VETERANS LAW JOURNAL

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CAVC Bar Association Panel Discusses Recent Precedential Cases and How to Utilize Their Holdings

by Jillian Berner

On June 9, 2021, the CAVC Bar Association convened a panel of practitioners to review certain recent precedential cases of the Court and offer tips on their application to practitioners' cases. Held via Zoom, the panel attracted over 115 attendees, who heard about panelists' takeaways from the Court's newest cases.

The panel consisted of Adam R. Luck of GloverLuck; Ronen Morris of the VA Office of General Counsel, Court of Appeals Litigation Group; Kaitlyn C. Degnan of Chisholm, Chisholm, & Kilpatrick; Jenny J. Tang of Bergmann & Moore; and moderator Jenna Zellmer of Chisholm, Chisholm, & Kilpatrick.

Attorney Ronen Morris of the VA Office of General Counsel, Court of Appeals Litigation Group, spoke to the attendees about his impressions of recent CAVC opinions.

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During the panel, each of the attorneys discussed their roles in some of the precedential cases of focus. For example, Luck discussed *Hatfield*, a case recently decided by the Court in which the informed consent and deviation standards under 38 U.S.C. § 1151 were considered. Tang discussed her colleague James Ridgway's role in *Grimes*, also recently decided by the Court and addressing the scope of claims for service connection. *Degnan* discussed *Chavis*, a case considering the Court's jurisdiction over radiculopathy claims when considering spinal disorders.

In addition to the attorneys discussing their thoughts on their own cases, the other panelists provided their feedback as to the effect of the Court's rulings in the various opinions. The panel explained recent changes and updates to case law in a manner that allowed attendees to gain insight into counselors' reaction to the Court's treatment of their claims. With the high volume of precedential opinions issued by the Court this quarter, these panelists' understanding of the case law is helpful to practitioners on both sides of the aisle.

A recording of the panel can be accessed here: https://zoom.us/rec/share/GFi3HKhz_62Hc2plcwrZ1VVBfxAQmUffLAjRTDYMeUuWREKgGaV-gUb7VZDoeUX-.tiApB8vje_Y614Rr.

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

CAVC Bar Association Holds Panel Discussing Adapting to the Appeals Modernization Act (AMA) from Veterans' Advocates' Perspective

by Stacey-Rae Simcox

On May 26, 2021, the CAVC Bar Association convened a panel of practitioners to discuss the pros and cons of each avenue of appeal in the AMA system, tips as to when to use which lane, and an assessment of the success of the AMA so far. Held via Zoom, the panel attracted approximately 100 attendees.

The panel consisted of April Donahower, Appellate Supervisor at Chisholm, Chisholm, & Kilpatrick; Shana Dunn, Founding Partner of West & Dunn; Professor Caleb Stone with William & Mary's Lewis B. Puller, Jr. Veterans Benefits Clinic; Tom Polseno, Partner with Bergmann & Moore; and moderator Sarah Blackadar, a member of the CAVC Board of Governors.

Panelist Shana Dunn, Founding Partner of West & Dunn, discussed her thoughts on the AMA system.

The panelists discussed how to determine whether cases should be moved from the legacy to the AMA system. There was also discussion of the strategies that are used to navigate the new system and determine how to help veterans and the VA to get more comfortable with the new appeals system. The panel also discussed how to help the VA make good decisions on issues that are newly found in the AMA system, particularly procedural deficiencies, both on remands from the Court and within the appeal options in the VARO.

There was a vibrant Q&A session afterwards with several CAVC Bar Association members asking questions about issues they are seeing in their own practice.

Stacey-Rae Simcox is a Professor of Law and the Director of the Veterans Law Institute and Veterans Advocacy Clinic at Stetson University College of Law.

Message from the President

It has been a very busy year for the CAVC Bar Association, even with the world only beginning to spin again in the last couple of months. I hope that all our members have taken advantage of the outstanding monthly programming events we have presented thus far in FY 2020-21. I wish to once again personally thank and recognize those who committed their time and expertise to our programming and helped support our mission of furthering the knowledge of all practitioners who, in one way or another, work towards assuring veterans receive proper and judicial review within the U.S. Court of Appeals for Veterans Claim process.

November: Virtual Lunch with the Court's newest members of the bench, Judge Scott J. Lauer and Judge Grant C. Jaquith.

January: Court Updates from Chief Judge Margaret Bartley

February: This event was an extremely interesting and fun panel discussion we jointly presented with our friends at the CAVC Historical Society. Great job by all four of the Court's Clerks from over the years: Melanie Dorsey, Robert Comeau, Norman Herring, and current Clerk, Gregory Block.

March: The DVA Hiring Panel, consisting of Brian Griffin, James Ridgway, Sarah Fusina, and moderated by BOG member Ashley Varga, provided insight and advice that was no doubt helpful to all those who may be interested in pursuing a career within the Department of Veterans Affairs.

April: The Veterans Consortium Overview Training presented by Judy Donegan and Courtney L. Smith showed just how much TVC is up to every day in assuring our nation's veterans have an opportunity to seek justice through pro bono representation and other resources they provide at no-charge. I encourage all the Bar's members to consider volunteering with TVC in one capacity or another.

May: The AMA Panelists of April M. Donahower, Shana M. Dunn, Professor Caleb Stone, Tom Polseno, and moderated by BOG member Sarah Blackadar, set forth a lot of excellent insight into how the AMA is playing out in the VA admin and CAVC worlds and how diligent strategy when in either realm can directly impact how successful you will be in the other.

June: Our most recent panel made up of Adam Luck, Ronen Morris, Kaitlyn Degnan, Jenny Tang, and moderated by Jenna Zellmer, dove into a review of selected precedential decisions by the Court in 2021 and what their impact may be on future Appellant arguments. Our panelists were all involved in the cases reviewed and their collective insight was outstanding.

I am extremely excited about our July programming event, "*Point Made*", a legal brief writing workshop with acclaimed instructor Ross Guberman. This event will be held on July 6th, from 9 a.m.-12 p.m. and is being presented to the Bar's members at no charge. Be sure to RSVP soon as our deadline is by emailing our Membership chair Amanda at Amanda.Radke@va.gov, with your interest, affiliation, and note if you are a member of the Court's staff.

August's programming date is TBD as we pull together our panelists for what will be a follow-up to our July programming that you will not want to miss (yes, I am intentionally keeping you in suspense until the save the date goes out in mid-July). Our final programming event of the fiscal membership year will be part of our annual membership meeting on September 29th and will take place, in person, in Washington, D.C. In addition to conducting necessary business and hearing from Chief Judge Bartley, we will be hearing from some of our founding members, who came together 20 years ago this July to create the CAVC Bar Association. Following the meeting we will be adjourning to

socialize and celebrate 20 years! More details will follow on time and location as things open more and more, and you did not misread that, we will indeed be in-person! Live streaming will also occur, but we hope to see as many of you there as possible! I invite you to join me in making it a great week by attending our annual meeting and 20-year anniversary celebration on the 29th followed by the NOVA Fall meeting on Sept. 30-Oct. 1 in D.C.

Finally, elections for our Board of Governors and officers will be occurring in September. If you are ready to step up and serve the mission and purpose of the Bar by serving on our BOG, or as an officer, I encourage you to express your interest when we put out the call for nominations via email in August. We are an all -volunteer organization and need our members to be engaged and participate in leadership. I have been serving the Bar for almost 5 years as a member of the BOG, and then officer, and am happy to answer any questions/provide insight into what the different positions within the BOG entail. Email me anytime at jjohns@westdunn.com.

Your humble and obedient servant,
Jason E. Johns
President
CAVC Bar Association

Readers: are you interested in contributing to the Veterans Law Journal*? Attorneys, non-attorney practitioners, paralegals, law students, and other interested parties who wish to either write for the* VLJ *or contribute to its publication should contact Editor-in-Chief Jillian Berner at berner.jillian@gmail.com.*

Message from the Clerk of Court

Dear Colleagues:

Spring greetings to all, with hopes that you are as optimistic as I am about the potential to put so many aspects of life in a pandemic behind us. While this last year has been challenging, we continue to be amazed at the incredible work being done on behalf of veterans at the Court. In fact, I think it's fair to say that we have collectively not missed a beat and have even made some changes that further enhance our ability to be both efficient and effective.

One example of change for the better has been the recent introduction of electronic payments for filing fees. Some of you have already used the Court's pay.gov portal for bar admissions or to request certificates of good standing, but beginning in April the pay.gov portal was expanded to accept filing fees. Filing fees payable include the Court's $50 basic filing fee for appeals and petitions, the $400 fee associated with filing requests for class certification and class action, and the $500 filing fee for appeals to the U.S. Court of Appeals for the Federal Circuit. You can reach the Court's pay.gov portal at https://www.pay.gov/public/form/start/836394429.

Another example of innovation, in this case driven by encouragement from the Court's Bar, is the Court's recent amendment of its E-Rules to clarify that the Court does not object to the use of

electronic signatures from commercial providers like DocuSign. As these kinds of services become more prevalent, this change creates flexibility that many practitioners can make use of, particularly during a pandemic when mail service delays are not infrequent.

A very new and exciting Rule 33 pilot program was announced by Chief Judge Bartley in her "Message from the Chief Judge" in the last Veterans Law Journal. Subsequent to this announcement, we had just over fifty experienced veterans law practitioners volunteer to participate in this pilot, and in the first week of May we started notifying pro se appellants of the opportunity to participate in the pilot. It's too early to tell how many appellants will opt into the program, or what kind of results they will achieve,

but the pilot does create opportunity for pro se litigants to participate in Rule 33 conferences and, for those cases that are resolved, to reduce the number of pro se cases that require further case development, briefing, and review by a judge.
By the way, if you didn't volunteer initially, there is still time to become part of this pilot – if you have been a member in good standing of the Court's Bar for at least two years and have completed at least 50 cases before the Court, you are eligible. All it takes to volunteer is to send an email, with current contact information, to the Clerk of the Court (i.e., me) at gblock@uscourts.cavc.gov.

While it truly is exciting to talk about current innovations, my recent experience with CAVC Historical Society/CAVC Bar Association jointly-sponsored Clerks of the Court Panel gave us a chance to highlight the work of some who have gone before us. Their experiences were many – Clerk Melanie Dorsey talked about forging payroll services for the Court with the Department of Agriculture, Clerk Bob Comeau was there at the beginnings of Rule 33 and the Court's mediation program, and Clerk Norm Herring's term included transition of the Court into the paperless world. Picking the brains of past clerks turned out to be very instructive, and the process also inspired me to reach out to some of the long-serving staff at the Court for helpful thoughts they might have to share.

One of the longest serving members of our Court staff – more than 30 years - is Elizabeth (Liz) Hessman-Talbot from our Central Legal Staff. When asked for some thoughts, Liz shared the following:

Often, lawyers are required to interpret and assess the adequacy of medical opinions written by doctors who don't know anything about veterans law. Interpretation of medical opinions is not taught in law school. In addition to panel opinions, I think reading single-judge decisions is a way to get a feel for how medical opinions should be assessed. Everyone should read the single-judge decisions when they can. They provide insight into individual judges and situations that have not been addressed by panel opinions.

When parties agree to a JMR, they should anticipate going up against the 30-day limit and the necessity of filing stays. Communication between attorneys is important. If you must leave town, let the other counsel know. It's frustrating leaving unanswered messages.

I think lawyers should be aware of their client's status. I am amazed that appeals have gone on for months, and even years before anyone found out about the veteran's death. No one wants to draft elaborate opinions or schedule exams to only find that a veteran is deceased. Communications with clients is an important part of the attorney-client relationship.

Another long serving member of the Court staff just retired after 30 years of service at the Court – Karen Meyers from our Public Office. Karen is a stickler for details and her thoughts are focused on making sure specific pleadings are accurate and avoid confusion. Specifically, Karen offered the following thoughts:

- JMRs & JMPRs: Make sure the BVA decision date matches in both the first and last paragraph. Not all quote the BVA decision date in the last paragraph, but if they do, they must match.
- Documenting the Appellant's consent on Rule 42 withdrawal motions: It would be helpful if the attorneys could make a separate sentence that says, "The appellant consents to the motion."
- EAJA applications: Make sure the amount in first paragraph matches the total with fees in the itemization.
- EAJA: If multiple attorneys are on the case, make sure the lead counsel signs the itemization.
- If an attorney needs to report a change of address or any contact information, notify the Court's admissions clerk, Karolyn Marshall, at kmarshall@uscourts.cavc.gov, and not the Public Office.

It continues to be a privilege to work with so many of you in support of the Court's important work, and I particularly appreciate your efforts to reach out to me with your thoughts and suggestions. I look forward to the opportunity to see many of you in person again soon.

Regards,
Greg

Greg Block
Clerk of Court

Announcement: Elections are Coming!

The CAVC Bar Association Board of Governors will have 3 Governor-at-large vacancies for the upcoming year (3-year term beginning September 29, 2021), as well as elections for our annual officer positions of President-elect (3-year commitment), Secretary, and Treasurer. A formal call for nominations will go out on or around August 2. Candidates may also self-nominate. Nominations will close August 27 and ballots will be released on August 30, with a voting deadline of September 22. Ballots will be mailed from and to cavcbarassoc@gmail.com. If you are interested in serving the Bar Association in any one of these leadership positions, they are open to any regular member in good standing and we encourage all to consider serving!

Court Addresses Functional Ankylosis and Jurisdiction over Radiculopathy Ratings

by Jenny J. Tang

Reporting on *Chavis v. McDonough*, __ Vet.App. __, No. 18-2928 (Apr. 16, 2021).

In *Chavis*, the Court held that ankylosis may be found when there is evidence of the functional equivalence of ankylosis, and that 38 C.F.R. §§ 4.40 and 4.45 apply when determining the same. Second, the Court held that, given the particular facts in *Chavis*, the Board had jurisdiction over the issue of an increased rating for radiculopathy associated with a spine disorder, despite an unappealed partial award by the RO for radiculopathy that was issued during the appeal proceedings for an increased rating for the spine disorder. The Court also declined to issue a bright-line rule regarding whether radiculopathy is always part and parcel of a claim for increase for a spine disorder.

Initially, a discussion of the facts is warranted in light of the Court's fact-driven analysis. In August

1976, the RO granted service connection for low back strain and assigned an initial noncompensable rating. In January 1999, the RO increased the low back rating to 20%, and the RO noted that the results of a March 1998 MRI were "questionable whether [Mr. Chavis] had symptoms of a left L5 radiculopathy." In November 2008, Mr. Chavis filed a claim for increase for the lumbar spine disability. A December 2008 VA examiner found no ankylosis. The VA examiner also found bilateral lower extremity (BLE) neurological symptoms and sciatic nerve involvement.

In February 2009, the RO granted a 40% rating for the lumbar spine disability based on the December 2008 VA examiner's finding of flexion limited to 30 degrees or less. Mr. Chavis filed a timely NOD to appeal the decision "on back problems" and he perfected his appeal to the Board in April 2010. In January 2012, he described "episodes" of pain that left him unable to move. In a June 2012 SSOC, the RO stated that a December 2011 VA examiner's diagnosis of left lumbar radiculitis was based on subjective symptoms and therefore does not warrant "a separate diagnosis of radiculopathy." During the December 2015 Board hearing, Mr. Chavis testified that when he is experiencing a period of increased symptoms, he is unable to move and is either confined to his bed or dependent on a walker or wheelchair. He also described BLE radiating pain and numbness.

In February 2016, the Board remanded the lumbar spine claim, in part, to obtain a VA examination addressing the severity of the lumbar spine disability as well as to determine the presence of neurologic manifestations. After a February 2017 VA examination, a November 2017 VA addendum opinion stated that Mr. Chavis presented with symptoms of BLE radiculopathy and that such radiculopathy is moderate. In January 2018, the RO awarded service connection for BLE radiculopathy as associated with the lumbar spine disability and assigned an initial 10% rating for each leg. In April 2018, the Board issued a decision regarding the lumbar spine and BLE radiculopathy ratings, and Mr. Chavis appealed the decision to the Court.

Functional Ankylosis

The Board denied entitlement to a rating greater than 40% for a lumbar spine disability. The Board found that there was no ankylosis. The Board then found that 38 C.F.R. §§ 4.40 and 4.45 are not applicable because "the [v]eteran already has the highest available rating based on restriction of motion."

Mr. Chavis argued that 38 C.F.R. §§ 4.40 and 4.45 are applicable, and that the Board's failure to apply these provisions was prejudicial because his lumbar spine disability more nearly approximates the functional equivalent of unfavorable ankylosis during flare-ups that render him unable to move. In response, the Secretary argued that each VA examiner determined that his spine was not fixed in flexion or extension and therefore no examination showed ankylosis. At oral argument, the Secretary contended that VA's General Rating Formula for Diseases and Injuries of the Spine (General Rating Formula) under 38 C.F.R. § 4.71a does not contemplate the functional equivalent of ankylosis.

The Court discussed VA's history of proposed rulemakings pertaining to "ankylosis" and emphasized that, despite the Secretary's assertion during oral argument that ankylosis is a diagnosis, VA considers ankylosis to be an objective finding like limitation of motion, muscle spasm, guarding, and tenderness. The Court also identified provisions in the *VA Adjudication Procedures Manual* (M21-1) that describe ankylosis as a "symptom." The Court then discussed how joint disabilities are rated based on the criteria in 38 C.F.R. § 4.71a, and that a higher rating for a joint condition may be warranted based on the factors listed in §§ 4.40 and 4.45 (colloquially known as the *DeLuca* factors). The Court explained that its caselaw makes clear that application of the *DeLuca* factors may result in a higher evaluation than one based solely on limited motion if a claimant demonstrates functional loss equivalent to that contemplated by the higher evaluation. The Court further explained that nothing in those regulations or in its caselaw suggests that the *DeLuca* factors should not apply in the context of ankylosis, particularly given that ankylosis is, in essence, a complete limitation of motion. The Court also distinguished this case from *Johnson v. Brown*, 9

Vet.App. 7, 11 (1996), which the Board had relied upon to deny a higher rating based on ankylosis.

The Court held that the requirement of ankylosis in the General Rating Formula can be met with evidence of the functional equivalent of ankylosis, and that §§ 4.40 and 4.45 apply when evaluating the severity of a joint condition for the presence of the functional equivalence of ankylosis, to include during flare-ups. Because the Board incorrectly foreclosed the application of the *DeLuca* factors in determining whether there was the functional equivalence of ankylosis, the Court remanded the matter to the Board for readjudication.

Jurisdiction over Radiculopathy

The Board expressly found that it had jurisdiction over the BLE radiculopathy ratings, and it denied ratings greater than 20% for the BLE radiculopathy associated with the lumbar spine disability based on a finding that Mr. Chavis's radiculopathy was not moderately severe.

After briefing and oral argument at the Court, the Secretary argued that the Board did not have the jurisdictional authority to address the merits of the radiculopathy rating issues because Mr. Chavis did not file a Notice of Disagreement (NOD) against the January 2018 RO decision that awarded service connection and assigned initial 10% ratings for BLE radiculopathy, because the propriety of those ratings is a downstream issue requiring a separate NOD. The Court noted that a potential jurisdictional defect may be raised, *sua sponte* or by any party, at any stage in the Court's proceeding.

Mr. Chavis argued at the Court that the Board properly had jurisdiction over the radiculopathy evaluations because those matters were part of the claim for an increased rating for the lumbar spine disability. He also argued that his November 2009 NOD against the lumbar spine disability rating placed the radiculopathy evaluations in appellate status because it expressed disagreement with the February 2009 RO decision that did not address neurologic complications.

Overall, the Court concluded that, given the nature and progression of Mr. Chavis's lumbar spine condition and VA's duty to sympathetically construe his broadly-worded pro se filings, the issues of increased BLE radiculopathy ratings were part of his claim seeking a higher rating for the underlying lumbar spine disability. The Court, however, noted in footnote 17: "We leave for another day the question whether issues of higher evaluations for radiculopathy are always part of claims seeking higher evaluations for the underlying spine disability."

First, the Court explained that the lay and medical evidence throughout the appeal period of the lumbar spine claim reflects neurologic signs and symptoms that VA eventually attributed to BLE radiculopathy associated with the lumbar spine disability.

Second, the Court explained that VA had considered Mr. Chavis's reports of neurologic sequelae as part of his claim seeking increased compensation for his back disability, as demonstrated by the RO's June 2012 Supplemental Statement of the Case, the discussion of neurological symptoms and the availability of separate ratings during the December 2015 Board hearing, and the Board's February 2016 remand that instructed a VA examiner to identify and evaluate all neurological manifestations of the back condition. The Court noted that the RO's and the Board's consideration of Mr. Chavis's lumbar spine disability as including neurological manifestations is consistent with the M21-1's guidance regarding Note (1) of the General Rating Formula.

Third, the Court explained that VA's consideration of his neurological manifestations as part of the claim seeking higher compensation for the lumbar spine disability is also consistent with VA's duty to sympathetically read pro se pleadings. The Court noted that there was evidence of neurological manifestations contemporaneous with his November 2008 informal claim and with his November 2009 NOD, and the Court explained that a sympathetic reading of those broadly worded pleadings compels a conclusion that they encompassed the appropriate ratings for the neurological component of his lumbar spine disability, even though clarity was not obtained until

VA later confirmed the source of the neurological manifestations.

Given these facts, the Court concluded that the Board had jurisdiction over the BLE radiculopathy ratings issues and did not err by issuing a decision on the merits of these issues. Then, the Court remanded the matter for the Board to provide adequate reasons or basis for its denial of increased ratings for BLE radiculopathy, in light of the parties' agreement that the Board failed to adequately explain the standard that it used to determine that the BLE radiculopathy was not moderately severe.

Judge Meredith, dissenting in part, noted that she agreed that VA had an obligation to adjudicate entitlement to benefits for Mr. Chavis's neurological conditions associated with his lumbar spine condition, but that, unlike the majority, she found no legal basis to conclude that any matters addressed in that VA adjudication were automatically placed in appellate status without an NOD against the RO's January 2018 decision regarding BLE radiculopathy.

Judge Meredith noted Mr. Chavis's argument that his November 2009 NOD encompassed disagreement with the RO's failure to adjudicate entitlement to benefits for radiculopathy in the February 2009 rating decision. Judge Meredith agreed that "the 2009 NOD could encompass disagreement with the RO's failure to *award* secondary service connection for radiculopathy in February 2009[.]" She stated, however, that "because the RO did not consider the *upstream* issue of entitlement to benefits for radiculopathy until January 2018, more than 8 years after the NOD was filed[,]" the NOD could not have placed the downstream issue of the propriety of the radiculopathy ratings into appellate status. "In other words, in November 2009, there was no adjudicative determination as to the disability ratings for radiculopathy with which the appellant could have disagreed," she wrote. Judge Meredith also explained that there is no basis for concluding that Note (1) of the General Rating Formula obviates the statutory requirement for placing a rating issue into appellate status by virtue of an NOD.

The dissent also distinguished Mr. Chavis's case from *Bailey v. Wilkie*, 33 Vet.App. 188 (2021), and *Warren v. McDonald*, 8 Vet.App. 214 (2016), explaining that Mr. Chavis's case involved a single claim stream, rather than two claim streams. Judge Meredith further explained that *Bailey* and *Warren* do not compel or support the conclusion that the Board here had jurisdiction over the downstream element of disability ratings for the secondarily service-connected condition. She also distinguished Mr. Chavis's case from a case involving the issue of TDIU as part and parcel of an underlying disability on appeal for increase.

The Secretary filed a motion for reconsideration of the Court's decision in *Chavis*, and on May 18, 2021, the Court denied the Secretary's motion, with Judge Meredith noting her dissent.

Jenny J. Tang is a Senior Appellate Litigation Attorney with Bergmann & Moore, LLC, and she serves as immediate-past-President of the CAVC Bar Association.

Nehmer in Résumé: A Brief Coda

by Benton Jay Komins

In the last Volume of the *Veterans Law Journal* (Spring 2021, 42-48), upon an evaluation of developments of *Nehmer*, I posited that four instructive, arguably exemplary, decisions suggest that any and all subsequent VA regulations concerning diseases "associated" with dioxin/Agent Orange exposure will, somewhat invariably, "trigger" the 1991 Consent Decree and create new groups of qualifying Veterans and appellants. And, despite many efforts to circumscribe the scope off the 1991 Consent Degree, VA has not prevailed in its challenges or defenses.

In reporting on *Euzebio v, McDonough,* No. 20-1072 (Fed. Cir. March 3, 2021) (accessed electronically as *LEXIS 6188*) in the same volume of the *Veterans Law Journal* (10-12), Jillian Berner discussed the latest development in *Nehmer*, wherein the Court of Appeals for the Federal Circuit (Federal Circuit)

found that the Court of Appeals for Veterans Claims (CAVC) had erred by misapplying the legal standard for constructive possession when it held that the Board of Veterans' Appeals (Board) was in constructive possession of a 2014 National Academy of Sciences, Engineering & Medicine (NAS) report (update). Ms. Berner thoroughly discussed all of the salient facts and procedural issues; in short, NAS released its 2014 update, which disclosed an increase in thyroid diseases with Agent Orange exposure, while Mr. Euzebio's appeal to the Board was pending. In denying Mr. Euzebio's appeal, the Board found that the "available scientific and medical evidence" did not support connexity between Mr. Euzebio's thyroid nodules and conceded in-service Agent Orange exposure.

In a panel decision, CAVC upheld the Board's denial. In pertinent part, the majority found that the Board did not constructively possess the 2014 NAS update at the time of Mr. Euzbio's appeal because constructive possession required both awareness and a "direct relationship" to Mr. Euzebio's claim.

Upon disquisition of CAVC jurisprudence, the Federal Circuit found that CAVC had erred in holding that constructive possession required the afore-noted direct relationship to Mr. Euzebio's claim. In lieu of direct relationship, the Federal Circuit held that the legal standard for constructive possession must pivot upon that which is both *reasonable and relevant* to a claim. This standard remains consistent with VA's duty to assist.

Although *Euzebio* focalizes on the proper scope of constructive possession, it maintains the *fil conducteur* of prior consistent *Nehmer* decisions.

The 1991 Consent Decree mandates that whenever VA recognizes that emerging scientific evidence discloses that a positive association exists between Agent Orange exposure and a new disease entity, VA must identify all claims based on the newly recognized disease that were previously denied and then pay disability and death benefits to these claimants, retroactive to the claim's initial date. As I discussed previously, courts have deployed and crafted the Consent Decree, and, arguably, its binding case law antecedents, in multiple ways.

A. To quantify membership in the *Nehmer* "Agent Orange" class ("1. those who are eligible to apply, who will become eligible to apply, or who have a pending claim before VA for service-connected disabilities/diseases and 2. those who had had a claim denied by VA for service-connected disabilities/diseases").

B. To enforce modes of information dissemination about eligibility for compensation under the Agent Orange Act ("ordering mailings to all veterans on VA's Agent Orange Registry; broadcasting through radio and television; publishing notices in major newspapers; and establishing a toll-free telephone information line").

C. To setting scientific evidentiary standards of association between diseases and Agent Orange exposure ("increased risk of incidence" or "a significant correlation").

D. And, in *Nehmer v. U.S. Dep't of Veterans Affairs,* No. 86-06160 (N.D. Cal. Nov. 5, 2020)(accessed electronically as *LEXIS 207458*) (to accepting the fact that some "overlapping and coextensive" benefits for some veterans does not undermine the benefits enunciated in the 1991 Consent Decree for other Veterans or appellants).

Indeed, within this expansive context, *Euzebio* would appear to be as much of a judicial qualification of the meaning of constructive possession within VA jurisprudence as it represents the Federal Circuit's (and prior courts') intransigent maintenance of the provisions of the 2011 Consent Decree, which heretofore have neither been proscribed by overreach, by sunset provisions, nor by the affirmative defense of laches. When taken as such, one cannot overlook that *Euzebio* is yet another responsive iteration of the Ninth Circuit's scathing dicta in *Nehmer v. U.S. Dep't of Veterans Affairs*, 494 F. 3d 846 (9th Cir. 2007) (the government's treatment of Veteran's exposed to

Agent Orange is a disturbing story and VA "has contributed substantially to our national shame.").

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

The *McNair v. Shinseki* Minor-Deviation Standard Does Not Apply Where the Veteran Did Not Give Informed Consent

by Kathryn L. Blevins

Reporting on *Hatfield v. McDonough,* No. 19-7165 (March 8, 2021).

In *Hatfield v. McDonough*, a panel of the U.S. Court of Appeals for Veterans Claims (Court), comprised of Judges Bartley, Greenberg, and Allen, considered whether the rule the Court articulated in *McNair v. Shinseki*, Vet. App. 98 (2011)—that deviations from the informed consent requirements of 38 C.F.R. § 17.32 are minor and immaterial if a reasonable person in similar circumstances would have proceeded with the medical treatment even if informed of the foreseeable risk—applies to a situation where VA did not obtain informed consent before administering a given treatment.

The veteran, Mr. Archie Hatfield, developed Hodgkin's disease after service. He underwent radiation therapy and follow-up care at a VA hospital for two months in 1978. Medical records contain no evidence of documented informed consent for radiation therapy. Though radiation eliminated the Hodgkin's disease, Mr. Hatfield began experiencing severe pulmonary complications soon after completing the treatment. He was re-admitted to a VA hospital one month after completing radiation, but his pulmonary complications worsened, and in January 1979 he died from cardiac arrest and radiation-induced pulmonary fibrosis.

The appellant, Mrs. Pat Hatfield, is his surviving spouse. Soon after Mr. Hatfield's death, Mrs. Hatfield filed a claim seeking dependency and indemnity compensation (DIC) and death pension benefits based on Mr. Hatfield's death, pursuant to 38 U.S.C. § 1151.

A May 1979 postmortem VA medical opinion found the VA had provided an appropriate treatment plan and standard of care, and that radiation pneumonitis was a predictable result of radiation therapy. The VA Regional Office (RO) denied entitlement to death benefits under 38 U.S.C. § 351 (now 38 U.S.C. § 1151) based on the May 1979 VA postmortem opinion.

Mrs. Hatfield appealed. The VA obtained an independent medical opinion in August 1980 which echoed much of the May 1979 opinion. Of particular importance to the appeal, the opinion indicated that the radiation therapy was administered properly, and that fatal radiation pneumonitis is an unusual but well-recognized complication in patients who have undergone radiation therapy.

In October 1980, the Board continued to deny Mrs. Hatfield's claims under § 1151. Mrs. Hatfield did not appeal this decision, and though she attempted to reopen the claim several times between 1991 and 2000, she did not submit new and material evidence to advance the claims. Thus, VA administratively closed the claims.

In 2010, Mrs. Hatfield filed another application to reopen her claim for DIC benefits under § 1151. The decision on appeal derives from this application. Subsequently, the Board issued eight decisions and Mrs. Hatfield appealed to this Court twice, resulting in the Court remanding Mrs. Hatfield's case in both instances. In April 2018, the claim was reopened by the Board because it found it had received new and material evidence to warrant reopening. This April 2018 reopening is important to the Court's analysis because it triggered the applicability of 38 C.F.R. § 3.361.

In an October 2019 decision, the Board denied entitlement to DIC benefits under § 1151. The Board applied *McNair v. Shinseki* and concluded that no reasonable person would have declined the radiation treatment. Mrs. Hatfield appealed to the Court.

The Court addressed two of Mrs. Hatfield's several arguments: 1) the Board erred in determining that informed consent was obtained because it misapplied both 38 C.F.R. §§ 17.32 and 3.361 as well as *McNair*; and 2) the Board erred in finding no pending issues remaining from the time of the 1980 Board decision. This summary will address each argument in turn.

Informed Consent

At the Court, Mrs. Hatfield argued she was entitled to benefits because the VA did not obtain informed consent from her husband, and, as a matter of law, such lack of consent satisfies the proximate causation requirement of 38 C.F.R. § 3.361(d)(1)(ii). She further contended that the Board erred when it used *McNair* to establish consent instead of curing consent that was otherwise defective.

The Secretary argued that the Board correctly applied *McNair* because no reasonable person in Mr. Hatfield's situation would have opted to forego radiation treatment. The Secretary maintained that if the Board finds a lack of documentation of informed consent, then *McNair*'s reasonable-patient standard applies in assessing whether VA had obtained informed consent.

The Court first discussed the Federal Circuit case of *Viegas v. Shinseki*, 705 F.3d 1374 (Fed. Cir. 2013), which details the requirements for entitlement to benefits under § 1151(a). The requirements are as follows: 1) The veteran must experience a qualifying additional disability or death that was not the result of the veteran's willful misconduct; 2) the additional disability or death must have been caused by VA medication, treatment, care, or examination (an actual "but for" causation requirement); and 3) the proximate cause of the veteran's additional disability or death must be "carelessness, negligence, lack of proper skill, error in judgment, or similar instances of fault on the part" of VA or "an event not reasonably foreseeable."

The Court found the first and second elements were met in this case. Thus, the issue was the proximate causation element. 38 C.F.R. § 3.361(d) describes the three scenarios in which veterans may establish proximate causation.

Section 3.361(d)(1), which essentially mimics 38 U.S.C. § 1151(a)(1)(A), provides that proximate causation can be established with a showing of "carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on VA's part in furnishing hospital care, medical or surgical treatment, or examination caused for the additional disability or death." In *Halcomb v. Shinseki*, 23 Vet. App. 234 (2009), the Court noted that under § 3.361(d)(1), the claimant must show *either* (1) VA failed to exercise the degree of care that would be expected of a reasonable health care provider; or, as relevant here, (2) VA furnished the care, treatment, or examination *without the veteran's informed consent based on the requirements of 38 C.F.R. § 17.32*.

The Court further explained that, under § 3.361(d)(1)(ii), proximate cause is established where there was a lack of informed consent substantially complying with § 17.32; however, the regulation provides an exception to defective consent when the defect is a minor deviation from § 17.32's requirements. This exception was at issue in *McNair*. The Court noted that, contrary to the Secretary's argument, this exception does not create another means to find consent in the first place, and nothing in *McNair* suggests it does.

In *McNair*, the Court held that VA's failure to inform a patient about a potential adverse effect did not defeat a finding of informed consent if a reasonable person faced with a similar circumstance would have proceeded. The Court distinguished *McNair* from the present case by noting that, in *McNair*, there was an attempt to provide informed consent shown in the record, but the VA provider failed to warn of a specific adverse side effect from which the veteran suffered as a result of the VA provided care. However, here the Board expressly found no documentation of informed consent.

The Court held that the minor-deviation exception provided in § 3.361(d)(1)(ii) and the reasonable person standard in *McNair* applies only when there has been a predicate finding of informed consent that is in substantial compliance with § 17.32's requirements. The Court further held that *McNair* does not apply to situations where no informed

consent was obtained or attempted. Accordingly, the Court concluded that the Board legally erred by applying the *McNair* minor-deviation standard to Appellant's case where there was no informed consent.

Having established that the Board found Mr. Hatfield had a qualifying disability, that this disability was actually caused by VA's actions, and that VA did not obtain informed consent, all three requirements to establish entitlement to benefits pursuant to § 1151 were met. Thus, setting aside the Board's legal error in misapplying *McNair* to this case, the Court concluded Mrs. Hatfield is entitled to § 1151 benefits. Accordingly, the Court reversed the Board's denial and ordered VA to award benefits on remand.

The 1980 Board Decision

Mrs. Hatfield also contended that the October 1980 Board decision did not address whether the quickness of Mr. Hatfield's death was an unforeseeable event. The Court addressed this conclusion despite their grant of § 1151 benefits based on informed consent because, if Mrs. Hatfield were correct, she could potentially be entitled to an earlier effective date for the award of § 1151 benefits.

The Secretary argued that in the October 1980 decision, the Board clearly found that Mr. Hatfield's pneumonitis was not "an unforeseen or untoward event" associated with radiation therapy, and, therefore, the Board adequately adjudicated all pending issues in the decision.

The Court agreed with the Secretary and concluded that the Board did not err when it concluded that the foreseeability issue was adjudicated and therefore does not remain pending. That portion of the decision was affirmed.

Kathryn L. Blevins is Associate Counsel at the Board of Veterans' Appeals.

CAVC Holds that 38 C.F.R. § 20.101(d) (now 38 C.F.R. § 20.104(c)-(d)) does not Apply to Petitions to Reopen a Claim

by Michelle V. Smith

Reporting on *Sheppard v. McDonough,* No. 19-4776 (March 15, 2021).

In *Sheppard*, Mr. Sheppard (the veteran) appealed a May 2019 Board of Veterans' Appeals (Board) decision that denied reopening claims for service connection for an unspecified right-hand disability and for a psychiatric disorder. Mr. Sheppard argued that whether new and material evidence had been submitted to warrant reopening a claim for service connection is a jurisdictional question, which requires notice of the jurisdictional defect, the opportunity to present evidence and argument, and to request a hearing under 38 C.F.R. § 20.101(d) (2018) (redesignated as 38 C.F.R. § 20.104(c)-(d), effective February 19, 2019). The Court of Appeals for Veterans Claims (CAVC) held that the reopening of a claim is not a jurisdictional question to which the regulation applies.

By way of background, the VA regional office (RO) denied the claims for service connection in 2008 and the rating decision became final. In April 2014, the RO declined to reopen the claims because new and material evidence had not been submitted. In response to a notice of disagreement (NOD), the RO issued a statement of the case, which reopened the claims and denied them on the merits. With the substantive appeal, Mr. Sheppard requested a Board hearing in Washington, D.C. He later withdrew the request, stating that a hearing was unnecessary to decide the case and that he did not want to travel "to try and provide any new information." In May 2019, the Board denied reopening the claims for service connection for a right-hand disability and a psychiatric disability.

Before the CAVC, Mr. Sheppard argued that the Board erred by not providing notice and an

opportunity to be heard prior to denying the petitions to reopen.

The Secretary argued that the Federal Circuit case of *Jackson v. Principi*, 265 F.3d 1366 (Fed. Cir. 2001) controlled. In *Jackson*, the Federal Circuit found that a claimant is not prejudiced in situations where the RO had reopened the claim and the Board concludes that new and material evidence has not been submitted without first providing notice. The Federal Circuit reasoned that there was a large degree of overlap in the evidence that would require reopening a claim or addressing the same claim on the merits. In response, Mr. Sheppard argued that *Jackson* pre-dates the promulgation of the regulation.

The CAVC determined that the logic underpinning *Jackson* applied in this scenario. Here, as in *Jackson*, Mr. Sheppard was on notice that he had to persuade the Board that newly submitted evidence established a nexus or other element of service connection. In other words, both the issues of reopening and service connection on the merits required the same nexus evidence.

The CAVC concluded that requests to reopen are distinct from other jurisdictional defects contemplated by § 20.101(d), and the regulation should be applied only when the jurisdictional and merits questions differ. The regulation applies to jurisdictional defects mainly within the appeal process itself, such as whether an NOD was timely or other defects within a substantive appeal. In those instances, the Board may make a *sua sponte* determination concerning a jurisdictional issue that the RO has not decided in the first instance, and the decision may come as a surprise to a claimant. By contrast, there is no surprise when the Board considers reopening a claim for service connection because it does not do so on its own initiative; the RO has already addressed the issue and the Board is required by law to address it, regardless of the RO's decision on the matter. Moreover, the Board disposes of requests to reopen claims by denial, not by dismissal, which it does when it lacks jurisdiction. The procedural safeguards exist so that dismissals do not occur without due process. Finally, the Board reviews the same or similar evidence in a petition to reopen and the underlying service connection claim on the merits (e.g., whether evidence of a nexus exists) because the issues substantially overlap; however, different evidence would be reviewed for a jurisdictional defect (e.g., the date an NOD was received).

Ultimately, the CAVC found that the Board's decision to deny reopening the claims was not prejudicial. Mr. Sheppard asserted that had he been notified that reopening was an issue, he would have attended a hearing and presented evidence. However, the CAVC noted that Mr. Sheppard was provided an opportunity to have a hearing, but withdrew his request. The CAVC was unpersuaded because it was unclear how the outcome would have changed if the Board had informed Mr. Sheppard about the lower hurdle of reopening the claims, when he decided that he did not want to provide new information on the merits (the higher hurdle).

In dissent, Chief Judge Bartley stated that the plain language of the regulation shows that it applies to requests to reopen because the Federal Circuit and the CAVC have held that whether there is new and material evidence to reopen a claim is a jurisdictional question that the Board must address prior to addressing the merits. Moreover, the regulation stipulates that the safeguards are not limited to situations involving the timeliness and adequacy of appeal documents. Chief Judge Bartley also asserted that the Board's practice of denial instead of dismissal is legally incorrect because reopening is a jurisdictional question and "an unfavorable answer to this question requires a summary dismissal of the claim" without consideration of the merits. Additionally, the Board's decision not to reopen a claim that the RO previously reopened causes unfair surprise because it represents a change in VA position on an established jurisdictional question. Chief Judge Bartley explained that § 20.101(d) (now § 20.104(c)-(d)) applies to requests to reopen previously denied claims, and that the Board's failure to afford the benefit of the regulation is prejudicial. Finally, Chief Judge Bartley noted that any error was not harmless since the veteran's petition to reopen was held to a higher legal standard than required by law, and he

withdrew his hearing request while he believed VA had reopened his claims.

Michelle Smith is Attorney Advisor for the Board of Veterans' Appeals.

CAVC Navigates Uncharted Waters, Appointing a Special Master for Class Action

by Sarah Battaile

Reporting on *Wolfe v. McDonough*, No. 18-6091 (Mar. 24, 2021).

In *Wolfe*, the U.S. Court of Appeals for Veterans Claims (Court) faced the issue of assessing compliance with a class action judgment when there are disputes between the parties about compliance with that judgment, and issued a precedential Order appointing a special master in a limited capacity for the first time in the Court's history.

The case has a long history, but pertinent here is that the Court certified a class of "claimants whose claims for reimbursement of emergency medical expenses incurred at non-VA facilities VA has already denied or will deny, in whole or in part," after invalidating 38 C.F.R. § 17.1005(a)(5) and finding those claim decisions made under 38 C.F.R. § 17005(a)(5) invalid. The Court issued orders in September 2019 and April 2020 which, *inter alia*, instructed the Secretary to develop and then implement a plan for notice to class members, to begin readjudications of the invalid claim decisions, and to provide a status report on the readjudications every 45 days thereafter. After the Court entered judgment on April 15, 2020, the Secretary appealed to the Court of Appeals for the Federal Circuit.

Essentially at issue in Ms. Wolfe's October 2020 Motion for Appointment of a Special Master to Enforce the Court's Judgment were the pace of the readjudications and the accuracy and usefulness of the Secretary's status reports. Fundamentally, Ms. Wolfe contended that the readjudications were moving too slowly and that the status reports were confusing and inaccurate, and the Secretary contended that he is working diligently to comply and that the status reports are sufficient to monitor compliance.

Noting its now-limited ability to act in any way that alters the parties' rights under the orders due to the Secretary's appeal, the Court found that appointing a special master was warranted to a limited degree, and would greatly assist the Court in assessing the compliance dispute. The Court reasoned that while a special master would not be warranted in every class action, here, he could gather information and offer the Court an independent assessment regarding compliance with the readjudications and status reports and could also offer assistance to the parties as a communications facilitator.

The Court stressed that the special master is not a "roving commissioner of justice," finding that the appointment in the specified limited capacity would be helpful in this case as communication could improve with an independent third party present, and because the status reports had taken on a life of their own, "as if they were ends instead of means."

Pending any possible objection or recusal, the Court appointed the Honorable Thomas B. Griffith, who served on the U.S. Court of Appeals for the District of Columbia Circuit from 2005 – 2020 and is now special counsel with Hunton Andrews Kurth LLP. The Court also ordered the special master to prepare a report within 120 days of appointment, to include: (1) a summary of the special master's actions during the 120-day period; (2) his assessment of whether noncompliance (or undercompliance or delayed compliance) is an issue, specifying the nature of any such issue; (3) whether he concludes that VA is providing sufficient information to class counsel to allow them to effectively monitor VA's compliance; and (4) whether he recommends that the Court take any further action, including reappointment of the special master, specifying the nature of such recommended action.

Judge Falvey concurred separately to emphasize the limited nature of the appointment, discussing the limited authority of the Court due to the pending

appeal and the limited authority of the special master tailored to enforcement of the orders and not to enforce the Court's judgment.

Sarah Battaile is Associate Counsel with the Board of Veterans' Appeals.

Federal Circuit Holds that 38 U.S.C. § 3033's Prohibition against Duplicative Payments under Two or More Educational Assistance Programs Applies, Even When Benefits are Awarded in Error

by Grace T. Raftery

Reporting on *Vollono v. McDonough*, 991 F.3d 1381 (Fed. Cir. 2021).

In *Vollono v. McDonough*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) affirmed a decision of the United States Court of Appeals for Veterans Claims (Veterans Court), which in turn affirmed a decision by the Board of Veterans' Appeals (Board) that denied the extension of certain educational benefits to Mr. Vollono. The Federal Circuit agreed with the Veterans Court that Mr. Vollono was not entitled to receive benefits from two or more educational assistance programs covering the same semesters of study, even when he received benefits under one program in error.

By way of background, Mr. Vollono served on active duty in the United States Navy from July 1996 to June 1997, and from May 2001 to March 2005. His first period of active duty was voluntary, while his second was compulsory based on his attendance at the United States Naval Academy.

Mr. Vollono applied for and was later awarded educational benefits pursuant to chapter 30 of the Montgomery G.I. Bill and used these benefits to pursue post-graduate education at Georgetown University. In May 2009, after VA notified him that he may be eligible for Chapter 33 Post-9/11 G.I. Bill educational assistance, Mr. Vollono applied for and was (mistakenly) found eligible for Post-9/11 benefits in an amount greater than what he was awarded under the Montgomery G.I. Bill. Accordingly, he elected to receive Post-9/11 benefits in lieu of Montgomery benefits. Starting August 1, 2009, he used the Post-9/11 benefits to complete post-graduate education at Georgetown and, later, Oxford University.

In June 2011, the Regional Office (RO) notified Mr. Vollono that he was erroneously awarded $60,507.08 in Post-9/11 benefits. The RO explained that because his service after September 11, 2001, was compulsory, he was precluded from Post-9/11 benefits. VA did not recoup the benefits it had paid out because they were paid due to an administrative error.

Mr. Vollono disagreed and initiated an appeal in July 2011. The Board affirmed the RO's decision that Mr. Vollono was erroneously awarded the Post-9/11 benefits. He appealed to the Veterans Court, which in May 2014 ruled that VA did not err in finding him ineligible for Post-9/11 benefits but remanded to the Board on other grounds and directed that the Board make certain factual findings concerning his entitlement to Montgomery benefits.

In April 2016, the Board found that Mr. Vollono did not waive entitlement to Montgomery benefits by electing to receive Post-9/11 benefits because he was not eligible to receive Post-9/11 benefits in the first place. The Board later vacated its decision at Mr. Vollono's request and remanded to the RO to consider his claim for retrospective Montgomery benefits based on his education at Georgetown and Oxford.

In February 2017, the RO found Mr. Vollono eligible for $29,107 in Montgomery benefits for his time at Georgetown and Oxford but determined that it could not release payment of the funds because they would be duplicative of the Post-9/11 benefits he had previously received.

Mr. Vollono again appealed to the Board, contending that the relevant statutes and regulations applied only to individuals who were actually eligible for both Montgomery and Post-9/11

benefits, not to those awarded benefits by administrative error. The Board denied his claim, explaining that 38 C.F.R. § 21.7143(a) and its enabling statute, 38 U.S.C. § 3033, precluded payment of duplicative educational benefits regardless of current eligibility.

Mr. Vollono subsequently appealed to the Veterans Court, which affirmed the Board's decision, finding that the payment of benefits, not current eligibility, was the determinative factor, and that awarding Montgomery benefits to Mr. Vollono would lead to an absurd result of placing him in a better position than that of veterans who were actually eligible for Post-9/11 benefits.

Mr. Vollono appealed to the Federal Circuit, arguing that the Veterans Court made two errors in its interpretation of 38 U.S.C. § 3033—first, that § 3033(a) bars only duplicative payments for individuals who are actually eligible for Post-9/11 benefits, not duplicative payments made in error; and second, that he had never received assistance under two programs concurrently, as required by statute.

The Federal Circuit disagreed. It declined to adopt Mr. Vollono's interpretation of 38 U.S.C. § 3033, explaining that such an interpretation would necessarily put a veteran who mistakenly received Post-9/11 educational benefits in a better position than those who were actually eligible for such benefits. In this regard, the Federal Circuit noted that 38 U.S.C. § 3033, entitled "Bar to duplication of educational assistance benefits," provides that "[a]n individual entitled to educational assistance under a program established by this chapter [Montgomery] who is also eligible for educational assistance under a program under chapter 31, 32, 33 [Post-9/11], or 35 . . . may not receive assistance under two or more of such programs concurrently . . ." 38 U.S.C. § 3033(a)(1); and the implementing regulation, entitled "Nonduplication of educational assistance," provides that "[p]ayments of educational assistance shall not be duplicated" and "a veteran is barred from concurrently receiving educational assistance under 38 U.S.C. chapter 30 [Montgomery] and—. . . 38 U.S.C. chapter 33 (Post-9/11 GI Bill)." 38 C.F.R. § 21.7143(a).

The Federal Circuit explained that VA's error in paying Post-9/11 benefits to Mr. Vollono did not preclude application of § 3033(a)'s prohibition against duplicative payments for the semesters during which he received those benefits; as the Veterans Court held, the payment of benefits, not current eligibility, is the determinative factor. The Federal Circuit further explained that at the time Mr. Vollono elected to receive Post-9/11 benefits, VA considered him eligible for both programs, and that concurrent eligibility would have precluded him from receiving both Montgomery benefits and Post-9/11 benefits at the same time. The Federal Circuit determined that the fact that VA later reconsidered his eligibility for one of the programs did not alter that conclusion.

The Federal Circuit further concluded that Mr. Vollono was barred from receiving benefits from two or more educational assistance programs covering the same semesters of study. The Federal Circuit acknowledged his assertion that the payment of such benefits did not qualify as "receiv[ing] assistance under two or more of such programs concurrently," as stated in § 3033(a), since the actual receipt of benefits occurred at different times. However, the Federal Circuit held that regardless of when the actual benefits are paid out, educational benefits covering an overlapping period of study qualify as concurrent assistance, and § 3033(a)'s implementing regulation made clear that concurrent benefits refers to the period of schooling. *See* 38 C.F.R. § 21.7143(b) ("The individual may choose to receive benefits under 38 U.S.C. chapter 33 at any time, but not more than once during a certified term, quarter, or semester."). Because the Veterans Court properly interpreted the statute, the Federal Circuit affirmed.

Grace Raftery is Counsel at the Board of Veterans' Appeals.

Federal Circuit Finds No CUE in VA's Application of Prior Version of 38 U.S.C. § 1111 Presumption of Soundness

by April Maddox

Reporting on *George/Martin v. McDonough*, 991 F.3d 1227 (Fed. Cir. 2021).

The United States Court of Appeals for the Federal Circuit (Federal Circuit) in *George/Martin* affirmed the denials of claims of clear and unmistakable error (CUE) in prior decisions of the Department of Veterans Affairs (VA), reasoning that VA did not commit CUE when it faithfully applied the version of the presumption of soundness regulation that existed at the time of the prior denials. Notably, *George* and *Martin* were initially two separate appeals but were consolidated based on similar facts and legal issues.

By way of background, the statutory presumption of soundness (38 U.S.C. § 1111) presumes a veteran to have been in sound condition at entry to service as to disorders that are not identified on the veteran's entrance examination. The presumption, however, can be rebutted by "clear and unmistakable evidence" that the disorder "existed before acceptance and enrollment and was not aggravated by service."

However, in 1970, the presumption of soundness did not require clear and unmistakable evidence of lack of aggravation by service for rebuttal. In other words, for VA to rebut the presumption of soundness, the 1970 version of 38 U.S.C. § 1111 required only clear and unmistakable evidence that the disorder "existed prior [to service]." The 1970 version of the regulation was changed to the current version in 2003, which requires both a preexisting condition and no aggravation. *See* VA Gen. Counsel Prec. 3-2003 (July 16, 2003) (2003 OGC Opinion).

George

In *George*, Mr. George's enlistment examination made no mention of any psychiatric disorders. However, a week after enlistment, Mr. George suffered a psychotic episode requiring extended hospitalization and was diagnosed with paranoid schizophrenia. Two months into Mr. George's service, a military medical board determined that his schizophrenia preexisted service and had been aggravated by service. At the time of discharge, however, a physical evaluation board concluded that Mr. George's condition was not caused by service. Mr. George submitted an initial claim for service connection for schizophrenia in December 1975, contending that his condition was aggravated by his service. His claim was denied by the VA Regional Office and affirmed by the Board of Veterans' Appeals (Board) in a final September 1977 decision. While the Board did not specifically cite the statutory presumption of soundness, it concluded that Mr. George's schizophrenia "existed prior to military service" and "was not aggravated by his military service."

In December 2014, Mr. George requested revision of the 1977 Board decision on the basis of CUE, arguing that the 1977 Board decision failed to correctly apply 38 U.S.C. § 1111 as it did not "rebut *both* prongs of the presumption," i.e., that his enlistment examination was negative for a preexisting psychiatric disorder and the record did "not clearly and unmistakably indicate that [his] schizophrenia was not aggravated by service."

In 2016, the Board denied Mr. George's CUE claim, finding that, as of 1977, the presumption of soundness of soundness did "not require[] clear and unmistakable evidence that the disability was not aggravated by service." In support of this decision, the Board noted that the decision in *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004), found that "new interpretations of the law subsequent to a VA decision cannot be the basis of a valid CUE claim." The Board's denial of Mr. George's claim was affirmed by the United States Court of Appeals for Veterans Claims (Veterans Court).

Martin

In *Martin*, Mr. Martin's enlistment examination made no mention of any respiratory disorders; however, Mr. Martin was later treated for respiratory symptoms and it was discovered that Mr. Martin had a childhood history of asthma and was diagnosed with "rhinitis and asthma, mixed infectious-allergic, with dust-mild and ragweed sensitivity" during service. However, his separation examination was negative for asthma.

In October 1969, shortly after his discharge from service, Mr. Martin submitted a claim for service connection for asthma. A December 1969 VA examination showed a diagnosis of "[a]sthma due to sensitivity of ragweed class." In February 1970, the RO denied Mr. Martin's claim, finding that: "In view of the pre-service history of asthma[,] it is held that the solitary exacerbation in service with a subsequent asymptomatic period of better than a year does not establish aggravation."

In July 2013, Mr. Martin requested revision of the 1970 RO decision on the basis of CUE, arguing that the RO had failed to correctly apply "both" prongs of the presumption of soundness. As with *George*, the Board denied the request, finding no CUE in the 1970 RO decision because the regulation at that time did not require clear and unmistakable evidence of no aggravation. Citing *George*, the decision was affirmed by the Veterans Court.

Federal Circuit Findings

Before the Federal Circuit, the Appellants (Mr. George and Mr. Martin) contended that their CUE claims did not seek to retroactively apply a changed interpretation of the law, but were premised on VA's failure to correctly apply the statute as written in 1970. Rather than establish a "new" interpretation of 38 U.S.C. § 1111, the Appellants argued that *Wagner* "merely provided an authoritative statement of what [§ 1111] had always meant" including at the time of the Appellants' respective VA decisions. The Appellants also noted that this reasoning comports with a trio of *Patrick* cases, one of which permitted a CUE claim to proceed based on the argument that VA had "misapplied § 1111." *See Patrick v. Principi*, 103 Fed. App'x 383 (Fed. Cir. 2004); *Patrick v. Nicholson*, 242 Fed. App'x 695 (Fed. Cir. 2007); *Patrick v. Shinseki*, 668 F.3d 1325 (Fed. Cir. 2011).

The Federal Circuit disagreed with the Appellants' argument, noting that the argument overlooked the significance of VA's regulation that existed at the time of the original decisions and failed to consider relevant caselaw. Specifically, in *Jordan v. Nicholson*, 401 F.3d 1296 (Fed. Cir 2005), and *Disabled Am. Veterans v. Gober*, 234 F.3d 682 (Fed. Cir. 2000), the Federal Circuit established that a legal-based CUE claim requires a misapplication of the law as it was understood at that time, and cannot arise from a subsequent change in interpretation of law by the agency of or judiciary. Significantly, in *Jordan*, the Federal Circuit also considered a CUE claim regarding the 1970 version of the presumption of soundness and found that "the accuracy of the regulation as an interpretation of the governing legal standard does not negate the fact that [the 1970 version of the regulation] did provide the first commentary on section 1111, and was therefore the initial interpretation of that statute," which subsequently changed with the issuance of the 2003 OGC Opinion.

In the present case, the Federal Circuit noted that the Appellant's argument "fails to appreciate that [the 1970 version of the regulation] provided the initial interpretation of § 1111, regardless of any inaccuracies subsequently reflected in *Wagner*." The Federal Circuit also found that the *Patrick* cases were either non-precedential or did not directly address whether *Wagner* can serve as a basis for CUE.

The Appellants also argued that the Veterans Court misconstrued principles of finality and retroactivity in Supreme Court decisions, such as *Harper v. Va. Dep't of Taxation,* 509 U.S. 86 (1993), and *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529 (1991). Specifically, the Appellants argued that these cases "'support the retroactive application of judicial pronouncements in cases that are open to collateral attack' or, if not, are otherwise 'irrelevant' to their CUE claims given [the holding in *Rivers v. Roadway Exp., Inc.,* 551 U.S. 298, 313 (1994)] that a judicial construction of a statute is an authoritative statement of what that statute has always meant."

The Federal Circuit disagreed with this argument as well, as none of these cases "support the Appellants' contention that a new judicial pronouncement retroactively applies to *final* decisions, even those subject to a collateral attack, such as a request to revise a final Board or RO decision for CUE." Instead, the Federal Circuit noted that "*Harper* adopted a rule consistent with *Beam* that new judicial pronouncements are to be given 'full retroactive effect in all cases *still open on direct review*' but not in final cases already closed." While *Rivers* indicates that "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction," it does not hold "that judicial constructions of statutes should be retroactively applied to *final* decisions, such as the VA decisions at issue here."

Finally, the Federal Circuit noted that the decision that *Wagner* cannot serve as the basis for the Appellants' CUE claims is supported by the legislative intent behind the CUE statutes. Significantly, the CUE statutes do not address subsequent changes or interpretations of laws. As such, it appears that Congress "did not intend for CUE to go so ar as to attack a final VA decision's correct application of a then-existing regulation that is subsequently changed or invalidated, whether by the agency or the judiciary."

April Maddox is Counsel for the Board of Veterans' Appeals.

CAVC Holds that Appellant's Request to Pause Adjudication of Appeal Must be Honored by VA

by Jason Massey

Reporting on *Groves v. McDonough,* No. 17-3084 (Mar. 25, 2021).

In *Groves,* the U.S. Court of Appeals for Veterans Claims (Court) issued a precedential decision written by Judge Meredith (with Chief Judge Bartley concurring) that held that the Board of Veterans' Appeals (Board) erred in adjudicating Mr. Groves's claim, despite his request to pause the adjudication. However, the Court ultimately affirmed the Board's decision, finding that such error was procedural in nature and not prejudicial to Mr. Groves.

Mr. Groves filed an appeal seeking VRE (Veteran Readiness and Employment, formerly Vocational Rehabilitation and Employment) benefits. During the course of the appeal, Mr. Groves submitted numerous statements enjoining VA from adjudicating the claim. He requested that the Board refrain from adjudicating his claim and cited *Hamilton v. Brown*, 4 Vet. App. 528, 544 (1993), *aff'd* 39 F.3d 1574 (Fed. Cir. 1994), which states that "where… the claimant expressly indicates an intent that adjudication of certain specific claims not proceed at a certain point in time, neither the RO nor the Board has authority to adjudicate those specific claims, absent a subsequent request or authorization form the claimant or his representative."

In a July 2017 decision denying the VRE claim, the Board acknowledged Mr. Groves's multiple requests for injunction, but found that those statements did not constitute withdrawals of the appeal for VRE benefits. Therefore, there was no basis for the Board to not proceed with appellate review of the claim.

In his Court brief, Mr. Groves argued that the Board violated *Hamilton* by adjudicating his claim despite his repeated requests that VA refrain from doing so. The Secretary countered, stating that *Hamilton* "cannot be read as establishing an absolute right to keep a claim pending indefinitely." Instead, the Secretary asserted that *Hamilton* held that a claimant can appeal a decision that the agency of original jurisdiction was not authorized to make in the first place. Amicus briefs filed with the Court argued that the en banc Court's discussion in *Hamilton* of a claimant's ability to prohibit VA from adjudicating his or her claim is clear and unequivocal. However, the amici conceded that the Secretary raised a valid policy concern in arguing that *Hamilton* should not be read to permit "perpetual stays."

The Court agreed with Mr. Groves that *Hamilton* is clear that VA must honor a claimant's request to pause adjudication of a claim. The Court explained that the Board's error in adjudicating the appeal in violation of *Hamilton* is procedural in nature and therefore a showing of prejudice to the claimant is required, which the Court found was not demonstrated by the Veteran in the instant matter.

The Court acknowledged the Secretary's argument that a claimant should not be able to pause adjudication indefinitely and that the Board has inherent authority to place reasonable limits on requests to halt adjudications. However, the Court declined to resolve the question regarding the circumstances under which VA can resume the adjudication process. The Court affirmed the Board's denial of VRE benefits on the merits, finding the Veteran's arguments unpersuasive.

Chief Judge Bartley concurred in the judgment, but disagreed that *Hamilton* created a procedural tool that allowed claimants to indefinitely pause the VA adjudication process at will because the claimant in that case never requested that VA suspend adjudication. Chief Judge Bartley found no other statutory or regulatory authority that would support suspension of the VA adjudication process at a claimant's will.

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

We Cannot Allow You to Present Evidence to Support Your Claim, but We Can and Will Deny Your Claim for Lack of Evidence

by David R. Seaton

Reporting on *Bowling v. McDonough*, No. 18-5263 (Vet. App. March 29, 2021); *Appling v. McDonough*, No. 19-0602 (Vet. App. March 29, 2021).

In *Bowling v. McDonough and Appling v. McDonough*, the Court of Appeals for Veterans Claims (Veterans Court) expressed its continued displeasure for both class action lawsuits and attempts to use the Veterans Court as a tool to make structural changes to the framework for Department of Veterans Affairs (VA) benefits. Specifically, the Veterans Court considered whether or not a regulation implementing the insanity exception (an exception to the rule that unfavorable discharges serve as a bar to VA benefits) was unconstitutionally vague. The Veterans Court excluded the bulk of the evidence offered in support of the claim, and, after rejecting the evidence, ruled that the Appellants had not met their evidentiary burden. Moreover, the Veterans Court denied an attempt to certify a class of veterans allegedly aggrieved by the insanity regulation. By doing so, the Veterans Court made it difficult to not only create a record large enough to demonstrate statistically significant disparate outcomes, but also made mass litigation as a means to reform the framework of VA benefits law an even more difficult proposition more generally.

After a period of service in the armed forces ends, the military characterizes the quality of the service during that period. If the characterization is unfavorable enough, this can serve as a partial, or a complete bar to VA benefits. A veteran with an unfavorable discharge, however, may still be entitled to VA benefits if they were insane for VA compensation purposes during their unfavorable period of service. A veteran is insane if "due to disease, [he/she exhibits] a more or less prolonged deviation from his[/her] normal method of behavior; or . . . interferes with the peace of society; or . . . has so departed (become antisocial) from the accepted standards of the . . . as to lack the adaptability to . . . social customs[.]" 38 C.F.R. § 3.354.

At issue in the instant case was whether 38 C.F.R. § 3.354 violated the right to due process guaranteed by the U.S. Constitution.

Two separate Appellants made this allegation in two separate cases, and the Veterans Court disposed of the two cases in a single opinion. In the first case, Charlotte A. Bowling, the surviving spouse of

Charles E. Bowling, appealed VA's denial of benefits based on the characterization of her late husband's period of service.

Mr. Bowling had two consecutive periods of service in the United States Marine Corps from September 1961 to April 1970. Despite a number of instances of being absent without leave (AWOL) during his first period of service, Mr. Bowling's first period of service was characterized as honorable, and Mr. Bowling was allowed to reenlist. During his second period of service, Mr. Bowling deployed to Vietnam from June to October 1967. After his deployment to Vietnam, there were several additional periods of being AWOL. Ultimately, this resulted in an other than honorable (OTH) discharge from the Marine Corps.

VA determined that Mr. Bowling's discharge barred him from receiving VA benefits. In March 2007, Mr. Bowling filed a claim for VA benefits and requested VA reconsider this determination based on the insanity exception. In support of his claim, Mr. Bowling presented two medical opinions from two private psychologists. Both opinions indicated that Mr. Bowling developed posttraumatic stress disorder (PTSD) that diminished his decision-making capacity, including the ability to decide whether or not to go AWOL during his second period of service. A VA examiner, however, opined that Mr. Bowling did not have PTSD during those periods of being AWOL. Unfortunately, Mr. Bowling passed away during the pendency of his VA claim, and Ms. Bowling, the surviving spouse, was substituted as the claimant. In July 2018, the Board of Veterans' Appeals (Board), relying on the VA examiner's opinion denied the claim for VA benefits. Ms. Bowling appealed to the Veterans Court.

In the second case, Kevin D. Appling similarly appealed VA's denial of benefits based on the characterization of his period of service. Mr. Appling served in the United States Army from October 1979 to May 1981. After several criminal convictions and being assigned to a retraining brigade, Mr. Appling was given an OTH discharge from the Army.

VA determined that the characterization of Mr. Appling's discharge barred him from receiving VA benefits. In January 2010, Mr. Appling filed a claim for VA benefits and requested VA reconsider this determination based on the insanity exception. Mr. Appling claimed that he was the victim of racial discrimination during his period of service, and that this led to depression and alcohol abuse, which, in turn, led to his behavior problems. In October 2018, the Board, relying on a lack of evidence of a psychiatric disorder and alcohol abuse being barred as a basis for the insanity defense under VA Office of General Counsel Precedential Opinion 20-97 (May 22, 1997), denied the claim for VA benefits. Mr. Appling appealed to the Veterans Court.

The Veterans Court began by disposing of the issue of class action certification. The Appellants conceded at oral arguments that if their claims were denied on the merits, then the class action issue would be moot. The Veteran's Court ruled against the Appellants on the merits, and, relying on the Appellants concession at oral arguments, the Veteran's Court found the class certification issue moot.

The Veterans Court went on to alternatively hold that the Appellants could not prevail substantively on the class action issue even if the Veterans Court had not ruled against them on the merits. The Veterans Court outlined four criteria to certify a class: (i) collateral to a claim for benefits; (ii) complex factual record; (iii) sufficiently developed appellate record; and (iv) a unique need for remedial enforcement. The Veterans Court indicated that the Appellants' proposed class did not meet these criteria.

The Veterans Court noted that the Appellants' proposed class included those with final decisions that cannot be appealed to the Veterans Court. The Veterans Court denied that it could extend jurisdiction over claims in which the window to appeal had expired. The Veterans Court did consider whether it could consider a free-standing due process claim as an original action in the Veterans Court rather than an appeal from the Board, but found that, even if such a claim were

allowable, VA would have to review the case in the first instance.

The Veterans Court then considered potentially certifying a class *sua sponte* that excluded veterans with unappealable final claims. Ultimately, the Veterans Court held that the final *Skaar* factor would dispositively foreclose the possibility of class certification. Specifically, a class action would have more or less the same effect as a precedential decision of the case at bar on the merits, and that, therefore, the superiority of the remedial enforcement of a class action had not been established.

Turning to the merits of the case, the Veterans Court then considered whether 38 C.F.R. § 3.354 violated Appellants' constitutional rights to due process. Appellants argued that it did, due to the disparity of outcomes among individual VA adjudicators and lack of training among VA examiners. Appellants also argued that the definition of insanity was vague, as to necessarily result in arbitrary and capricious outcomes. In response, the government argued: (1) the regulation could be enforced fairly; (2) Appellants had not offered a proper standard of review; (3) inconsistency between individual adjudicators is due to different fact patterns rather than regulatory vagueness; (4) Appellants were free to petition VA to change the regulation; and (5) the Veterans Court was the wrong forum to challenge the link between the characterization of discharges and access to VA benefits.

The Veterans Court noted that much of the evidence that the Appellants relied on was outside the record on appeal and it could not take judicial notice of the evidence, because it was potentially subject to reasonable dispute. Having eliminated most of the evidence the Appellants offered in support of their argument, the Veterans Court ruled that the Appellants had not met their evidentiary burden of demonstrating the unconstitutionality of the regulation implementing the insanity exception.

The Veterans Court clearly does not desire to disturb the regulatory framework governing the structure of VA benefits litigation. The rationale of this decision sets a high evidentiary bar for finding a regulation illegal and, at the same time, makes an evidentiary ruling that the very statistical evidence of widespread disparities required to meet the high evidentiary burden is inadmissible due to being outside the record. By discouraging class actions moreover, the Veterans Court is eliminating one of the potential avenues to develop a sample size large enough to develop statistical evidence from within the record. Ultimately, the Veterans Court appears to be using its vast judiciary authority to supervise VA in order to construct a legal framework that makes it impossible to supervise VA. In doing so, it has established nigh insurmountable hurdles to making structural changes to the framework for VA benefits.

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Sedentary Employment under *Withers* and *Ray*

by Andrew Strickland

Reporting on *Rouse v. McDonough*, No. 19-5699 (April 13, 2021).

In *Rouse*, the Court addressed whether *Ray v. Wilkie*, 31 Vet.App. 58 (2019), provided independent legal significance to the phrase "sedentary employment," where *Withers v. Wilkie*, 30 Vet.App. 139 (2018), held it could not provide a fixed definition. The *Rouse* Court held that while *Ray* recognized that sedentary employment is a potentially relevant factor, it did not create an explicit factor in claims for total disability due to individual unemployability (TDIU) that would overturn the premise of *Withers*.

TDIU was raised by the record as part of Mr. Rouse's claim for increased compensation for a service-connected back disability. Treatment records and VA examination reports showed that Mr. Rouse's back disability interfered with his ability to sit. VA examiners opined that the disability prevented

Rouse's ability to pursue physical occupations but not sedentary occupations. Conversely, a private vocational expert noted a more severe impairment that altogether precluded sedentary employment.

The Board ultimately denied entitlement to TDIU, finding that the probative evidence contradicted the vocational expert. The Board concluded that Mr. Rouse was capable of some form of light-physical or non-physical employment. It explained how it determined that Rouse was capable of certain types of employment, by considering his overall disability picture, prior educational history, prior occupational history, and medical history. After weighing the evidence, the Board found that Mr. Rouse's impairments did not preclude substantially gainful employment with reasonable workplace accommodations.

On appeal to the Court, Mr. Rouse argued that the Board erred in determining that he was capable of sedentary employment, as it did not use the definition of sedentary work set forth in regulations governed by the Social Security Administration (SSA). Rather, the Board defined sedentary employment as some type of non-physical occupation.

The Court disagreed. Sedentary employment cannot be defined at the Court because it does not appear in any statute or regulation related to veterans benefits and, thus, has no independent legal significance. *See Withers*, 30 Vet.App. at 145. While not a legally governing consideration, a veteran's ability to perform sedentary work could be a relevant factor if raised by the evidence of record, which must be supported by sufficient factual context to explain the meaning of sedentary employment.

The Court concluded that the Board's factual determinations reflected a plausible reading of the record and satisfied the requirements of *Withers* when it fully explained its reasoning.

Mr. Rouse also argued that the holding in *Ray* provided independent legal significance to sedentary employment and, thus, overturned *Withers*. Specifically, Mr. Rouse argued that *Ray* listed sedentary employment as a relevant factor in a TDIU analysis and generally adopted SSA's specific definition for the same.

The Court first concluded that *Ray* did not disturb the premise of *Withers*. "To be clear, [the Court does not] adopt Social Security's regulations as VA regulations." *Ray*, 31 Vet.App. at 73. It explained that the Court lacks authority to interpret a phrase found in one of its opinions but not found in any relevant statute or regulation; thus, in turn, transforming the phrase into a term of independent legal significance. The Court maintained that a veteran's ability to perform sedentary employment could be germane to a TDIU analysis where the Board relies on such a basis for its denial. While *Ray* noted that sedentary employment is a potentially relevant factor, the Court was clear that it wasn't creating a checklist that must be completely satisfied in every case.

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Analysis of Newly-Received Service Department Records Constitutes Reconsideration Under 38 C.F.R. § 3.156(c)(1) Even Without Citation

by Philip Timmerman

Reporting on *Morse v. McDonough*, Fed. Cir. 2020-1838 (April 19, 2021).

In *Morse*, the Federal Circuit stated that the Board's decision reopening Mr. Morse's previously denied claim constituted a "reconsideration" under 38 C.F.R. § 3.156(c)(1), even though the Board never cited that regulation, because the Board did in fact reconsider all the evidence of record, including newly-obtained service department records. In other words, reconsideration by any other name is still reconsideration.

Although the court's main conclusion dealt with a 2008 Board decision, it was not this decision but a 2018 Board decision that was actually on appeal. As

explained below, in the appeal of the 2018 decision, Mr. Morse argued that the 2008 decision had failed to reconsider his claim as required by Section 3.156(c)(1). Although the Board, the CAVC, and the Federal Circuit all agreed that the merits of the 2008 decision were not before them, each nevertheless addressed the merits, finding that the 2008 Board decision had properly reconsidered Mr. Morse's claim.

Mr. Morse's underlying claim for service connection for posttraumatic stress disorder (PTSD) had been finally denied by the Regional Office (RO) in 2002 and then reopened and denied again in 2004. After the 2004 denial, the RO sought and obtained additional service department records, including various relevant service treatment records, among others. The RO then confirmed denial in a 2006 supplemental statement of the case.

Mr. Morse appealed and the Board in 2008 granted reopening, but denied his underlying claim for service connection upon a *de novo* review, including review of the newly-obtained service department records. The Board's decision did not cite Section 3.156(c)(1), which states that if, after issuing a decision, VA receives or associates with the claims file relevant "official service department records" that were not previously of record but existed at the time the claim was decided, VA "will reconsider the claim."

The Board's 2008 decision became final, and Mr. Morse filed to reopen again in 2009. In developing the claim, the RO added to the file a 2010 memorandum by the RO's Joint Services Records Research Center (JSRRC) coordinator, summarizing the traumatic in-service events that Mr. Morse reported caused his PTSD.

In the meantime, Mr. Morse also sought to have the Board's 2008 decision overturned on the grounds of clear and unmistakable error (CUE). The Board denied Mr. Morse's CUE motion in 2014 and he did not appeal.

The RO granted Mr. Morse's claim for service connection for PTSD in 2010, with an effective date in 2009, when his claim to reopen was received. Mr. Morse appealed for an earlier effective date, arguing, among other things, that the 2010 JSRRC memorandum constituted an "official service department record" under Section 3.156(c)(1), such that VA was required to reconsider his claim. After several ensuing remands from the Board and the CAVC, the Board denied the appeal in 2018. It is this decision that was appealed to the CAVC and then to the Federal Circuit.

The Board's 2018 decision found that the 2010 JSRRC memorandum did not constitute an "official service department record" within the meaning of Section 3.156(c)(1), because it was produced by VA, not a service department, and did not rely on any service department records not previously in the file. Therefore, reconsideration of Mr. Morse's claim was not warranted under Section 3.156(c)(1) on the basis of the 2010 memorandum. Both the CAVC and the Federal Circuit affirmed this conclusion, for the same reasons.

However, the Board's 2018 decision also addressed Mr. Morse's argument that the Board's 2008 decision had failed to properly reconsider his claim as required by Section 3.156(c)(1). The Board first noted that this argument went to the merits of the 2008 decision, which was final and could only be subject to revision on a finding of CUE or subject to reconsideration upon subsequent receipt of qualifying service department records. Because Mr. Morse's CUE motion had been finally denied and no additional relevant service department records had been added to the file since the 2008 decision, it was no longer "subject to revision." In other words, the question of the merits of the 2008 decision was not before the Board.

Nevertheless, the Board went on to find that the 2008 Board decision did in fact reconsider Mr. Morse's claim, including review of the then-newly-obtained service department records, even though it neither said so nor cited Section 3.156(c)(1). The CAVC agreed with both parts of the Board's analysis.

The Federal Circuit's decision in *Morse* stated that Mr. Morse raised two claims on appeal: 1) that the 2008 Board decision did not properly "reconsider" Mr. Morse's claim, as required by Section 3.156(c)(1),

and 2) that the 2010 JSRRC memorandum was a service department record, the receipt of which should have triggered reconsideration of Mr. Morse's claim under Section 3.156(c)(1).

As to the second claim, the Federal Circuit agreed with the Board and the CAVC that the 2010 JSRRC memorandum was not a service department record, as noted above.

As to the first, the Federal Circuit likewise agreed with the Board's and the CAVC's analysis. Specifically, the court stated that "[b]ecause the 2008 Board's decision is final, we do not address the merits of that decision." Nevertheless, the Federal Circuit stated that it would "review the Veterans Court's decision to treat the 2008 Board's decision as a reconsideration." In other words, the Federal Circuit would not review the 2008 Board decision on the merits, only the CAVC's review of the 2008 Board decision on the merits.

Upon review of review of the merits of a decision not on appeal, the Federal Circuit concluded that the 2008 Board decision constituted a reconsideration, since the decision analyzed all the evidence of record, including the newly obtained service department records, and "section 3.156(c) requires nothing more."

Philip Timmerman is Associate Counsel at the Board of Veterans' Appeals.

Failure to Discuss Required Elements Prior to Reducing Disability Rating is Reversible Error

by S. Mohammad Mahmoudi

Reporting on *Stern v. McDonough*, 2021 U.S. App. Vet. Claims LEXIS 677.

Recently, the United States Court of Appeals for Veterans Claims (Court) discussed the appropriate remedy where the Board of Veterans' Appeals (Board) reduced the Appellant's non-protected disability rating without conducting a complete analysis as required by *Brown v. Brown*, 5 Vet. App. 413, 421 (1993). The Court held that reversal of a rating reduction is required where the Board fails to make a finding necessary for the lawful reduction of a disability rating.

In July 2007, Mr. Stern was granted disability compensation for right and left arm polyneuropathy rated at 30 percent and 20 percent disabling, respectively, under Diagnostic Code (DC) 8515 for moderated paralysis of the median nerve, and for bilateral leg polyneuropathy, rated at 20 percent per leg under DC 8520 for moderate incomplete paralysis of the sciatic nerve. All evaluations were effective March 29, 2007. He filed a claim for increased ratings for polyneuropathy disabilities in March 2008 and underwent a VA examination in April 2008. The Regional Office (RO) continued the disability ratings based on the examination report finding no significant change in Mr. Stern's condition compared to his 2007 examination.

Pursuant to the RO's request, Mr. Stern underwent another VA examination in April 2010 to reevaluate his service-connected disabilities. Based on the examination findings, the RO proposed reducing Mr. Stern's bilateral polyneuropathy disability ratings to 10 percent each. Mr. Stern objected to the reductions in an August 2010 statement and requested another examination, which he underwent in June 2011. In an October 2011 rating decision, the RO reduced his bilateral polyneuropathy ratings to 10 percent per leg, effective January 1, 2012. Mr. Stern filed a Notice of Disagreement and perfected his appeal to the Board. In April 2018, the Board found that the rating reductions were proper.

Mr. Stern appealed to the Court, which issued a memorandum decision, holding that the Board provided inadequate reasons or bases for finding the rating reductions proper and vacated and remanded the matters for readjudication. Mr. Stern filed a motion for either reconsideration or panel review, arguing that reversal was the proper legal remedy. The Court withdrew its previous memorandum decision and granted the motion for panel review to address the appropriate remedy.

Mr. Stern argued that the Board applied an incorrect legal standard when it determined the reductions in his polyneuropathy ratings were proper because the Board applied only one element of the two-element test prescribed in *Brown*. In *Brown*, the Court held that, "in any rating-reduction case not only must it be determined that an improvement in a disability has actually occurred but also that that improvement actually reflects an improvement in the veteran's ability to function under the ordinary conditions of life and work." The April 2018 Board decision addressed whether there was actual improvement in his condition based on the VA examination report. However, Mr. Stern argued that the Board failed to consider the effects of his disabilities on the ordinary conditions of life and work. The Secretary conceded that the Board failed to provide adequate reasons and bases for finding the reduction in ratings proper but asserted that remand rather reversal was the appropriate remedy.

In its decision, the Court highlighted that its review of rating reduction cases generally involved the protections afforded in 38 C.F.R. §§ 3.105(e), 3.343, and 3.344. The Court discussed *Schafrath v. Derwinski*, which essentially held that an unlawful reduction must be vacated and the rating prior to the reduction must be restored. Following this reasoning, in *Murphy v. Shinseki*, the Court held that reversal was the proper remedy where VA failed to provide the procedural protection pursuant to 3.105(e). The Court also noted that reversal is proper where a Board decision upheld the reduction of a total disability rating based on multiple examinations that did not reflect a material improvement, *Hohol v. Derwinski*, 2 Vet.App. 169, 172 (1992), or was based on a single examination which conflicted with all the evidence of record, *Dofflemyer v. Derwinski*, 2 Vet.App. 277, 281 (1992). Reversal is also proper in circumstances where a decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law where VA did not provide the claimant special regulatory protections for rating reductions.

The Court found that remand for readjudication is proper where informed judicial review is not possible, *Peyton v. Derwinski,* 1 Vet.App. 282 (1991), and where it was unclear whether the Court had jurisdiction of the appeal, *Murincsak v. Derwinski*, 2 Vet.App. 277 (1992). The Court also discussed a decision which affirmed a rating reduction decision where the Board did not adhere completely to 38 C.F.R. § 3.343 because the Board made findings that met the requirements of 38 C.F.R. § 3.343(a) and 38 C.F.R. § 3.343(c) did not apply to the claim. *Faust v. West*, 13 Vet.App. 342 (2000).

In this decision, the Board's failure to discuss and make the necessary findings for a lawful reduction constituted reversible error. The Court was persuaded by its discussion in *Brown*, which found that the Board committed reversible error where it failed to discuss all required elements of a statutory provision before reducing a protected disability rating. Although the *Brown* decision involved a protected disability rating and the Board's failure to discuss elements of 38 C.F.R. § 3.344, in Mr. Stern's case, the Board failed to make a finding necessary for the lawful reduction of a disability rating. This required reversal of the October 2011 rating decision and restoration of Mr. Stern's prior disability rating.

Accordingly, the Court reversed the Board's April 2018 decision and remanded the issue for additional proceedings consistent with its decision.

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Court Decides Whether 38 U.S.C. § 5104(b) Applies to Legacy Appeals

by Alayna Carroll

Reporting on *Mattox v. McDonough*, No. 19-5212 (April 26, 2021).

In *Mattox v. McDonough*, the Court of Appeals for Veterans' Claims (Court) addressed whether 38 U.S.C. § 5104(b) applies to any decision, whether in the legacy or Appeals Modernization Act (AMA) appeal system, made on or after February 19, 2019. Mr. Mattox filed for service connection for PTSD in July 2015. A December 2015 Regional Office (RO)

rating decision denied service connection, and he appealed to the Board. In April 2019, the Board issued a decision denying service connection.

Mr. Mattox challenged the decision on both procedural and substantive grounds. The Court rejected each contention and affirmed the Board decision.

Procedurally, Mr. Mattox contended that, although the appeal was decided by the RO under the legacy system, the Board was required to comply with the notice requirements of the AMA-amended version of 38 U.S.C. § 5104(b), as it was a decision rendered after AMA's effective date of February 19, 2019. The Secretary responded that § 5104(b) does not apply to legacy appeals, because whether a matter is part of the AMA or legacy appeal system is determined by whether the *initial* decision leading to the administrative appeal was issued before or after AMA's effective date of February 19, 2019 – which, in this case, was the December 2015 rating decision. The Secretary further contended that even if § 5104(b) applied to legacy matters, it would only apply to ROs and other VA Agencies of Original Jurisdiction, not Board decisions.

Section 5104(a) states: "In the case of a decision by the Secretary under section 511 of this title affecting the provision of benefits to a claimant, the Secretary shall on a timely basis, provide to the claimant (and the claimant's representative) notice of such decision. The notice shall include an explanation of the procedure for obtaining review of the decision."

Section (b) goes on to list the information that must be included in the notice required under subsection (a). Mr. Mattox particularly took issue with his lack of notification as to "[i]dentification of findings favorable to the claimant."

The Court first reviewed fundamental statutory interpretation principles, including that the plain meaning of regulations should not be read in isolation, but must be considered with Congress's intent in enacting the regulation. The Court emphasized that when Congress created a new adjudicatory system in AMA, it did not eliminate the then-existing legacy system, clearly indicating its intent for the systems to operate concurrently.

As the AMA became effective on February 19, 2019, the Court turned to the question of how an appeal becomes subject to AMA on or after February 19, 2019. That question is answered by 38 C.F.R. § 3.2400, which includes that AMA applies to all claims (1) for which VA issues notice of an initial decision on or after the effective date or (2) where a claimant has elected review of a legacy claim under AMA.

It was undisputed that the initial decision in this case was issued prior to February 19, 2019, and that Mr. Mattox did not elect, or opt-in, to AMA review. Thus, the Court explained that the answer was simple – Mr. Mattox's claim was a legacy appeal subject to the legacy appeals process, not the AMA or its notice requirements.

The Court rejected Mr. Mattox's continued contentions that AMA should apply to *any* decision rendered on or after February 19, 2019, by explaining that this would directly contradict with Congress's intent to have concurrent systems. If his contentions were correct, then, for all practical purposes, the legacy system would not exist, as all cases would automatically become subject to AMA provisions as of February 19, 2019. Such a result would be at odds with the AMA provisions allowing legacy claimants to affirmatively opt-in to the AMA system, and would be contrary to § 3.2400's clear definition of which appeals are subject to the AMA. Because the Court determined that § 5104(b) does not apply to legacy appeals, it did not reach the issue of whether § 5104(b) applies to Board decisions in AMA appeals, which remains an unanswered question.

Substantively, Mr. Mattox contended (1) the Board failed to consider whether he engaged in combat with the enemy, entitling him to a lower evidentiary standard pursuant to 38 U.S.C. § 1154(b); (2) the Board failed to consider the applicability of 38 C.F.R. § 3.304(f)(3) involving an in-service stressor due to fear of hostile military or terrorist activity in service; (3) the Board erred in rejecting a private medical opinion without sufficiently explaining its reasons

for doing so; and (4) the Board misapplied the benefit of the doubt doctrine in finding the evidence was against him because, according to Mr. Mattox, the evidence was in relative equipoise.

The Court found each of these contentions to be without merit. First, the decision was denied for a lack of current PTSD diagnosis under DSM-5 criteria, so any alleged error in the failure to adequately discuss provisions relating to in-service stressors were not prejudicial. Regarding the private medical opinion and benefit of the doubt doctrine, while the Court acknowledged that the record included one positive medical opinion and one negative opinion, it emphasized that the benefit of the doubt doctrine addresses the quality of the evidence and not merely the quantity – in other words, whether the benefit of the doubt doctrine applies is not determined by counting pieces of evidence. Here, the Board determined the positive private opinion was entitled to little probative value, and it clearly explained its reasoning. Thus, the Court held that there was no clear error in the decision.

Alayna Carroll is Associate Counsel with the Board of Veterans' Appeals.

Adverse Determinations under VA Caregiver Program are Appealable to the Board

by Freda J.F. Carmack

Reporting on *Beaudette v. McDonough*, No. 2020-4961 (April 19, 2021).

In *Beaudette v. McDonough*, the Court of Appeals for Veterans Claims (Court) issued a writ of mandamus ordering the Secretary of Veterans Affairs to notify claimants of their right to appeal adverse determinations under the Program of Comprehensive Assistance for Family Caregiver (Caregiver Program) to the Board of Veterans' Appeals (Board). The Court also certified the *Beaudette* class, defined as: "All claimants who received an adverse benefits decision under the Caregiver Program, exhausted the administrative review process within the Veterans Health Administration (VHA) and have not been afforded the right to appeal to the Board."

Jeremy Beaudette served in the U.S. Marine Corps from 2002 to 2012, including five combat tours in the Middle East, during which he suffered multiple concussions that caused traumatic brain injury and rendered him legally blind. VA rated him 100 percent disabled.

In March 2013, Mr. Beaudette and his wife applied for benefits under the Caregiver Program. VA found them eligible and Mrs. Beaudette quit her job to care for her husband full-time. In October 2017, VA reassessed Mr. Beaudette. Mr. Beaudette requested to reschedule his VA examination on the basis that he was recovering from two major surgeries, but VA denied this request and proceeded with the reassessment based on medical records alone. VA concluded that the Beaudettes were no longer eligible for the Caregiver Program.

The Beaudettes challenged this determination through the VHA appeals process, and the appeal was denied both by the Caregiver Program manager and the Director of the Sierra Pacific Veterans Integrated Service Network. The Beaudettes then appealed to the Board, but they did not receive a response. Indeed, the Secretary conceded that if the Board had responded, it would have disclaimed jurisdiction to hear the appeal.

The Caregiver Program, codified under 38 U.S.C. § 1720G, provides benefits for family caregivers of seriously injured combat veterans. Section 1720G(c)(1) describes decisions made under this program as "medical determinations" rather than "adjudicative matters;" and the Final Rule implementing this program explains that such decisions are, therefore, "beyond the Board's jurisdiction." *See Caregiver Program*, 80 Fed. Reg. 1357, 1366 (Jan. 9. 2015). Adjudicative matters, as opposed to medical determinations, are subject to Board review pursuant to the Veterans' Judicial Review Act (VJRA) that created a process for judicial

review of veterans' benefits decisions. *See* 38 U.S.C. § 7104(a).

At the Court, the Beaudettes argued that benefits provided under the Caregiver Program are "benefits" within the scope of the VJRA. The Secretary asserted, however, that the Caregiver Program is excluded from the VJRA's Board-review mandate because "medical determinations" are explicitly excluded from the Board's jurisdiction under 38 C.F.R. § 20.104(b), which notes that: "medical determinations such as determinations for the need and appropriateness and specific types of medical care and treatment for an individual are not adjudicative matters and beyond the Board's jurisdiction." The Beaudettes argued that this interpretation conflicts with the ordinary operation of the VJRA and that a mere reference in 1720G(c)(1) to "medical determinations" is insufficient to abrogate the VJRA's Board-review mandate.

In deciding this case, the Court agreed that section 1720G(c)(1) does not insulate the Caregiver Program from judicial review because it does not specifically mention jurisdiction. Congress is aware of how to limit the Board's jurisdiction – indeed, it did so in establishing the Veterans Community Care Program. *See* 38 U.S.C. § 1703(f) ("The review of any decision under subsection (d) or (e) shall be subject to the Department's clinical appeals process, and such decisions may not be appealed to the Board of Veterans' Appeals.").

Moreover, two canons of statutory construction weigh against the Secretary's interpretation. First, there is a strong presumption in favor of judicial review of administrative action that is only overcome if there is "clear and convincing evidence of an intent to withhold" judicial review. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 n.2 (1967); *see also Salinas v. U.S. R.R. Ret. Bd.*, 141 S. Ct. 691, 698 (2021). The Secretary's argument that section 1720(c)(1) implicitly references VA's regulatory carveout for medical determinations in 38 C.F.R. § 20.104(b) does not on its face demonstrate an intent to withhold judicial review and is therefore insufficient to overcome this presumption. Additionally, there is a strong presumption against "repeals by implication," and Congress is expected to be explicit when it seeks to suspend the application of preexisting law in a later statute. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (cleaned up). An intention to displace one law with another must be clear and, in this case, there is insufficient proof of Congressional intent to displace the application of the VJRA.

The Court concluded that Congress was unambiguous in mandating Board review of all decisions concerning the provision of benefits by the Secretary and that VA's interpretation of section 1720G(c)(1) is invalid, to the extent that it limits the ordinary scope and operation of the VJRA. It therefore issued a writ of mandamus ordering the Secretary to notify claimants of their right to appeal adverse determinations under the Caregiver Program, citing "an indisputable right to review, that lack of an adequate administrative means of securing that right, and the propriety of extraordinary relief in the these circumstances."

The Court then certified the *Beaudette* class, which includes all claimants who received an adverse benefits decision under the Caregiver Program, exhausted the administrative review process at VHA and were not afforded the right to appeal to the Board. The Court included even those that did not actually seek Board review because of the Secretary's assertion that Caregiver Program benefits are not reviewable by the Board.

The Court considered Rule 23 of the Court's Rules of Practice and Procedure that sets out the requirements for seeking class certification, noting that the Secretary did not dispute four of the five requirements: that the proposed class is so numerous that consolidating individual actions at the Court is impracticable; that the question of law or fact is common to the class; that the representative parties will fairly and adequately protect the interests of the class; and that the action alleges that the Secretary has acted or failed to act on grounds that apply generally to the proposed class. The Court agreed. In contrast to the Secretary's assertion, however, the Court found that the legal issue being raised by the representative parties on the merits is typical of the legal issues that could be raised by the class. The Secretary argued that "on the merits" required typicality with

respect to the underlying benefits claims at issue, and that petitioners do not allege agency error in common when VA decided the merits of their initial claims. The Court found, however, that the main issue is whether Board review is available for adverse determinations under the Caregiver Program, and thus it is typical of all past claimants who were not permitted Board review.

Finally, the Court found that class certification is superior to a precedential decision because the Beaudettes' challenge is collateral to a claim for benefits—they only seek the *right* to appeal their case to the Board—and the record is sufficiently complete for adjudication, as the Beaudettes included an appendix of relevant documents that adequately address the legal and factual issues present in this case. Finally, there are unique circumstances warranting class-wide relief: Class members already suffered a serious injury in the line of duty, and it is essential that Caregiver Program claims be resolved as efficiently as possible.

Note that, as of the time of this writing, the Secretary filed a motion for en banc review of this decision.

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Court Distinguishes Bounds of Scope, Date of Claims for Purposes of Effective Dates and Initiation of Claims

by Caitlin Kucera

Reporting on *Gudinas v. McDonough*, No. 19-2640 (April 16, 2021).

In *Gudinas*, the Court affirmed a Board decision denying entitlement to an earlier effective date for the grant of a 100 percent rating for posttraumatic stress disorder (PTSD), finding that an earlier claim for service connection for sleep apnea secondary to PTSD did not also constitute an increased rating (IR) claim for PTSD. There are two key takeaways here: 1) secondary service connection claims do not presumptively include an IR claim for the primary disability and 2) an earlier effective date for a grant of an IR claim for a primary disability cannot be established on the basis of an earlier claim for secondary service connection.

In August 2014, the Board issued a rating decision denying a May 2014 claim for service connection for sleep apnea. The Veteran, initially filing *pro se*, later contended his sleep apnea was secondary to his PTSD as an additional theory of entitlement. He had been service-connected for PTSD since 2005. During the pendency of his sleep apnea appeal, in October 2015, VA received his claim for IR for PTSD; a VA Form 21-8940, Application for Increased Compensation Based on Unemployability; and earnings records from the Social Security Administration. In the interim period, he also appointed a representative.

A January 2016 rating decision then granted a 100 percent rating for PTSD, effective October 26, 2015 (i.e., the date the IR claim had been received). The Veteran appealed this decision, asserting that the grant of the 100 percent rating for PTSD should date back to May 2014, the date his claim for service connection for sleep apnea was received. The Board denied an effective date prior to October 26, 2015, for the grant of a 100 percent rating for PTSD. Notably, the Board did not specifically assess whether 38 C.F.R. § 3.156(b), which pertains to new and material evidence, was triggered because the May 2014 claim did not mention a psychiatric disability.

The Veteran then appealed to the Court, contending that because he claimed service connection for sleep apnea as secondary to PTSD, his earlier secondary service connection claim implicitly included an IR claim for PTSD, thus triggering consideration under § 3.156(b) as to whether new and material evidence had been received to warrant an earlier effective date for his October 2015 IR PTSD claim.

The Court first noted the precedential decision, *Ross v. Peake*, 21 Vet. App. 528 (2008), *aff'd*, 309 F. App'x 394 (Fed. Cir. 2009), which holds that, when a claim for secondary service connection is received during the pendency of an IR claim for the primary

disability, the effective date for the grant of service connection for the secondary disability is based on the secondary service connection claim, rather than the earlier IR claim. Similarly, *Manzares v. Shulkin*, 863 F.3d 1374 (Fed. Cir. 2017), holds that § 3.310 does not control effective dates for secondary conditions and, because a secondary condition is a separate, additional disability, such a claim cannot be the same as a claim for an increased rating. In other words, the Court concluded that the law is clear that claims for secondary service connection are not claims for increased compensation and are not part and parcel of claims for increased compensation for the primary condition.

While in this case, the claim for an increased rating for the primary disability was received while a claim for secondary service connection was pending, the nature of the claims remained the same—a claim for secondary service connection is seeking benefits for an *additional* disability, whereas a claim for an increased rating for the primary disability is seeking benefits for the worsening of an already service-connected disability. This is because IR claims and secondary service connection claims are considered distinct. Secondary service connection, by definition, requires the incurrence of an additional disability. *See Ellington v. Peake*, 541 F.3d 1364 (Fed. Cir. 2008) (noting the language of § 3.310(a) does not suggest a claim for secondary service connection should be treated as a part of an IR claim for the primary condition).

The Court also summarily rejected the Veteran's contention that *Rice v. Shinseki*, 22 Vet. App. 447 (2009), logically extends to claims for secondary service connection, concluding that the claim for service connection for sleep apnea secondary to PTSD did not implicitly include a claim for an increased rating for PTSD, and, significantly, that the claim for an increased rating for PTSD was not part and parcel of the pending claim for secondary service connection for sleep apnea. As *Ross* establishes, being secondarily service-connected is not analogous to being rendered unemployable as a result of a service-connected disability, because the latter demonstrates a worsening of the underlying condition rather than the incurrence of an entirely new condition.

Accordingly, the Court held that the Board did not err by declining to assess whether the Veteran's October 2015 submissions constituted new and material evidence under § 3.156(b) following the August 2014 denial of service connection for sleep apnea when determining whether an earlier effective date for an increased rating for PTSD was warranted, because the claim for service connection for sleep apnea did not include a claim for an increased rating for PTSD.

Dissenting, Judge Greenberg indicated a desire to revisit the aforementioned precedential caselaw, stating that the majority was unduly restricted by their precedent and failed to create new caselaw to affect the type of benefits system Congress intended to create—something well within the Court's congressional mandate. According to Judge Greenberg, this holding penalized the Veteran for initially attempting to navigate the complex veterans benefits system unrepresented; he should not be penalized for not recognizing or articulating the fact that his symptoms stemmed from separate disabilities.

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"Equal Convincingness" as a Potential New Prerequisite to *Auer* Deference

by Anna Kapellan

Reporting on *Huerta v. McDonough*, No. 19-2805 (Apr. 27, 2021).

"[Tis] strange, but true; for truth is always strange; Stranger than fiction," observed the Supreme Court, quoting Lord Byron. *Denton v. Hernandez*, 504 U.S. 25, 33 (1992). The *Huerta v. McDonough* decision has just verified the wisdom of this old adage.

In *Huerta*, the Court of Appeals for Veterans Claims (Court) analyzed 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5000, a rating regulation that governs veterans' compensation for osteomyelitis (*i.e.*, bone infection) and allows for 10, 20, 30, 60, and 100 percent ratings.

A 10 percent rating is assigned for osteomyelitis that has been inactive for at least five years, a 20 percent rating is assigned for inactive osteomyelitis that was active within the past five years, but the 30, 60, and 100 percent rating criteria do not expressly speak in terms of the active-inactive distinction. Further, while the 30 percent criteria omit using the phrase "constitutional symptoms" (and, instead, state that such a rating applies if a segment of necrotic bone is separated from the healthy bone, or a reactive bone has developed around the necrotic sequestrum), the two highest, *i.e.*, 60 and 100 percent rating criteria both utilize the phrase "constitutional symptoms." Specifically, a 60 percent rating is assigned if osteomyelitis manifests by "frequent" constitutional symptoms, while a total rating is assigned for osteomyelitis defined by a mouthful: "of the pelvis, vertebrae, or extending into major joints, or with multiple localization or with [a] long history of intractability *and debility, anemia, amyloid liver changes, or other continuous constitutional symptoms*" (emphasis added).

The issue of whether the modifier "and debility . . . or other continuous constitutional symptoms" applied only to osteomyelitis "with long history of intractability" or also to osteomyelitis "of the pelvis, vertebrae, or extending into major joints, or with multiple localization" was the main issue in *Huerta*. Underlying the appeal was the Board's decision finding that an application of the staged DC 5000 rating was appropriate where a veteran, after diagnosis of chronic osteomyelitis of the pelvis, experienced no active infection for many years after an initial period of active infection. The Board, therefore, assigned a 100 percent rating for the initial active-infection period, a 20 percent rating for the following five years of inactive osteomyelitis, and a 10 percent rating for all times thereafter. Detailing its rationale for utilizing the staged rating, the Board opined that the plain language of DC 5000 simply did not authorize assignment of a total rating for inactive osteomyelitis.

On appeal to the Court, Mr. Huerta argued that the plain language of DC 5000's total-rating criteria entitled him to a total rating for his osteomyelitis at all times from its onset forward, regardless of whether his infection was active or inactive, because his osteomyelitis was that of the pelvis. In support of this construction of DC 5000, Mr. Huerta posited that the plain language of the regulation showed that the modifier "and debility . . . or other continuous constitutional symptoms" applied solely to osteomyelitis "with long history of intractability," therefore allowing a total-rating compensation for inactive, wholly asymptomatic osteomyelitis, if osteomyelitis was that "of the pelvis, vertebrae, or extending into major joints, or with multiple localization."

The Secretary disagreed, positing that the Veteran's reading of the total-rating criteria was inconsistent with the structural logic of DC 5000, which aimed to present a "graduated" scheme that implicitly allowed compensation for inactive osteomyelitis only under the 10 and 20 percent rating criteria.

Judge Pietsch, joined by Judge Allen, penned the majority opinion, holding that the plain language of DC 5000's total-rating criteria was both unambiguous and supported Mr. Huerta's reading. Judge Toth dissented, opining that DC 5000's total-rating criteria was "wildly" ambiguous and warranted a finding for the Secretary. The majority and dissent both relied, expressly or implicitly, on *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), a Supreme Court decision that revisited the *Auer* deference, which obligates courts to defer to an agency's reasonable interpretations of its own ambiguous regulation.

In *Kisor*, the appellant invited the Supreme Court to overrule *Auer* and discard the deference, but the Supreme Court declined the invitation. Writing for the plurality, Justice Kagan pointed out that, if properly applied, the scope of *Auer* was narrow because the deference was applicable only if, after utilizing all "traditional tools" of construction detailed in *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, n.9 (1984), *i.e.*, consideration of the regulatory text, structure, history, and purpose, the adjudicator still found that the regulation was "genuinely ambiguous" and, in addition, determined that the agency's reading was both reasonable and within the scope of its substantive expertise. Stressing that a regulation could not qualify as genuinely ambiguous simply because its language appeared "impenetrable on first read," the *Kisor* plurality omitted *dicta* reiterations

of such long-established principles as the canon urging avoidance of constructions leading to absurd results or the fact that a provision qualified as genuinely ambiguous if the adjudicator could detect more than one reading that "f[e]ll within a zone of reasonableness." *Linc Gov't Servs., LLC v. United States*, 96 Fed. Cl. 672, 709 (Ct. Fed. Cl. 2010); *see also Wassenaar v. Office of Pers. Mgmt.,* 21 F.3d 1090, 1092 (Fed. Cir. 1994) (the canon directing avoidance of constructions leading to absurd results).

Therefore, in *Huerta*, the Veteran could prevail only if DC 5000 were found to be both unambiguous and supporting his reading, while the Secretary could prevail if DC 5000 were found to be unambiguous and supporting his reading or, in case the regulation were deemed ambiguous, if the Secretary's reading warranted the *Auer* deference, as detailed in *Kisor*.

Focusing on the observation from *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 115 (Fed. Cir. 2013), that the structural purpose of any DC was to correlate a greater level of the disability addressed by the DC to a higher compensatory rating, Judge Toth pointed out that Mr. Huerta's reading of the DC 5000 criteria was reasonable linguistically. However, as applied, the interpretation yielded an absurd result, because it allowed to award a total rating to an asymptomatic veteran merely because, once upon a time, (s)he was diagnosed with chronic osteomyelitis "of the pelvis, vertebrae, or extending into major joints, or [present in] multiple localization," but required a denial of a rating in excess of 60 percent to any veteran who was presently suffering from frequent episodes of active osteomyelitis in the event such a veteran's active infection was located in some other part of the body.

Concluding, therefore, that the active-infection requirement was omitted from the express language of DC 5000's total-rating criteria but implicitly injected into the criteria by the *Vazquez-Claudio* structural purpose, Judge Toth found DC 5000 genuinely ambiguous and, therefore, the Secretary's reasonable reading of the regulation (which fell within the Secretary's core expertise) was entitled to *Auer* deference. *Accord* 38 C.F.R. §§ 3.321(a), 4.1 (since the assigned percentage of a disability rating compensates a veteran for the loss of/reduction in his/her ability to generate a work-related income, the rating percentage should be proportionate to the severity of the veteran's disability at issue).

In contrast, focusing primarily on the semantics and punctuation of DC 5000's total-rating criteria, the majority began by stating that the comma, which separated nouns "pelvis" and "vertebrae" without resorting to the use of disjunctive "or," placed osteomyelitis of the pelvis and that of vertebrae into their own, two-item group, distinct from the next group consisting of three items, *i.e.*, osteomyelitis present in "multiple localization," osteomyelitis that "extended into major joints," and that with a "long history of intractability." Then, the majority noted that each of these five items operated independently from the other four, but the modifier requiring the showing of "debility . . . or other constitutional symptoms" followed only the last item of the second group, *i.e.*, osteomyelitis "with [a] long history of intractability," without any punctuation mark between the word "intractability" and the phrase "and debility." Accordingly, the *Huerta* majority concluded that the absence of a punctuation mark between "intractability" and "and debility" was "a strong counterpoint" to the Secretary's construction of DC 5000's total-rating criteria.

The majority declined to elaborate, in *dicta*, which punctuation mark between the word "intractability" and the phrase "and debility" would have sufficiently supported the Secretary's construction of the total-rating criteria. However, it appears that a colon or a dash would be the only viable options, and neither one would provide sufficient support. Indeed, although there are 14 punctuation marks in the English language, *i.e.*, the period, question mark, exclamation point, comma, colon, semicolon, dash, hyphen, brackets, braces, parentheses, apostrophe, quotation mark, and ellipsis, only the use of a colon or dash between "intractability" and "and debility" would not render DC 5000's total-rating criteria facially nonsensical, would not create a sixth item (as it would be if the semicolon were used, since it would generate an independent item in the form of any form of osteomyelitis accompanied by "debility . . . or other continuous constitutional symptoms"), and would not be grammatically incorrect (as it would be if a comma were placed before the "debility . . . or other continuous constitutional

symptoms" modifier, which is a restrictive clause). Further, neither a colon nor a dash before the phrase "and debility" would suffice to conclusively rule out the validity of Mr. Huerta's position.

The majority also elected not to reflect on whether the grammar of DC 5000's total-rating criteria, assessed as a whole, indicated that a consideration of the criteria as being carefully drafted was not warranted. Yet, a close analysis of the total-rating criteria strongly suggests so. For instance, while the modifier "and debility, anemia, amyloid liver changes, or other continuous constitutional symptoms" contains an Oxford comma before the last item, the premodifier list inconsistently omits an Oxford comma before its last item. Further, a duplicative preposition "with" is used between the penultimate and last items of the premodifier list ("with multiple localization or with long history of intractability"), but an analogously duplicative preposition "of" is inconsistently omitted before the second item in the premodifier list, hence yielding an odd, choppy opening phrase "of the pelvis, vertebrae."

Given the at-best uneven drafting style of DC 5000, it appears that the regulation is one of the, alas, many haphazardly-worded legal provisions, *see*, *e.g.*, *United States v. Nippon Paper Indus. Co., Ltd.*, 109 F.3d 1, 4 (1st Cir. 1997) (defining the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6a as "inelegantly phrased"), that tend to greatly benefit from being construed through the prism of the provision's structural purpose, *see*, *e.g.*, *Animal Sci. Prods. v. China Minmetals Corp.*, 654 F.3d 462, 467 (3d Cir. 2011) (reading the FTAIA's mandate through the prism of its structural purpose, in line with the guidance provided in *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), and overruling in part the court's decade-old, purely-literal construction utilized in *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293 (3d Cir. 2002), and *Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62 (3d Cir. 2000)).

While the *Huerta* majority elected not to reflect on either the *Vazquez-Claudio* structural purpose of DC 5000 or the anomalous result ensuing from the application of Mr. Huerta's reading of DC 5000, the majority carefully examined the language of regulations adjoining DC 5000 and, upon noting that those DCs expressly distinguished "between active and inactive disease processes, not requiring adjudicators to read between the lines or impose criteria not expressly required by the DC," found that the total-rating criteria of DC 5000 was carefully drafted, in the sense that it intentionally omitted referring to the active-infection process.

With that, the majority qualified the language of the total-rating criteria as unambiguous – upon finding that the Secretary's reading of the regulation was "less convincing" than Mr. Huerta's reading. However, at no point did the majority suggest that DC 5000's language was not amenable to more than one reasonable reading, *i.e.*, that the Secretary's construction fell outside a zone of reasonableness. Correspondingly, the holding of *Huerta* cabined the *Auer* deference beyond the limitations carefully detailed in *Kisor*: since the *Huerta* majority required the Secretary to produce a regulatory construction not merely falling within a zone of reasonableness but, in addition, "equally convincing" to that offered by Mr. Huerta – and all of that just for DC 5000 to be qualified as genuinely ambiguous.

Time will tell whether such an analytical feat would remain required or is even achievable, especially if an adjudicator has to sift through the inelegantly phrased niceties of a mouthful regulation structured akin to a chain tale, with a restrictive clause buried deep at the very end. After all, referring to a popular children nursery rhyme structured as a chain tale with a buried restrictive clause, the Supreme Court cautioned that a legal "adjudication cannot rest on any such 'house that Jack built' foundation." *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 731 (1973).

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The Court Addresses VA's Obligation to Broadly Construe Claims

by Katherine Kiemle Buckley

Reporting on *Grimes v. McDonough*, No. 18-1017 (April 28, 2021).

In *Grimes,* the Court of Appeals for Veterans Claims (Court) issued a precedential decision written by Chief Judge Bartley on behalf of a panel of judges. The Court addressed a December 18, 2017, Board decision, which denied entitlement to an initial compensable disability rating for bilateral hearing loss, remanded a claim of service connection for sinus disability, and referred a claim of service connection for hyperacusis to the Regional Office (RO) for initial development and adjudication.

Mr. Grimes originally filed a claim of entitlement to service connection for loss of hearing, earaches, sinus pressure, and tinnitus in July 2011. In October 2012, the RO contacted the Veteran to clarify the scope of his claims. An October 2012 Report of Contact reflected that the Veteran reported his intention to claim hearing loss, tinnitus, aches, and sinus pressure. In an October 2012 rating decision, the RO granted service connection for bilateral hearing loss and assigned a noncompensable (zero percent) initial rating; service connection was also granted for tinnitus and a 10 percent initial rating was assigned. In the letter notifying the Veteran of the rating decision, the RO also indicated that service connection for aches and sinus pressure was denied. The Veteran filed a notice of disagreement (NOD) in November 2012; he argued that his claims were incomplete or not properly expressed. In the NOD, he further described experiencing sinus pressure and ear pain dating from service, and asserted entitlement to service connection for sinus pressure, ear pressure, and headaches. A September 2013 statement of the case (SOC) continued the noncompensable disability rating for bilateral hearing loss and the denial of service connection for aches and sinus pressure. The Veteran perfected a timely appeal via a VA Form 9 in September 2013. In an October 2013 rating decision, the RO denied service connection for earaches/blockages, as well as headaches. The Veteran did not file a NOD as to the October 2013 rating decision. He was afforded a Board hearing in October 2016, during which the Veterans Law Judge identified the issues on appeal as entitlement to an increased evaluation for bilateral hearing loss and entitlement to service connection for a sinus disability. At the hearing, the Veteran's then-representative explained that the Veteran experienced hyperacusis, which resulted in pain and discomfort from everyday noises. The Veterans Law Judge asked if the Veteran was attempting to have the hyperacusis pain compensated as part of the instant appeal, and the Veteran's former representative responded in the affirmative.

In a December 18, 2017, decision, the Board denied entitlement to a compensable initial disability rating for bilateral hearing loss, remanded the claim of service connection for a sinus disability for further development, and referred the claim of service connection for hyperacusis for initial development and adjudication by the RO.

On appeal to the Court, Mr. Grimes argued that the Board erred in referring, rather than adjudicating, the claim of service connection for hyperacusis. He contended that the RO impermissibly narrowed his appeal to exclude compensation for hyperacusis in violation of the sympathetic claim construction principles set forth in *Clemons v. Shinseki*, 23 Vet. App. 1 (2009). Mr. Grimes further asserted that the Board erred in finding that it lacked jurisdiction over the hyperacusis issue. In contrast, the Secretary argued that the Board's decision to refer the hyperacusis claim should be affirmed because the Board properly determined that the Veteran's claim of service connection for hyperacusis was jurisdictionally separate from the bilateral hearing loss and sinus disability claims pending on appeal. The Secretary contended that, rather than *Clemons*, the appeal was controlled by *Ephraim v. Brown*, 82 F.3d 399 (Fed. Cir. 1996), *vacating* 5 Vet. App. 549 (1993), and *Boggs v. Peake,* 520 F.3d 1330 (Fed. Cir. 2008), which establish that separate diagnoses represent separate claims.

In its analysis, the Court noted that the primary issue raised in the appeal is whether the Veteran's July 2011 claims and ensuing appeal included the

matter of entitlement to service connection for hyperacusis. The Court cited *Murphy v.* Wilkie, 983 F.3d 1313, 1318 (Fed. Cir. 2020) (citing *Boggs*, 520 F.3d at 1336; *see Ephraim*, 82 F.3d at 401-02), and explained that, generally, when an appellant has two diagnoses with separate factual bases, the diagnoses should be treated as two separate claims. However, the Court clarified that the scope of a service connection claim may be expanded beyond an appellant's lay description of a disability, to include any condition that "may reasonably be encompassed by several factors including: the claimant's description of the claim; the symptoms the claimant describes; and the information the claimant submits or that the Secretary obtains in support of the claim." *Clemons,* 23 Vet. App. at 5.

The Court determined that the Board erred by treating Mr. Grimes's request for compensation for hyperacusis as a jurisdictionally separate matter from his appeal of the claims of entitlement to a compensable initial rating for bilateral hearing loss and entitlement to service connection for a sinus disability. The Court stated that, when viewed sympathetically, the Veteran's submissions to the RO since July 2011 concerning his hearing problems and earaches reflected his intent to seek compensation for hyperacusis both as part of his original claims for service connection and in connection with the ensuing appeal.

The Court explained that, like the appellant in *Clemons,* Mr. Grimes did not file a claim to receive benefits for a particular diagnosis, but rather for his hearing problems including hyperacusis. The Court therefore concluded that the Board erred in finding that Mr. Grimes's initial claims and ensuing appeal did not encompass the matter of entitlement to compensation for hyperacusis. As such, the Board's referral of the claim of entitlement to service connection for hyperacusis to the RO for development and adjudication was improper.

The Court additionally noted that, once Mr. Grimes initiated an appeal which included service connection for hyperacusis, the RO was prohibited from reclassifying the matter as a new claim and subsequently denying it. To this end, the October 2013 rating decision could not have resolved the hyperacusis claim because that claim was properly pending on appeal before the Board, along with the issues of entitlement to a compensable initial rating for bilateral hearing loss and entitlement to service connection for a sinus disability. The Court stated that this principle is "especially true" where, as here, the appellant perfected an appeal to the Board before the RO issued an adverse decision on the "new claim." As Mr. Grimes's appeal of the bilateral hearing loss and sinus disability claims was perfected to the Board in September 2013, the October 2013 rating decision could not have resolved the hyperacusis appeal. The Court therefore concluded that the intervening October 2013 RO denial of service connection for earaches/blockages and headaches and Mr. Grimes's failure to appeal that decision does not affect the scope of the July 2011 claims or their subsequent appeal.

The Court recognized that Mr. Grimes was not diagnosed with hyperacusis at the time of the July 2011 service connection claim or prior to the October 2012 rating decision on appeal. The Court nevertheless stated that, because Mr. Grimes was diagnosed with hyperacusis while his original bilateral hearing loss and sinus disability claims were pending and prior to the issuance of any final decision, the holdings in *Ephraim* and *Boggs* do not control. Instead, pursuant to *Clemons*, VA is obligated to broadly construe Mr. Grimes's original claims to include any issue reasonably encompassed therein. As described above, the Court emphasized that such a sympathetic reading of the Veteran's claims on appeal would include the matter of entitlement to compensation for hyperacusis.

The Court summarized that, although VA construed Mr. Grimes's references to hearing difficulties and earaches as distinct from hyperacusis, he had always considered those impairments to be part of the same "constellation of ear problems'" for which he had sought compensation dating from the original July 2011 claim. In applying the holding of *Clemons*, the Court determined that the filings and assertions of Mr. Grimes as well as the evidence of record, reveal his intent to pursue compensation for hyperacusis as part of his bilateral hearing loss and sinus disability claims.

As the issue of entitlement to compensation benefits for hyperacusis was part of the properly-appealed

bilateral hearing loss and sinus disability claims over which the Board inarguably had jurisdiction, the Board's referral of the matter to the RO was in error. The Court therefore modified the December 18, 2017, Board decision to strike the referral and remanded the issue of entitlement to service connection for hyperacusis to the Board for adjudication in the first instance.

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Federal Circuit Overturns CAVC Reduction in EAJA Attorney Fees for Time Necessarily Spent on Both Prevailing & Non-Prevailing Claims

by Mel Bonish

Reporting on *Smith v. McDonough*, No. 2020-1354 (Fed. Cir. Apr. 29, 2021).

In November 2017, Mr. Smith appealed a Board of Veterans' Appeals (Board) decision granting him entitlement to various disability ratings for certain medical conditions and denying him entitlement to benefits for others. Of the seven issues raised on appeal, the Court of Appeals for Veterans Claims (CAVC) vacated only the Board's decision denying Mr. Smith entitlement to a disability rating in excess of 20% for a gastrointestinal disorder. The CAVC remanded that matter for further proceedings consistent with its decision and affirmed as to the six remaining issues on appeal.

On June 13, 2019, Mr. Smith timely filed an Application for Attorney Fees and Expenses (Application) pursuant to the Equal Access to Justice Act (EAJA) seeking $10,207.27 for 50.15 hours of attorney work and $89.36 in expenses. Under the EAJA, the federal government must reimburse a prevailing party's reasonable attorney fees, unless special circumstances make such an award unjust. The party seeking fees bears the burden of establishing the reasonableness of the fee request and must show: 1) that they are a prevailing party; 2) that they are eligible to receive an award; 3) an itemized statement of fees and expenses sought; and 4) a statement alleging that the position of the United States was not substantially justified.

In response to Mr. Smith's Application, the Secretary conceded that an award of fees was appropriate, but contested the reasonableness of the amount sought. The Secretary took particular issue with 18 hours of attorney time Mr. Smith's appellate counsel spent initially reviewing the record. Relying on *Cline v. Shinseki*, 26 Vet.App. 325, 331 (2013), the Secretary argued that those hours should be reduced proportionately to reflect that Mr. Smith prevailed on only 14 percent of the claims challenged on appeal. Despite agreeing to various adjustments which reduced his overall fee request to $7,320, Mr. Smith continued to seek full fees for those 18 hours. He argued that the CAVC only reduced paralegal fees in *Cline* because the paralegal's itemized descriptions were vague, time was recorded in five- and six-hour increments, and certain increments could have been solely attributed to unsuccessful claims. Mr. Smith maintained that, by contrast, any reduction in fees here was inappropriate because his counsel's initial record review was necessary for *any* appeal. The CAVC was not persuaded by Mr. Smith's attempts to distinguish *Cline*, concluding that reductions were warranted under the EAJA for time spent on non-prevailing issues. The CAVC granted fees for only six hours of record review, awarding Mr. Smith expenses totaling $53.91 and fees totaling $5,137.70 for 20.45 hours of attorney work. Mr. Smith timely appealed to the Federal Circuit.

The Federal Circuit began by addressing the Secretary's jurisdictional challenge. The Secretary argued that the Federal Circuit did not have subject matter jurisdiction to review the CAVC's purely factual determination that not all hours spent reviewing the initial record could have directly related to Mr. Smith's sole successful claim. The Federal Circuit disagreed, holding that it did have jurisdiction because Mr. Smith's appeal presented a question of law—whether the CAVC improperly interpreted the EAJA when rendering its decision.

The Federal Circuit explained that the CAVC erroneously assumed that time necessarily spent on both prevailing and non-prevailing claims merited reduction. Instead, the Federal Circuit held that courts properly award attorney fees for time necessarily spent on successful claims, even if that time was also spent on unsuccessful claims. The Federal Circuit concluded that the EAJA required that Mr. Smith's counsel be compensated for time necessarily expended on the initial review of the record, regardless of whether some of the claims that came from that review were non-prevailing, if that time was necessary for a successful appeal.

Abrogating *Cline*, the Federal Circuit reversed the CAVC's decision with respect to its reduction in reimbursable attorney time spent on initial record review, remanded with instructions to increase Mr. Smith's award by $2,412 to reflect the full 18 hours of initial record review, and affirmed the remainder of the CAVC's decision.

Mel Bonish is an LL.M student at The George Washington University Law School.

Requirements for Earlier Effective Dates Following Receipt of Service Department Records Under 38 C.F.R. § 3.156(c)

by Gillian Slovick

Reporting on *Flores-Vazquez v. McDonough*, No. 19-1780 (April 30, 2021).

In *Flores-Vazquez*, the United States Circuit Court of Appeals for the Federal Circuit (Federal Circuit) emphasized that for an earlier effective date to be assigned following the receipt of service department records, the grant of benefits must be based at least in part on those records.

Procedurally, Mr. Flores-Vazquez was denied service connection in September 1999 for depression. He did not appeal this decision and it became final. Thereafter, in January 2005, he requested that his claim be reopened, and received an examination in May 2005. Service connection was again denied in June 2005. While his appeal was pending, a command history of the *U.S.S. Kitty Hawk* and a related Department of Defense report were added to the claims file. The command history verified a claimed stressor.

In February 2010, the Board granted service connection for bipolar disorder with depression. In its decision, the Board discussed the May 2005 examination as well as previously unreviewed record from the *U.S.S. Kitty Hawk*, but also noted that the May 2005 examiner provided a diagnosis of bipolar disorder, and not posttraumatic stress disorder. In accordance with the Board's grant, the RO assigned an effective date of January 24, 2005, the date of the request to reopen.

In response, Mr. Flores-Vasquez sought an effective date going back to his November 1998 claim for service connection. An earlier effective date was denied in a May 2015 Board decision. Following an appeal, the Court of Appeals for Veterans Claims (Court) vacated and remanded the Board decision for the Board to discuss the applicability of 38 C.F.R. 3.156(c) prior to 2006.

In an October 2017 decision denying an earlier effective date, the Board found that 38 C.F.R. §3.156(c) did not apply because the 2010 award was not based on the new service records. The Court agreed, finding that the award of benefits "was not based in any way" on the new service records.

The Federal Circuit found no error in the Court's analysis. It found that both the pre-2006 and current versions of § 3.156(c) "require that the award of benefits be based at least in part on the new service department records to qualify for an earlier effective date." The Federal Circuit found that the plain pre-2006 language of the regulation stated that the evaluation must be service connected "on the basis of new evidence from the service department" and that the 2006 amendment was meant to clarify that "the award needs to be based all or in part" on the newly added records.

In support of this finding, the Federal Circuit pointed to its previous findings in *Blubaugh v. McDonald*, which noted that § 3.156(c) only applied when newly obtained service department records *lead to* the benefit previously denied. *Blubaugh*, 773 F. 3d 1310 (Fed. Cir. 2014) (emphasis added). The Federal Circuit further pointed to *Jones v. Wilkie*, when it found that the proper effective date was the request for reopening where the award is not predicated on then-new evidence. The Federal Circuit explained that the Board identified other service treatment records and the May 2005 opinion, but not the newly obtained records in support of its grant. The Federal Circuit further noted that the May 2005 findings were not contingent on verification of claimed stressors and thus found no legal error in the Court's conclusion that the newly submitted service department records "played no role in the granted of service connection for bipolar disorder."

Finally, in response to Mr. Vazquez-Flores's assertion that the Court erred in its determination that the *U.S.S. Kitty Hawk* records "played no role" in the Board's grant, the Federal Circuit determined that would be a factual question over which it did not have jurisdiction.

In her dissent, Judge Newman asserted that the majority's finding that the effective date was a factual determination was erroneous and that Mr. Flores-Vazquez was entitled to an effective date from the date of his original claim. Essentially, Judge Newman noted that the Board and the Court improperly weighed the evidence. Judge Newman contended that the Board and the Court misconstrued §3.156 in finding that an earlier effective date should be assigned only where newly obtained service department records were the "sole basis" for the grant of service connection.

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

Federal Circuit Rules that the Pro-Veteran Canon Only Applies When "Interpretive Doubt" Remains

by Mitchell J. Wright

Reporting on *Kisor v. McDonough*, No. 2016-1929 (Fed. Cir. Apr. 30, 2021).

On April 30, 2021, the Federal Circuit entered a modified opinion of its August 12, 2020 ruling in *Kisor v. McDonough*. The April 30 ruling is the latest iteration of a winding set of appeals on remand from the Supreme Court. The most recent ruling held that courts may only apply the pro-veteran canon of interpretation when there is "interpretive doubt" in statutory or regulatory language. Applying this rule, it found that the term "relevant," as used in 38 C.F.R. § 3.156(c)(1), which allows the Department of Veterans Affairs ("VA") to grant earlier effective dates for service connection if it receives "*relevant* official department records that existed and had not been associated with the claims file when VA first decided the claim," was unambiguous, and therefore precluded utilization of the pro-veteran canon of interpretation.

James Kisor is a Vietnam War veteran. Following his service, he applied for service connection for post-traumatic stress disorder ("PTSD") in December 1982, with the VA Regional Office ("RO"). In May 1983, the RO denied his claim for service connection for PTSD because a VA psychiatric exam found that he did not suffer from PTSD, but rather an "intermittent explosive disorder and atypical personality disorder." Of note, however, the psychiatric examiner did not examine Mr. Kisor's military combat records for in-service stressors.

One June 5, 2006, Mr. Kisor discovered that VA had not examined his military combat history in its 1983 decision and requested that VA reopen his PTSD claim and examine records showing his involvement in a 1965 operation named "Harvest Moon." Mr. Kisor argued that these events established an in-service stressor. In September 2007, Mr. Kisor was

diagnosed with PTSD and assigned a 50% disability rating with an effective date of June 5, 2006. Mr. Kisor challenged the disability rating and effective date. In March 2009, the RO granted a 70% disability rating but denied an earlier effective date. Mr. Kisor continued to appeal, arguing that his unexamined combat records established an effective date of 1982, pursuant to 38 C.F.R. § 3.156(c)(1).

On April 29, 2014, the Board of Veterans' Appeals ("BVA") denied Mr. Kisor's claim for an earlier effective date. BVA held that "relevant" records under 38 C.F.R. § 3.156(c)(1) must "speak to a matter in issue" or be "in dispute." It determined that, because the combat records Mr. Kisor submitted for examination only pertained to the presence of an in-service stressor (an element not in dispute) the records were not relevant to the disputed element: the lack of a diagnosis of PTSD in 1982. Therefore, although the combat records "existed and had not been associated with the claims file when VA first decided the claim," they were not "relevant" to his 2007 PTSD diagnosis, and thus did not establish a basis for an earlier effective date. On January 27, 2016, the Court of Appeals for Veterans Claims ("CAVC") affirmed the BVA's decision.

On September 7, 2017, the Federal Circuit affirmed BVA's decision (*Kisor I*). It held that the term "relevant" as used in 38 C.F.R. § 3.156(c)(1) was ambiguous and could mean that "relevant" records are either: (a) any records that tend to make the existence of any fact that is of consequence to the determination of the action more or less probable, or (b) only those records that address a dispositive issue and therefore affect the outcome of the proceeding. Finding that either of these interpretations were equally reasonable, it deferred to BVA's interpretation, pursuant to *Auer v. Robbins*, 519 U.S. 452 (1997). Mr. Kisor appealed this decision to the Supreme Court.

On June 26, 2019, the Supreme Court held that the Federal Circuit had resorted to *Auer* deference too quickly (*Kisor II*) and remanded the case to the Federal Circuit to examine whether the term "relevant" in 38 C.F.R. § 3.156(c)(1) is "genuinely ambiguous" by examining "indicia like text, structure, history, and purpose," to determine "whether the regulation really has more than one reasonable meaning." Notably, the Supreme Court granted certiorari on the *Auer* issue (declining to overturn *Auer*) but did not grant certiorari as to whether the pro-veteran canon of interpretation dispositively resolves this case.

On August 12, 2020, the Federal Circuit affirmed once again (*Kisor III*), this time finding that the term "relevant" was *not* ambiguous and instead necessarily leads to the BVA's interpretation that "relevant" records, for the purposes of establishing an earlier effective date under 38 C.F.R. § 3.156(c)(1), must speak to a matter in dispute. First, the court noted that, in the general veterans benefits context, "relevant" evidence is that which tends to "prove or disprove a material fact." *AZ v. Shinseki*, 731 F.3d 1303, 1311 (Fed. Cir. 2013). Second, in the context of VA's duty to assist, VA's duty only extends to obtaining "relevant" records--those that would aid the veteran in substantiating a claim. *Golz v. Shinseki*, 590 F.3d 1317, 1321 (Fed. Cir. 2010). Third, "relevant" records under 38 C.F.R. § 3.156(c)(1) must have the potential to "lead VA to award a benefit that was not granted in the previous decision." *Blubaugh v. McDonald*, 773 F.3d 1310, 1314 (Fed. Cir. 2014). Fourth, the court pointed to Black's Law Dictionary, which defined "relevant" as "[l]ogically connected and tending to prove or disprove a matter in issue." Finally, it looked to the Veterans Appeals Improvement and Modernization Act of 2017, which defines "relevant evidence" for supplemental claims as "information that tends to prove or disprove a matter at issue in a claim [and] includes evidence that raises a theory of entitlement that was not previously addressed." 38 C.F.R. § 3.2501. Thus, the court affirmed BVA's reading of the term "relevant" and affirmed the denial of an earlier effective date.

On September 28, 2020, Mr. Kisor petitioned the Federal Circuit to rehear the case *en banc* based on his argument (and that of various *amici*) that the court should have applied the pro-veteran canon alongside the court's other methods of interpretation to adopt his broader definition of the term "relevant." The Federal Circuit denied his petition and produced a modified decision addressing the pro-veteran canon on April 30, 2021 (*Kisor IV*). In its modified opinion, the court held

that the pro-veteran canon of interpretation only applies *after* using other means of textual interpretation if "interpretive doubt" still remains. The court found that, after looking to analogous cases, dictionary definitions, and statutory or regulatory definitions, it had no remaining interpretive doubt that the term "relevant" means the narrower definition given by the BVA in 2014. Therefore, the pro-veteran canon did not apply.

Justice Prost concurred, noting that Congress's active legislative role, correcting and preventing courts and agencies from undermining the purpose of veteran statutes and regulations, suggests that courts need not put their "thumb on a scale" in favor of veterans when interpreting text. Justice Hughes also concurred, arguing that the pro-veteran canon of interpretation should take a back seat to *Auer* deference, noting that this method was more consistent with the approach taken by other, non-veteran agency appeals, which defer to agency interpretation of agency regulations.

Justice O'Malley dissented, arguing that, contrary to the majority's assertion, the pro-veteran canon should remain a tool that courts should employ "alongside traditional tools of statutory construction" and should not reserve application for the end of the analysis. She argued further that courts should apply the pro-veteran canon more readily and broadly when the statute or regulation at issue is remedial in favor of the veteran.

Justice Reyna echoed Justice O'Malley's dissent and added a factual analysis of Mr. Kisor's case, noting that his combat records *were* relevant to his diagnosis of PTSD, particularly because they had not been examined when he received an alternate diagnosis in 1982. He noted that, had the combat records been examined in 1982, Mr. Kisor may have received a PTSD diagnosis, and therefore the records were relevant to his effective date under 38 C.F.R. § 3.2501. He pointed out that "relevant records," both in the context of VA's duty to assist and under "new and material evidence" for reconsideration, are those that address a necessary, unestablished element of the claim as a whole.

Justice O'Malley concluded by foreshadowing a potential return trip to the Supreme Court.

Mitchell J. Wright is a 3L student associate at West & Dunn.

CAVC Holds Board Has Authority to Deny Attorney Fees

by Rakhee Vemulapalli

Reporting on *Cox v. McDonough*, No. 19-3317 (May 12, 2021).

In *Cox v. McDonough,* the United States Court of Appeals for Veterans Claims (Court) affirmed the Board of Veterans' Appeals (Board) decision that Mr. Brinkley, the veteran, had discharged his attorney, Mr. Cox, the appellant, for "good and adequate cause" and, therefore, Mr. Cox was not entitled to any attorney fees.

The Court attributed the decision, which it described as an "apparently harsh result," to Mr. Cox's choice to enter into a contract with Mr. Brinkley that eliminated his ability to obtain a fee in quantum meruit if the veteran discharged him for "good and adequate cause" and to his choice to behave in a way that led Mr. Brinkley to discharge him.

Mr. Brinkley entered into a total of three fee agreements with Mr. Cox, the first in 1996, again in 2000, and, finally, in 2005. All three agreements provided for direct payment by VA to Mr. Cox of 20 percent of any past-due benefits recovered. Additionally, all of the agreements provided that if the client discharged the attorney without good and adequate cause after the attorney fully performed, substantially performed, or contributed in any way to the results finally obtained by the client, the client shall be liable for payment of the attorney's fees and expenses in quantum meruit.

From 1996 to 2007, Mr. Brinkley's claims moved up and down from VA to the Court. During much of that time, Mr. Cox represented Mr. Brinkley. In November 2009, after appointing Disabled American Veterans as his representative in August 2005, Mr. Brinkley informed Mr. Cox that he was terminating their attorney-client relationship because he rarely, if ever, returned his phone calls and declined his request for an in-person hearing, after which he received an unfavorable decision. He also wrote that he often received VA claim papers from Mr. Cox to complete without his assistance. Mr. Cox withdrew as Mr. Brinkley's representative in February 2010. In November 2010, Mr. Brinkley appointed American Legion as his representative. In July 2013, VA granted Mr. Brinkley entitlement to service connection for depression not otherwise specified with an evaluation of 50 percent, effective February 16, 1993, and entitlement to a total disability rating based on individual unemployability, effective October 17, 2001.

In July 2013, VA determined that a valid fee agreement between Mr. Brinkley and Mr. Cox existed and found Mr. Cox was eligible for a direct payment of fees of $58,586.30. Mr. Brinkley disagreed with the VA's fee decision based on Mr. Cox's poor and neglectful conduct as his attorney. He asked that VA bar Mr. Cox from receiving fees for deficient work. The issue was appealed to the Court after the Board concluded in a July 2015 decision the requirements for payment of the fees had been met and the amount was reasonable. The Court vacated the Board's decision for failure to discuss the fee agreement's "good and adequate cause" provision and remanded the matter back to the Board.

In a May 2019 decision, the Board denied Mr. Cox any fees and found that pursuant to the contract terms, he was not entitled to the recovery of fees under quantum meirut because Mr. Brinkley discharged Mr. Cox for good and adequate cause. The Court agreed with the Board's conclusion and analysis.

In its discussion of the law, the Court described four concepts that set forth the "big picture" with respect to attorney fees: the validity of a fee agreement; the eligibility of counsel for a fee; counsel's entitlement to a fee in a given situation; and, the reasonableness of any fee that is ultimately awarded. However, the statutory and regulatory framework provides only a three-pronged analysis including validity, eligibility, and reasonableness, but not entitlement. Yet, caselaw sometimes references "entitlement" or variations of this term.

To further understand how the concept of "entitlement" factors into the equation, the Court looked to *Scates v. Principi*, 282 F.3d 1362 (Fed. Cir. 2002). In *Scates*, the Federal Circuit determined that an attorney discharged during the case is entitled to a fee only reflecting his contribution to the litigation. While the Board is primarily an entity with appellate jurisdiction, it did have original jurisdiction to review direct-payment contingency fee agreements for reasonableness, but the Federal Circuit pointed out how the line between entitlement to and reasonableness of attorney fees may not be as clear and bright as CAVC envisioned considering an issue could be framed as one of entitlement or reasonableness.

Having outlined the law, the Court turned to a discussion of the Board's May 2019 decision. The Board found that Mr. Brinkley had discharged Mr. Cox for good and adequate cause under the terms of the fee agreement; therefore, Mr. Cox was not entitled to any fees and it was not necessary to discuss whether the fees awarded were unreasonable or what amount of fees was reasonable.

The Court concluded the Board did not exceed its authority or otherwise err when it denied Mr. Cox any fee based on the contract term. While the Board noted that a discussion around reasonableness was not warranted in this case, the Court pointed out that based on the particular facts of this case, including the inclusion of the "good and adequate cause" discharge and contract term, no fee in this case was reasonable.

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Montgomery GI and 9/11 Too: *Rudisill v. McDonough* Injunction Pending Appeal Provides Veteran Serving Time Period Covering More Than One GI Bill Benefit

by Pace A. Duckenfield and Mary Benton

Reporting on *Rudisill v. McDonough*, No. 16-4134 (May 7, 2021).

In *Rudisill v. McDonough*, the Court granted Mr. Rudisill's motion for an injunction pending appeal. The Court ordered the VA to begin paying Mr. Rudisill the statutory benefits to which he is entitled, unless and until the Federal Circuit renders a decision reversing or vacating this Court's August 15, 2019, decision in *BO v. Wilkie*, 31 Vet. App. 321 (2019), on appeal and remanding the matter.

Mr. Rudisill, a U.S. Army Veteran, served over a period of time qualifying to earn benefits under more than one GI Bill, namely, the Montgomery GI Bill education program (MGIB), chapter 30 of title 38 of the United States Code, and the Post-9/11 GI Bill education program (Post-9/11 GI Bill), chapter 33 of that title. Each program is subject to a 36-month cap on utilization and a 48-month cap overall. *Rudisill v. McDonough*, No. 16-4134; *Ribaudo v. Nicholson* (*Ribaudo II*), 21 Vet. App. 137, 140 (2007). This fact leads to a significant applicable development from an earlier ruling from the Court in *BO v. Wilkie*. In this case, the Court held Mr. Rudisill and fellow veterans in similar situations (with two separate periods of qualifying service) may obtain the benefits of both the MGIB and Post-9\11 GI Bill, subject to the cap.

Rudisill v. McDonough has a lengthy procedural history. In this case, Mr. Rudisill filed a Motion under Rule 8 (Motion), CAVC (Rule 8: Suspension of Secretarial Action or Suspension of Precedential Effect of Decision of this Court) as well as under the Federal Rules of Appellate Procedure, asking the Court to have the Secretary of Veterans Affairs (Secretary) provide him with his Post-9/11 GI Bill benefits, as seen in *BO v. Wilkie*.

The Secretary requested the Court deny the Motion, arguing both jurisdictional and merit concerns. On April 5, 2021, Mr. Rudisill sought leave to reply to the Motion, which the Secretary opposed. The Court granted leave to reply on April 13, 2021.

Before delving into the merits of the case, the Court addressed the question of jurisdiction concluding that Mr. Rudisill's Motion for injunction pending appeal posed no risk that both the Court and the Federal Circuit would evaluate the same case at the same time. The Court held that the Motion fell under the Court's jurisdiction because it is an implementation of a prior Court's decision.

The Court addressed the merits of the case in two parts, first addressing the matter of applicability of *Tobler v. Derwinski,* 2 Vet. App. 8 (1991). In *Tobler*, the Court held that a decision of the Court takes effect on the date it is issued and any rulings, interpretations, or conclusions of law contained in such a decision are authoritative and binding as of the date the decision is issued and, where applicable, are to be followed by VA. However, the Court noted that the rules from *Tobler* are not absolute, looking to later precedent such as *Ribaudo v. Nicholson (Ribaudo I),* 20 Vet. App. 552 (2007), which held that a party may move the Court to stay the precedential effect of a decision by the Court. Thereby, as seen in this case, the Court read *Tobler* as (1) binding VA for all further adjudications at the Agency, but (2), until final, not requiring implementation with respect to the named appellant.

Applying the analysis of these two earlier decisions to the present case, the Court reasoned that *Tobler* does not, on its own, suggest the motion should be denied, but rather that *Tobler* and *Ribaudo I* mean that in the instant case, Mr. Rudisill had the burden of proving injunctive relief is necessary.

Secondly, regarding the merits in this case, in order to address how Mr. Rudisill satisfied the burden of seeking injunctive relief, the Court applied a four-part test, to wit: (1) whether appellant is likely to succeed on the merits; (2) whether appellant is likely

to suffer irreparable harm in the absence of injunctive relief; (3) whether the balance of equities tip in his favor; and (4) whether the injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008); *Ribaudo II*, 21 Vet. App. at 140. In the present matter, the Court noted that Mr. Rudisill demonstrated entitlement to his requested relief. Although panel members disagreed on part one of the test (whether he is likely to succeed on the merits of the appeal) the Court reasoned that the remaining factors weigh in Mr. Rudisill's favor. Chief Judge Bartley concurred with the majority but disagreed that Mr. Rudisill has a strong likelihood of success on the merits of his appeal.

Part two of the test is noted by the Court as the most compelling. Based on the specific facts, the Court reasoned that appellant would be irreparably harmed if it denied the relief Mr. Rudisill sought. The Court noted the damage he will face if benefits are not rendered, which will essentially end his educational program. Mr. Rudisill further explained how and why taking out loans or securing aid to replace his remaining benefits is not an option. Specifically, the Court noted Mr. Rudisill has no adequate remedy at law to recover such expenses if he ultimately wins his case. For instance, there is no provision in the Post-9/11 program compelling the Secretary to reimburse him.

Under the Court's discussion of the third and fourth prong, it ruled for Mr. Rudisill. Ultimately, the Court granted Mr. Rudisill's motion for an injunction pending appeal, as he has shown imminent harm that would occur if the Court did not grant his request for relief. This harm would not be remedied by an eventual award of benefits. Furthermore, no harm would result to the VA Secretary nor the public, since, unlike Mr. Rudisill, the Secretary has a remedy at law to recoup debt.

Pace A. Duckenfield is an intern at the Veterans Consortium Pro Bono Program. Mary Benton is a Staff Member at the Veterans Consortium Pro Bono Program.

What is the Scope of 38 C.F.R. § 3.156(b) in Relation to Morphing Claims and What is "Relevant" under § 3.156(c)?

by Angeline Allen

Reporting on *Davis v. McDonough*, U.S. Court of Appeals for Vet. Claims No. 18-4371 (May 18, 2021).

In a May 18, 2021, panel decision authored by Judge Toth, the Court of Appeals for Veterans Claims (Court) affirmed a portion of the Board of Veterans' Appeals (Board) decision denying an earlier effective date under 38 C.F.R. § 3.156(b) while also vacating the portion denying an earlier effective date under 38 C.F.R. § 3.156(c).

Mr. Davis, the appellant in this case, served on active duty in the Navy from August 1985 to June 1988 with previous active duty for training in the Army from November 1984 to April 1985. Mr. Davis filed a disability compensation claim in 1999 for psychiatric problems, in response to which VA obtained the veteran's Navy medical records. The regional office (RO) denied this claim, finding that adjustment disorder, which was diagnosed in service and documented in the service records, did not qualify as a disability for VA purposes. Additional review was requested, and the claim was again denied in an unappealed June 2000 decision.

In December 2001, Mr. Davis sought disability compensation for multiple claims including "nerves (breakdown)," posttraumatic stress disorder (PTSD), bilateral knee and foot "pain/problems," and hand arthritis. The RO denied these claims in a June 2002 decision, from which the Veteran timely appealed only the claim for service connection for a psychiatric condition.

In May 2003, Mr. Davis submitted a statement to VA requesting compensation for lupus, asserting that his depression and all other mental conditions were a result of lupus. He asked VA to obtain identified

private treatment records. In October 2003, he asserted that his benefit claims for hand, knee, and foot pain were actually claims for lupus because the problems were "associated."

The RO issued a May 2004 rating decision, noting a request to reopen a previous claim was received, and proceeded to adjudicate said claims on the merits, denying service connection for lupus and psychiatric problems secondary to lupus. The RO also continued the denial of service connection for psychiatric conditions in November 2006, finding that the evidence was not new and material. Mr. Davis did not appeal the May 2004 or November 2006 rating decisions.

In February 2009, Mr. Davis filed a request to reopen his lupus claim. The RO reopened the claim, completed additional development, and granted service connection for lupus with glomerulonephrosis, alopecia, and depression in a 2010 rating decision, assigning a 100 percent disability rating, effective February 27, 2009.

The Veteran timely appealed, arguing that the effective date assigned should have been based on his original December 2001 claim because VA ultimately granted service connection for lupus based on service treatment records that were not part of the claims file during the original adjudication under § 3.156(c).

Before the Board, Mr. Davis renewed his § 3.156(c) argument, while also arguing for an earlier effective date under § 3.156(b). He asserted the May 2003 statement "transformed" his prior claim for benefits "into a claim for depression and lupus" and the October 2003 statement again modified the claim into one for "lupus, depression, and other orthopedic conditions." Mr. Davis also argued that the 2003 statements constituted new and material evidence that the RO was bound to address under § 3.156(b), and because the RO failed to do so, his December 2001 claim remained pending until it was granted in 2010.

While the appeal was pending before the Board, Mr. Davis submitted medical records from his period of Army service from November 1984 to April 1985. He asserted that these new records were relevant to the lupus claim and thereby triggered the duty to reconsider the claim under § 3.156(c).

In a June 2018 decision, the Board denied an earlier effective date for lupus.

On appeal to the Court, Mr. Davis argued with respect to § 3.156(b): (1) that the Board erred in finding the 2003 statements did not alter the scope of the December 2001 claim; (2) the question of whether "material evidence" includes "evidence that expands the scope of a claim" is a legal issue that the Court must resolve de novo; and (3) the Board mistakenly concluded the 2003 statements were not material. He also argued that the Board applied an incorrect legal standard for assessing relevance under § 3.156(c).

The Court held that § 3.156(b) was satisfied by the RO's May 2004 decision that considered Mr. Davis's 2003 statements and new and material evidence. The Court found that even if the Board erred in finding that the 2003 statements were not new and material evidence received with respect to the December 2001 lupus claim, the errors would not change the fact that the May 2004 RO decision treated Mr. Davis's 2003 statements as if they were new and material and said decision became final.

The Court further explained that the RO indicated it was acting on a "previous claim" based on submissions received in 2003 and the RO recharacterized the issues in light of information taken from the 2003 statements. The RO also discussed the records Mr. Davis requested VA obtain in his 2003 statement. Accordingly, the Court found that the RO's May 2004 decision was "directly responsive" to Mr. Davis's 2003 statements. The Court also found that it was clear from the RO's readjudication that it treated Mr. Davis's 2003 statements as new evidence relevant to a pending claim as the RO rendered a merits based decision on compensation for the disabilities identified in the 2003 statements based on the theories raised in the 2003 statements. Indeed, the Court noted that Mr. Davis did not identify any aspects of the 2003 statements that the May 2004 RO decision did not consider or offer response.

Judge Bartley issued a dissent, disagreeing that VA fulfilled its duty under § 3.156(b). The dissent found that the RO failed to respond to Mr. Davis's 2003 evidence that his lupus claim was associated with in-service psychiatric symptoms. Had the RO assessed whether Mr. Davis's in-service psychiatric symptoms were manifestations of or associated with lupus, the RO would have been obligated to consider whether the in-service psychiatric symptoms represented the initial onset of lupus. If so, Mr. Davis's lupus claim would have been assessed under 38 C.F.R. § 3.303(a), requiring service connection where there is inception of a disability during service. The dissent argued that the RO failed to make such assessments; therefore, it failed to render a decision that was responsive to Mr. Davis's 2003 evidence, as required by § 3.156(b).

Regarding § 3.156(c), the Court rejected Mr. Davis's argument for readjudication based on the Navy medical records finding said records were part of the claims file and considered when lupus was denied in May 2004. Indeed, the Court noted that Mr. Davis did not challenge this conclusion.

Rather, Mr. Davis contended that the Board applied the wrong legal standard of relevance when the Board determined that the Army medical records first received in 2017 were not "relevant" to the lupus claim. The Court then discussed the meaning of the word "relevant" for the purposes of § 3.156(c) which was first addressed in *Kisor v. Shulkin*, 869 F.3d 1360 (Fed. Cir. 2017), and cited by the Board in its decision on appeal.

During the pendency of Mr. Davis's appeal, the *Kisor* decision was vacated by the Supreme Court. Thereafter, the Federal Circuit issued another decision in that case, which was subsequently modified again earlier this year. The Court noted that the briefings in Mr. Davis's case were submitted "long before" the final *Kisor* decision in 2021. In circumstances where there has been a new legal development between the issuance of a Board decision and the submission of a case to the Court, the Court relied upon its discretion not to address the effect of that development and instead remand for the Board to consider it in the first instance. Accordingly, the Court vacated the portion of the Board's decision denying an earlier effective date under § 3.156(c), remanding the issue for readjudication in the first instance in light of the most recent holdings in *Kisor v. McDonough*.

Angeline Allen is Associate Counsel at the Board of Veterans' Appeals.

CAVC Defines "Bore the Expense," as Related to Accrued Benefits under 38 U.S.C. § 5121(a)(6)

by Morgan MacIsaac-Bykowski

Reporting on *Helmick v. McDonough*, No. 19-5290 (May 25, 2021).

In *Helmick*, the Court of Appeals for Veterans Claims (Court) issued a precedential order written by Judge Allen and held that the phrase "bore the expense" in 38 U.S.C. § 5121 means something broader than "paid."

Larry Helmick, Appellant, is the adult child of veteran Karl Helmick. When Karl died in 2007, his spouse, Appellant's mother, filed for and was awarded a death pension with aid and attendance. In 2010, she submitted an expense report to VA providing that she had paid over $39,000 for her own unreimbursed medical expenses and just over $28,000 for assisted living expenses that year; she expected to pay even more in 2011. However, she died in April 2011.

Appellant applied for accrued benefits for his mother indicating that he had loaned her $15,000 for her assisted living between 2010 and 2011. VA denied $15,000 in accrued benefits because of what the Court called "double counting." Because the assisted living fees were considered medical expenses, VA asserted that they could not also be considered expenses for accrued benefits purposes. However, VA did not support this position with a citation to law. VA continued its denial throughout the appellate process based on this "double counting" and a supposed lack of evidence that the

loan was related to the claimant's last illness, as required by 38 U.S.C. § 5121(a)(6) and 38 C.F.R. § 3.1000(a)(5).

In 2018, the Court granted a joint motion for remand (JMR) directing the Board of Veterans' Appeals (Board) to provide an adequate statement of reasons or bases for why appellant's mother's conditions were not determined to be her "last sickness." On remand, the Board solely focused on the "double counting" argument made below. Subsequently, Appellant appealed to the Court a second time.

Here, the Court focused on the meaning of the word "bore" in 38 U.S.C. § 5121(a)(6), which provides that "only so much of the accrued benefits may be paid as may be necessary to reimburse the person who bore the expense of the last sickness and burial." As the VA contended, "bore" meant "paid," and because Appellant's mother paid for those expenses, Appellant could not have and, accordingly, is not entitled to accrued benefits under the statute. Because the word "bore" had not been defined by the Court in this context before, the Court looked to the plain meaning.

The Court highlighted that Congress used both "paid" and "bore" in the same sentence, and that if it meant "paid" when it said "bore," it would have simply said "paid." The Court then looked at multiple definitions for the word "bore," and even discussed a hypothetical situation where a parent provided a child with $5, which the child used to purchase an ice cream, showing that both the person physically transferring the money and the person who provided that money could be considered to have "born" the expense.

The Court reasoned that because the Appellant loaned his mother $15,000 for her medical expenses and she actually used that money for her medical expenses, it is possible that both Appellant and his mother bore the expense, and their claims could co-exist. The "double counting" argument, therefore, was struck down.

Ultimately, the Court set aside and remanded the Board's decision and directed the Board to make the factual findings necessary to determine whether Appellant bore the expense, applying a definition broader than just "paid," and to address the order of the Court in the previous JMR, regarding the last illness issue.

Morgan MacIsaac-Bykowski is a staff attorney at the Stetson University Veterans Law Institute.

CAVC Confirms Prohibition on Post-Board-Remand Evidence Submissions Under AMA Direct Review Docket

by Trevor T. Bernard

Reporting on *Andrews v. McDonough*, No. 19-3227 (May 28, 2021).

In *Andrews*, the United States Court of Appeals for Veterans Claims (CAVC) held in a unanimous panel opinion that, under the Appeals Modernization Act (AMA), *Kutscherousky v. West*, 12 Vet. App. 369 (1999), and *Fletcher v. Derwinski*, 1 Vet. App. 394 (1991), do not permit a claimant to submit additional evidence pursuant to a remand to the Board of Veterans' Appeals' (Board) where the claimant elected his or her appeal under the direct review docket.

In September 2015, Mr. Andrews filed for an increased rating for his service-connected bilateral knee disabilities. In September 2017, the United States Department of Veterans Affairs (VA) agency of original jurisdiction (AOJ) had the Veteran's bilateral knees evaluated. Relying on the associated examination report, the AOJ denied Mr. Andrews's claim in an October 2017 rating decision.

Mr. Andrews appealed the October 2017 decision, opting into VA's Rapid Modernization Appeal Program (RAMP) and selecting the supplemental claim lane. VA again denied his claim and he appealed to the Board under its direct review docket. In a January 2019 decision, the Board, among other things, denied Mr. Andrews's claim for increase for his bilateral knees; he appealed to the

CAVC only the issue of an increase in excess of 10 percent for his right knee.

Mr. Andrews and the VA Secretary (collectively referred to as "the Parties") agreed that the Board erred by (1) failing to consider whether Diagnostic Code 5259 applied to Mr. Andrews's partial meniscectomies of his right knee and (2) relying on the September 2017 VA examination, which was inadequate. Thus, the Parties agreed, and the CAVC eventually ordered, that the January 2019 Board decision should be vacated and remanded for a new examination so that the Board could issue a decision supported by an adequate statement of reasons and bases.

The Parties disagreed, however, about (1) whether the CAVC could instruct Mr. Andrews about his rights on remand and (2) if so, what the instructions should be.

Mr. Andrews argued that the Due Process Clause of the Fifth Amendment, Title 38 U.S.C., and case law require that the remanded matters be handled expeditiously and that he be afforded an opportunity for a hearing and to submit additional evidence. The Secretary believed that it was premature for the CAVC to address Mr. Andrews's rights on remand; however, he agreed with Mr. Andrews regarding expeditious handling, pursuant to 38 U.S.C. § 7112 and 38 C.F.R. § 20.800(d). The Secretary otherwise argued that Mr. Andrews is ineligible to submit additional evidence upon remand based on the direct review docket he previously selected under RAMP. In his reply brief, Mr. Andrews conceded that he no longer sought a hearing on remand, so the only remaining dispute was whether he could submit additional evidence.

The CAVC first engaged in an analysis on what *Fletcher* and *Kutscherousky* require. *Fletcher* stands for the proposition that, upon remand, the Board simply may not rewrite a decision to comply superficially with the reasons-and-bases requirement; rather, a remand must entail a critical examination of the justification for a decision. The Board must reexamine all relevant evidence of record, seek any other evidence that the Board feels is necessary, and issue a timely, well-supported decision. In *Kutscherousky*, the CAVC held that, unless stated otherwise, claimants have a 90-day window after the issuance of post-Board-remand notices to submit additional evidence or request a hearing; Board remands to the AOJ also must state a claimant's right to submit additional evidence on the remanded matters.

The CAVC then compared the differences between the Legacy system of appeals and appeals under the AMA, noting that, under the AMA, VA's statutory duty to assist no longer applies after the AOJ issues its decision, as opposed to appeals under the Legacy system, where the duty to assist applies at all stages of the appeal. Under the AMA direct review docket, the appellate record examined by the Board closes upon issuance of the AOJ's decision and does not permit the claimant to submit any additional evidence, absent a timely request to switch to an appellate docket that permits the submission of additional evidence.

As to the first issue—whether the CAVC has authority to address Mr. Andrews's remand rights—the CAVC disagreed with the Secretary. According to the CAVC, the Secretary's contention here undermined his position in *Kutscherousky*, where he asked the CAVC to opine about a claimant's rights on remand, as well as contradicts decades of case law. Additionally, the Secretary's contentions amounted to a challenge to the CAVC's statutory authority to affirm, modify, or reverse a Board decision. The CAVC was clear that it may address a claimant's rights on remand, just as it has done for its entire history.

With respect to the second question presented—whether Mr. Andrews can submit additional evidence upon remand to the Board—the CAVC held in favor of the Secretary. It started by noting that, under the AMA, Congress clearly and unambiguously provided limitations on evidence submission for claimants who selected the direct review docket. Without any ambiguity in the applicable and controlling legislation, the CAVC held that it was bound to give effect to those plain and unambiguous words. Thus, it could not instruct the Board to let Mr. Andrews submit additional evidence upon remand when his appeal was

returned to the direct review docket. Mr. Andrews attempted to distinguish remands from the Board as opposed to remands from the CAVC. The CAVC, however, found that Congress made no distinction between remands from either entity and that the AMA was written with Congress's full knowledge that the CAVC regularly remands cases back to the Board.

Responding to Mr. Andrews's due process argument, the CAVC found that, because that argument was raised only in Mr. Andrews's reply brief and at oral arguments, as opposed to his opening brief, the argument was forfeited. It nevertheless held that Mr. Andrews's due process rights were not jeopardized. Even assuming he is denied benefits on remand, he may file a supplemental claim and, should he be denied again, another Board appeal, opting for an appeal docket that allows for the submission of additional evidence, all of which would preserve his initial effective date for any future benefits awarded.

The CAVC was clear that Congress's passage of the AMA did not abrogate the holdings in *Fletcher* and *Kutscherousky*, as they apply to claimants in the Legacy system of appeals. Rather, Congress created a new appellate structure to which the CAVC may not apply its Legacy precedent when evaluating an appeal under the direct review docket. The CAVC's holding here did not remove all value from *Fletcher* and *Kutscherousky*; on the contrary, the Board still is required to (1) remand and seek additional evidence where the AOJ committed a pre-decisional duty-to-assist error (as it did here relying on an inadequate examination), as well as (2) avoid superficial compliance by merely rewriting its prior decision. Rather, the Board must reexamine the evidence and its justification for the decision, reconsider its conclusions, and issue a timely, well-supported new decision. Under the AMA, however, the CAVC may not instruct the Board to permit a claimant to submit, and the Board cannot review, additional evidence upon remand where the claimant has selected the direct review docket.

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Five Fundamentals of Sympathetically Reading Claims

by James D. Ridgway

The veterans benefits system is supposed to be paternalistic and claimant-friendly. No wonder then that one of the situations that will most infuriate a veteran is a Board decision that dismisses the merits of their complaint by holding that the matter presently on appeal is something different than what the veteran is trying to dispute. As an advocate, I'm hopeful that a series of recent cases have clarified the fundamentals of how this complex process can be operated in a sympathetic manner.

No one can dispute that an operation as vast as the VA claims process needs organizing rules to avoid chaos and keep matters moving efficiently. Nonetheless, from the earliest days of judicial review, the CAVC and the Federal Circuit have recognized that Congress intends for VA to "fully and sympathetically" adjudicate claims from veterans. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (quoting H.R. Rep. No. 100-963, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 5782, 5794-95); *see also Manio v. Derwinski*, 1 Vet.App. 140, 144 (1991) ("The legislative history of the Act which created this Court, the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, indicates that VA is to adjudicate claims in a manner sympathetic to veterans."). The challenge of sympathetically operating a complex system efficiently has always been that—whatever the rules—many veterans simply will not know them; nor will they know the medical and legal terminology that would allow them to express themselves clearly. Thus, many cases will reach puzzling crossroads where it becomes apparent that there is a disconnect between what the veteran is expecting and how adjudicators understand what is happening. This is where a sympathetic reading goes to work. And today we have a better understanding than ever of how the tools of sympathetic reading operate. A

series of recent cases illustrates five fundamental principles of sympathetically reading claims.

1. A sympathetic reading is focused on the veteran's expectations. Perhaps this point is obvious, but it is worth beginning with it: A veteran's expectations do not necessarily correlate to their ability to navigate the VA process in a technically precise way. The Federal Circuit reaffirmed the proper focus of a sympathetic reading in December in *Murphy v. Wilkie*, 983 F.3d 1313 (Fed. Cir. 2020). The opinion in *Murphy* broadly reviews some key caselaw on determining the scope of claims and helpfully distils it. It notes that "in accordance with the general pro-veteran canon, *Clemons* [*v. Shinseki*, 23 Vet. App. 1 (2009)] explains that the VA shall afford lenity to a veteran's filings that fail to enumerate precisely the disabilities included within the bounds of a claim. It further teaches that this goal is best accomplished by looking to the veteran's reasonable expectations in filing the claim and the evidence developed in processing that claim." *Murphy* recognizes that—at a fundamental level—perfect technical compliance with claims-processing rules is simply not required. In other words, if the veteran sought benefits with a reasonable expectation that a particular disability, symptom, or benefit was part of their claim, then a sympathetic reading will bring that disability within its scope.

This is not to say that a sympathetic reading excuses a veteran from compliance with all claims processing rules. For example, an appeal cannot proceed to the Board without a timely NOD. However, the precise language of the procedural documents should not be used against the veteran to send them back to the beginning of the process because they now express their complaints differently than they did in the beginning.

2. A sympathetic reading draws inferences from the evidence submitted or identified by the veteran. Focusing on the veteran's expectations is often easier said than done. On this point, it is crucial to understand that the process of determining the veteran's expectation is not limited to the original submission. This was well illustrated in the recent Federal Circuit decision in *Shea v. Wilkie*, 926 F.3d 1362 (Fed. Cir. 2019). In *Shea*, the veteran filed a claim for compensation for disabilities stemming from an in-service motor vehicle accident. The original application listed only her physical disabilities. Months later, she submitted a list of medical records that VA ought to obtain in connection with her claim, which included records of mental health treatment. The court concluded that the veteran's expectations could be understood by examining the records to which she directed VA's attention. "[W]hile a pro se claimant's claim must identify the benefit sought, the identification need not be explicit in the claim-stating documents, but can also be found indirectly through examination of evidence to which those documents themselves point when sympathetically read."

In other words, when sympathetically reading a claim "VA must look beyond the four corners" of the "claim-stating documents." Importantly, there are many ways to define the scope of a claim. A veteran may think of their claim in terms of the symptoms experienced, an injury in service, or the diagnosed problem and related conditions. No one approach is right for all claims. Rather, a sympathetic reading uses whichever approach best captures the full scope of the veteran's complaints.

3. A sympathetic reading is retrospective. One of the most common errors made in trying to analyze a claim sympathetically is the false belief that it requires finding that the RO made a mistake in how it originally interpreted the claim. In two recent cases, the CAVC removed any doubt that a sympathetic reading is done retrospectively. In *Grimes v. McDonough*, the Court explained that determining the scope of a claim requires examination of "the veteran's filings *and actions since that time*, as well as the evidence submitted and developed *throughout the appeal*." __ Vet.App. __, No. 18-1017 (Apr. 28, 2021). Just days before that, the Court stated in *Chavis v. McDonough* that "although clarity may not have been obtained" until later in the process as to what symptoms stemmed from the claimed condition "hindsight does not change VA's duties to consider the 'general lenity rule' in determining the scope of the claim based upon the claimant's filings and evidence of record." __ Vet.App. __, No. 18-2928 (Apr. 16, 2021) (quoting *Murphy*). Together, *Grimes* and *Chavis* make clear

that it does not matter what the best interpretation of the original pleading was at the time.

This point is critical because a sympathetic reading can help a veteran without requiring any fault on the part of VA early in the adjudication process. *Grimes* is a wonderful illustration of this. The dispute at the Court was whether hyperacusis (intense pain caused by hearing sounds) was within the scope of the appeal. At the beginning of the case, Mr. Grimes had not been diagnosed with this condition and had no idea what the term was for it. Early in the process he talked about "ear aches" and "pain" in addition to his hearing loss and tinnitus, which the RO staff quite reasonably thought was a general complaint associated with his sinus claim. It was not until years into the appeal process that he was diagnosed with "hyperacusis" and could finally name and clearly identify the problem that he thought VA was overlooking. It would not be fair, nor was it necessary, to blame the RO staff for not understanding his original submissions. Without finding fault by the original adjudicators, a sympathetic retrospective reading of the entire file made clear that hyperacusis was within the scope of the appeal before the Board.

4. A sympathetic reading looks at the full constellation of related issues. Another common mistake is assuming that a claim that is explicitly about one condition can only be about that condition. This is a point that will become increasingly important as we encounter more cases governed by VA's 2015 regulations requiring the use of standard forms for claims and appeals, as well as the AMA's continuous pursuit rules. Fundamentally, a sympathetic reading understands that veterans do not divide their problems with the same precision as lawyers and doctors.

At the beginning of the year, the CAVC helpfully reaffirmed that the scope of a claim may be broader than the disability explicitly at issue. In *Bailey v. Wilkie*, 33 Vet.App. 188 (2021), the Court recognized that 38 C.F.R. § 3.155(d)(2) defines the scope of a claim to include "entitlement to any additional benefits for complications of the claimed condition, including those identified by the rating criteria for that condition in 38 CFR Part 4, VA Schedule for Rating Disabilities." Perhaps more importantly, the Court recognized that "the final [standard-forms] rule did 'not alter VA's general practice of identifying and adjudicating issues and claims that *logically relate* to and arise in connection with a claim pending before VA'" (emphasis added). A few months later, *Grimes* added to the vocabulary of "complications" and "logically related" issues by referring to the "constellation" of problems for which the veteran was seeking benefits.

Sympathetically reading submissions to broadly include claims and benefits reflects the reality that veteran will not necessarily understand the law or the medicine in the same way as trained adjudicators and practitioners of veterans law. Accordingly, a sympathetic reading means many separate things: (1) a claim for a specified condition broadly includes alternative diagnoses for the same symptoms, *see Clemons*; (2) a claim for one condition may include claims for conditions or symptoms that VA considers separate and secondary to the primary condition, *see Shea*, *Bailey*, *Chavis*, and *Grimes*; (3) a claims for disability compensation may include the issues of entitlement to ancillary benefits like special monthly compensation and TDIU, *see Payne v. Wilkie*, 31 Vet.App. 373 (2019); and (4) a claim for a condition secondary to another condition may include a claim for service connection for the primary condition, *see DeLisio v. Shinseki*, 25 Vet.App. 45 (2011). In each of these instances, a veteran might reasonably view the matters as a single ball of wax. The question is not could the veteran have guessed the "correct" procedures or terminology, but whether the veteran could reasonably have thought that the disputed matter was within the scope of what he or she had been pursuing all along. Of course, something that is not reasonably raised by either the veteran or the evidence is beyond the scope of the claim, but in such situations, it would be unreasonable to conclude that the expectations of the veteran included the issue.

Notably, this principle combines favorably with the previous ones. For example, a veteran may file a claim for a back disability. Sometime during the adjudication process, secondary radiculopathy may develop. A technical approach might conclude that

the radiculopathy is necessarily a new and separate claim because it did not exist at the time of the original claim. However, a sympathetic reading would understand that the veteran would view the radiculopathy as "logically related" to the original back claim and would have the "expectation" that this new manifestation of his back problem is part of what he's been complaining about all along. Accordingly, it would be unreasonable to assume that the veteran would know to make any separate filings to pursue compensation for the radiculopathy. And once again, a sympathetic reading does not require any fault by the original VA adjudicators.

5. *An intervening RO decision on an issue revealed by a sympathetic reading cannot bifurcate it out of appellate status.* Finally, one of the common procedural mistakes that is made is treating a piece of a claim as a separate matter once VA has recognized and adjudicated the issue. Often, VA will recognize the true scope of a veteran's original claim at some intermediate point in the process and issue a separate rating decision. At this point, the RO issues a separate rating decision. While adjudicating the matter is a positive step and is important to protecting the veteran's right to an initial adjudication by the RO, the veteran will often not realize that VA considers the matter separate from the appeal that the veteran is already pursing. Fortunately, the proper application of the sympathetic reading doctrine means that a separate appeal is not required.

This principle is not new. For example, the Court's decision in *Harper v. Wilkie*, 30 Vet. App. 356 (2018), made clear that entitlement to TDIU cannot be bifurcated out of an appeal of a disability rating by issuing a separate RO decision. The new opinion in *Grimes* is an important decision because it explicitly clarified once the veteran has appealed the original decision, a later RO decision "does not affect the scope" of the original claim or appeal. This makes perfect sense. Without this rule, veterans will often be ambushed when they fail to file an NOD as to a matter they could reasonably believe was part of something that had already been appealed. In the veteran's mind, he or she has been seeking benefits for the disputed condition all along, so it would not be apparent that a separate appeal would be necessary. Once again, applying a sympathetic reading is a matter of perspective. Regardless of what makes sense to an adjudicator who understands the rules, it is the perspective of the veteran that matters in determining whether the matter is part of the dispute before the Board.

Together, the five principles outlined above should be able to favorably resolve most any situation where the Board is tempted to dismiss the veteran's complaints by finding that they were technically beyond the scope of the present appeal. Ultimately, if these principles are insufficient to provide a clear answer, the thorniest sympathetic-reading issues can be resolved by remembering that "[t]he VA disability compensation system is not meant to be a trap for the unwary, or a stratagem to deny compensation to a veteran who has a valid claim." *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009). "The government's interest in veterans cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them." *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006). It is the application of these principles to the infinite variety of fact patterns generated by unsophisticated claimants that makes the benefits system paternalistic and veteran-friendly in practice.

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Essay:
What is the "Veteran" Experience?

by Aaron Moshiashwili

This seems odd for me to say, but I don't know what the word "veteran" means.

Oh, I know what it means to me… and it seems simple. A veteran is someone who served in the military. Served, past tense. So if I use the phrase "the veteran experience," I mean very specifically the unique experiences after their service is over. Things like having to translate military skills to a civilian career. Coping with injuries – physical, psychological, and even moral – that civilians may have limited experience with or sympathy for. Dealing with the VA.

I don't know that anyone would disagree with what I wrote, necessarily. At the same time, I don't know that many people, picked off the street, would even understand the distinction I'm making. Every month or so I look around to see what new books I can find on veterans' issues to read and review. The results fall into four categories. The first, and by far the most numerous, are books of war stories. There are more of these than all the other categories put together. Then come books trying to help veterans, either to deal with VA or to deal with physical or psychological injury. Next up are the books I'm looking for, which make up a small number compared to the other two. These are books that written by veterans about being veterans rather than servicemembers, or written about veterans generally or their experiences. Pulling up the rear are books trading on the fact that the author is a veteran – "Business lessons from my 20 years as a Marine."

That first category never sits right with me. When a book's cover advertises a "veteran's story," but it's actually the story of that person's combat service, with nothing about the time after service, it feels wrong. Veterans can tell war stories, but war stories aren't stories about veterans; they're stories about servicemembers.

I absolutely understand that this is a semantic quibble so fine you need a microscope to see it. But I can't help but think by tying the veteran experience – prosaic, sometimes dull, possibly painful – to the undeniably romanticized idea of combat service means that people will give the veteran short shrift for the solider. And I think the people who we most need to see veterans as veterans – civilians who have never served – are going to be most vulnerable to this.

I'm of course not suggesting that veterans should identify themselves to other people in any given way or that, or dictate how they should relate their veteran life to their life in the service. If I had any opinions on that topic, the only appropriate way to treat them would be to keep my mouth shut. But I think it matters quite a bit how the civilian population looks at veterans. We've entered a period in American history with an enormous military-civilian divide, and veterans suffer because of that divide. If we as a society constantly relate veterans only to their service, we not only do them a disservice by helping to hide issues unique to veterans, we do ourselves one by putting them on the other side of the divide, when they are the natural bridge over it.

I'm not suggesting anyone try to police the term "veteran," least of all me (although there is a popular online slogan which starts "a veteran, whether active duty…" and I'd like to at least ask what people mean by that). But I think we can be mindful and purposeful in how we use it – try to make it clear that we, of all people, are focused as veterans *as veterans*. We can try to help people to understand what the difference is and why it's important to respect it.

Because when we turn our veterans into just purveyors of war stories and nothing else, we're all worse off.

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