as Secondary Claims

by Andrew Hennessy

Reporting on *Bailey v. Wilkie*, No. 19-2661 (Jan. 6, 2021).

Bailey v. Wilkie is a precedential Court decision that vacated and remanded a March 2019 Board decision, addressing the scope of the claims review process, in the context of Diagnostic Code (DC) 7528, pertaining to prostate cancer residuals.

In this decision, Chief Judge Bartley, writing for the majority, held that under DC 7528, a single evaluation may be assigned for residuals of prostate cancer based only on voiding or renal dysfunction, whichever is predominant and that other residuals may be compensated under appropriate DCs not in § 4.115b if they are separately service connected as secondary to prostate cancer. The Court also held that the claimant need not file a separate, formal claim for secondary service connection for those residuals, and that, instead, VA must consider those "complications" in connection with a properly initiated claim concerning the prostate cancer claim. This decision has implications for assigning effective dates because claims for service connection for prostate cancer residuals experienced by veterans, such as diarrhea and lymphedema (which were the complications at issue here), may be developed separately at the Regional Offices (ROs), following development of primary prostate cancer claims – and, thereby, allowing the assignment of later effective dates for residuals that are developed later.

The veteran, Mr. Bailey, served on active duty from August 1954 to October 1974 and was diagnosed with prostate cancer in March 2013, for which he received radiation therapy that concluded in September 2013. He filed a claim for service connection for prostate cancer in April 2013. This claim was granted in August 2013 and evaluated as totally disabling, pursuant to DC 7528, for malignant neoplasms of the genitourinary system. A note to DC 7528 instructs: "Following the cessation of surgical, X-ray, antineoplastic chemotherapy or other therapeutic procedure, the rating of 100 percent shall continue with a mandatory VA examination at the expiration of six months. Any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of §3.105(e) of this chapter. If there has been no local reoccurrence or metastasis, rate on residuals as voiding dysfunction or renal dysfunction, whichever is predominant." In this case, Mr. Bailey was assessed as totally disabled because he was still undergoing treatment at the time his claim was granted.

Following the grant of service connection, Mr. Bailey underwent a VA examination in September 2014 to assess the current severity of his prostate cancer and residuals (approximately one year from the cessation of radiation treatment he received). The examiner found that Mr. Bailey's prostate cancer was in remission and noted his complaints of urinary symptoms requiring the use of five to six absorbent

pads per day. In October 2014, the RO proposed a reduction to Mr. Bailey's total (100 percent) evaluation for prostate cancer to 60 percent based on the predominant symptom of voiding dysfunction. Mr. Bailey timely objected to the reduction, and in May 2015, he submitted a prostate cancer disability benefits questionnaire (DBQ) identifying, *inter alia*, diarrhea as a symptom. A VA examination report from March 2016 identified diarrhea and lymphedema as conditions associated with the Mr. Bailey's residuals of prostate cancer.

In January 2019, Mr. Bailey filed a claim for secondary service connection with the RO for, *inter alia*, lymphedema (and not for diarrhea).

In March 2019, the Board issued the decision on appeal, which determined that the discontinuation of the 100 percent evaluation for prostate cancer was proper and denied an evaluation in excess of 60 percent for that condition. In its decision, the Board found that the Mr. Bailey's predominant residual of prostate cancer was voiding dysfunction and that a 60 percent evaluation under DC 7528 was warranted because the evidence established that he changed absorbent materials more than four times per day. The Board also explained that DC 7528 excluded diarrhea and lymphedema from consideration on appeal because the rating schedule specified that only renal and voiding dysfunctions be rated.

In appealing to the Court, Mr. Bailey asserted that the Board, in its consideration of the proper evaluation for service-connected residuals of prostate cancer, was required to address entitlement to additional compensation for diarrhea and lower extremity lymphedema, which evidence of record suggested was related to radiation treatment for prostate cancer. He argued that the Board's interpretation of DC 7528 as prohibiting compensation for diarrhea and lymphedema was inconsistent with the plain language of § 4.115b and VA's duty to maximize benefits and award separate evaluations when appropriate. As further evidence in support of his argument, Mr. Bailey relied, by analogy, on the VA's *Adjudication Procedures Manual* (M21-1) that directs adjudicators to consider the non-voiding and non-renal residuals of erectile dysfunction when it is reasonably raised in connection with a prostate cancer claim. Mr. Bailey also argued, that, in the alternative, even if the Board's interpretation of DC 7528 was correct, the Board was obligated to adjudicate entitlement to additional compensation for diarrhea and lymphedema as complications of prostate cancer pursuant to § 3.155(d)(2).

The Secretary countered that Mr. Bailey was misreading the Board decision, insofar as the Board did not mean that the Veteran was prohibited from claiming diarrhea or lymphedema as a complication of his service-connected prostate cancer, but rather meant that the issues of diarrhea and lymphedema were not a part of the claim on appeal. The Board cited *Manzanares, v. Shulkin*, 863 F. 3.d. 1374 (Fed. Cir. 2017), *Sellers v. Wilkie*, 965 F.3d 1328 (Fed. Cir. 2020), *Ellington v. Peake*, 541 F.3d 1364 (Fed. Cir. 2008), and the current versions of 38 C.F.R. §§ 3.155 and 3.160. The Secretary argued that the Board was not obligated to address entitlement to compensation for those conditions as secondary to treatment for prostate cancer because (1) entitlement to secondary service connection is not inherently part of the evaluation for an already service-connected disability, and (2) although Mr. Bailey filed a formal claim for secondary service connection for those conditions in January 2019, those claims had not reached the Board by the time of its March 2019 decision.

The Court, based on its analysis of both the plain language and the regulatory history of the regulations, concluded that, in the context of § 4.115b, DC 7528, clearly and unambiguously limited the adjudication of prostate cancer residuals to either voiding or renal dysfunction, whichever is predominant.

The Court next held that the record in Mr. Bailey's case reasonably raised the issue of entitlement to secondary service connection for diarrhea and lymphedema, as would be consistent with the Court's prior holdings in, e.g., *Wanner v. Principi*, 17 Vet. App. 4, 8 (2003) (secondary service connection for tinnitus caused by medication used to treat service-connected tuberculosis), *rev'd on other grounds*, 370 F.3d 1124 (Fed. Cir. 2004), and *Fountain v. McDonald*, 27 Vet. App. 258, 275-76 (2015)

(concluding that entitlement to secondary service connection was reasonably raised by the record).

The Court considered the applicability of § 3.155(d)(2), which provides, in relevant part, that VA will: consider all lay and medical evidence of record in order to adjudicate entitlement to benefits for the claimed condition as well as entitlement to any additional benefits for *complications* of the claimed condition, including those identified by the rating criteria for that condition in 38 C.F.R. Part 4, VA Schedule for Rating Disabilities (emphasis added). The Court consulted the principles of regulatory interpretation as set forth in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019), identifying this matter as one in which there was regulatory ambiguity and administrative silence as to the word "complications" in the context of § 3.155(d)(2), thereby permitting review of this question *de novo*.

The Court held that § 3.155(d)(2) placed a duty on VA to identify, develop, and adjudicate claims that were reasonably related to the primary claim. In doing so, the Court cited a number of precedential cases, and predecessor regulations to § 3.155(d)(2), which lent additional support for the existence of such a duty.

