VETERANS LAW JOURNAL

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# CAVC Bar Members Volunteer to Wash Vietnam Memorial Wall in D.C.

by Jennifer A. Howley

Bright and early on Sunday, June 26, at 6:30 a.m., members of the CAVC Bar and their families met up at the Vietnam Memorial Wall in Washington, D.C. to help with the weekly washing of the monument. The wall washing is a weekly event led by members of the Vietnam Veterans of America ("VVA"), Chapter 641, located in Silver Spring, Maryland. The National Park Service provided hoses, buckets, brushes, and a specially formulated cleanser that helps protect the sacred memorial's granite wall.

From the opening to the closing ceremony, both led by members of the VVA, participants were immersed in the history and traditions of the Wall and its heroes. The VVA veteran leading the ceremony spoke not only to the volunteers, but also spoke in reverence to the brave heroes the wall represents. Volunteers learned of the youngest veteran on the wall—Private First Class Dan Bullock, who was only 15 years old when he lost his life—as well as one of the few women on the wall—1st. Lt. Sharon Lane, who was killed in action during a torpedo attack. VVA members also placed flowers at the nearby "The Three Soldiers" and the Vietnam Women's Memorial statues.

Volunteers split into two teams, each tasked with spraying, cleaning, and rinsing their side of the monument. Using long-handled scrub brushes, CAVC Bar participants cleaned the walkway and the wall. The washing took roughly two hours to complete. The event ended with the VVA chapter ceremoniously opening "the doors" to the monument and inviting its heroes back in. Volunteers were then presented with Certificates of Appreciation for their participation. Shortly thereafter, around 9 a.m., many visitors began to arrive to the freshly washed monument.

The VVA Chapter holds the washing every Saturday morning at 6:30 a.m. from April until October and volunteers are always welcome.

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## Message from the Incoming President

Dear fellow CAVC Bar Association members,

I am so thrilled to be the incoming President of the Bar Association after four years on the Board of Governors. As you all can imagine, the first half of that tenure was a bit different than the last two years. I am proud of how the Bar Association and the Court have retained the collegial spirit that makes this bar so unique, despite so many challenges. I am grateful to our Immediate Past President, Jenna Zellmer, for her leadership,

steadiness, and insight over the past year and look forward to her continued service on the Board.

I have practiced veterans law for the past six years and have worked at the National Veterans Legal Services Program, the University of Illinois at Chicago Law School Veterans Legal Clinic, and the Court. One constant throughout my short but varied career has always been the outstanding lawyering and advocacy I have seen from attorneys and advocates in this practice area. The Board members I have had the pleasure of working with in the past few years are no exception. Each of these members' creativity and dedication have kept the Bar Association moving forward, despite everyone's busy deadlines and other commitments.

I hope that you will consider the ways that you can also be involved as members of the Bar Association. Whether you choose to summarize a recent Court or Federal Circuit case for the quarterly *Veterans Law Journal*, volunteer as a mentor to a law student or new attorney through our mentorship program, or join the Rule 33 pilot program organized by the Court and the Veterans Pro Bono Consortium, there are a myriad of ways for you to lend your talents to our organization. Please don't hesitate to contact me or any member of the Board to inquire about opportunities to connect and raise your hand.

My goals for the next year include ensuring that advocates in all locations and roles can fully participate in Bar Association activities and programs, strengthening our networking opportunities, and continuing to provide high-quality and diverse CLE opportunities. I also personally strive to be an open and honest ear for any members who wish to share their feedback or thoughts on what we're doing and how we can improve. Please know that you can always contact me (my email is berner.jillian@gmail.com) to chat. I am honored to have been chosen to lead the Bar Association for the next year and look forward to all that is to come.

Best,
Jillian Berner

## Message from the Outgoing President

Greetings readers,

As this is my final message before handing over the reigns to Jillian Berner, I want to take the opportunity to thank each of you for helping to make my year as President truly memorable. Whether you were a member of the Board of Governors, a panelist or moderator for one of our programs, or simply a program attendee or reader of the VLJ, your support and engagement have meant so much to me.

I am very proud of the work that the Bar Association has done this year. At the 2021 Annual Meeting, I

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outlined my goals for the year: to build off Jason Johns' work improving our technology and website and to hold more in-person events while maintaining the strength of our online programming. I also had the large responsibility of helping to plan a successful Judicial Conference. Looking back, I am happy to say that, with the help of the Board of Governors and the Court, I've accomplished those goals.

First, as announced at the September 14th Annual Meeting, we have a new and improved website: cavcbarassociation.org. We could not have launched this without a substantial amount of hard work and dedication from Board of Governors Member at Large, James Drysdale. He worked to design and build a much more modern and visually appealing site, with increased capabilities, including the ability to RSVP to events, check whether your membership is up to date, and find recordings of past programs. I am so excited for you all to experience the new site.

Second, I am proud of the quality of our content and programming over the last year. I have frequently heard from members of the Bar expressing enthusiasm and gratitude for the thoroughness of our Veterans Law Journal. The case analyses are particularly impressive. As for our online programs, we provided substantive legal analysis of recent case law, practical tips for motion practice, brief writing, and oral advocacy, and career insights. Simultaneously, we worked to achieve the goal of providing in-person opportunities to network. I was so honored by the turnout for our July networking event, especially because I know how busy summer can be for many of us.

The Judicial Conference was the largest of these in-person events. Planning the conference with the rest of the Volunteer Planning Committee was a highlight of my Presidency. I truly appreciated the opportunity to work closely with practitioners on both sides of the Bar, Court staff, and the Judges. Thank you to everyone who helped make that event such a success.

I'm thrilled to hand off the gavel to Jillian Berner, who I know will continue to build on the Bar Association's mission to facilitate communication between the Bar and the Court and to provide substantive learning opportunities for our members.

I'll sign off with one final plug: please consider volunteering to help with the National Veterans Law Moot Court Competition this fall! I have judged briefs and oral arguments in the past and can attest that it is a valuable experience. Anyone interested in volunteering can email veteranslawmoot@law.gwu.edu.

I hope to continue to see you all at future Bar Association events!

Jenna Zellmer

## Message from the Clerk of Court

Dear Colleagues:

I hope that each of you is finding ways to celebrate a return to some sense of post-pandemic normalcy. And maybe many of you are even well rested after taking a vacation (maybe one put off by the pandemic), or at least having taken a trip to a lake or ocean beach. Regardless, I know many of you are continuing to work hard on veterans cases – incoming appeals numbers will not reach numbers we saw in 2020, but we still expect to take in close to 7,500 appeals in the fiscal year that will end on September 30th. Recent passage of the PACT Act suggests that even busier times are certainly ahead.

I do need to extend thanks to those who volunteered and have been participating in the Court's Rule 33 Pilot. For those unfamiliar with the pilot, it is focused on providing an opportunity for unrepresented appellants to have their cases taken to a Rule 33 conference. Essentially, pilot volunteers are linked up with unrepresented appellants who opt into the pilot to receive limited representation at the Rule 33 conference. To date, about half of the unrepresented appellants who have been given the opportunity to participate in the pilot have opted in, and about half of those who opted in have

successfully concluded their cases with a JMR/JMPR filed after a conference. Significantly, a fair number of volunteers who have not reached an agreement as part of limited representation have elected to stay on the case and represent the appellant through briefing and decision by the Court.

Although the pilot has been successful for many unrepresented appellants, we have concluded that we need more volunteers. To that end, the Board of Judges recently approved changes to qualification criteria for participants in the Rule 33 Pilot. Until now, volunteers had to have been a member of the Court's bar for at least 2 years and appeared in at least 50 cases.

Effective immediately, volunteers are eligible if they:

- meet a 2 year and 25 case requirements for individual attorneys, OR
- agree to participate as a volunteer in the Rule 33 Pilot under the supervision of an attorney who meets the 2 year/25 case prerequisite.

This change will not only increase the number of attorneys eligible to participate in the pilot, but it will also open the pilot to law students working under the supervision of an experienced clinic director.

Are you interested in volunteering to participate in the pilot? With the revised qualification criteria in mind, 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.

As you come out of summer and refocus on your cases, please do be mindful that the Court is counting on everyone to conform pleadings to the Rules and make sure pleadings are timely filed. This is critical to maintaining the Court's ability to stay on top of the many thousands of active cases at the Court. If after filing a pleading you are notified that the Public Office docket clerk has changed the filing to "Received," that usually means that the pleading is deficient for some reason. We wait for four hours after marking a pleading "Received" before issuing a Notice of Non-Conforming Document to give you a chance to correct the pleading and refile it. If you don't know why the pleading is deficient, please call the Public Office at ((202) 501-5970 x100 + the last number of your case).

Overall, the Court is mindful of the outstanding contributions all bar members are making to the Court and the process of providing judicial review to veterans and their family members. The impressive attendance at the Court's judicial conference earlier this year, and the ongoing participation rates we see at CAVC Bar Association events tell the story of an engaged and enthusiastic bar focused on optimizing the Court's work. Please don't hesitate to reach out to me personally if I can help you navigate the Court's processes in your own cases, or if you have constructive thoughts to share regarding what the Court can do to enhance your practice.

Regards,
Greg Block

## Supreme Court Addresses Clear and Unmistakable Error and Whether a Final Decision Can be Revised Due to a Later-Invalidated Regulation

By Alayna Carroll

Reporting on *George v. McDonough*, 142 S.Ct. 1953 (June 15, 2022)

On June 15, 2022, the U.S. Supreme Court affirmed a decision of the Court of Appeals for the Federal Circuit (Federal Circuit), which held that a change in the interpretation of a law, even in the form of an invalidated regulation, does not allow for revision of a final decision based on clear and unmistakable error.

By way of background, Mr. George was denied service connection for schizophrenia by the Board of Veterans' Appeals (Board) in 1977, on the basis that his condition preexisted service and was not aggravated by service. In 2014, he filed a motion to revise the 1977 Board decision on the grounds of clear and unmistakable error (CUE), contending

that the Board had erred by applying a regulation that had since been invalidated.

The regulation at issue was 38 C.F.R. § 3.304(b), which was invalidated by a 2003 VA Office of General Counsel opinion (VAOPGCPREC 3-2003) and by *Wagner v. Principi*, 370 F.3d 1089 (2004) the following year because it was deemed inconsistent with its authorizing statute, 38 U.S.C. § 1111 (formerly 38 U.S.C. § 311). In relevant part, the invalidated regulation failed to require clear and unmistakable evidence both of preexistence and a lack of in-service aggravation to overcome the presumption of soundness.

The Board denied the motion to revise the 1977 Board decision, and this denial was affirmed by the Court of Appeals for Veterans Claims (Veterans Court) and the Federal Circuit.

Mr. George argued that CUE must encompass clear misinterpretations of an unambiguous statute, such as the error at issue here. He pointed to the pro-claimant design of veterans' benefits laws, as well as more specific intent on Congress' part to show that Congress intended that CUE be allowed in such circumstances.

The Secretary argued that CUE has a well-established regulatory meaning providing a rare and narrow avenue for relief that has long precluded changes in interpretations of the law, including the later-invalidated regulation at issue.

The Supreme Court affirmed the Federal Circuit's decision in a majority opinion written by Justice Barrett, joined by Chief Justice Roberts as well as Justices Thomas, Alito, Kagan, and Kavanaugh. The opinion emphasized that CUE was a legal term of art with a longstanding regulatory history and agency practice dating back to at least 1928 that establishes it does not encompass subsequent changes in the law. Contrary to Mr. George's argument, Justice Barrett found that the invalidated regulation was indeed a change in the interpretation of the law contemplated by the CUE regulation, which Congress incorporated into its CUE statute in 1997, as evidenced by its silence to the contrary.

Justice Gorsuch, joined by Justices Breyer and Sotomayor (in part), dissented, agreeing with Mr. George that a regulation that conflicts with the statute necessarily constitutes CUE, because such a conflict would have always been incorrect, including at the time the decision was rendered. Justice Gorsuch specifically relied on the CUE statute having been written in the present tense, rather than past, to find that Congress did not incorporate the portion of the CUE regulation exempting errors resulting from changes in interpretation of the law.

Justice Sotomayor wrote separately to make clear that, while she agreed with the majority that Congress incorporated the pre-existing regulatory doctrine, she disagreed with the majority's reasoning about what constitutes a change in interpretation of law. She found the question of whether judicial invalidation of a regulation that clearly conflicts with the statute constitutes a change in interpretation of law to be unsettled, citing several Veterans Court opinions. Due to this ambiguity, she found that the pro-claimant design of veterans' law required a finding in favor of Mr. George.

In *George*, the U.S. Supreme Court upheld a line of cases holding that the existing regulatory structure precludes a finding of CUE when the VA correctly applies the law as it existed at the time the decision was made. The U.S. Supreme Court puts to rest the question of whether decisions can be subject to revision based on CUE following subsequent changes in the law, judicial or regulatory.

*Alayna Carroll is Counsel at the Board of Veterans' Appeals.*

## The Benefit of the Doubt Standard, Codified in 38 U.S.C. § 5107(b), Governs When Evaluating Veteran Status

by Melanie McComb

Reporting on *Newman v. McDonough*, No. 18-2015 (June 16, 2022).

In *Newman*, the United States Court of Appeals for Veterans Claims (Court) issued a precedential opinion per curiam. Judges Greenberg, Toth, and Falvey affirmed the use of the benefit of the doubt standard, codified at 38 U.S.C. § 5107(b), as the governing standard to evaluate whether a veteran meets the VA's definition of insanity.

Joel Newman, the appellant, is the brother of veteran Marshall Newman, who passed away during the pendency of his appeal. Marshall Newman joined the Marine Corps in 1973 and was absent without leave (AWOL) from his unit on three separate occasions. His absence spanned more than 9,000 days from 1973 to 1999. In August 2012, he filed a compensation claim seeking service connection for a nervous condition. The Regional Office (RO) found that Marshall was barred from receiving veteran benefits due to VA regulations.

The general rule under 38 C.F.R. § 3.12(c)(6) is that former service members are barred from receiving compensation for service-connected disabilities if they were discharged for being AWOL for extended periods. However, an exception exists under 38 C.F.R. § 3.12(b) for persons who fit VA's definition of insanity at the time of the offense that led to discharge. Marshall appealed the August 2012 denial acknowledging his unfavorable discharge and argued VA's definition of insanity applied to him when he first went AWOL in 1973. Accordingly, Marshall contended he was entitled to compensation benefits because he fit the exception.

The Board of Veterans' Appeals (Board) disagreed based on the evidence and required Marshall to prove his insanity by a preponderance of the evidence. Joel, the appellant, argued that the Board used the wrong standard when it applied the preponderance of the evidence standard. Both sides agreed that the benefit of the doubt standard, 38 C.F.R. § 5107(b), is the governing standard for evaluating whether a claimant meets VA's definition of insanity.
The Court first looked at the legal background of veteran status, a prerequisite for compensation benefits. VA establishes veteran status using the Characterization of Discharge determinations. VA defines a veteran as one with an "other than dishonorable" discharge, because Congress defined a veteran as such for purposes of VA benefits eligibility. 38 U.S.C § 101(2). For any discharge other than honorable, VA examines the underlying conditions that led to the veteran's discharge.

Initially, the Court required potential claimants to prove veteran status by a preponderance of the evidence. In *Augilar v. Derwinski*, 2 Vet.App. 21, 23 (1991), the court upheld this view regarding reopening claims. The holding was reaffirmed by *Laruan v. West*, 11 Vet.App. 80, 84, 85 (1998) when the Court reasoned the benefit of the doubt standard was reserved for veterans. Thus, claimants had to first prove veteran status before the more lenient standard could be applied. This view prevailed for nearly a decade.

The U.S. Court of Appeals for the Federal Circuit in *D'Amico v. West*, 209 F.3d 1322, 1326-27 (Fed. Cir. 2000), held that the new and material evidence requirement in section 5108 applied to reopening claims that were disallowed for any reason. This includes claimant's veteran status not being established. As this standard is similar to the benefit of the doubt standard, *D'Amico* seemingly overruled *Laruan*. Despite this ruling, the Federal Circuit's holding in *D'Amico* left uncertainty about whether it covered all veteran-status questions or only attempts to reopen claims under section 5108.

Case law has offered mixed messages since the *D'Amico* decision. Both the benefit of the doubt and preponderance of the evidence standards were being used. The Newman case was brought to panel to put the discrepancy to rest.

The Court first reasoned that providing new and material evidence to reopen veteran status claims is an evidentiary advantage similar to the benefit of the doubt standard. Therefore, to hold the preponderance of the evidence standard applies to Marshall, who claimed insanity at the time of the event that led to his discharge, would be illogical. Additionally, the Court found no support in the legislative history for reserving more lenient standards for veterans. Finally, the Secretary conceded that the benefit of the doubt standard under section 5107 applies when determining whether veteran status has been established.

Therefore, the Court held veteran status is evaluated using the benefit of the doubt standard.

Next, the Court turned its analysis to the focus of Marshall's argument, the insanity exception. Marshall was AWOL for more than 180 days and therefore his discharge, as determined by VA, was "other than dishonorable." For this classification, the VA examines the underlying conduct that led to the veteran's discharge to determine whether the veteran is entitled to VA benefits. VA relied on 38 C.F.R. § 3.12(c)(6), which bars former service members from receiving benefits if they were discharged for being AWOL for at least 180 days. As a result, Marshall could not establish veteran status. However, he contended that he met the criteria of subsection (b). The provision provides an exception allowing for persons who were insane at the time of committing the offense causing such discharge to remain eligible for VA benefits.

VA defines insanity as "interfere[ing] with the peace of society." Joel argued that his brother's 1974 housebreaking arrest demonstrated that he was "interfere[ing] with the peace of society" and therefore was insane by VA's definition. Additionally, argued the Board provided an inadequate statement of reasons to support its determination that this behavior did not constitute an "interfere[ence] with the peace of society." Finally, Joel asserted that the Board applied the wrong standard when it required the veteran to prove his insanity by a preponderance of the evidence. Instead, he argued, the more lenient benefit of the doubt standard should have been applied.

As the Court ruled, the benefit of the doubt standard under section 5107 is the correct standard to apply when evaluating veteran status. Thus, remand was warranted. The Court held that Joel has the burden to prove insanity but does not have to prove insanity caused his brother's actions. Further, the Court vacated the Board's finding that Marshall was not insane at the time of his first AWOL and 1974 housebreaking conviction. Finally, the Court noted that the Board's statement of reasons was deficient regarding its decision to find that Marshall was not insane.

Accordingly, the Court vacated the Board's February 15, 2018, decision and remanded it for readjudication consistent with the recommendations listed above.

*Melanie McComb is a summer fellow at the Stetson University Veterans Law Institute.*

## Ear Pain Caused by Hearing Aids Used Because of Service-Connected Hearing Loss Warrants Extra-Schedular Consideration

by Phillip Chalker

Reporting on *Long v. McDonough*, No. 2021-1669 (Fed. Cir. June 29, 2022).

In June 2022, the United States Court of Appeals for the Federal Circuit (Federal Circuit) issued its decision in *Long v. McDonough,* ruling in favor of the Veteran Walter Long and holding that secondary conditions, those caused indirectly by a service connected disability, may warrant an extraschedular rating.

Mr. Long filed a claim in 2009 seeking disability compensation for hearing loss. The Department of Veterans Affairs (VA) granted this claim, assigning a noncompensable rating. Mr. Long appealed the decision to the Board of Veterans' Appeals (Board) arguing in part that hearing aids required for hearing loss hurt his ears and the rating schedule for hearing loss did not adequately account for his ear pain. Therefore, he contended, VA should have referred the matter for extraschedular consideration, pursuant to 38 C.F.R. § 3.321 (b)(1).

The Board denied Mr. Long's claim, finding that referral for extraschedular consideration was not warranted and Mr. Long appealed to the Court of Appeals for Veterans' Claims (Court). In an *en banc* decision, the Court affirmed the Board's decision, holding that there was not a direct link between hearing loss and ear pain, i.e., service-connected hearing loss did not cause the ear pain; rather ear

pain was caused by hearing aids. Mr. Long appealed to the Federal Circuit.

Citing *Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009), the Federal Circuit noted that extraschedular ratings are warranted when the schedule of disability ratings is (1) inadequate to describe the severity and symptoms of a particular disability, (2) the disability is exceptional or unusual, and (3) it is in the interest of justice to provide an extraschedular rating. The Federal Circuit added that pursuant to 38 C.F.R. § 3.310(a), a secondary condition, such as ear pain caused by hearing aids, is considered service connected if it "proximately due to or the result of a service connected disability." The Federal Circuit held that the Court erred by failing to address the *Thun* factors and held that direct causation is not necessary to warrant extraschedular consideration.

In addition to the above holding, the Federal Circuit found that in rendering its decision, the Court erred by conducting fact finding, a function which is reserved for the Board.

Judge Bryson dissented on procedural grounds, opining that Mr. Long forfeited his argument that extraschedular fact finding was needed because the veteran failed to show indicia of an exceptional or unusual disability picture, and he did not adequately argue his contentions before the Court.

*Phillip Chalker is an attorney at the Department of Veterans Affairs, Board of Veterans' Appeals.*

## Herbicide Exposure in Thailand: Defining the Phrase "On or Near the Perimeter" While Serving During the Vietnam Era

by Anita Nigam-Ritchie

Reporting on *Stover v. McDonough*, No. 20-5580, 2022 U.S. App. Vet. Claims LEXIS 1099 (Vet. App. July 11, 2022)

In *Stover v. McDonough*, a three-judge panel of the U.S. Court of Appeals for Veterans Claims (Court), comprised of Judges Greenberg, Allen, and Meredith, set aside and remanded a June 2020 Board of Veterans' Appeals (Board) decision that denied entitlement to service connection for type II diabetes mellitus (diabetes) based on herbicide exposure in Thailand.

Mr. Stover is a U.S. Air Force veteran, who was stationed in Thailand from January 1969 to January 1970. He claimed that, while working on aircraft as an electronic warfare systems repairman at Takhli Royal Thai Air Force Base (RTAFB), he was exposed to herbicides.

The Court was asked to consider the operation of the VA's Adjudication Procedures Manual (M21-1) provision concerning herbicide exposure for veterans who served in Thailand and how the Board defines the phrase "on or near the perimeter" as it relates to a veteran serving at an RTAFB. The Court held that the Board adopted M21-1's provision for establishing exposure to herbicides in Thailand and, while it does not provide a true presumption of herbicide exposure, the provision eases the burden of proving exposure.

In reaching its decision, the Court concluded that the Board erred by failing to explain what it understood "near the perimeter" to mean when it denied Mr. Stover's appeal, placing him in the untenable position of not knowing what he needed to prove to satisfy the rule of decision adopted by the Board. In other words, because the Board has adopted the M21-1 definition of "near the perimeter," without explaining what it understood that phrase to mean or what he would need to demonstrate to prove herbicide exposure by whatever standard the Board employed, it placed Mr. Stover in the position of not knowing what he needed to satisfy the rule of decision adopted by the Board.

Mr. Stover, in support of his herbicide exposure claim, described working for 10 hours per day on the flight line, which was within 100 yards of the base perimeter fence, and reported that he often worked between 20 and 30 yards from the perimeter. He described frequently traveling to the runway and

radio station, both of which were near the base perimeter. He also alleged that his living quarters were located near the perimeter, and that both his living quarters and the flight line had drain ditches that had been contaminated with herbicides. In support of his assertions, Mr. Stover submitted various physical evidence to include photographs of his living quarters in Thailand, the location of the Takhli RTAFB flight line where he served, maps showing the layout of the base, and buddy statements describing his work on the flight line and its proximity to the base perimeter.

In its decision, the Court provided a history of the VA's treatment of the issue of herbicide exposure and Thailand. The Court noted that in the early 1970s the U.S. Air Force conducted a study of base defense practices at RTAFBs, which led to the creation of a February 1973 report entitled "Contemporary Historical Examination of Current Operations Report" or the CHECO Report. The CHECO Report, among other things, discussed the use of herbicides at RTAFBs for vegetation control.

The Court noted that the VA's Compensation and Pension Service (Service) issued a bulletin in May 2010 that cited the CHECO Report and reflected that the Service conceded significant herbicide use at various RTAFBs, to include Takhli, during the Vietnam era.

The Court also observed that in May 2013, the VA incorporated the May 2010 bulletin into the M21-1. The Court noted that the VA identified the types of military occupational specialties and supporting evidence that could serve to support allegations of herbicide exposure in Thailand. The VA also indicated that such evidence would trigger its special consideration of herbicide exposure on a factual basis. The Court observed that the M21-1 directs an adjudicator to "conceded herbicide exposure on a direct [or] facts-found basis. The Court summarized that the M21-1 provision is the VA's guidance for adjudicating claims based on herbicide exposure for Thailand veterans, and specifically defines what constitutes "otherwise near the air base perimeter."

The Court also summarized the procedural history of the case, to include a January 2020 joint motion for remand (JMR). The Court granted that JMR after the parties agreed that the Board's decision to deny the appeal was inadequate as it was based on finding that Mr. Stover's personal accounts of working near the perimeter of the Takhli RTAFB were not credible due to the passage of time. The JMR also addressed the Board's decision to deny the appeal based on the lack of a presumption of herbicide exposure for Thailand veterans, despite it being required to provide special consideration of herbicide exposure on a factual basis.

The Court noted that the June 2020 decision revealed that the Board again denied the appeal based on its opinion that the evidence did not support finding that Mr. Stover was exposed to herbicides in service. The Board reasoned that if his assertions were to be believed, then everyone who worked on the flight line would have been exposed to herbicide agents, which was counter to the VA's position that Thailand veterans were not entitled to a presumption of exposure. The Board also rejected the evidence Mr. Stover provided in favor of his claim as insufficient to establish that he regularly served at or near the base perimeter. The Court observed that the Board impugned Mr. Stover's credibility based on its finding that he made inconsistent statements about the onset of his diabetes during the pendency of the appeal, and that it concluded that he had not established that his "regular work duties placed him near the perimeter" because he did not serve in one of the military occupational specialties exampled for such cases in the M21-1.

The Secretary took the position that the M21-1 provision pertaining to alleged herbicide exposure in Thailand was not binding on the Board, pursuant to 38 C.F.R. § 20.105, and that even if it was, the Board properly provided special consideration and correctly found that Mr. Stover's military occupational specialty involved duties that were inherently different from those examples listed in the M21-1. Following completion of the parties' briefing, the Court ordered the Secretary to submit additional evidence regarding the VA's policy of herbicide exposure in Thailand, and in response the Secretary argued that "on" and "near," as used in the M21-1, meant close enough to physically touch the perimeter structure. The Secretary contended that

the M21-1's provision, which focused on the perimeter, required the application of an "exclusion canon," such that, by applying the provision to those at the perimeter, the VA necessarily excluded other parts of the RTAFBs, to include the flight line.

In its decision, the Court held that the Board was bound by the M21-1's provision about herbicide exposure in Thailand and stressed that its holding applied in the particular case because the Board adopted the provision as the rule of decision. The Court noted that the Board had failed to explain what it understood the phrase "near the perimeter" to mean, which left Mr. Stover to guess what he needed to do to prove his claim. The Court concluded that the Board's failure prevented it from effectively reviewing the Board's decision. The Court provided the Board with guidance on remand, to include addressing missing factual findings, credibility, compliance with the 2020 JMR, and applying the benefit-of-the-doubt doctrine. The Court also pointed out that the VA presumptively awards service connection for diabetes mellitus, type II, if a claimant shows exposure to certain herbicide agents in service.

The Court noted that the Board may not ignore relevant M21-1 provisions, but could take action that would make the M21-1 binding in a particular case. The Court explained its rationale by citing to its recent holding in *Andrews v. McDonough*, which observed that the "significance ascribed to the M21-1 in an individual appeal often turns on the context of the case and nature of [the] Board's analysis and treatment of the provision…" 34 Vet.App. 216, 223 (2021). The Court held that in Mr. Stover's case, while the Board did not cite the specific M21-1 provision regarding Thailand herbicide exposure, it employed the language of the provision in its June 2020 decision. The Court explained that the parties in the JMR understood this to be the case, as it addressed the Board's misapplication of the M21-1 standard.

The Court then addressed how the Board applied the M21-1 provision as the rule of decision and concluded that the Board failed to provide adequate reasons and bases for its decision because it failed to explain what the phrase "near the perimeter" meant in the context of the M21-1 provision. The Court noted that since Mr. Stover was not fully informed of the standard by which his claim would be adjudicated, it also could not meaningfully engage in judicial review of the Board's decision.

The Court then cited its holdings in *Cantrell v. Shulkin* and *Johnson v. Wilkie*, in which it held that the Board errs when it adjudicates a claim based on undisclosed standards. *Cantrell*, 28 Vet.App. 382, 392 (2017); *Johnson*, 30 Vet.App. 245, 254 (2018). The Court noted its holding in *Johnson* that "[without a standard for comparing and assessing terms of degree, [the Board's] conclusory findings [as to the degree of severity] are unreviewable in this Court." *Id*. The Court reiterated that it could not assess whether there was error in the Board's application of the M21-1 provision concerning herbicide exposure in Thailand that it adopted as the rule of decision because it was unable to determine the standard the Board used for "near the perimeter." The Court observed that the Board found that Mr. Stover did not qualify for "special consideration," which indicates it used the portion of the M21-1 rule of decision that special consideration is also due to servicemembers who "otherwise [served] near the air base perimeter."

The Court also addressed the Secretary's argument that the definition of "near the perimeter" was akin to "on the perimeter" and required a veteran to have served in an occupational specialty that allowed him or her to physically touch the perimeter fence. The Court noted that the Secretary may not step into the Board's shoes to meet its reasons-or-bases requirement and held that the Board must define the phrase "near the perimeter" in the first instance. Moreover, the Court noted that the definition the Secretary offered does not appear to comport with what the Board understood the phrase to mean and rejected the notion that the Board's and the Secretary's divergent conceptualizations of what was meant by "near the perimeter" were consistent enough to be the basis for appropriate review.

The Court offered guidance to the Board, to include making findings regarding Mr. Stover's proximity to the base perimeter during his time at Takhli RTAFB, regardless of the definition the Board uses, and that the findings be based on the "evidence" of record. The Court observed that the Board failed to address

Mr. Stover's testimony that established his proximity to the base perimeter, which could have led to a factual finding about how close he was to the perimeter throughout his time at the Takhli RTAFB, in the first instance.

The Court further noted the January 2020 JMR was essentially ignored in the June 2020 decision when the Board offered the same rationale for rejecting Mr. Stover's statements about his Thailand service as "too tenuous to be persuasive," and impugned his credibility due to inconsistent statements. The Court observed that any inconsistent statements addressed in the Board decision were not related to whether Mr. Stover had been exposed to herbicides, but rather, when he was diagnosed with type II diabetes mellitus.

Finally, the Court observed that the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) holding in *Lynch v. McDonough*, includes the acknowledgment that the "preponderance of the evidence" language used in the June 2020 decision could be read out of context to impose a greater burden on a claimant than Congress intended or required. 21 F.4th 776, 781-82 (Fed. Cir. 2021) (en banc).

In a concurring opinion, Judge Greenberg agreed that the Board failed to explain what it believed the term "near the perimeter" meant, which led to arbitrary decision making. However, Judge Greenberg did not believe the majority's opinion went far enough for those veterans who served in Thailand and were exposed to herbicides during the Vietnam era. Specifically, Judge Greenberg opined that the Board's decision should have been reversed, with judgment entered in favor of Mr. Stover, because the uncontroverted evidence submitted in the appeal created an irrebuttable presumption that the M21-1 provision was satisfied.

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## The Federal Circuit Finds that VA's Denial of a Rulemaking Petition Presuming Herbicide Agent Exposure for Veterans Who Served in Guam or Johnston Island During Specified Periods Was Proper

By Jason Massey

Reporting on *Military-Veterans Advoc. (MVA) v. Sec'y of Veterans Affs.*, 38 F.4th 154 (Fed. Cir. 2022).

MVA petitioned VA to issue a rule presuming herbicide agent exposure for veterans who served in Guam or Johnston Island during specified periods. VA initially denied the petitions, but after MVA petitioned the Federal Circuit for review, VA requested a remand, so it could consider additional evidence. The evidence submitted on remand by MVA in support of its petition included photographs of browned out vegetation that purported to be evidence of herbicide spraying in Guam, veterans' affidavits that recounted their Vietnam-era service in Guam and their awareness of, witnessing, or conducting herbicide spraying, and a report that found trace amounts of herbicide agents in soil taken from Guam. MVA also noted in its petition that Johnston Atoll was used as a storage site for Agent Orange from 1972 to 1977.

In denying MVA's petition, VA rejected the photographic evidence, stating that it would be speculation to conclude that the "brown out" vegetation found in these photographs was the result of tactical herbicides, since commercial herbicides were used regularly in Guam. It found that the photographs did not provide sufficient evidence that Agent Orange or other tactical herbicide agents were tested, used, stored, or transported in Guam. This conclusion was not altered after consideration of the supporting veterans' affidavits. As for Johnston Atoll, VA did acknowledge that it was a storage site for Agent

Orange, but found that civilian personnel were responsible for storage-related activities, which consisted of screening the entire inventory daily for leaks and performed de-drumming activities as needed. In addition, VA noted that the storage site floor (densely compacted coral) would have bound any leaked herbicide agents and, thus, would have prevented it from becoming airborne. Furthermore, VA found that while contemporaneous independent monitors found concentrations of herbicide agents in air and water samples, those monitors concluded that any exposure was well below permissible levels.

Of note, VA addressed MVA's argument against distinguishing between tactical and commercial herbicides, finding that the Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11., was not enacted to establish presumptive service connection for veterans who served in the Republic of Vietnam because of commercial herbicide products that are used commercially worldwide for standard vegetation and weed control, but rather based on the unique application and exposure of these herbicide agents during Vietnam, as well as the Korean demilitarized zone (DMZ) and veterans servicing C-123 aircraft used to spray herbicide agents during the Vietnam War. VA further found that while veterans who served in Guam and Johnston Atoll may have supported the effort in Vietnam, it did not place them in the same position as those veterans who served in the Republic of Vietnam.

The Federal Circuit affirmed VA's denial of the rulemaking petition, holding that VA's distinction between tactical and commercial herbicide agents was not based on its interpretation of the Agent Orange Act, but was rather based on an analysis of the circumstances that led Congress to pass the Agent Orange Act. The Federal Circuit noted the history of the Agent Orange Act as well as a 2018 U.S. Government Accountability Office (GAO) report which found no evidence to substantiate the presence of Agent Orange or other tactical herbicide agents in Guam. This report noted distinct differences between tactical and commercial herbicides, such as being centrally managed by the military, unauthorized for domestic use, and undiluted and sprayed aerially. The Federal Circuit also found that VA's explanation for its decision denying the rulemaking petition had a rational basis, noting that VA looked at the circumstances warranting a presumption of herbicide agent exposure in Vietnam, compared them to Guam and Johnston Atoll, and found them not comparable. The Federal Circuit found that VA had evidence regarding the nature and extent of herbicide agent activity in Guam and Johnston Atoll and determined that it did not warrant presumptive exposure for veterans who served there during the relevant period.

Significantly, however, section 403(d)(5) of the recently enacted PACT Act, Public Law No. 117-168, creates a presumption of herbicide agent exposure for veterans who served in Guam or its territorial waters between January 9, 1962 and July 31, 1980 and for veterans who served on Johnston Atoll or on a ship that called at Johnston Atoll between January 1, 1972 and September 30, 1977.

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## Will Extraschedular Referral "Back to VBA" Survive Post-*Snider*?

by Benton Jay Komins

Reporting on denial of full-Court review in *Snider v. McDonough,* No. 19-6707 (May 20, 2022)

In the January 2022 *VLJ*, Megan-Brady Viccellio wrote a superb synopsis of the procedural history, facts, and newly established standard of "reasonable possibility," which the Board must employ when considering *whether a referral* for a TDIU should be made to the Director of Compensation Service.

In brief, the Court (Judges Pietsch, Toth, and Falvey) held that the Court's interpretation of 38 C.F.R. § 4.16(b) laid out in *Ray v. Wilkie*, 31 Vet. App. 58, 66

(2019)—namely, that an initial extraschedular referral must consider whether there is sufficient evidence to substantiate a "reasonable possibility" that a veteran is unemployable due to service-connected disabilities—must also apply when the Board refers a case for extraschedular consideration to the Director of Compensation Service, regardless of whether the Board grants or denies entitlement (in accord with or contrary to the Director's decision).

Ms. Viccellio underscored presciently in her synopsis that the Court referenced correlatively the lessened standards which trigger a VA examination laid down in *McLendon v. Nicholson*, 20 Vet. App. 79 (2006). Remand for a VA examination is warranted when a current disability or persistent or recurrent symptoms thereof "may be associated" with an in-service "event, injury, or disease"—an evidentiary quantum which is considerably lower than the standard required for a grant of service connection (now the "relative equipoise" standard laid out in *Lynch v. McDonough*, 21 F. 4th 776 (Fed. Cir. 2021)).

By analogy, the precedent of *Ray v. Wilkie* warrants that when the facts present a "reasonable possibility" that a claimant has been rendered unable to sustain substantially gainful employment due to service-connected disabilities (that do not meet the schedular threshold), the Board must refer the issue to the Director of Compensation Service under 38 C.F.R. §4.16(b). Importantly, as is the case with *McLendon* and the evidentiary trigger for a VA examination, the evidentiary quantum necessary for referral under 38 C.F.R. §4.16(b) is far lower than that laid out in *Lynch*.

## The May 20, 2022, Order and Dissent

In December 2021, VA filed a motion for full-Court (en banc) review; in turn (upon the Court's direction), the appellant, Ms. Snider, filed a response to the motion. In denying the motion, the Court, referencing the two prongs of U.S. Vet. App. R. 35(c), held that VA has neither shown that such a review would "[1] secure or maintain the uniformity of the Court's decision nor [2] resolve a question of exceptional importance."

At first blush, this would appear over, but Judge Toth (joined with Judges Falvey and Jaquith) wrote a dissent which questions the efficacy and necessity of Board referral to the Director under 38 C.F.R. §4.16(b) prior to granting or denying extraschedular ratings, to include a TDIU.

Specifically, Judge Toth opined that the prohibition placed upon the Board in deciding extraschedular claims without referral (first enunciated in *Floyd v. Brown*, 9 Vet. App. 88 (1996) and directly on-point to extraschedular TDIU claims in *Bowling v. Principi*, 15 Vet. App. 1 (2001)) needs full-Court reconsideration of its present legal viability.

Noting that the prohibitions placed upon the Board in both *Floyd* and *Bowling* have been questioned in the past as deviating from the "overall statutory scheme" of Title 38, which directs that agency of original jurisdiction (AOJ) decisions must be appealed to the Board for final decisions, Judge Toth posited that the *Floyd*/*Bowling* prohibitions might well run afoul of Supreme Court precedents that clarify the "distinctions" between jurisdictional laws which Congress passes and non-jurisdictional "requirements" vis-à-vis the form and the timing of claims.

Hence, Judge Toth pointedly questioned whether the prohibitions which the Court set down in *Floyd* and *Bowling* have narrowed the Board's authority, which Congress conferred.

There are also far more pragmatic reasons for full-Court review of *Floyd* and *Bowling*; the Board's mandatory referral back to the AOJ on extraschedular matters lengthens and delays the appellate process, implying a detriment to claimants as well as an impediment to administrative efficiency.

Indeed, *Ray* identified the need to devise a lower standard than the standard which applies when granting or denying benefits sought directly. But *Ray's* "reasonable possibility" simply is not to be found in Title 38. While *Floyd* and *Bowling* might well run afoul of the afore-mentioned Supreme Court precedents, *Ray*, in clarifying a "threshold" standard, takes nothing aways from the Board's

appellate authority under the overall statutory scheme of Title 38.

Through extension, *Snider* holds that *Ray's* lower "reasonable possibility" standard applies to the Board's decisions to refer or decline to refer entitlement to a TDIU under 38 C.F.R. § 4.16(b) "back" to VBA's Director of Compensation Service. