VETERANS LAW JOURNAL

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

Message from the Clerk

Greetings from the Clerk,

More than 20 years ago, while I was serving in the Air Force JAG Corps, a "Captain Burnat" called me to discuss a military justice issue. We immediately got along; it helped that we agreed on how to resolve the issue and that we would present a united front to command.

After that, we crossed paths many times while we served in the Air Force JAG Corps, and it became clear to me that intelligent, deliberate decision-making is a hallmark of Mike Burnat's leadership. It was complete serendipity that we both ended up at the Court. Now, the Court gets the benefit of his skills as he tackles everyday issues to ensure smooth operations and establishes new procedures. Recently, he had the opportunity to oversee the processing of the Court's first bifurcation case, *Jackson* (*Gary Dean*) *v. McDonough*, U.S. Vet. App. No. 22-3042.

In *Jackson*, the Court issued a precedential panel decision and a single-judge decision on the same docket, both on the same day. The Court was able to do so because the bifurcated issue did not substantially intersect or overlap the remaining single-judge matters, and all parties were represented.

I now turn to Mike, so he can explain from the Public Office (PO) perspective how bifurcation worked, as well as provide guidance on noncompliant pleadings:

Greetings from the PO,

Recently, the Board of Judges elected to bifurcate certain cases. In panel proceedings, at any point before the panel issues a decision, the panel may decide to bifurcate the case if the decision to bifurcate is unanimous. The panel does not issue a bifurcation order.

In the bifurcated case, the panel issues a precedential panel decision, *as well as* a single-judge decision that addresses the remaining nonprecedential matters.

If a party files a Rule 35 motion or appeals to the Federal Circuit, any part of the panel and single-judge decision not challenged remains at the Court, pending resolution of the Rule 35 motion or appeal. And once those matters are resolved, or if no Rule 35 motion or appeal is filed, the Court enters a single judgment, and then a mandate.

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In bifurcated cases, the PO will issue the panel decision first, and then the single-judge decision will be issued on the same day. Any post-decisional deadlines will run at the same time.

In *Jackson*, the Court's first bifurcated case, the process worked smoothly because in advance of bifurcation, chambers and the PO worked closely to coordinate efforts, which gave me the opportunity to further discuss the process with my team. From a PO standpoint, *Jackson* demonstrated that processing a bifurcated case is no different than a non-bifurcated case, with the exception that the PO will issue two decisions on the same docket in bifurcated cases. So, as it turns out, processing a bifurcated case was not complicated from the PO's standpoint and I'm happy to report that *Jackson* went smoothly because of solid communication between chambers and the PO.

I am sure we will continue to see more such cases and my team of professionals will be ready to assist. I am also sure processing bifurcated cases will continue to go smoothly.

Noncompliant Pleadings

I would like to take some time to discuss noncompliant pleadings.

Over the course of the year, we have seen many thousands of pleadings, and most are fully compliant. Those pleadings that present concerns frequently involve Rule 26 motions for extension of time that contain calculation errors, such as errors in calculating extended or revised deadlines. Most errors can be avoided by using a date calculator, by double checking the docket to determine when the last operative pleading was filed, and by determining whether the Court is closed on the day the pleading would otherwise be due. Movants should also remember to calculate the total number of days previously granted to the movant and the other party or parties in the merits or attorney-fee-application phase (and not just how many days the movant was previously granted for the pleading that the movant is filing). See Rule of Practice and Procedure 26(b)(1)(C) and (D) (Computation and Extension of Time). The Court has a template for a motion for extension of time on the Court's webpage, which Rule 26 movants may find useful. See US Court of Appeals for Veterans Claims - Court Forms and Fees (cavc.gov).

The PO also sees a few other common mistakes. To avoid these mistakes, appellant's counsel should remember that the appellant's brief is due no later than 60 days after the notice to file the brief, or 30 days after the Rule 33 staff conference is completed, *whichever is later* (Rule 31 (Filing and Service of Briefs)). The Secretary's counsel should remember that an EAJA response is due no later than 30 days after the date the appellant files the EAJA application (Rule 39 (Attorney Fees and Expenses)). The PO also sees represented cases in which counsel does not try to obtain the other side's position, which is a violation of Rule 27(a)(5) (Motions).

If a pleading is not compliant, several things will happen. First, the docket clerk will mark the filing as "received" on the docket. Second, the docket clerk will note on the docket the rule and reason with which the document does not comply. Third, the docket clerk will create a notice in CM-ECF to the parties that the submitted document is noncompliant. After that, the PO gives counsel a minimum of 4 hours to correct the document. If the document is not corrected, the PO issues a formal notice of nonconforming, and stays the case for 7 days. However, in my experience, the vast majority of counsel quickly correct their noncompliant pleadings, avoiding the need for a formal notice.

If anyone has a question about a pleading, the best course of action is to contact the docket clerk. The last number in the docket number the Court assigns to a case corresponds to the docket clerk assigned to process that case. If the number ends in "0" (for example, 24-1200), call 202-501-5970, ext. 1000, to reach that docket clerk. If your case ends in "1" (for example, 24-1201), call 202-501-5970, ext. 1001. And so forth.

The PO thanks all those who practice before the Court for their efforts in representing their clients and for taking steps to ensure compliant pleadings, which avoids delay and benefits case processing overall.

Message from the President

Dear Colleagues,

Spring has arrived here in Washington, D.C., with cherry blossoms, tulips and cardinals letting us know that warmer weather and longer days are on the way. It's hard for me to believe that my term as your bar association president is already halfway done. I am incredibly grateful for the Bar Association's Board of Governors and all of their hard work to support me and to make this organization so valuable to our members.

Since the last edition of the Veterans Law Journal, the Bar Association hosted a happy hour in January to welcome Tiffany Wagner, the new Clerk of the Court. We also hosted a panel in February—featuring James Ridgeway (Bermann & Moore), Ronen Morris (VA Office of General Counsel, CAVC Litigation Group), and Judge Joseph L. Toth—discussing how to bring finality to more decisions on appeal, with a reception afterward. We hope that you are able to attend these events, engage with your fellow veterans law practitioners, and pick up some useful information along the way.

Speaking of the February panel event, if you tried to tune in online, you saw that we were having tech issues and were unable to provide good quality live-streaming of the event. We were also unable to record the event to post on the Bar Association's website. We're lucky that this was the first time we've had such problems since starting to provide hybrid programs to our members. But in order to avoid any future issues, we're looking into solutions to ensure that you can access our fantastic programs even if you can't attend in person.

Finally, I want to let you know about events and opportunities coming up in the next several months. On April 24th, members of VA leadership will provide their annual update on how things are going at the Agency. On May 4th, the Bar Association will be welcoming an Honor Flight at Reagan National Airport, giving our nation's heroes the welcome many of them never got when they came home from their time in service. And on June 30th, we will be cleaning the Korean War Memorial, which commemorates Korean War veterans who fought against North Korea's invasion of South Korea in 1950. Details on these events will be emailed out soon, so make sure that you have created an account on the Bar Association's website: cavcbarassociation.org.

Best Regards,

Ashley Varga
President, CAVC Bar Association

The Federal Circuit Affirms *Euzebio II*'s Constructive Possession Standard

by Lisa Marie Valdes

Reporting on *Conyers v. McDonough*, 91 F.4th 1167 (Fed. Cir. 2024).

Under the U.S. Court of Appeals for the Federal Circuit's ("Federal Circuit's") holding in this case, the correct standard to determine whether The Department of Veterans Affairs ("the VA") had constructive possession of evidence is whether the evidence is "relevant and reasonably connected to the veteran's claim." The court reaffirmed *Euzebio v. McDonough*, 989 F.3d 1305 (Fed. Cir. 2021) ("*Euzebio II*"), rejecting a requirement of a direct relationship between the evidence and the appellant's claim.

In 2013, Vincent Curtis Conyers ("Mr. Conyers") applied for employment benefits under the Veteran Readiness and Employment program. This program is designed to provide services to aid veterans through the integration process into the civilian workforce. After submitting various questionnaires and meeting with a VA counselor, Mr. Conyers' application was denied because his chosen vocational goal of self-employment was deemed to be not feasible. Mr. Conyers sought administrative

review and was again denied for lack of a reasonable vocational goal. He then appealed this decision to the Board of Veterans Appeals ("Board"), who then affirmed the denial because his vocational goal was not suitable for his circumstances.

After the Board's decision, Mr. Conyers appealed to the U.S. Court of Appeals for Veterans Claims ("CAVC"). During these proceedings, Mr. Conyers filed a motion to compel certain documents. On April 9, 2020, the CAVC denied his motion and held that certain documents were not part of the administrative record under the constructive possession doctrine because, as stated in *Euzebio v. Wilkie*, 31 Vet. App. 394 (2019) ("*Euzebio I*"), a direct relationship between a document and the appellant's claim must be proven. The CAVC reasoned that the veteran did not show how the documents he wanted to bring into the record were relevant to his issue or that he was prejudiced. Mr. Conyers then filed a motion to reconsider the order but was denied.

Following the CAVC's decision to not reconsider the motion to compel, the court decided *Euzebio II*. The court flatly rejected the CAVC's requirement of a "direct relationship" to satisfy the constructive possession doctrine. In *Euzebio II*, the court held that a showing of relevance and reasonableness is more appropriate because of the VA's statutory duty to assist veterans in developing evidence.

After the court's holding in *Euzebio II*, Mr. Conyers moved for reconsideration again, but the CAVC denied this motion because any argument regarding constructive possession can be addressed during the review of the merits. In August 2022, the CAVC affirmed the Board's rejection of his claim and stated that the issue of constructive possession had already been addressed by the April 9, 2020 Order. Notably, the referenced order was issued before the court's holding in *Euzebio II*. Mr. Conyers then moved for a panel decision, but the panel affirmed the previous single-judge decision because Mr. Conyers did not demonstrate a conflict with CAVC precedential decisions or that the order misunderstood a point of law that was prejudicial to him.

In this case, the Federal Circuit held that the CAVC failed to address the conflict between *Euzebio I* and *Euzebio II*. The Federal Circuit was not convinced that the error was harmless and without prejudice because the standard used in the April 9, 2020 Order was facially incorrect. The Federal Circuit reasoned that the language of the CAVC's orders did not indicate that the CAVC acknowledged there was a difference between the "direct relationship" and "relevant and reasonable" standards. Moreover, the April 9, 2020 Order was issued before *Euzebio II* was decided and the subsequent orders failed to make any mention of *Euzebio II*. The Federal Circuit further reasoned that the mere use of the word "relevant" was not enough to signify that the CAVC recognized the difference between the standards. The Federal Circuit refused to conflate the standards. The doctrine of constructive possession is supposed to function as a safeguard to ensure "all record documents reasonably expected to be part of the veteran's claim are included in the administrative record," thus satisfying the VA's duty to assist.

As the Federal Circuit did not have jurisdiction to review whether the error was harmless, the Federal Circuit remanded the case to the CAVC to decide whether Mr. Conyers established that the documents he wanted to bring into the record were relevant and reasonably connected to his claim.

Lisa Marie Valdes is a third-year law student at the University of Florida Levin College of Law.

Consideration of the Rule Against Freestanding Earlier Effective Date Claims under the Appeals Modernization Act

by Tyana N. Bond

Reporting on *Calhoun v. McDonough*, No. 21-6125 (Vet. App. Jan. 9, 2024)

In *Calhoun v. McDonough*, the U.S. Court of Appeals for Veterans Claims ("Court") addressed the finality rules relating to earlier effective date claims under the legacy system and the Appeals Modernization Act (AMA). The main issue was whether the Board

of Veteran's Appeals (Board) had statutory authority to decide a continuously pursued earlier effective date claim under the AMA. The Court also addressed the merits of the issue of entitlement to an earlier effective date for Total Disability based on Individual Unemployability (TDIU).

Mr. Calhoun filed a claim for entitlement to TDIU, which was granted by the agency of original jurisdiction (AOJ) in February 2021, with an effective date of January 8, 2020. Mr. Calhoun filed a Notice of Disagreement (NOD) with this effective date. The AOJ subsequently found that there was clear and unmistakable error and provided Mr. Calhoun with an earlier effective date of January 1, 2016. Mr. Calhoun filed another timely NOD regarding the January 2016 effective date. In an April 2021 decision, the Board denied an earlier effective date and Mr. Calhoun subsequently filed a supplemental claim in May 2021 disagreeing with the Board's denial of an earlier effective date. After the AOJ again denied an earlier effective date, the Board readjudicated Mr. Calhoun's TDIU claim in September 2021 on the merits. The key question addressed by the Court was whether the Board erred in implicitly finding that it had the authority to consider the merits of whether an earlier effective date was warranted or whether such consideration was barred by the rule against freestanding earlier effective date claims.

At the outset, the Court noted that based on *Rudd v. Nicholson,* 20 Vet. App. 296, 299 (2006), the Board does not have the authority to review a claim for an earlier effective date once an effective date determination has become final. Comparing the two appeal systems, legacy and AMA, the Court noted that under the legacy system there was a single path for a veteran to pursue if dissatisfied with a rating decision, with a year to file a NOD and 60 days to file a substantive appeal after the VA issued a Statement of the Case or within the remainder of a one-year period from the mailing of the notification. If the Board decision was unfavorable, the veteran would have 120 days to file a Notice of Appeal to the Court. The Court noted that finality under the legacy system occurred when the time frame lapsed with no action from the veteran.

The Court noted that the version of 38 U.S.C. § 5110(a) in effect for legacy claims provides that the effective date of claim reopened after final adjudication could be no earlier than the date of the claim to reopen, which avoided the possibilities of an effective date earlier than that in the initial and now final decision.

The Court discussed in detail the ability of a veteran under the AMA to continuously pursue an initial claim through a request for higher level review, filing a supplemental claim after an AOJ, Board, or Court decision, or filing a NOD. The Court noted that under the AMA, the finality of a claim is forestalled when a claim is continuously pursued under any of the AMA review options. The Court noted and the parties agreed that a continuously pursued claim including one for an earlier effective date does not implicate *Rudd* and the rule of finality. Thus, the Court found that because Mr. Calhoun continuously pursued his claim for an earlier effective date for TDIU by filing a supplemental claim in May 2021 following the April 2021 Board decision, the Board did not err in deciding the claim on the merits as it had the statutory authority to do so under the AMA.

The Court then turned to the merits of the issue of entitlement to a TDIU prior to January 1, 2016.

The parties agreed that the relevant period was from March 1, 2013, to October 29, 2014, and the question was whether entitlement to TDIU was warranted, *i.e.*, whether Mr. Calhoun's service-connected disabilities rendered him unable to secure or follow a substantially gainful occupation during this period. The Court held that the Board's reasons and bases in answering this question were inadequate.

The Board relied on a July 2012 VA examiner's report and found a private vocational opinion less probative. The July 2012 examination report indicated that Mr. Calhoun had shortness of breath but that his lung condition did not impact his ability to work. The private vocational opinion focused its assessment on the effect of aphonia on Mr. Calhoun's employment and was specifically based on records after June 2015. The Board found that the private vocational opinion relied on evidence from after the appeal period and contradicted the July

2012 VA examination. The Court noted that both opinions cited evidence from outside the appeal period, but that the Board did not discuss why it only discounted the value of the private opinion on this basis.

The Court found that the Board also erred because the Board noted Mr. Calhoun's functional capacity was limited but did not provide further details on what these limits were. The Court also noted the Board did not apply the framework provided by *Ray v. Wilkie*, 31 Vet. App. 58, 73 (2019) to determine occupations available to Mr. Calhoun by assessing both the economic and noneconomic factors of his TDIU claim. Thus, the Court set aside the Board's September 2021 decision denying entitlement to an earlier effective date prior to January 1, 2016, for TDIU.

Tyana N. Bond is an Attorney-Advisor with the Board of Veterans' Appeals. The views and opinions provided by Ms. Bond are her own and do not represent the views of the Board of Veterans' Appeals, the Department of Veterans Affairs, or the United States. Ms. Bond is writing in her personal capacity.

No Mandamus, No Class Certification in Veteran's Character of Discharge Determination; Implicit Denial Rule Makes Petition Moot

by Ben Dishman

Reporting on *Hamill v. McDonough*, 37 Vet. App. 65 (2023).

Petitioner David A. Hamill filed a petition for a writ of mandamus, seeking to compel the Veterans Administration (VA) to decide whether he submitted new and material evidence (NME) related to his other than honorable (OTH) character of discharge (COD). Mr. Hamill sought an appealable decision readjudicating his COD. The Court of Appeals for Veterans Claims (CAVC) held that the petition was moot without exception and dismissed the petition.

Mr. Hamill served on active duty from January 2009 to March 2013, when he was discharged under OTH conditions. Upon his discharge, Mr. Hamill filed a claim for disability compensation; however, the VA denied his claim in May 2014, finding that Mr. Hamill's COD made him ineligible for the benefits he sought. Nevertheless, the VA noted that under chapter 17 of title 38, U.S. Code, Mr. Hamill's COD didn't bar him from receiving healthcare "for any disabilities determined to be service connected" for his period of service.

In May 2017, Mr. Hamill filed a new claim for benefits which the VA treated as an attempt to reopen the May 2014 decision. In July 2017, the VA explained that it could not reopen the claim because the time to appeal had expired and Mr. Hamill hadn't submitted NME. The VA included a notice of appellate rights with this decision, but Mr. Hamill did not appeal.

In March 2021, Mr. Hamill filed two new claims. Relevant here, Mr. Hamill sought compensation for the same disabilities he raised in May 2017—implicitly seeking to reopen the claims. The VA granted part of Mr. Hamill's claim in May 2021, by awarding service connection (for treatment purposes only) pursuant to chapter 17. The VA denied the remaining claimed disabilities. Again, Mr. Hamill did not appeal.

Mr. Hamill's attorney sent a letter to the VA in July 2022, asking for a decision on Mr. Hamill's discharge characterization. The VA directed Mr. Hamill to his service department. In December 2022, Mr. Hamill petitioned CAVC, arguing that the VA violated *Harris v. McDonough*, 33 Vet. App. 269 (2021) (per curiam order) (requiring the VA to provide a decision that "will allow [Mr. Harris] to avail himself of the regular appeals process"), because the VA hadn't adjudicated whether he'd submitted NME relevant to this COD when it granted him chapter 17 benefits in May 2021.

The Secretary moved to dismiss Mr. Hamill's petition as moot, citing a February 2023 letter the VA sent to Mr. Hamill, explicitly finding that he had not submitted NME to warrant reopening the May 2014 decision. The same day, Mr. Hamill filed a request for class certification and class action (RCA),

recognizing that the February 2023 VA letter satisfied his request for an appealable decision, but arguing that CAVC should certify a class of similarly situated veterans who had not received explicit NME determinations.

Mootness

On appeal, the Secretary opposed the RCA, citing mootness and a failure by Mr. Hamill to demonstrate that a class action would be superior to a precedential decision. Mr. Hamill essentially conceded mootness but maintained that the VA's February 2023 letter was the source of relief—an appealable decision—and not the VA's earlier May 2021 letter.

Here, the legal jiu-jitsu begins. Initially, the Secretary relied on the same February 2023 letter cited by Mr. Hamill. Yet, the Secretary changed course, arguing that the petition should be moot based on the May 2021 letter (which included a notice of appellate rights). Per the Secretary, whereas the February 2023 letter explicitly denied Mr. Hamill's request, the May 2021 letter implicitly denied reopening the VA's COD determination and provided a notice of appellate rights, satisfying *Harris*.

In the opinion, CAVC explained the importance of, and reason behind, the Secretary's changed position; if the February 2023 letter mooted Mr. Hamill's petition, he could argue that the "inherently transitory" and "picking off" exceptions to mootness should allow his class to go forward. Conversely, if the May 2021 letter was sufficient to moot Mr. Hamill's petition before he had even filed it, both the class certification and petition fall away as moot.

CAVC determined that the implicit denial doctrine, combined with a close reading of *Harris*, was the key to resolving the controversy. In this case, Mr. Hamill read *Harris* to require the VA to explicitly decide whether a claimant has submitted NME sufficient to reopen a COD decision. Yet CAVC rejected his reading, clarifying that the true relief that Mr. Harris sought—and that the VA refused to provide—was "a VA decision that will allow him to avail himself of the regular appeals process, not a substitute for that process." *See Harris*, 33 Vet. App. At 274.

CAVC went on to explain that *Harris* must be read in tandem with the implicit denial doctrine because, by its nature, that rule arises when a veteran receives notice that doesn't comply with the strictures of an applicable notice provision. The implicit denial doctrine arises when, in some cases, "a claim for benefits will be deemed to have been denied, and thus finally adjudicated, even if [the VA] did not expressly address that claim in its decision." *See Adams v. Shinseki*, 568 F.3d 956, 961 (Fed. Cir. 2009).

To assess whether the VA implicitly denied Mr. Hamill's claim, CAVC implemented the four factors established in *Cogburn v. Shinseki*, 24 Vet. App. 205, 212-13 (2010). The *Cogburn* factors are (1) "the specificity of the claims or the relatedness of the claims"; (2) the "specificity of the adjudication," with an eye to whether "the adjudication allude[s] to the pending claim in such a way that it could be reasonably inferred that the prior claim was denied"; (3) the "timing of the claims" and whether they're closely associated time-wise; and (4) whether the claimant was represented by counsel. *Id.*

Applied to Mr. Hamill's case, CAVC ruled that all four factors weighed in favor of an implicit denial by the VA. CAVC concluded that Mr. Hamill's request to reopen his COD determination was denied by the VA's May 2021 notification to Mr. Hamill on how it decided the issue. Because the May 2021 decision hinged on his adverse COD, it gave Mr. Hamill sufficient notice that the VA declined to revisit the COD issue.

In responding to Mr. Hamill's argument, CAVC also rejected the notion that the VA must explicitly decide every issue lest it leave a claim or request pending. CAVC distinguished the VA's *adjudication* of every claim from an express *decision*. As applied to Mr. Hamill's case, CAVC stated that the decisions the VA issued put him on notice of the Agency's determination and thereby gave him access to the regular appeals process; since Mr. Hamill received a COD determination and a notice of appellate rights—all before he filed his petition—the petition was moot.

CAVC also touched briefly on the implicit denial rule with respect to the more robust notice obligations made part of 38 U.S.C. § 5104 by the AMA. CAVC punted on this issue, concluding that the petitioner didn't adequately develop his argument that "Congress intended through the AMA to sweep away this longstanding aspect of veterans law."

Exceptions to Mootness

Generally, a class action can continue after the "named plaintiff's claim" has been rendered moot if an exception to mootness applies. *Godsey v. Wilkie*, 31 Vet. App. 207, 218–20 (2019). Here, CAVC determined that the claims of the proposed class members didn't survive the holding that the petition is moot because neither the inherently transitory exception nor the picking off exception applied.

Inherently transitory claims are those that "a trial court will not have enough time to rule on" before they become moot. *Id.* at 219. The picking off exception to mootness refers to scenarios in which a defendant gives an injured claimant the relief that he was seeking to moot his claim and close off the possibility of litigation. *Id.*

CAVC determined that neither exception applied. Because CAVC concluded that the May 2021 letter mooted the petition, it was issued in the ordinary course of business, and well before the petition was ever filed. Thus, the picking off exception did not apply. Additionally, CAVC stated that the injury at issue—the VA's inaction—isn't by its nature a transitory one that would permit CAVC to ignore mootness.

Class Action vs. Precedential Decision

Finally, when reviewing an RCA, a court considers whether a class action would be superior to a "precedential decision granting relief on a non-class action basis." U.S. Vet. App. R. 22(a)(3). Here, CAVC explained that because implicit adjudication questions are case specific, they're ill-suited to both class-wide review and class-wide relief.

Judge Jaquith dissented from the majority's decision, explaining that implicit denial is acceptable only if the decision "provides sufficient notice to the claimant that the pending claim [not explicitly addressed] has been finally resolved." *Jones v. Shinseki*, 619 F.3d 1368, 1372 (Fed. Cir. 2010). Judge Jaquith disagreed with the majority that the May 2021 decision provided this notice and believed that the decision did not comply with the AMA's expanded notice requirements. Judge Jaquith contended that the majority misapplied the *Cogburn* factors, and that there was no implicit denial regarding the COD. The dissent concluded, therefore, that the petition was not moot.

Ultimately, CAVC denied Mr. Hamill's request for class certification and class action. CAVC also granted the Secretary's motion to dismiss the petition. However, CAVC also noted that the Secretary updated the relevant portion of the Veterans Affairs Adjudication Procedures Manual, M21-1, so the VA now must issue explicit new and material evidence determinations when it decides whether a prior COD decision can be reopened.

Ben Dishman is an Attorney-Advisor at the Board of Veterans' Appeals. The views and opinions provided by Mr. Dishman are his own and do not represent the views of the Board of Veterans' Appeals, the Department of Veterans Affairs, or the United States. Mr. Dishman is writing in his personal capacity.

Court Invalidates Agency Regulation Addressing Fees for CUE

by Michele Vollmer

Reporting on *Held v. McDonough*, 37 Vet. App. 28 (2023).

In *Held*, a panel of the U.S. Court of Appeals for Veteran Claims (Court) comprised of Judges Allen, Falvey, and Jaquith, invalidated 38 C.F.R. § 14.636(c)(2)(ii), holding that the regulation subsection conflicts with the plain language and ordinary meaning of 38 U.S.C. § 5904(c)(1).

Specifically, on its face, § 14.636(c)(2)(ii) provides that agents or attorneys may only collect fees for

successful clear and unmistakable error (CUE) revisions when (1) notice of the challenged decision was issued before enactment of the Veterans Appeals Improvement and Modernization Act of 2017 (AMA); (2) "a Notice of Disagreement [NOD] was filed with respect to the challenged decision on or after June 20, 2007"; and (3) the fee agreement complies with the general requirements for fee agreements in § 14.636(g).

On the other hand, 38 U.S.C. § 5904(c)(1) simply provides that "a fee may not be charged, allowed, or paid for services of agents and attorneys with respect to services provided before the date on which a claimant is provided notice of the agency of original jurisdiction's initial decision under section 5104 of this title with respect to the case." In sum, this statutory subsection, effective as of February 2019 as part of the AMA, permits agents and attorneys to collect fees after an initial decision is issued by a VA Regional Office, addressing any type of VA claim with or without CUE revisions, regardless of whether any NOD is submitted.

The Court reversed the Board of Veterans' Appeals' (Board) decision denying VA-accredited agent, Bryan J. Held, any fees for assisting a veteran with a successful CUE motion involving a post-traumatic stress disorder (PTSD) disability rating because no NOD had been filed.

In 2016, the veteran filed a claim to temporarily increase his 70% PTSD rating to 100% based on a hospitalization. That temporary total disability rating was granted in a February 2017 Rating Decision. However, the decision erroneously stated that following the temporary total disability, the veteran's PTSD rating would be returned to 50%, not 70%. The veteran wrote to the VA in August 2017 to identify the rating error but did not file a NOD.

Mr. Held began representing the veteran in March 2018. His fee agreement allowed him to collect a 20% contingency fee for any award of past-due benefits. Mr. Held filed a CUE motion in September 2018. In February 2019, while the CUE motion was pending, VA implemented the AMA. CUE was granted in a December 2019 Rating Decision.

The Board denied fees based upon 38 C.F.R. § 14.636(c)(2)(ii) because no NOD was filed. When denying fees to Mr. Held under 38 C.F.R. § 14.636(c)(2)(ii), the Board noted that the agreement was valid, was properly filed with VA, and contained the information required by § 14.636(g).

CAVC's rationale for holding that the regulatory subsection is ultra vires was stated simply: "Because section 5904(c)(1) as it existed at the time of the December 2019 rating decision granting the veteran's CUE motion (and today) does not condition the eligibility for entitlement to attorney or agent fees on the filing of an NOD at any time, VA's implementing regulation, § 14.636(c)(2)(ii), that includes such a requirement is invalid." The Court further reasoned that "[r]equiring more than what Congress put into place is unlawful."

When invalidating the regulation subsection for contravening the plain and ordinary meaning of the statute, CAVC relied on the Supreme Court's decision limiting *Auer* agency deference in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019), and CAVC precedent in *Frantzis v. McDonough*, 35 Vet.App. 354, 360-61 (2022). In *Frantzis,* the Court emphasized that when Congress uses clear and unambiguous language, CAVC's "job is simply to apply it."

In addition to concluding that 38 U.S.C. § 5904(c)(1) was "plain and unambiguous," the Court in *Held* also found that the facts were undisputed.

The Court did not fault the Board for following § 14.636(c)(2)(ii), noting that the Board had no discretion to ignore the regulation and was required to apply it under 38 C.F.R. § 20.105.

Although CAVC emphasized that the plain language of the statute was clear and unambiguous, and sufficient to invalidate the regulatory subsection, the Court explained how Federal Circuit case law addressing agent and attorney fee awards also supported the holding. For example, in *Mil.-Veterans Advoc. v. Sec'y of Veterans Affairs*, 7 F.4th 1110, 1136 (Fed. Cir. 2021), the Federal Circuit interpreted the 2019 statutory amendment as "part of a continuing congressional effort to enlarge the

scope of activities for which attorneys can receive compensation for assisting veterans."

Similarly, the Federal Circuit in *Stanley v. Principi*, 283 F.3d 1350, 1358 (Fed. Cir. 2002), explained that the more restrictive 1988 version of § 5904(c)(1) "was designed to allow attorneys' fees, after the initial claims proceeding, in connection with proceedings to reopen a claim [based on] . . . clear and unmistakable error."

Stanley was reaffirmed in *Carpenter v. Nicholson*, 452 F.3d 1379, 1379 (Fed. Cir. 2006), when the Federal Circuit reiterated that "the reopening of a claim . . . [based on CUE] is within the statutory entitlement to attorney fees." According to the Court, "*Carpenter* underscores that the December 2019 decision granting the veteran's CUE motion in our appeal was part of the same 'case' as the initial decision in February 2017." Use of the word "case" by CAVC is a direct reference to the phrase "with respect to the case" at the end of § 5904(c)(1).

Similarly, the Secretary argued that the relevant version of § 5904(c)(1) to be applied was not the December 2019 version in force when VA granted the CUE motion but rather the prior version that had been in place in February 2017 when the initial VA RO Decision was issued (erroneously reinstating the veteran's temporary total disability to 50%). Citing *Mattox v. McDonough*, 34 Vet.App. 61, 69 (2021), *aff'd*, 56 F.4th 1369 (Fed. Cir. 2023), CAVC was not persuaded by the Secretary's argument. The Court also noted that the Secretary's reliance on *Perciavalle v. McDonough*, 32 Vet.App. 117, 120 n.4 (2019), *aff'd*, 847 F. App'x 914 (Fed. Cir. 2021), to support this argument was "misplaced." CAVC disagreed that footnote four in *Perciavalle* was a broad holding about the effective date of the AMA because *Perciavalle* addressed only a legacy case. Instead, the Court referred to footnote four as "merely . . . informative" about the date of the AMA's signing in 2017. CAVC reiterated that the AMA went into effect in February 2019 and clearly applied to the December 2019 Rating Decision granting CUE to the veteran in this case.

The Court noted that case law also supported the holding in *Held* because the practical effect of a contrary ruling would deter agents and attorneys from taking CUE cases in the future. "[L]imiting fees for work performed by representatives in CUE matters to only those cases in which an NOD had been filed on or before June 2007 would preclude payment of fees in most CUE cases."
During oral argument, the Secretary argued for the first time that Mr. Held was not entitled to a fee based on the terms of the fee agreement itself. CAVC first addressed whether the existence of that disagreement undermined jurisdiction. The Court concluded jurisdiction over the validity of the regulation was proper because the Board never reached the fee contract interpretation issue.

The Secretary alleged that the fee agreement included language from the regulation without reference to, or incorporation of, § 14.636(c)(2)(ii). This language (similar to § 14.636(c)(2)(ii)) allegedly made receipt of fees contingent upon an NOD being filed on or after June 19, 2007.

CAVC remanded the fee agreement interpretation issue to the Board, and declined to address the issue, for four reasons. First, arguments raised for the first time at CAVC oral argument are discouraged and generally will not be considered. Second, the Board did not reach the issue because it was required to apply 38 C.F.R. § 14.636(c)(2)(ii). Third, the VA should "consider in the first instance" questions about fee contracts under its direct fee authority. Finally, the Board should determine how the fee agreement's validity under the statute (through the holding of CAVC in this case) impacts the Secretary's argument that the fee contract itself prohibited payment to Mr. Held as agent.

On January 24, 2024, the Court denied the Secretary's motion for reconsideration and the judgment became final on February 15, 2024.

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Court Holds Rating Code for Diabetes Contemplates the Effects of Medication in a Bifurcated Panel Decision

by Susan Morford

Reporting on *Jackson v. McDonough*, No. 22-3042 (Vet. App. Dec. 27, 2023).

In *Jackson v. McDonough*, the U.S. Court of Appeals for Veterans Claims ("Court") affirmed a Board of Veterans' Appeals ("Board") decision that denied a rating higher than 20% for Mr. Jackson's service-connected diabetes mellitus. The Court held that the diagnostic code (DC) for rating diabetes, DC 7913, contemplates the effects of diabetic medication, and there is no requirement to discount those effects when rating the disability.

Mr. Jackson filed a claim for an increased rating for his diabetes type II in April 2020. VA granted an increase of Mr. Jackson's diabetes rating from 10% to 20% based on a July 2020 medical examination that found that he managed his diabetes with a restricted diet and use of an oral hypoglycemic agent, but that he did not need insulin or regulation of activities, or have episodes of ketoacidosis or hypoglycemia. Mr. Jackson appealed this rating decision, and in February 2022, the Board denied a rating higher than 20% for Mr. Jackson's diabetes mellitus under 38 C.F.R. § 4.119, DC 7913.

On appeal to the Court, Mr. Jackson contended that the Board was required to discount the ameliorative effects of his medication pursuant to *Jones v. Shinseki*, 26 Vet. App. 56 (2012). He argued that although DC 7913 contemplates the *use* of medication, it does not contemplate the *effects* of medication, i.e., the Board should consider his diabetes symptoms as if he were not taking oral hypoglycemic agents. The Secretary disagreed, arguing that the Board properly considered Mr. Jackson's use of medication for his diabetes, as the holding in *Jones* does not apply to DC 7913.

For the first time, the Court bifurcated an appeal into a precedential panel decision in order to address the rating assigned for diabetes mellitus under DC 7913, and a contemporaneous, nonprecedential memorandum decision to address Mr. Jackson's associated lower extremity diabetic peripheral neuropathy rating under DC 8521, also on appeal.

In arriving at its precedential decision, the Court discussed the case law history on the issue of medication in VA ratings. First, in *Jones v. Shinseki*, the Court found that the criteria for DC 7319 for rating irritable bowel syndrome did not contemplate the impact of medication on symptoms, and in such instances the ameliorative effects of medication should be discounted when evaluating. Conversely, in *McCarroll v. McDonald*, 28 Vet. App. 267 (2016), the Court found that rating hypertension under DC 7101 does specifically contemplate the effects of medication and, therefore, *Jones* did not apply in that case.

Ultimately, the Court found that the plain language of DC 7913 expressly contemplates the effects of medication because each higher rating is based on how much treatment, including medication, a veteran requires and whether that treatment controls a veteran's diabetes symptoms, or causes other complications. In other words, DC 7913 contains cumulative criteria, with each higher rating including the same criteria as the lower rating, e.g., insulin use, plus distinct new criteria. *Middleton v. Shinseki*, 727 F.3d 1172, 1178 (Fed. Cir. 2013). Thus, the holding in *Jones* does not apply to DC 7913, and VA was not required to discount the effect of his oral hypoglycemic agent when assigning a rating for diabetes mellitus.

In the contemporaneous memorandum decision (Falvey, J.), the Court remanded Mr. Jackson's claim for separate, increased ratings for diabetic peripheral neuropathy, for the Board to consider the claims in light of the Federal Circuit's decision in *Webb v. McDonough*, 71 F.4th 1377 (Fed. Cir. 2023), issued while the claims were pending, and which discusses the proper analysis to undertake when rating a disability under an analogous DC.

Susan Morford is Counsel with the Board of Veterans' Appeals. The views and opinions provided by Ms. Morford are her own and do not represent the views of the Board of Veterans' Appeals, the Department of Veterans Affairs, or the United States. Ms. Morford is writing in her personal capacity.

Court Defines Employment Within a "Protected Environment" for TDIU

by Claire L. Hillan Sosa

Reporting on *LaBruzza/McBride v. McDonough*, No. 21-4467, No. 20-8562 (Vet. App. Jan. 24, 2024).

In the combined cases of *LaBruzza v. McDonough* and *McBride v. McDonough*, the U.S. Court of Appeals for Veterans Claims clarified the relevant factors for determining whether employment is within a so-called protected environment, and thus marginal, presenting no bar to a total disability rating based on individual unemployability (TDIU). The panel of Chief Judge Bartley and Judges Pietsch and Toth held that employment in a protected environment is "employment in a lower-income position that, due to the veteran's service-connected disability or disabilities, is shielded in some respect from competition in the employment marketplace."

Under 38 C.F.R. § 4.16(a) a veteran will be compensated at the rate for total disability if "unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities." Section 4.16(a) excludes marginal employment from the scope of a substantially gainful occupation, and offers "employment in a protected environment such as a family business or sheltered workshop" as one example of marginal employment.

The Court previously declined to define the term "employment in a protected environment," urging in *Cantrell v. Shulkin*, 28 Vet. App. 382, 390 (2017), that the Secretary should do so himself. Years later, in *Arline v. McDonough*, 34 Vet. App. 238, 246 (2021), the Secretary reluctantly offered a definition; he suggested that a protected environment is "a non-competitive workplace separated from workplaces in the open labor market and in which hiring and compensation decisions are motivated by a benevolent attitude towards the employee." *Id.* at 247. The Court did not reach this issue in its opinion in *Arline*.

Now addressing the question, the Court's opinion in *LaBruzza* and *McBride* rejects the Secretary's primary reliance on the intent of a veteran's employer.

In *LaBruzza*, the veteran worked for the same employer for nearly 20 years and the record included evidence that his service-connected disabilities caused him to leave work early, that he had extended absences for up to 2 months at a time, and that he exhibited paranoia, uncontrollable temper, significant social isolation, aggressive behavior, and mistakes due to his service-connected disabilities. The veteran stated he got special treatment and was able to keep his job only because he was a veteran. Private expert opinions concluded the veteran was "incapable of performing nonsheltered, substantially gainful employment for many years." In his final year of employment, the veteran earned $198,147, but prior income data was absent.

In *McBride*, evidence showed that while employed the veteran had 10-15 panic attacks per day, he made many mistakes, his employer assigned others to finish his tasks, his job requirements were altered to accommodate his service-connected disabilities, and his employer was lenient following verbal altercations. In addition, an employee database contained the word "protected" next to the veteran's name. The veteran testified that he was able to keep his job for so long because he, "knew [his] stuff better than anybody."

In both cases, the Board found that the veterans did not lose income, were not given more accommodations by their employers than were legally required under relevant law, and that the veterans' employers did not continue employing the veterans out of purely charitable or benevolent intent. Based on these factors, the Board found that neither veteran was employed in a protected environment, and they were therefore able to secure

or follow substantially gainful occupations due to service-connected disabilities.

On appeal, the Court vacated and remanded the Board's denial of TDIU in each case for insufficient reasons or bases. It held that "[t]he phrase unambiguously means employment in a lower-income position that, due to the veteran's service-connected disability or disabilities, is shielded in some respect from competition in the employment market." Thus, we can discern two primary inquiries from the Court's opinion:

1. Is the income limited?
2. Is the employment shielded in some respect?

Regarding the level of income permissible for employment in a protected environment, the Court reasoned that § 4.16(a) must contemplate some income limit because without one the protected-environment exception, which is itself an exception from the unemployment requirement for TDIU, "could swallow the general rule." Under the terms of § 4.16(a), we know that the limit must be above "the amount established by the U.S. Department of Commerce, Bureau of the Census, as the poverty threshold for one person." The Court did not set a bright-line income cut-off, but noted that an annual income of $198,147 would certainly disqualify a veteran from asserting marginal employment. In a footnote, the Court suggested that VA might look to existing income-limits for maximum allowable pension rates (38 U.S.C. § 1521) and for VA healthcare (38 U.S.C. § 1722).

As for the question of whether an employment environment is shielded in some respect, the Court stressed that the employment need not be completely shielded. Although the Court rejected the Secretary's proposed definition focused on the charitable or benevolent intent of the employer as a dispositive element, the Court conceded that this may be a relevant factor because it could constitute shielding in one respect. Further, the Court indicated that the sufficiency of legal protections under the Americans with Disabilities Act is relevant to the analysis. It reasoned that the ADA affects almost every employer in the competitive marketplace, thus, if accommodations made for a veteran are no greater than those that would be afforded under the ADA, the employment is truly no less competitive in that respect. Presumably, then, practitioners of veterans disability law should now become at least somewhat familiar with the accommodation provisions of the ADA.

Just as important as the Court's definition of a protected environment was the line of analysis leading to its conclusion. The Court relied on the U.S. Supreme Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), to overturn its prior holding in *Cantrell* that the phrase "employment in a protected environment" was ambiguous. Whereas the Supreme Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997), previously led to broad deference to agency interpretation of its own regulations when ambiguous on their face, the *Kisor* decision "reinforc[ed]" that a court can only determine a regulation is ambiguous ***after*** it assesses the provision's text, structure, history, and purpose. Thus, it is not enough that the language of a regulation, read alone, without context, could be considered ambiguous. The reviewing court must use all tools of textual interpretation to determine whether any ambiguity remains. Only if the regulation remains ambiguous at that point will the court defer to the agency's interpretation if it is a reasonable one (this analysis also significantly narrowed to exclude ad hoc statements, post hoc litigation strategy, or any arguments without the "power to persuade.").

In *LaBruzza* and *McBride*, therefore, the Court resorted to the common meaning of the word "protected," in concert with the structure and purpose of the TDIU rule, to find an unambiguous definition for the term "employment in a protected environment," and avoided the question of deference altogether. This decision, therefore, illustrates at least this particular panel's willingness to follow the Supreme Court's signal to limit the circumstances in which judicial deference to the agency interpretation might arise.

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CAVC Denies Writ of Mandamus Relief to Veterans Seeking VA Reimbursement Claims

by Lukas Ericson, Amy Rathke, and Moriah Williams

Reporting on *Redwood v. McDonough*, 37 Vet. App. 58 (2023).

In *Redwood v. McDonough*, the U.S. Court of Appeals for Veterans Claims ("CAVC") held that veterans Douglas Redwood, Terrance Fowler, James LePlant, John Jelen, Kenneth Schmidt, and Steven Butler (the "Petitioners"), petitioning on behalf of themselves and proposing two classes of VA claimants, failed to show that the CAVC's reversed decision was the source of a clear and indisputable right justifying a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a). Even assuming such a right, the Petitioners failed to show that The Department of Veterans Affairs ("the VA") had unreasonably delayed adjudicating their claims. Thus, the Petitioners had no "right to a writ compelling VA to adjudicate their reimbursement claims."

Congress requires, in some cases, that the VA reimburse veterans for emergency medical care costs at non-VA facilities. 38 U.S.C. § 1725. How the VA handles reimbursement when the veteran has other coverage is commonly litigated in the CAVC and Federal Circuit. Before *Redwood*, the CAVC and Federal Circuit addressed the VA's reimbursement regulations in four significant cases: *Staab v. McDonald*, 28 Vet. App. 50 (2016); *Wolfe v. Wilkie* ("*Wolfe I*"), 32 Vet. App. 1 (2019); *Wolfe v. McDonough ("Wolfe II")*, 28 F.4th 1348 (Fed. Cir. 2022); and *Kimmel v. Secretary of Veterans Affairs*, 2022 U.S. App. LEXIS 29615 (Fed. Cir. 2022). The CAVC relied on the development of these cases to reach its decision in *Redwood*.

In *Staab*, the CAVC held that section 1725 "improperly excluded reimbursement for non-VA emergency medical care when a veteran had any insurance covering the service at issue." After *Staab*, the VA updated its regulations, prohibiting "reimbursement for deductibles and coinsurance, reasoning that they were much like the copayment—a category excluded from reimbursement by Congress."

The CAVC addressed the updated regulation in *Wolfe I*, holding the VA's new regulation "flouted" the *Staab* decision and that deductibles and coinsurance were in fact not like copayments. Further, the CAVC certified a class of claimants whose reimbursement claims for emergency medical expenses at non-VA facilities were denied on grounds they were part of deductibles and coinsurance. Using its authority under the All Writs Act, the CAVC ordered the VA to adjudicate the class members' claims.

The Secretary appealed to the Federal Circuit in *Wolfe II*. Upon review, the Federal Circuit concluded that there was a "clear and indisputable" right to relief covering coinsurance, but not deductibles. The Federal Circuit reversed the CAVC decision to grant the writ of mandamus.

Subsequently, in *Kimmel*, the Federal Circuit held that the VA's exclusion of coinsurance reimbursement was invalid. It ordered the VA to amend its regulations. As part of its amendments, the VA added a provision allowing claimants under *Staab*, *Wolfe I*, and *Kimmel* an opportunity to file new claims for emergency cost reimbursements incurred between February 1, 2010, and more than 90 days before February 22, 2023. 88 Fed. Reg. 10,835 (2023).

The CAVC may issue writs of mandamus when a petitioner is at risk of never accessing the opportunity to appeal to the CAVC due to the VA's delay or inaction in issuing a decision. The CAVC applies three factors to decide whether to issue a writ of mandamus. First, a petitioner must show a lack of other adequate avenues to obtain relief. Second, a petitioner must show a clear and indisputable right to the writ. Finally, the court must be convinced that issuing the writ is warranted. Furthermore, when dealing with allegations of delay, the CAVC considers the six "*TRAC* factors," which assess the underlying reasonableness of an alleged delay.

In *Redwood*, the Petitioners asked the CAVC to use the All Writs Act to certify two classes of *Wolfe I* class members with reimbursement claims and order the VA to finish adjudicating their claims. The Petitioners argued that: (1) *Wolfe I* required the VA to re-adjudicate their claims, so the claimants need not reapply, and (2) *Wolfe I* created pending claims, so the VA must now decide them. The CAVC denied both arguments.

In support of its denial, the CAVC concluded that the Petitioners did not meet the first requirement for mandamus because the VA has a regulation and process to adjudicate their *Wolfe I* claims, which the Petitioners failed to exhaust. Though *Wolfe I* was reversed, the Petitioners nevertheless argued that the *Wolfe I* class members had a clear and indisputable right to coinsurance reimbursement. The Court disagreed. Despite *Wolfe II*'s ruling on the VA's regulation and how it decides reimbursement claims, the CAVC explained that *Wolfe II* "did not establish a right to adjudication of such claims." Thus, there is no clear and indisputable right to support a writ.

The CAVC next addressed the Petitioners' second argument, finding that the Petitioners could not rely on relief ordered in *Wolfe I* when the decision was overturned. Though the CAVC did not stay the order in *Wolfe I* while it was being appealed, the VA cannot be bound to a CAVC decision when a higher court found that decision to be incorrect. Though the VA began adjudicating claims under *Wolfe I*, the CAVC was unconvinced that the legal significance of re-adjudicating claims under *Wolfe I* gave the Petitioners a clear and undisputable right to a writ of mandamus.

So, do the Petitioners maintain the right to have the VA re-adjudicate their claims? The CAVC held that they do not. The CAVC concluded that neither *Wolfe II* nor *Kimmel* require the VA to re-adjudicate claims. And even if they did, the Petitioners failed to show that a writ was appropriate.

Finally, the CAVC found no unreasonable delay in the adjudication of the Petitioners' claims. Rather, by the time *Kimmel* concluded, the VA had already issued the above-mentioned regulations. The Court reasoned that only one month lapsed between the effective date of the regulation and the Petitioners' filing. Therefore, no writ was warranted, even under the weight of the *TRAC* factors. Moreover, "delay of adjudication with pending litigation and after VA won *Wolfe II*, [did] not strike [the CAVC] as unreasonable given the competing interests and limited resources the VA must balance."

In the end, the CAVC concluded that the Petitioners failed to assert a clear and indisputable right. The CAVC found no way to grant the Petitioners relief. "[T]o dispel potential uncertainty faced by the former *Wolfe I* class members after *Wolfe II*," the CAVC encouraged the Petitioners' counsel to make use of the VA's updated regulations and its impending deadline. Because the CAVC will not order the VA to re-adjudicate those claims, veterans should reapply for the reimbursement claims "that veterans in this litigation have long sought."

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When a Pen Is Mightier Than a Sword: Does Recent Court Precedent Implicitly Invalidate an OGC Opinion as to Incarcerated Debtors?

by Anna Kapellan

There is no conversation more boring than the one where everybody agrees.
– Michel de Montaigne

Two and a half millennia ago, Confucius observed, "It does not matter how slowly you go, as long as you do not stop." Perhaps Confucius' great wisdom was a quintessential depiction of the evolution of law since courts traditionally act as careful, thoughtful "breaks" moderating progressive "motors" of legislative and executive developments that set forth and propel changes reflecting the society's positions. However, judicial mandates are

necessarily self-limiting, be it constitutionally or through statutes, and no court may render an advisory opinion as to a matter that does not qualify as a case or controversy presently before the court. Hence, while courts have a lot to say about many important topics, they essentially depend on litigants to place these topics before the courts in order to trigger the holdings that spell out the views of the judiciary.

In the absence of an opportunity to address a matter in a holding, the judiciary's options as to sharing its insights are limited to either mentioning a court's position in *dicta* or subtly elaborating on the court's reading of legislative and executive mandates that would have guided the judiciary's analysis had the courts had a chance to issue a precedential opinion, *i.e.*, had the courts been presented with a question qualifying as a case or controversy. And while the use of judicial *dicta* by litigants and lower-level tribunals is abundant and, by now, has garnered a substantial amount of academic studies, the method of analyzing the rationale of judicial opinions to distill an overall "trend" of the courts' reasoning still remains academically seminal, being often limited to a brief mention of the coherence between a judicial opinion on the one hand and a legislation's bill jacket or a regulatory body's notice-and-comments process on the other hand.

However, in light of the comparatively young age of veterans' law jurisprudence and the even younger age of the Court (which will turn only 35 this November), the value of the Court's elaborations on its vision of legislative mandates and implementing regulations cannot be overestimated. While a careful study of the implicit directions chartered through the pages of the Court's opinions is a task for a full-scale law review, a brief glance is warranted into a series of courts' decisions allowing the reader to predict whether a two-decade-old OGC opinion (that became first inconsistent and then irreconcilable with the direction taken by the legislators, courts, and agencies as to the process of determining the start date of the period when the reduction in the amount of payable VA benefits should occur in light of a VA beneficiary's incarceration) would withstand judicial scrutiny.

First, as a reminder, under 38 U.S.C. § 5313(a)(1)(A), (B), effective the 61st day of incarceration of a veteran who is held in confinement in connection with a felony conviction is entitled to only the amount of VA compensation benefits equal to that payable for a 10 percent rating if the veteran has a 20 percent or higher combined rating, and to a half of that amount if the combined rating is 10 percent. And, under 38 U.S.C. § 1505, a statute analogous to § 5313, no pension at all is paid to a VA pensioner effective the 61st day of the incarceration, even if it is based on a misdemeanor conviction. These limitations remain in effect until the date of the prisoner's release from confinement into any form of a non-prison environment, *e.g.*, a civil confinement (for instance, a mental health institution), or a halfway house, or on parole, or into society at large without any restrictions or monitoring upon serving the prisoner's sentence it its entirety. These limitations are implemented through 38 C.F.R. §§ 3.666 and 3.665 and, if penal litigation were instantaneous, the task of determining the first day of a conviction-based incarceration would be quite easy. Unfortunately, since the wheels of justice tend to move slow (because the docket of any Federal and State judge typically has over 700 cases at any given day, and procedural due process guarantees necessitate a complex order of many carefully taken steps), the task of penal litigation, at times, can be anything but swift.

Therefore, many inmates spend substantial periods in pretrial detention, some due to their inability to post bail and others due to the decisions of the judges presiding over their arraignments and declining to set bail in light of the gravity of these inmates' charged offenses and/or because of they are shown to be a high risk of flight from justice. Accordingly, an average criminal defendant ends up spending about 10 months in pretrial detention, that is, a period about eight-month longer than the 61-day period envisioned by 38 U.S.C. §§ 1505 and 5313, and 38 C.F.R. §§ 3.666 and 3.665.

Notably, the phrase "pretrial detention" is a legal term of art in the law of prisoners' litigation that addresses civil-law claims of arrestees, persons held in detention in connection with criminal proceedings or removal of alien detainees from the United States to their countries of origin, civilly

committed individuals at risk of harming selves/others, probationers, parolees, and convicted prisoners who are held in penal facilities, mental health institutions, halfway houses, etc. Therefore, the phrase "pretrial detention" simply means an arithmetical sum of all periods during which a convicted person had been held in custody at any facility operated or related to law enforcement until he or she: (a) entered the custody of the Federal Bureau of Prisons or a State's Department of Corrections for the purposes of serving his or her already-imposed penal sentence arising from the conduct underlying placement in custody; or (b) was released upon being sentenced to the period equal to the time that had already been served by being held in such facilities in connection with the penal prosecution underlying the sentence. This is why a "pretrial detention" includes all periods and forms of physical custody starting from the first day when a penal defendant enters police custody due to, *e.g.*, the arrest and being taken to a police precinct, and it continues to run throughout all the steps of criminal proceedings, *e.g.*, arraignment, plea negotiations, suppression hearings, trial, sentencing, post-sentencing detention, etc., as long as the penal defendant is held in any form of a law-enforcement-related custody: until the Federal Bureau of Prisons (or a State's Department of Corrections) takes custody of this by-now-already-convicted prisoner or if the court presiding over the penal proceedings sentences him or her to the time served.

Accordingly, if a VA compensation beneficiary, after spending, e.g., one year (365 days) in custody from the day of his/her arrest to the date of his/her sentencing, is convicted of a felony and gets sentenced to the time served, *i.e.*, this 365-day period and, thus, is immediately released upon his/her sentencing, then 10 months of this one-year period must become subject to the reduction in the amount of his/her VA benefits under 38 U.S.C. § 5313 and 38 C.F.R. § 3.666 because the entirety of this 365-day period was credited against his/her penal sentence. In sync, no actual "trial" is required for a "pretrial detention" to take place. Indeed, if a VA beneficiary is convicted based on his/her entry of a guilty or *nolo contendere* or *Alford-Serrano* plea, and the presiding court imposes a penal sentence, then every day that this beneficiary spent in any form of confinement until the Federal Bureau of Prisons (or a State's Department of Corrections) accepted him/her into custody (or until the court sentenced him/her to the time served) would qualify as time spent in "pretrial detention."

Hence, the watershed point in time for the purposes of determining the period of "pretrial detention" is the date when a convicted prisoner is taken into physical custody, and all periods spent in any form of law-enforcement-related custody prior to that point in time would qualify as "pretrial detention." Since many pretrial detainees shift from being in to being out of custody, and back in (e.g., due to first being arrested and placed in custody, then being arraigned and released on bail or on their own recognizance, but then violating the terms of their release and being returned to custody), the task of calculating the period of a convicted prisoner's pretrial detention might become very complex, especially if a criminal defendant undergoes more than one penal prosecution at the same time, thus being "loaned," pursuant to a writ of *habeas corpus ad prosequendum*, by one jurisdiction prosecuting some of his/her criminal offenses to another jurisdiction prosecuting his/her other penal offenses. Therefore, the Federal Bureau of Prisons, as well as States' Department of Corrections typically have specialized personnel performing these intricate calculations.

Thus, it is predictable that the period of pretrial detention is mandatorily credited against the sentences imposed upon these individuals since doing otherwise would result in penalizing convicted prisoners for the time needed to comply with due process guarantees and the reality of the courts' large dockets. Because every State jurisdiction and Federal law have statutes that ensure proper credits for pretrial detention, it suffices to take just one quick look at 18 U.S.C. § 3585 stating that a "defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences [if this sentence is] a result of the offense for which the sentence was imposed . . . ." and the Supreme Court's opinion in *United States v. Wilson*, 503 U.S. 329 (1992), stressing that "[t]he Attorney General *shall give any such person credit* toward service of his sentence for any days spent in custody in connection with the offense

or acts for which sentence was imposed," *id.* at 332 (emphasis in original). Therefore, it should be quite obvious that, to determine when the 61st day of confinement of a convicted VA beneficiary took place, VA would need to contact either the Federal Bureau of Prisons or the State's Department of Corrections to finds out whether a particular VA beneficiary who has been convicted of an offense triggering 38 U.S.C. §§ 1505 or 5313, and 38 C.F.R. §§ 3.666 or 3.665 was awarded credits based on any pretrial detention: since the Office of U.S. Attorneys and States' Offices of Attorney General delegate the tasks of calculating the beginning and end dates of penal sentences to the Federal Bureau of Prisons or the States' Department of Corrections.

However, it appears the VA may not be doing that, even though VA officers (tasked with determining the beginning dates of the periods of incarceration underlying the debts arising from overpayments of VA benefits based on penal convictions triggering 38 U.S.C. §§ 1505 and 5313, and 38 C.F.R. §§ 3.666 and 3.665) should be aware of pretrial-detention credits. The reason why VA is acting out of sync with *United States v. Wilson* and 18 U.S.C. § 3585, and their State counterparts, is in February 2005, the OGC issued a precedential opinion VAOPGCPREC 3-2005 addressing the task of determining when the 61st day takes place for the purposes of 38 U.S.C. §§ 1505 and 5313, and 38 C.F.R. §§ 3.666 and 3.665.

There, the OGC observed that, to trigger these provisions, a VA beneficiary must be incarcerated in a Federal, State, or local penal facilities for a period in excess of sixty days, and that incarceration should occur "as a result of [the beneficiary's] conviction" of a felony (or misdemeanor if (s)he is a VA pensioner). Then, focusing solely on the word "conviction," the OGC construed the phrase "as a result of conviction" as allowing the reduction in the amount payable under 38 U.S.C. §§ 1505 and 5313, 38 C.F.R. §§ 3.666 and 3.665 only on the 61st day from the date of the entry of a guilty verdict or the date of the court's acceptance of a guilty, *nolo contendere*, or *Alford-Serrano* plea. Therefore, under the OGC construction of 38 U.S.C. §§ 1505 and 5313, 38 C.F.R. §§ 3.666 and 3.665, a convicted VA beneficiary who has spent a substantial period of time in pretrial detention (more often than not due to the gravity of the charged offense and/or the high risk of flight from justice) becomes literally rewarded for the gravity of the offense and/or a lack of community ties with a substantial financial windfall in the form of taxpayer-funded VA benefits paid for many months in full until the date of conviction comes, while a more-law-obedient counterpart, *i.e.*, a VA beneficiary who – due to the relatively minor type of penal offense and/or close ties with the community – gets released on bail or on his or her own recognizance – ends up with pretrial credits only in the form of 24-72 hours from arrest to arraignment, is prevented from getting any meaningful financial windfalls. In other words, the OGC inadvertently put the most central principle of penal law (*i.e.*, that a more serious penal offense should entail a greater penal measure to prompt a higher level of societal deterrence) literally on its head by *de facto* financially rewarding more harmful conduct.

This coming February 2025, VAOPGCPREC 3-2005 will turn 20 years old. However, during these two decades, an important, substantial body of caselaw unambiguously indicated that the phrase "as a result of conviction" was selected by legislators for a reason very different from those perceived by the OGC two decades ago, *i.e.*, the phrase merely expressed the legislators' realization that a VA beneficiary – same as any person – might be placed in pretrial detention for a multitude of unfortunate reasons that have nothing to do with him/her committing a penal offense or with procedural due process guarantees, e.g., a VA beneficiary, same as any person, might find himself/ herself placed in pretrial detention due to tampering with or undue spoliation of evidence, cross-racial misidentification, malicious prosecution, etc. It is in light of this noble and important concern – rather than with an intent to designate the date of the entry of a guilty verdict or an acceptance of a plea as the first day of confinement – the legislators elected to use the phrase "as a result of conviction": since they wished to underscore that even if a VA beneficiary becomes subject to a pretrial detention for a period in excess of 60 days, the veteran should not be subjected to a financial insult (in the form of having the amount payable of his or her VA benefits reduced) in addition to the already serious mental injury (in the form of being subjected to an unwarranted or otherwise deficient criminal proceeding) if the criminal prosecution did not result in a penal

conviction. Hence, the phrase "as a result of conviction" was merely meant to stress that a reduction in the amount of VA benefits payable due to incarceration is likely to be both retroactive and prospective. But VA should proceed with the retroactive portion of such a reduction only if VA determines that the pretrial detention did not precede an acquittal, and the pretrial detention was followed by a conviction and has been factored into the Federal Bureau of Prisons' or a State's Department of Correction's calculation of a VA's beneficiary's penal sentence imposed upon a conviction of an offense triggered 38 U.S.C. §§ 1505 or 5313, and 38 C.F.R. §§ 3.666 or 3.665.

By now, even a cursory review of the caselaw that has accrued after the OGC issued VAOPGCPREC 3-2005 demonstrates that VAOPGCPREC 3-2005 has been implicitly "overruled" by the legislators, the Court, and the Federal Circuit. For instance, in *Wanless v. Shinseki*, 618 F.3d 1333, 1337 (Fed. Cir. 2010), the Federal Circuit stressed that the purpose of § 5313 (and § 1505) was "to correct the perceived problem of providing hundreds and thousands of tax free benefits to veterans incarcerated for the commission of felonies when[,] at the same time[,] the taxpayers of this country are spending additional thousands of dollars to maintain these [very] same individuals in penal institutions." No statement in *Wanless* even hinted at the possibility that a VA beneficiary who has been convicted of a felony should be "provid[ed with] thousands of [dollars in] tax free benefits" during a pretrial detention credited against the penal sentence. Then, first in *Woodard v. Shinseki*, No. 2011-7178, 480 F. App'x 576, 579 (Fed. Cir. 2012), and – after that – in *Wilson v. Gibson*, 753 F.3d 1363, 1367 (Fed. Cir. 2014), the Federal Circuit pointed out that an overpayment created, based on a 38 U.S.C. §§ 1505- or 5313-triggering conviction, did not depend on the actual date of the defendant's receipt of the conviction order and, if the conviction order would eventually get reversed by a court sitting in appellate or post-conviction-relief jurisdiction, or by means of a Federal writ of habeas corpus or a State writ of *coram nobis,* such a reversal would nullify the basis for the overpayment debt if that debt was already created or charged since the acquittal would necessarily yield a remittance of the funds recouped.

In contrast, not a word in *Wilson v. Gibson* suggested that a VA beneficiary whose conviction was not invalidated by a Federal or State post-conviction decision could be entitled to either an in-real-time payment or a past-due remittance of taxpayers' funds affected by the operation of §§ 1505 or 5313 during the period of his/her pretrial detention that has been credited against his/her criminal sentence. Notably, the Federal Circuit's opinion in *Wilson v. Gibson* came just one month after the Court had issued its influential opinion in *Mulder v. Gibson*, 27 Vet. App. 10 (2014), that was affirmed by the Federal Circuit *sub nom. Mulder v. McDonald*, 805 F.3d 1342 (Fed. Cir. 2015). There, the Federal Circuit all but rang the death toll to VAOPGCPREC 3-2005.

In *Mulder*, an incarcerated veteran asserted that his 60-day period (*i.e.*, the period preceding the date of the reduction of the amount payable of his VA benefits) should have started to run later, that is, on the date of the veteran's sentencing since, under the laws of his State (same as it is under the laws of all other States, be it based on the States' constitutions or their penal statutes, or caselaw-based doctrines), he could have been, theoretically speaking, released on bail until sentencing. In light of this theoretical possibility, the veteran argued that the amount payable of his VA benefits had been reduced too early. In response, the Federal Circuit made the statement showing that the position taken by the OGC in VAOPGCPREC 3-2005 was incorrect.

Specifically, the Federal Circuit in *Mulder* pointed out that a VA beneficiary "incarcerated prior to sentencing will generally be released earlier than if the veteran was not incarcerated until after sentencing," *i.e.*, that the period of the pretrial detention would be credited against the beneficiary's penal sentence. Therefore, "[a]ny perceived inequity [in terms of the length of the period of reduced amount payable of VA benefits would necessarily be] remedied by the earlier resumption of [full payments of VA] benefits that accompanies an earlier release from incarceration." *Mulder*, 805 F.3d at 1349. Thus, the Federal Circuit unambiguously acknowledged that any period of pretrial detention that has been credited against the period of a VA beneficiary's penal sentence must indeed be factored into the calculative process of an

overpayment since it would be wholly anomalous to end the period of 38 U.S.C. §§ 1505 or 5313 earlier upon release from confinement that had been sped up by the beneficiary's pretrial-detention credit but start the 38 U.S.C. §§ 1505 or 5313 period on the same day regardless of any pretrial-detention credit. And, after the Federal Circuit's influential affirmance in *Mulder*, both the Court and the Federal Circuit have had their eye on legislative policy, reiterating, time and again, that "we have recognized the policy inherent in § 5313: 'Congress did not see the wisdom in providing substantial benefits to [incarcerated] disabled veterans when at the same time the taxpayers of this country are spending additional thousands of dollars to maintain these same individuals in penal institutions.'" *Gurley v. McDonough*, 23 F.4th 1353 (2022) (affirming the Court's opinion in *Gurley v. Wilkie*, No. 19-1880, 2020 U.S. App. Vet. Claims LEXIS 1898 (Oct. 15, 2020), quoting *Mulder*, 805 F.3d at 1348, and clarifying that this legislative "policy applies regardless of whether the reduction for the incarceration period is [or is not] implemented by VA during incarceration or after incarceration").

Further, for those having unease with the need to contact the Federal Bureau of Prisons or the States' Departments of Correction for information as to the periods of credited pretrial detention that is critical to proper determinations of 61st days of incarceration for the purposes of 38 U.S.C. §§ 1505 or 5313, and 38 C.F.R. §§ 3.666 or 3.665, the Court reminded in *Zulu v. McDonough*, No. 19-8021, 2022 U.S. App. Vet. Claims LEXIS 177, at *4 (Feb. 8, 2022), that, pursuant to 38 U.S.C. § 5112, the "effective date of a reduction or discontinuance of [VA] compensation, [DIC], or pension . . . by reason of an erroneous award based on an act of commission or omission by the beneficiary . . . shall be the effective date of the award," and the meaning of "the term 'erroneous award' . . . includes [each] erroneous payment made subsequent to the initial award." *Id.* (quoting *Dent v. McDonald*, 27 Vet. App. 362, 374 (2015)). In light of this body of law, it appears substantially certain that, had a pretrial-detention-credit-based challenge been presented to the Court or the Federal Circuit in the form of a case or controversy, the position that had been taken two decades ago in VAOPGCPREC 3-2005 would have been rejected as facially inconsistent with the courts' guidance and legislative policy pronouncements accrued during the two decades that have passed by.

Indeed, in *Molitor v. Shulkin*, 28 Vet. App. 397, 408 (2017), the Court stressed that OGC precedential opinions were not binding on the courts since such opinions lacked the formalities of true notice-and-comment rulemaking, *i.e.*, the courts would defer to the OGC opinions depending on the OGC's ability to "persuade." As of now, it has become clear that the courts have not been persuaded by the position stated in VAOPGCPREC 3-2005. And while OGC precedential opinions are, as a general matter, binding on the Board, *see Walsh v. Wilkie*, 32 Vet. App. 300, 305 (2020) (citing 38 U.S.C. § 7104(c)), it has also been long established that an OGC precedential opinion cannot binding on the Board if the OGC's position is "inconsistent with binding judicial decisions." *Bernard v. Brown*, 4 Vet. App. 384, 394 (1993). Given that the rationale in *Wanless*, *Woodard*, *Wilson*, *Mulder*, and *Gurley* are seemingly consistent with the Supreme Court's guidance in *United States v. Wilson* and the legislative purpose of 38 U.S.C. §§ 1505 and 5313, but wholly incompatible with the OGC's position taken in VAOPGCPREC 3-2005, the time has come for the OGC to revisit the issue and issue a new precedential opinion enabling the Board to stop being pulled in two diametrically opposite directions by the OGC two-decade-old guidance on the one side and the legislative-intent-based rationale of the Court's and Federal Circuit's opinions on the other side. In sum, while, two decades ago, the OGC had to act without a benefit of the courts' and legislators' guidance, the same is no longer true. The law of veterans' benefits is a unique area of law; it is a nimble and swiftly developing discipline, akin to the law of information technologies, where two decades might have more impact on a subtle subarea of veterans law jurisprudence than two centuries might impact, say, the law of negligence, *i.e.*, a long-settled subarea of the law of torts. And, since VA's actions rooted in the OGC guidance stated in VAOPGCPREC 3-2005 cost taxpayers about two hundred million dollars per year in VA benefits overpaid to incarcerated veterans and about twenty million dollars per annum in VA benefits overpaid to re-incarcerated veterans, the urgency of an OGC *de novo* review of the current legal landscape related to the determination of the 61st day of incarceration

for the purposes of 38 U.S.C. §§ 1505 and 5313, and 38 C.F.R. §§ 3.666 and 3.665 cannot be overstated since VA can certainly put these funds to great use by benefitting many veterans and their families in a fashion consistent with the legislative intent and judicial guidance. After all, as William E. Gladstone noted, "Justice delayed is justice denied."

Anna Kapellan is a Counsel to the Board of Veterans' Appeals with the Specialty Case Team, Overpayment and Waiver Group. The views and opinions provided by Ms. Kapellan are her own and do not represent the views of the Board of Veterans' Appeals, the Department of Veterans Affairs, or the United States. Ms. Kapellan is writing in her personal capacity.

For background information and additional discussion concerning this topic, the reader is referred to Ms. Kapellan's previous articles appearing in the Veterans Law Journal, Vols. I and III of 2022 (entitled "A Two-Hundred-Million-Dollar Question About 'Day One' in VA's Overpayments to Incarcerated Beneficiaries" and "A Twenty-Million-Dollar Question About Sixty Days in VA's Overpayments to Reincarcerated Beneficiaries").

Finding the Lost Case Law of the Agency

By Eric Lee Hughes

The US Department of Veterans Affairs and its predecessor agencies can trace their beginnings to November 15, 1636, when the pilgrims at Plymouth enacted a law providing benefits to maimed veterans. *See* G. Adolphus Weber, Laurence Frederick Schmeckebier, *The Veterans' Administration, its history, activities, and organization.* Washington: The Brookings Institution (1934), at 3, available at: https://hdl.handle.net/2027/uva.x001477481 (accessed March 19, 2024). It might surprise the reader that, like other American bodies of law, there is a continuous case law history. However, unlike the rest of American common law, most pre-Court of Appeals for Veteran's Claims case law was generated by the VA and its predecessor agencies, not by a particular court.

It seems these pre-CAVC decision are more than academic curiosity, as the Secretary has repeatedly relied upon these old cases in formulating both policy positions and precedent opinions of the General Counsel. This short note discusses where to find this old body of case law. The author is certain that anyone who explores this vast agency history will find the information illuminating academically. Additionally, the information gleaned from this resource will likely assist in informing the advocate of how and why the agency behaves the way it does. But perhaps most importantly, a tenacious advocate will be able to effect consistency in adjudication from an agency that is often too large to respond to individual cases predictably.

In *Lorenzano v. Brown*, 4 Vet. App. 446 (1993), the Court held that the 90-day requirement to qualify for veterans benefits meant "90 days of continuous service," and the Court relied upon Vet. Aff. Op. Gen. Counsel Prec. 4-80, which in turn relied upon Administrator Decision No. 247. After spending more than 10 years researching the VA's historical case law, the author has been unable to locate General Counsel Opinions issued between 1974 and 1989.

Lorenzano was decided without oral argument. The parties' briefs are not available on the CAVC website. However, from the nature of the ruling, it seems the Court relied heavily on the Secretary's reliance on the agency's unpublished history and opinions.

In *Sizemore v Principi*, 18 Vet. App. 262, 272 (2004), the Court pointed out that the Board failed to follow Vet. Aff. Op. Gen. Counsel Prec. 12-99, which cited Administrator Decision No. 100 (1932) for the Secretary's rationale. In both *Lorenzano* and *Sizemore*, it was counsel for the Secretary, and not the appellant, who relied on the old body of law for its arguments. Indeed, the author has been unable to locate any example of the veteran appellant or petitioner citing the agency's pre-1989 decisions – as expressed in this lost body of case law. Thus, veteran advocates seem to be at a disadvantage in terms of preparation, analysis of their fact pattern, and persuasive strength of their arguments before both the Board and the Court.

Looking into the Office of General Counsel's precedential opinions more deeply, the Office of General Counsel has cited the administrative case law generated by the Agency prior to the creation of the Court multiple times.

Decisions generated by the Veterans Administration before its elevation to a cabinet-level department are called "Administrator Decisions" and are numbered sequentially.

The author has searched the Secretary's own General Counsel Opinions, and has identified OGC citing to the "Administrator's Decisions" fifteen separate times, as follows:

> Vet. Aff. Op. Gen. Counsel Prec. 4-90, c*iting* Administrator Decision No. 931 (1953) *and* Administrator Decision No. 772 (1947).
>
> Vet. Aff. Op. Gen. Counsel Prec. 18-90, c*iting* Administrator Decision No. 715 (1946).
>
> Vet. Aff. Op. Gen. Counsel Prec. 70-90, c*iting* Administrator Decision No. 688 (1946).
>
> Vet. Aff. Op. Gen. Counsel Prec. 74-90, c*iting* Administrator Decision No. 607 (1944).
>
> Vet. Aff. Op. Gen. Counsel Prec. 17-91, c*iting* Administrator Decision No. 702 (1946).
>
> Vet. Aff. Op. Gen. Counsel Prec. 32-91, c*iting* Administrator Decision No. 702 (1946).
>
> Vet. Aff. Op. Gen. Counsel Prec. 58-91, c*iting* Administrator Decision No. 979 (1962).
>
> Vet. Aff. Op. Gen. Counsel Prec. 68-91, *citing* Administrator Decision No. 963 (1959).
>
> Vet. Aff. Op. Gen. Counsel Prec. 69-91, *citing* Administrator Decision No. 976 (1961).
>
> Vet. Aff. Op. Gen. Counsel Prec. 04-92, *citing* Administrator Decision No. 760 (1947).
>
> Vet. Aff. Op. Gen. Counsel Prec. 21-92, *citing* Administrator Decision No. 498 (1942).
>
> Vet. Aff. Op. Gen. Counsel Prec. 22-92, *citing* Administrator Decision No. 181 (1933).
>
> Vet. Aff. Op. Gen. Counsel Prec. 3-93, *citing* Administrator Decision No. 201 (1933).
>
> Vet. Aff. Op. Gen. Counsel Prec. 16-94, *citing* Administrator Decision No. 280 (1934).

Administrative case law generated under the Bureau of Pensions is called Precedent Opinions. Similarly, the author has searched the Administrator's decisions, which cite to the Precedent Opinions twenty-one times, as follows:

> Administrator Decision No. 101 (1932), *citing In re Vinal*, 9 P.D. 19 (1897), *In re Ames,* 8 P.D. 171 (1896), *and In re Showalters*, 7 P.D. 478 (1895).
>
> Administrator Decision No. 130 (1933), *citing In re Graham*, 18 P.D. 461, 463 (1911).
>
> Administrator Decision No. 219 (1934), *citing In re Landon*, 14 P.D. 83 (1903).
>
> Administrator Decision No. 242 (1934), *citing In re Tallman*, 6 P.D. 261 (1893), *In re McGregor*, 22 P.D. 51 (1925), *and In re Widow of Pillsbury*, 21 P.D. 145 (1921).
>
> Administrator Decision No. 375 (1936), *citing In re Apgar*, 14 P.D. 7 (1903).
>
> Administrator Decision No. 436 (1938), *citing In re Mary W., as Widow as Edgar Chadwick*, 22 P.D. 136 (1926), *and In re Moore*, 21 P.D. 443 (1924).
>
> Administrator Decision No. 561 (1944), *citing In re Gleeman*, 15 P.D. 54 (1904), *and In re Macentee*, 12 P.D. 464 (1902).
>
> Administrator Decision No. 646 (1945), *citing Davis v. Davis*, 10 P.D. 403, 408 (1899).
>
> Administrator Decision No. 661, (1945), *citing In re Bice*, 9 P.D. 21 (1890), *In re Graham*, 18 P.D. 461, 464 (1911).

> Administrator Decision No. 975 (1961), *citing In re Dudley*, 6 P.D. 205 (1893); *In re Dempsey*, 9 P.D. 149 (1897); *In Re. Dees*, 9 P.D. 455 (1898); *In re Hill*, 14 P.D. 57 (1903).

The above citations are not currently accessible on any legal search engine or database serving the legal industry. And the author's research indicates that no library in the country possesses a complete set of these printed works in physical form.

The General Counsel's office clearly considers this body of law binding, or at least persuasive, when establishing agency policy. This presents a problem for veterans' advocates because they should have the same opportunity as the Agency to consider and rely on these past decision as binding, or at least persuasive, authority when advocating on behalf of their clients. Thus, it is the author's position that the VA should publish these decisions and make them available to all.

This position is supported by the Freedom of Information Act, which requires the Agency to "make available for public inspection in an electronic format" final opinions and statements of policy and interpretations which have been adopted by the Agency and are not published in the Federal Register. 5 U.S.C. § 552(a)(2).

Nonetheless, a consortium of libraries, known as Hathi Trust, has recently digitized and made these historical decisions available to academics who happen to know where to find it. *See* https://www.hathitrust.org/about (accessed Dec. 4, 2023). This website and the digitally scanned books it contains were created only in recent years. It took the author several years of research, beginning with its an unexpected discovery in 2013, to piece together what has been obscured through history.

Within this archive collection are innumerable gems of veterans' law history on topics ranging from the threshold question of what constitutes fraudulent behavior in the application of benefits, verification that res judicata does not apply to agency decisions vis-a-vis CUEs, and the Agency's own version of the Pro-Veteran Canon upon which *Boone v. Lightner* was based. In short, if the reader is curious about the origin of the Agency's regulations or regulatory positions, the answer can likely be found in these historical records.

Thanks to Hathi Trust, you can find many of these historical gems in the following original source documents:

> United States Pension Bureau, Webster, W. Holcomb., Curtis, F. B., A digest of the laws of the United States: governing the granting of army and navy pensions and bounty-land warrants; decisions of the Secretary of the Interior, and rulings and orders of the commissioner of pensions thereunder. Washington: Govt. print. off. (1885), *available at* https://catalog.hathitrust.org/Record/006585264 (accessed Dec. 4, 2023)
>
> United States Department of the Interior, Board of Pension Appeals, Decisions of the department of the interior: in appealed pension and retirement claims, also a table of cases reported, cited, distinguished, modified, and overruled and of statutes cited and construed. Washington: U.S. Govt. print. off. (1887-1930), *available at* https://catalog.hathitrust.org/Record/002140888 and https://catalog.hathitrust.org/Record/010307456 (accessed Dec. 4, 2023)
>
> United States Veterans Administration, Central Office. Decisions of the administrator of veterans' affairs in appealed pension and civil service retirement cases. Washington: U. S. Govt. print. off., *accessible at* https://catalog.hathitrust.org/Record/010068909) (accessed Dec. 4, 2023)
>
> United States Veterans Administration. (1947-1974). Decisions of the Administrator of Veterans' Affairs, Veterans Administration. Washington, D.C.: U.S. G.P.O., *accessible at* https://catalog.hathitrust.org/Record/010365954) (accessed Dec. 4, 2023)

Downloading these case books must be performed one page at a time unless you are an institutional member of Hathi Trust. But most are indexed like other physical law book. So, if you don't mind the feeling of dusting off old books and spending a little

time reading through historical texts, you may find them to be a treasure trove of information.

Eric Lee Hughes is an accredited claims agent. The views and opinions provided are his own.

If you are interested in contributing to the Veterans Law Journal, either as an author or editor, please reach out to Jeff Price, our Editor-in-Chief, at Jeffrey.Price@nvlsp.org.

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