The Court distinguished this case from *Manzanares*, reasoning that the specific question at issue in *Manzanares* differed from the specific question at issue in Mr. Bailey's appeal. The question in *Manzanares* turned on whether a claim for increased rating for any service-connected condition necessarily includes a claim for a secondary service-connected condition by virtue of 38 C.F.R. § 3.310(a). The question in Mr. Bailey's case was limited to whether his evidence reasonably raised the issue of secondary service connection for diarrhea and lymphedema independent of the operation of 38 C.F.R. § 3.310(a).

Concerning the caselaw pertaining to effective dates, the Court distinguished *Ellington* because it did not speak to whether a claim for secondary service connection, raised during VA's consideration of the evaluation level for the primary service-connected disability, must be initiated by a formal claim (and because *Ellington* predated the addition of the word "complications" to § 3.155 (d)(2) by seven years). The Court also distinguished *Sellers*, noting that the Federal Circuit had reiterated that its holding should not be construed as precluding the VA from identifying, addressing, and adjudicating related matters, that are reasonably raised by the evidence of record which the claimant may not have anticipated or claimed.

The Court also considered the issues of mootness, remedy, and a claim for TDIU, which are not addressed in this case summary.

Judge Pietsch, concurring in the judgment, disagreed with the Court's analysis of § 3.155(d)(2), reasoning that § 3.155(d)(2) allowed for greater agency flexibility in determining how best to adjudicate claims for secondary entitlement, because § 3.155(d)(2) authorized compensation for "**any** additional benefits for complications" (emphasis added), and thereby would have required the Board to consider entitlement to secondary service connection, without needing to find an ambiguity in the regulations, such that the Court could apply the *Kisor* analytical principles for ambiguous regulations.

Judge Pietsch also reasoned that the failure of the Board to address an issue does not *per se* cause ambiguity, as 3.155(d)(2) instructs that "VA's decision on an issue within a claim implies that VA has determined that evidence of record does not support entitlement for any other issues that are reasonably within the scope of the issues addressed in that decision." In other words, veterans should construe silence as to whether the record reasonably raises entitlement to secondary service connection as tantamount to an implicit denial of reasonably related secondary claims. Judge Pietsch pointed to other mentions of "complications" in the regulations, which conflicted with the majority's interpretation of "complications," cautioning that the majority's holding could create confusion about when, precisely, "complications" in particular cases generate a duty to identify, develop, and adjudicate secondary claims.

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A Basic Primer on Separate Ratings after *Bailey v. Wilkie*

by Jenny J. Tang

I imagine many were as excited about the Court's issuance of *Bailey* as I was. In *Bailey*, the Court provided guidance for determining when the issue of "entitlement to a separate rating" or "entitlement to secondary service connection" for a certain manifestation is within the scope of an appeal for increase for the primary disability. I offer this basic post-*Bailey* primer for determining whether entitlement to compensation for certain manifestations are within the scope of the appeal for increase for the primary disability.

Has the issue of compensation for a specific symptom been raised within the scope of the evaluation for the claimed primary condition?

The first step in determining whether the issue of entitlement to compensation for a specific symptom has been raised within the scope of the claim is to look and see if that symptom has been expressly included or excluded from the scope of the evaluation for the claimed primary condition. Start by looking at the text, history, and purpose of the regulation(s) and diagnostic code (DC) governing the primary disability's evaluation to determine whether such authorities permit or prohibit a separate rating for any reasonably raised manifestations.

The plain language of some DCs broadly instructs VA to rate complications and/or residuals of the primary disability, or of medical treatment for the underlying condition, separately. For examples, Judge Pietsch's concurrence in *Bailey* notes several such DCs, to include DC 7900 (hyperthyroidism), DC 7122 (cold injury residuals), 38 C.F.R. § 4.116, Note (1) (e.g., pregnancy), DC 7913 (diabetes mellitus), DC 7816 (psoriasis), and DC 7703 (leukemia).

The plain language of some DCs permits separate ratings only for certain manifestations. For example, per *Bailey*, DC 7528 provides that a single evaluation for residuals of prostate cancer may be assigned based only on voiding or renal dysfunction, whichever is predominant. Other examples include 38 C.F.R. § 4.71a, General Rating Formula for Disease and Injuries of the Spine, Note (1), which instructs VA to evaluate "any associated objective neurological abnormalities" separately, and DC 7101, which instructs VA to separately rate hypertension from hypertensive heart disease and other types of heart disease.

If the plain text of the governing regulation(s) and DC are entirely silent regarding whether such manifestations may be separately rated, then look to the history and purpose to determine whether the agency intended to prohibit such separate ratings. Sometimes it is not possible to ascertain agency intent. After VA implemented its schedule for rating disabilities, per Veterans' Administration Act, Pub. L. No. 85-857, § 355, 72 Stat. 1105, 1125 (1958), VA published its rating schedule in 1964, *see* Rules and Regulations, 29 Fed. Reg. 6718 (May 22, 1964). Therein, the history of the rating schedule prior to 1964 is reflected in the Table of Amendments. However, because VA was required to summarize and respond to comments on proposed rules when issuing a final rule starting in 1977, and because many applicable versions of DCs remained unchanged since 1964, there is no useful source that I know of upon which we can rely to ascertain the history and purpose of such DCs.

If the text, history, and purpose of the reg(s) and DC governing the primary disability's evaluation do not actually prohibit compensation or a separate rating for a certain manifestation, or if it is not possible to ascertain the history and purpose, then the second step of the process is look to whether the issue of entitlement to secondary service connection for such manifestation is reasonably raised by the record. If secondary service connection is reasonably raised, then *Bailey* tells us that the claimant need not file a separate, formal claim for secondary service connection for that issue to be considered within the scope of the claim or appeal for increase. I note that though *Bailey* discusses 38

C.F.R. § 3.155(d)(2) and VA's formal forms regime, VA has long been required to develop a claim to its optimum and address all reasonably raised issues within the scope of a claim, and these general principles also apply to AMA cases.

Finally, in the alternative to the question of whether secondary service connection was reasonably raised, we can fall back on 38 C.F.R. § 4.25(b), which provides that, except as otherwise provided in this schedule, disabilities arising from a single disease entity are to be rated separately, as are all other disabling conditions, if any. Judge Pietsch discusses this in her concurrence in *Bailey*.

If raised, has the issue of compensation for that symptom been bifurcated out of the current proceeding?

What about when there has been an award by the Regional Office (RO) for an expressly- or reasonably-raised manifestation during the pendency of the claim on appeal? Is the issue of compensation for that manifestation effectively "bifurcated" from the appeal for entitlement to increased compensation for the primary disability? These questions require a close look at the facts and procedural posture.

First, look to whether the issue of entitlement to compensation for that manifestation of the primary disability was expressly or reasonably raised within the scope of the *claim*.

Second, what did the RO do in the rating decision from which the appeal stems? Many times, the RO broadly denies an increase for the primary disability, such that a reasonable lay claimant would not have received notice that the RO denied compensation for the reasonably raised manifestation in question. Sometimes, the RO denies an increased rating for the primary disability and also separately addresses ratings for other conditions that it deemed secondary to the primary disability.

Third, what did the lay claimant intend to appeal? The claimant's notice of disagreement (NOD) should be liberally construed, and this liberal reading includes issues raised in all documents or oral testimony submitted prior to the Board's decision. *See, e.g., EF v. Derwinski*, 1 Vet. App. 324, 326 (1991). An appeal can only be resolved by the Board. *See Jones v. Shinseki*, 23 Vet. App. 122, 124-25 (2009). If the claimant's NOD can be liberally construed as appealing the issue or sub-issue of entitlement to compensation for the manifestation of the primary disability, and as long as the appellant did not later *properly* withdraw the appealed issue, then the Board has jurisdiction over the issue. Here, depending on the result of your analysis from the first section, that issue on appeal may be characterized as entitlement to a separate rating for that manifestation of the primary disability, or entitlement to a secondary service connection for that manifestation.

If adjudicated elsewhere, has that adjudication rendered the issue of compensation for that symptom moot in the current proceeding?

If the issue of compensation for the reasonably raised manifestation can be construed as being within the scope of the *appeal*, does an intervening award by the RO (issued after the NOD) deprive the Board of its jurisdiction over that manifestation?

First, was that intervening grant a full grant of the benefits sought or only a partial award? Most often, the intervening grant was only a partial award because it was not an award of a 100% rating for that manifestation and/or the effective date assigned is much later than the date of the claim and the date that the manifestation was reasonably raised during the pendency of the claim. When there has been a partial award, the issue remains in controversy. *See AB v. Brown*, 6 Vet. App. 35, 38 (1993).

Second, did the appellant submit a separate, formal claim for secondary service connection at some point during the pendency of the claim or appeal for increase for the primary disability? If no, it is likely that the RO caught the reasonably raised manifestation of the primary disability after the RO already issued the rating decision that was already appealed. If yes, the separate, formal claim for secondary service connection likely initiated a new claim stream at the RO level that resulted in the RO's intervening partial grant.

Third, did the appellant submit an NOD (or a review option under AMA) against the RO's intervening rating decision that partially awarded compensation for the manifestation in question? Regardless of the answer, *Bailey* tells us that the RO's intervening decision "could not and did not divest the Board of jurisdiction over the veteran's initial appeal[.]"

Finally, even setting aside the above guidance in *Bailey*, if the appellant did not submit an NOD (or a review option under AMA) against the RO's intervening rating decision, you can look to whether fair process was violated. Consider VA's notices, particularly the RO's notices regarding its intervening partial grant, to determine whether VA led the appellant to conclude that VA considered the issue of compensation for that manifestation of the primary disability to be within the scope of the appeal for increase for the primary disability. *See Smith v. Wilkie*, 32 Vet. App. 332, 338 (2020).

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Federal Circuit Rules that *Boggs* and *Clemons* are Perfectly Compatible with Each Other, but Questions are Left Unanswered

by David R. Seaton

Reporting on *Murphy v. Wilkie*, No. 2019-2064 (Fed. Cir. December 21, 2020).

In *Murphy v. Wilkie*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) provided further guidance to the United States Court of Appeals for Veterans Claims (Veterans Court) on how to determine the scope of a claim for Department of Veterans Affairs (VA) benefits. The Federal Circuit specifically held that there was no conflict or distinction between the standard for determining the scope of an initial claim for service connection and the standard for determining the scope of a claim to reopen a previously denied claim based on new and material evidence. Indeed, the Federal Circuit went on to clarify that ultimately these standards are rooted in the requirement to interpret the *pro se* submissions of veterans claiming VA benefits charitably. Although largely illuminating, there are still some questions, specific to mental disorders, left unanswered.

Mr. David G. Murphy served honorably in the United States Army from December 1971 to February 1974. Unfortunately, Mr. Murphy was diagnosed with schizophrenia in April 1982. Thereafter, Mr. Murphy filed a number of claims seeking compensation from VA, alleging that he had a current mental disorder that was caused by a period of service; also known as a claim for service connection. In his claims for service connection, Mr. Murphy not only alleged that his diagnosis of schizophrenia was due to a period of service, but that he manifested other mental disorders that were related to service as well; including posttraumatic stress disorder (PTSD).

Mr. Murphy first filed for service connection for a mental disorder – in this case, alleging a diagnosis of PTSD – in February 2003, and, in April 2003, a VA Regional Office (RO) denied the claim. Mr. Murphy did not appeal, and the decision became final. In October 2006, Mr. Murphy filed for service connection again; this time alleging a number of different mental disorders including: anxiety, depression, and schizophrenia. The RO interpreted Mr. Murphy's claim as both an initial claim for service connection for another mental disorder, as well as a claim to reopen the previously-denied claim for service connection for PTSD based on new and material evidence. At that time, a claimant could reopen a previously denied claim for service connection if the claimant submitted new and material evidence that had not been previously considered in the most recent final decision. Recent changes in the law have amended this standard, and – to the extent that these changes are relevant to this discussion – they will be discussed further below. The RO declined to reopen the claim for PTSD and denied the initial claim for another

mental disorder in the first instance. Mr. Murphy did not appeal the RO's adjudication.
Between 2007 and 2012, Mr. Murphy filed multiple clams to reopen a previously denied-claim for PTSD and a previously-denied claim for mental disorders other than PTSD (such as schizophrenia). These claims were consistently denied. In total, Mr. Murphy was denied his requested relief five times, and Mr. Murphy did not appeal any of these unfavorable determinations.

In February 2012, Mr. Murphy filed a claim to reopen a previously-denied disability claim. Mr. Murphy explicitly listed PTSD as a disability claim that he was attempting to reopen, but Mr. Murphy neglected to indicate that he was attempting to reopen any other mental disorder, including schizophrenia. The RO denied Mr. Murphy's claim to reopen in August 2012, and Mr. Murphy appealed the matter to the Board of Veterans' Appeals (Board). Additionally, the RO denied a claim to reopen the Veteran's previously-denied claim for schizophrenia in July 2014, but Mr. Murphy did not appeal this denial. During the pendency of the appeal, Mr. Murphy repeatedly alleged that a claim to reopen a previously denied claim for schizophrenia was within the scope of his PTSD claim that was on appeal.

The Board denied Mr. Murphy's request to reopen a previously-denied claim for PTSD. The Board also rejected the Veteran's assertion that a claim to reopen a previously denied claim for schizophrenia was within the scope of the appeal. Noting *Clemons v. Shinseki*, the Board acknowledged that a claim for service connection for any one given diagnosis of a mental disorder can give rise to a claim for any and all mental disorders that a veteran has been diagnosed with. Nevertheless, the Board ultimately found that Mr. Murphy's schizophrenia claim was not within the scope of the appeal, because a "July 2014 rating decision declined to reopen a previously denied claim of service connection for schizophrenia with anxiety, depression, and mood swings[;]" and Mr. Murphy did not appeal "that rating decision[;] [ultimately concluding] that matter [(the schizophrenia claim)] is not before the Board."
In *Clemons v. Shinseki*, Mr. William Clemons, a veteran of the United States Navy, sought service connection for a mental disorder. Although Mr. Clemons initially sought service connection for PTSD and had been diagnosed with mental disorders other than PTSD (anxiety and a schizoid disorder), he alleged on appeal before the Veterans Court that his claim for service connection for PTSD encompassed claims for service connection for all diagnosed mental disorders, even for conditions for which he had not explicitly filed claims for service connection.

Agreeing with Mr. Clemons, the Veterans Court indicated that he "generally [was] not competent to diagnose his mental condition; he [was] only competent to identify and explain the symptoms that he observe[d] and experience[d]." The Veterans Court contrasted the ability of Mr. Clemons, as a layman, to identify his symptoms with the role of medical providers. Ultimately, the Veterans Court held, in pertinent part, that VA "should not limit its consideration of the claim based on the appellant's belief that he suffered from [a particular diagnosis such as] PTSD[;] something he generally is not competent to render in the first place."

In referencing *Clemons*, the Board acknowledged the potential of considering a claim for service connection for schizophrenia as within the scope of the claim for service connection for PTSD, but, ultimately, the Board found that, in this case, the claim for service connection for schizophrenia was not properly before the Board. Mr. Murphy appealed to the Veterans Court.

The Veterans Court first disposed of an argument from Mr. Murphy that VA had failed to adjudicate a single claim for service connection dating back to October 2006. As previously noted, Mr. Murphy filed a claim in October 2006 that was ultimately interpreted as a claim to reopen his previously denied claim for PTSD, as well as a new initial claim for service connection for a mental disorder other than PTSD, and the RO denied both claims. Mr. Murphy never appealed this denial. Mr. Murphy argued, essentially, that the RO had never fully adjudicated a claim for service connection for schizophrenia, and, as a result, the Board was required to consider the claim. The Veterans Court rejected this reasoning on the basis that, even

assuming *arguendo* that Mr. Murphy had such a claim, the Board did not have jurisdiction to consider such a claim, because he ultimately did not appeal the initial unfavorable rating decision or any of the rating decisions declining to reopen the previously-denied claim for service connection for schizophrenia. Mr. Murphy's "silence is deafening[.] . . . For more than 20 years, VA developed and adjudicated these claims separately," and Mr. Murphy "never seemed to contest VA's separate handling of them."

Next, the Veterans Court disposed of an argument from Mr. Murphy that under *Clemons*, the Board was actually required to consider his schizophrenia claim as within the scope of his claim for PTSD. The Veterans Court rejected this argument, instead finding that *Boggs v. Peake* was the appropriate case.

In *Boggs v. Peake*, Mr. Clinton Boggs, a veteran of the United States Army, sought to reopen a previously-denied claim for service connection for hearing loss. Mr. Boggs's claim for service connection for conductive hearing loss (hearing loss associated with damage to the middle and external ear often caused by ear infections or obstructions) in 1955. In 2002, Mr. Boggs filed a new claim for sensorineural hearing loss (hearing loss associated with nerve damage to the inner ear). The Board ruled that Mr. Boggs had not presented new and material evidence to reopen a previously denied claim for hearing loss. The Veterans Court affirmed the Board's determination, reasoning that the symptoms of, and therefore claims for, both conductive and sensorineural hearing loss were identical.

The Federal Circuit, however, reversed the Veterans Court and offered three reasons why "claims based on separate and distinctly diagnosed diseases or injuries must be considered separate and distinct claims." First, the Federal Circuit interpreted the legislative history of the federal statutes, upon which claims for service connection are based, to require that "claims based upon distinctly diagnosed diseases or injuries should be considered distinct claims[.]" Second, the Federal Circuit concluded that basing claims on "distinct medical diagnoses [was] more accurate and reliable than . . . subjective descriptions of . . . symptoms[.]" Third, the Federal Circuit found that this interpretation interacted harmoniously with the rule against pyramiding. Under the rule against pyramiding, "[t]he evaluation of the same disability under various diagnoses [(*i.e.* pyramiding)] is to be avoided." The Federal Circuit noted that, "since different diagnosed diseases . . . can have different causes," a claimant "should not be precluded from showing that one diagnosed disease . . . is service connected merely because a different diagnosed disease . . . was not."

This, of course, gives rise to a fairly obvious question—namely, if the Federal Circuit instructed the Veterans Court in 2008 that multiple diagnoses resulted in multiple separate claims, then how is it that the Veterans Court rules that multiple diagnoses are within the scope of a single claim one year later?

The *Clemons* Court took pains to distinguish initial claims for service connection from claims to reopen previously-denied claims for service connection, holding that "*Boggs* did not state a general rule that each new diagnosis presented prior to a final agency decision pertains to an entirely separate claim[,]" because such an interpretation would be prejudicial to both veterans and VA. Specifically, the *Clemons* Court found that such a policy would force veterans "to continually file new claims . . . for diagnoses made later in the [claims] process[,]" and VA "would have to process additional claims . . . lengthening and delaying an already arduous process." The second observation should be held in particularly sharp relief, given that delays in adjudicating claims for service connection are a perennial concern for veterans, veterans service organizations, and the public at large. Finally, the *Clemons* Court noted that "multiple diagnoses may represent subjective differences of opinions of [medical experts] rather than multiple conditions[.]"

Turning back to Mr. Murphy's case, the Veterans Court, taking *Clemons* and *Boggs* into consideration, held it was adjudicating "a reopened claim, unlike the initial claim at issue in *Clemons*[,] . . . [and that] based on the *Clemons* Court's own reasoning *Boggs v. Peake* applie[d.]" The Veterans Court went on to note that in addition to the July 2014 rating decision

on appeal, the record contained "five other final decisions . . . [that] handled the PTSD and schizophrenia claims separately[.]"

The Veterans Court, alternatively, reasoned that, even assuming *arguendo* that *Clemons* did control the outcome of Mr. Murphy's case, a schizophrenia claim still was not within the scope of Mr. Murphy's PTSD claim. The Veterans Court held that, in his written statements, Mr. Murphy "demonstrated a convincing understanding of the schizophrenia and PTSD claims as separate claims and independent bases for service connection." The Veterans Court also noted that Mr. Murphy "wouldn't be making the arguments he does now if VA granted him service connection for both PTSD and schizophrenia." If the Veterans Court granted Mr. Murphy his requested relief, "he'd foreclose this possibility of two separate grants."

Mr. Murphy appealed to the Federal Circuit. The Federal Circuit disagreed with the Veterans Court's conclusion "that Mr. Murphy's 'reliance on *Clemons* is misplaced[.]'" The Federal Circuit also disagreed with the Veterans Court's conclusion that "'*Clemons* draws clear distinctions between determining the scope of claims in the context of initial claims versus that of reopened claims.'" The Federal Circuit observed that *Clemons* is merely a specific example of the duty to interpret a *pro se* veteran's claim for VA benefits charitably, and that "*Clemons* provides further gloss on what should inform VA's review . . . a veteran's reasonable expectations." The Federal Circuit also noted that "the Veterans Court previously applied [the] same understanding" in a previous case disposed of just over a decade ago.

The Federal Circuit also rejected an argument, offered by VA, that applying *Clemons* to reopened claims, rather than cabining it to initial claims, would disturb the finality of previous decisions; holding that "if VA construes a request to reopen liberally . . . and determines that it refers to two distinct diseases[,]" then "VA's only duty is to consider whether the claimant has presented new and material evidence[.]"

As previously noted, changes in veterans law have changed to procedural framework for challenging previously denied claims. Under the new procedural framework promulgated pursuant to the Appeals Modernization Act, a claimant can *readjudicate* a previously denied claim (as opposed to reopen) based on new and *relevant* evidence (as opposed to new and material evidence). In light of the fact that the Federal Circuit rooted its reasoning in the general duty to interpret *pro se* pleadings liberally and generously (rather than the legislative history idiosyncratic to reopening claims based on new and material evidence) moreover, there is, at least at this current juncture, no reason to believe that the Federal Circuit's reasoning should not apply to the recently adopted new and relevant standard as well. Thus, under this new standard going forward, VA's only duty would ostensibly be to consider whether the claimant has presented new and relevant evidence.

Although the Federal Circuit disagreed with the Veterans Court on which case law was controlling, the Federal Circuit ultimately affirmed the Veterans Court's decision. Specifically, the Federal Circuit was satisfied with the Veterans Court's alternative holding that the Veterans Court "was unconvinced 'that [Mr. Murphy] had reasonable expectations of reopening both the schizophrenia and PTSD claims[.]" In particular, the Federal Circuit noted the Veterans Court's reliance on the five previous final agency decisions treating PTSD and schizophrenia as separate claims. "In light of this history, the Veterans Court explained that Mr. Murphy demonstrated an understanding that the conditions would be addressed separately[,]" and the Federal Circuit ultimately held that "the Veterans Court applied the proper legal standard in its alternate holding based on *Clemons,* we do not disturb this conclusion."

The Federal Circuit's discussion does illuminate a previously *seemingly* irreconcilable conflict between *Clemons* and *Boggs*. Nevertheless, there are at least two obvious issues left unresolved by this particular framework.

The first comes from the fine print of the decision itself. Lest you think the fact that the Federal Circuit affirmed a Veterans Court decision that applied the facts of the case to the correct legal

standard, think again after reading the footnotes. Namely, the Federal Circuit held "only that the Veterans Court applied the proper legal standard, *i.e.*, *Clemons* in reaching its decision in its alternate holding[,]" but "whether the *Clemons* inquiry is one of fact, law, or a question of fact and law has not been briefed by the parties and is not before the [C]ourt." True, the Federal Circuit's appellate jurisdiction is – with few exceptions – limited to disposing of questions of law, deferring to the Veterans Court. By refusing to take a position one way or another on whether this is a factual inquiry or a legal one however, the Federal Circuit is leaving open the possibility of deferring to the Veterans Court on further such inquiries by determining that they are factual inquiries; as well as the possibility of further intervention by determining that they are legal inquiries. This would also be further complicated in that – although the Veterans Court is empowered to "reverse . . . [a] finding [of fact that] is clearly erroneous" – a finding of fact made by the Board shall "in no event . . . be subject to trial *de novo* by the [Veterans] Court." Further suggesting that the Board may *de facto* have a more or less free hand entirely.

The next comes from the unique interaction between claims for service connection for PTSD and claims for service connection for other mental disorders. Claims for service connection for PTSD have a particular set of criteria unique from other claims for service connection: a diagnosis of PTSD; a corroborated in-service stressor; and a medical link between the two. Mental disorders other than PTSD, however, have the same criteria for any other claim for service connection: a diagnosis, an in-service incurrence; and a medical nexus between an in-service incurrence and a medical nexus. Additionally, service connection may also be assigned on a presumptive basis for mental disorders that manifest as psychosis within one year of separation from service or manifest continuous symptomology since separation from service. One key difference between the two is that PTSD typically requires a high level of corroboration of the claimed in-service stressor, although, in certain circumstances, such as in cases involving fear of hostile military/terrorist activity or military sexual trauma, this requirement can be substantially reduced. For claims for other medical conditions including for other mental disorders, however, an in-service incurrence *may* be established by the testimony of a veteran alone.

Given these two distinct legal standards, it is easy to see why it would be advantageous for a practitioner to separate claims for PTSD and claims for other mental disorders, and why it would be equally advantageous to group multiple mental disorders other than PTSD (schizophrenia and depression, for example) into a single claim (e.g. a mental disorder other than PTSD to include schizophrenia and depression). This convention is common at the Board. This convention, however, is by no means uniform throughout the entire Board.

This non-uniform, *de facto* practice of separating PTSD claims from claims for other mental disorders, regardless of whether or not the veteran's symptoms overlap, while keeping non-PTSD mental disorder claims united, even to the extent that a veteran is reporting distinct symptoms associated with distinct conditions, arguably conflicts with the Federal Circuit's reasoning, because it separates claims based on a review of substantive law rather than a charitable review of the *pro se* pleadings of the record on appeal. On the other hand, it may often be impossible to distinguish between mental disorders in the way the Federal Circuit envisioned, because many mental disorders have duplicative symptoms making such a distinction difficult. Even where possible, this process is often time consuming and thus prone to delay. This seems to fly in the face of the stated purpose of the *Clemons* analysis, which is to avoid "lengthening and delaying an already arduous process." Absent a clear instruction to the Board from the Federal Circuit or the Veterans Court, this practice will undoubtedly continue, and, based on the Federal Circuit's refusal to declare the issue a legal matter or a factual one, it is unclear which court, if either, has jurisdiction, or how that court will proceed.

There is also perhaps a more basic issue that arises out of the Federal Circuit's instruction that the scope of a claim for service connection for a mental disorder should be based on what a veteran could have reasonably expected. Namely, individuals with

mental disorders due to no fault of their own may not be able to think or act reasonably. How can it thereby be fair to limit the scope of a veteran's claim in such a matter to deny a claim for service connection for a mental disorder due to a veteran's seemingly unreasonable expectations? Seemingly unreasonable expectations that may themselves be symptoms of the very mental disorder that a veteran is seeking service connection for. Such a scheme, at least as first glance, appears to contradict the veterans canon as stated by the Supreme Court of the United States. "We have long applied the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011). Additionally, this framework seems eerily similar to a national controversy that occurred when Vietnam veterans were barred from receiving VA benefits for PTSD sustained during the Vietnam War, because the very symptoms of PTSD that they were seeking compensation for led to behavioral problems during their service in Vietnam, which in turn led to undesirable discharges from the armed forces barring the receipt of VA benefits. Rebecca Izzo, *In Need of Correction: How the Army Board for Correction of Military Records Is Failing Veterans with PTSD*, 123 Yale L.J. 1587 (March 2014).

The lesson to be learned from this controversy is that care should be taken to avoid a catch-22 of symptoms of a mental disorder being used to create a procedural hurdle that prevents veterans from receiving government benefits compensating them for that very same mental disorder. Depending on the specific mental disorder and the severity thereof, a veteran's ability to communicate expectations – that court's feel are reasonable – *may* be impaired. If a court's reasoning is rooted in a claimant's reasonable expectations, this impairment *may* create a procedural hurdle that prevents recovery, thus resulting in the same kind of catch-22 that history should have taught us to avoid by now. To be fair, the record in the case at bar does not contain any findings of fact that Mr. Murphy's failure to appeal his schizophrenia claim was due symptoms caused by his claimed schizophrenia, and it may be possible to reconcile this concern with the framework outlined by the Federal Circuit in this case. Regardless, this is another question that, at least for the time being, remains unanswered.

In *Murphy v. Wilkie*, the Federal Circuit clarified that "*Clemons* . . . applied to a *pro se* veteran's request to reopen" previously denied claims and that "seek[ing] to limit . . . *Clemons* by suggesting that it cannot apply to request to reopen in view of *Boggs* . . . is improper." The Federal Circuit further illuminated that the key to understanding both of these cases was rooted in the duty to interpret the submissions of a *pro se* litigant generously. Despite this clarification however, there is still some questions on how this framework will be implemented in the future, and whether any such guidance will come from the Federal Circuit or the Veterans Court.

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Nehmer in Résumé: Guidance from Four Instructive Cases

by Benton Jay Komins

On November 5, 2020, the United States District Court for the Northern District of California (Northern District) issued an Order on a Motion for Enforcement of Final Judgment. The Order enforced a certified class action that had been resolved by a Stipulation and Order (Consent Decree) of almost 30 years earlier. Thus, from 1987 through 2020, *Nehmer* has been the subject of controversy and litigation.

Through the lens of four cases, I provide an introduction to the substantive basis of *Nehmer*; the certification of the bifurcated plaintiff class in this constellation of cases; and the evolving issues in controversy.

Nehmer v. United States Veterans Admin., 118 F.R.D. (December 1987)

Beverly Nehmer, 10 other named parties, and the Vietnam Veterans of America (representative

plaintiffs) filed suit against the VA and related entities in the U.S. District Court for the Northern District of California. The representative plaintiffs alleged that they, or their deceased spouses, had developed diseases due to exposure to certain herbicide agents containing dioxin during service in the Republic of Vietnam. The representative plaintiffs had all filed claims, based upon dioxin exposure and their claims were summarily denied. In each case, the basis of denial was straightforward: the applicable VA regulation provided that chloracne was the only disease entity recognized as having a causal link to dioxin exposure.

In order to understand the basis of the representative plaintiffs' cause of action, we need to step backwards. Under 38 U.S.C. § 354, the Veterans Dioxin and Radiation Compensation Standards Act of 1984 (Dioxin Act), VA was authorized to determine which disease entities were caused by exposure to dioxin. Upon VA determinations—involving input from the Veterans Advisory Committee on Environmental Hazards (Committee) and the Scientific Council of the Committee (Council)—a regulation was adopted concerning which dioxin-caused disease entities would be service-connected.

Segueing to the case's cause of action, the representative plaintiffs averred that in promulgating 38 C.F.R. § 3.311(a), VA had not adequately reviewed germane scientific studies, contradicted the weight of scientific evidence, and therefore "arbitrarily and capriciously" delimited the scope of 38 C.F.R. § 3.311(a) to chloracne.

As such, the plaintiff representatives sought to certify a class of all current or former members (or their next of kin) into two categories—1) those who are eligible to apply, who will become eligible to apply, or who have a pending claim before VA for service-connected disabilities/diseases (or deaths) arising from exposure during active-duty service to herbicides containing dioxin, and 2) those who had had a claim denied by VA for service-connected disabilities/diseases (or deaths) arising from exposure during active-duty service to herbicides containing dioxin.

Under Federal Rule of Civil Procedure (Fed. R. Civ. P.) 23(A), a class must satisfy four requirements for certification, namely, numerosity, commonality; typicality; and adequacy. Stated more directly, the class must be so numerous that joinder of all its members would be impracticable; the class must share common issues of facts and law; the claims of representative parties must be typical of the claims of the class; and representative parties must adequately and fairly protect the interests of the class.

But there is more to the certification requirement as laid out in Fed. R. Civ. P. 23(b). As the Court noted, the representative plaintiffs sought certification under Fed. R. Civ. P. 23(b)(2), which mandates that plaintiffs establish that the party opposing the proposed class "has acted or refused to act" on grounds applicable to the proposed class whereby final injunctive or declarative relief would be appropriate to the class as a totality.

The Northern District held that numerosity was easily met as the representative plaintiffs sought to certify a class consisting of all Vietnam veterans (or their successors) who had been exposed to herbicides containing dioxin and have filed—or will file—claims for service connection, or those (or their successors) who had filed already and had been denied. As to commonality, the Northern District determined that the class members shared a common threat of future harm.

The Northern District held that the representative plaintiffs' claims were typical of those of the class. Even though certain representative plaintiffs were denied VA benefits prior to the Dioxin Act, they shared the threat of future harm with the rest of the class.

Adequacy was evinced in several ways: representative plaintiffs engaged experienced counsel; the record disclosed no suggestion of collusion; and the representative plaintiffs' interests coincided with the interests of the class in its potential totality.
Meeting the requirements of Fed. R. Civ. P. 23(b)(2) proved more challenging. The Northern District noted that even though the "necessity requirement

doctrine" remained somewhat unclear in the Ninth Circuit, there were strong policy reasons against "rigidly" imposing a necessity requirement. Litigating complex claims through class actions allows for resolution to the disputes of numerous similarly situated individual parties. Moreover, class actions require court approval for settlements, which ensures that the interests of wide groups are protected and advanced. They also enable "unidentified" class members to enforce court orders with contempt proceedings, rather than relying upon the res judicata in a subsequent lawsuit. (In dicta, the Northern District observed that especially for parties with limited resources and limited access to courts, the costs of initiating separate actions can be inhibitory.) Given the uncertainty of VA regulations and awards of benefits, the Northern District sided with caution and held that there was arguably a necessity or "need" for class certification herein.

Whither defendant VA's position on class certification? VA argued that the representative plaintiffs had not exhausted their administrative remedies. In effect, not one of the representative plaintiffs presented the claims raised in the instant case to VA in any individual claim or in a petition for rulemaking under the Administrative Procedure Act. The Northern District did not concur with VA because there was no current statute which mandated that a plaintiff exhaust the remedies of VA before initiating litigation. Rather, the issue of exhaustion falls within the discretion of courts.

While the Northern District found that it was VA's job to promulgate and disseminate rules governing dioxin adjudications, it is the Northern District's job to review the standard and procedures which VA adopts. As such, the Northern District's involvement in the instant case (and in the certification process itself) did not "invade upon" VA's expertise as an administrative agency.

VA also argued that the exhaustion doctrine helps to ensure the agencies create and maintain a record which proves adequate for judicial review. The Northern District found this argument unconvincing in the instant matter as VA had already promulgated 38 C.F.R. § 3.311(a). Likewise, VA's contention that the certification will encourage future litigants to bypass VA's own procedures did not influence the Northern District's reasoning, especially considering the fact that the ten named representative plaintiffs had all submitted service connection claims to VA and all of the representative plaintiffs' claims had already been denied.

As to VA's contention that the agency would be hindered in its abilities to correct its own errors, the Northern District found that VA had already adopted and codified the Dioxin Act in 38 C.F.R. § 3.311(a). Therefore, any errors made in delimiting the Dioxin Act to chloracne had already occurred.

The Northern District also concluded that even though the class's claim and individual claims overlapped to the extent that the class and individual claimants argued that their diseases were caused by dioxin exposure, there were intrinsic differences. The class attack on VA's procedural irregularities was quite distinct from any individual claimant's attack on VA's denial of granting benefits. There was no ambiguity implicated here, as the class members were readily identifiable through the very filing of their individual claims.

VA insisted that it would be "impossible" to notify all class members about the instant litigation. The Northern District did not agree that ordering mailings to all veterans on VA's Agent Orange Registry; broadcasting through radio and television; publishing notices in major newspapers; and establishing a toll-free telephone information line were impossible under the circumstances. Furthermore, the Northern District added that VA had not provided reasons why it cannot comply with these modes of or similar means of notice. The Northern District thus rejected VA's objections to class certification and the class was duly certified.

However, the issue was far from closed as VA's "acceptance" of dioxin-caused disease entities remained rife with uncertainty.

Nehmer v. United States Veterans Admin., 712 F. Supp. 1404 (May 1989)

This case came before the Northern District on cross motions for summary judgment. The Northern District granted summary judgment in part to the class and summary judgment in part to VA.

In the instant action, the plaintiff class argued that the final VA regulation was invalid because the "Committee" process violated provisions of the Dioxin Act. The class challenged compliance with the Act on the grounds that: 1) the process of the Committee did not adequately review pertinent scientific studies and erred in failing to contemplate animal-model studies, which suggest a link between dioxin exposure and more diseases than chloracne; 2) VA's five-factor guidelines for reviewing scientific evidence inappropriately precluded consideration of animal studies; 3) VA erred in requiring that the scientific evidence show a "cause and effect" relationship between the claimed disease entities and Agent Orange in lieu of the standard of a "statistical association" between such; 4) VA erred in failing to apply the benefit of doubt doctrine when challenged with discordant evidence of approximately the same probative value; and 5) the Committee failed to produce accurate minutes to the Administrator which vitiated the Administrator's review of the Committee's recommendations.

Upon consideration of the class's contentions, the Northern District held that all grounds of invalidation were unsustainable, with the exception of ground 3 and 4. The Northern District agreed with the class that the Administrator's adoption of a cause-and-effect relationship and the Administrator's failure to apply the benefit of doubt doctrine to veterans was violative of the Dioxin Act. Such errors were not harmless because they might have accounted for the conclusions reached in promulgating VA's dioxin regulation. Therefore, the Northern District invalidated those portions of the regulation (38 C.F.R. § 3.311(d)) that denied service connection for all other disease entities.

Upon assessment of the propriety of subject-matter jurisdiction, the Northern District did consider VA's arguments carefully.

VA argued that the Committee's selection of both the number of scientific studies reviewed and the particular scientific studies selected warrant great deference. The Northern District concurred. Judged through the minimum standard of rational basis, the Northern District could not find that the Committee's selection of particular scientific studies to review was arbitrary and capricious. Further, the Northern District could not agree that Congress's intent in the Dioxin Act required the Committee to undertake "the Herculean task" of expecting all members of the Committee to read and evaluate all of the studies on dioxin—prior to or even after the promulgation of the regulation. Moreover, the Northern District recognized that the Committee itself brought extensive knowledge to review and recommendation tasks *ab initio*. Likewise, the Northern District upheld the Committee's exclusion of animal studies in the calculus of its review and recommendations.

To ascertain the propriety of the Committee's adoption of a cause-and-effect relationship, the Northern District engaged in a lengthy disquisition of the legislative history of the Dioxin Act. Here, the Northern District highlighted the chairman of the legislative committee's remarks that "service connection has always been the product of temporal rather than causal relationship. [VA should] not introduce a causal relationship into the law."

From these remarks and a host of other remarks in the legislative history, the Northern District found that Congress intended service connection to be granted on the basis of "an increased risk of incidence" or a "significant correlation" between dioxin exposure and various disease entities. Hence, the Northern District held that VA erred by requiring proof of a causal relationship between dioxin and disease entities.

Again, though the selfsame legislative history, the Northern District wrote that it is very unlikely that Congress would legislate the Dioxin Act in such a way that veterans would actually be made worse

through the VA Administrator's rule-making process. Thus, by applying a cause-and-effect model, VA—through adoption of the work of the Committee—failed to apply the benefit of doubt doctrine to the dioxin rulemaking process.

As already noted, the Northern District voided 38 C.F.R. § 3.311(d). Additionally, the Northern District vacated all benefit denials made under the voided regulation and remanded the matters to the Committee and VA.

In 1991, the class and VA entered into a Northern District-approved Stipulation and Order—usually referred to as the 1991 Consent Decree. In pertinent part, the five paragraphs of the 1991 Consent Decree mandate that whenever VA recognizes that emerging scientific evidence discloses that a positive association exists between Agent Orange exposure and a new disease entity, VA must identify all claims based on the newly recognized disease that were previously denied and then pay disability and death benefits to these claimants, retroactive to the claim's initial date.

Nehmer v. United States Dep't of Veterans Affairs, 494 F. 3d 846 (9th Circuit 2007)

As made clear in its citation, this is a Federal Court of Appeals case. Thus, to set the stage, a detour into the underlying District Court clarification and enforcement order under appeal is necessary.

In 2003, VA added a regulation to include lymphocytic leukemia as a disease associated with Agent Orange. Even though lymphocytic leukemia now fell within the ambit of the 1991 Consent Decree, VA failed to re-adjudicate the claims of veterans and appellants who had previously been denied service connection for the disease. And, as a consequence, this group of veterans and appellants were not paid disability or death benefits retroactive to the dates of their respective claims.

VA argued that the 1991 Consent Decree did not apply to disease entities that VA determines to be service-connected after September 20, 2002—the original sunset date of the Agent Orange Act of 1991, 38 U.S.C. § 1116. (More expansive than the earlier Dioxin Act, the Agent Orange Act requires that the Secretary of VA conduct new rulemaking proceedings to determine which diseases are sufficiently associated with Agent Orange exposure to grant to veterans with approved diseases the presumption of service connection.)
In 2004, the class filed a motion with the Northern District, which the Northern District construed as a motion for clarification and enforcement of the 1991 Consent Decree. Rejecting VA's reasoning altogether, the Northern District granted the class's motion in 2005.

So, the stage was set. VA appealed the 2005 Northern District Order to the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit).

The Ninth Circuit noted that the question before it is whether the Northern District reasonably interpreted the 1991 Consent Decree in its 2005 clarification and enforcement order. The Ninth Circuit did not mince words when it initially wrote that the government's treatment of veterans exposed to Agent Orange is a disturbing story and VA "has contributed substantially to our sense of national shame."

Upon an exacting parsing of prior *Nehmer* jurisprudence; dioxin and Agent Orange legislation; and VA's regulation concerning lymphocytic leukemia as a disease associated with Agent Orange, the Ninth Circuit agreed that the class's 2004 motion did not directly challenge VA regulations. Rather, as the lower court noted, addressing the motion for clarification only sought to determine whether the plain language in the 1991 Consent Decree applies to veterans who are suffering from lymphocytic leukemia.

VA argued that the 2003 regulation concerning lymphocytic leukemia as a disease associated with Agent Orange did not intend to mandate re-adjudication or retroactive benefit payments for claims that VA determines to be associated with Agent Orange after the original sunset date of the Agent Orange Act (September 30, 2002). Stated differently, VA argued that the 2003 regulation was beyond the "express scope" of the 1991 Consent Decree.

The Ninth Circuit did not concur with such reasoning. The "express scope" of the lower court's approved of the 1991 Consent Decree is not subject to VA's interpretation. VA cannot usurp the power of the lower court to construe the provisions of an order it has issued, *viz*., the court-approved 1991 Consent Degree. And, VA cannot divest the lower court of its authority and transfer it to the Federal Circuit, simply by issuing a regulation interpreting the 1991 Consent Decree or declining to follow it. It is settled law that any district court has the "inherent authority" to enforce that parties comply *with any consent decree that the court has entered in an order*; to hold parties in contempt for violating the terms of such a consent decree; and to modify such a consent decree.

The clear language of the 1991 Consent Decree, within its four corners, unambiguously stated that VA is obligated by law to pay disability benefits to veterans who have lymphocytic leukemia due to the veteran's presumed exposure to Agent Orange. What remains unclear and difficult to understand, according to the Ninth Circuit, is why VA, having entered into the 1991 Consent Decree, resists its implementation.

Nehmer v. United States Dep't of Veterans Affairs*, 2020 U.S.Dist. LEXIS 207458* (N.D. Cal. November 2020)

Last year, the 1991 Consent Decree again became the subject of controversy. Noting that since agreeing to the 1991 Consent Decree, the Northern District pointed out that VA has issued ten rules concerning dozens of disease entities to be presumed service-connected due to Agent Orange exposure. In the past, the class has relied upon judicial enforcement of the provisions of the 1991 Consent Decree and the class did so again.

In June 2019, Congress enacted the Blue Water Navy Vietnam Veterans Act, 38 U.S.C. § 1116A(a) ("Blue Water Act"). The Blue Water Act, with great specificity, provides that all disease entities which have heretofore been covered by the Agent Orange Act, shall be extended to veterans' blue water service in the territorial waters of the (former) Republic of Vietnam.

VA argued that this Act did not fully extend to those class members who are beneficiaries under the 2011 Consent decree, such as adult grown children of Blue Water veterans. Thus, as such, the Act did not prescribe automatic re-adjudications of previously denied claims for service connection on a presumptive basis.

VA also argued that the class (or, more precisely, class counsel) was guilty of laches, in that the status of blue water Agent Orange-exposed Veteran was first raised in *Haas v. Peake*, 544 F. 3d 1306 (Fed Cir 2008), and the class only raised enforcement of the 1991 Consent Decree as to Blue Water veterans 12 years after *Haas*.

The Northern District, once again, did not concur with VA's arguments.

As to VA's contention of laches, the Northern District found that this was ultimately of no consequence. While the class might have challenged *Haas*, it would have been an attenuated process. By 2002, the Federal Circuit had exclusive jurisdiction to review VA rules and regulations. As such, the Northern District reasoned that it would have been quite improbable that the Ninth Circuit would feel obligated or bound to follow the holding in *Haas*. Thus, the argument of laches was unsustainable. and the class acted appropriately by bringing its motion after resolution of the issues raised in *Procopio v. Wilkie,* 913 F. 3d 1371 (Fed. Cir. 2019) had been resolved and the Blue Water Act passed.

Turning to the legislative history of the Blue Water Act itself, the Northern District cited language in H.R. Rep, 116-58 at 284 (2019) to the effect that "[n]othing in the Blue [Water] Act intends to limit the rights of *Nehmer* class members who seek relief for benefits under the *Nehmer* [1991] Consent Decree." *Id.* Thus, the fact that there are some "overlapping and coextensive" benefits for some veterans did not undermine the benefits enunciated in the 1991 Consent Decree for other veterans or appellants.

Therefore, the Northern District granted the class's motion for judicial enforcement. The Northern

District also ordered VA to provide "replacement decisions" for denials inconsistent with the 1991 Consent Decree *vis-à-vis* the provisions of the Blue Water Act.

Conclusion

Through the lens of 1987, 1989, 2007, and 2020 *Nehmer* decisions, I have sought to convey the ways in which this constellation of cases has evolved from the point of class certification (and its associated procedural hurdles) to the continued relevance of the 1991 Consent Degree.

These four instructive decisions suggest that any and all subsequent VA regulations concerning disease entitles "associated" with dioxin/Agent Orange exposure will, somewhat invariably, "trigger" the 1991 Consent Decree and create new groups of qualifying veterans and appellants. Despite many efforts to circumscribe the scope off the 1991 Consent Degree, VA has not prevailed in its challenges or defenses. Courts have intransigently maintained that the provisions of the 2011 Consent Decree are neither proscribed by overreach, sunset provisions, nor the affirmative defense of laches.

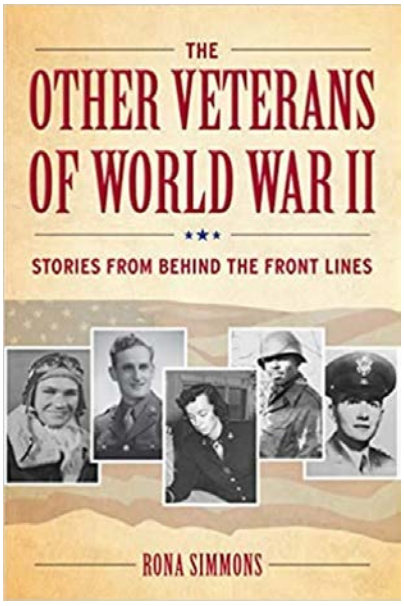
Benton Jay Komins is Counsel at the Board of Veterans' Appeals.

Book Review: *The Other Veterans of World War II*, Rona Simmons (The Kent State University Press, 2020), 240 p.p.

by Aaron Moshiashwili

Maybe I was being naïve when I saw the title of this book and I thought, "Wow, fascinating – an exploration of the lives of noncombat World War II service members, presumably focusing on the difference between their postwar experiences and the postwar experiences of combat veterans." Sure, I would love that book, and I bet some of the people who read this would, as well. But the obvious truth is (whether or not I was smart enough to realize it) that I'm part of a small minority. Most of the people who would be interested in a book like this want, and expect, a book of wartime stories.

To those readers, *The Other Veterans of World War II* delivers. It is a book about the wartime experiences of servicemen and servicewomen assigned to noncombat roles. It is light, enjoyable, and charming – on every page, Simmons paints a lovely picture of an earlier America, one which is very different from the one we live in, and tells the these people's stories with interest and heart. But the stories I was hoping to read – the stories of the veteran experience of service members assigned to noncombat roles – is given short shrift. With about 220 pages of stories and 19 veterans, that averages to a little more than 12 pages per veteran. For most of them, the last page is the only one that discusses their post-service experiences, and a single page on that topic isn't going to go into much detail. Many of them are similar tales about settling down to a happy postwar American life and how their grandchildren sparked their interest in telling their stories.



However, in a larger sense I'd like to think it's not narrow vision on my part but on the part of society as a whole. This book is a reflection of a fundamental problem, our inability to separate the idea of a "veteran" – a person with a unique set of experience and challenges – from a "servicemember," a person who has totally different experiences and challenges. A veteran is more than merely "someone who used to be a servicemember." Most people don't want to hear stories about problems with reintegration, about PTSD, about

skills that don't transition to civilian life, about dealing with long-term effects of life-changing injuries received in service.

I obviously have my own bias as well. The list I just made is universally negative, which reflects my own experience as someone who works with veterans benefits cases. I'm ignoring the many people I've known in my life who have come out of their time in service with leadership or technical skills, with experiences that are a constant source of pride to them.

But good or bad, people generally don't want to hear veterans' stories of their post-service experience – the veteran experience. People want to hear about a daring pilot landing a plane during a blackout with no instruments. Simmons provides that story, and other great ones. As a book of wartime stories, the stories of service members' noncombat roles, this book is a wonderful success. Simmons says in the epilogue that she decided to tell these stories because they're often ignored in favor of the stories of those who served in combat roles. These are important stories to hear about our shared history, and stories that deserve to be heard.

But I'll still hold out hope that someday, our society will see veterans not as sources to mine for war stories, but as people whose lives after service are just as important to us as their experiences during.

To be honest, it feels like a character flaw of some sort that Aaron Moshiashwili can read about a pilot saving the lives of a dozen people by landing a plane in impossible conditions, and think "I wonder how that experience impacted his life ***after*** *the war?"*

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Special thanks to Jon Hager for all of his help with the Veterans Law Journal.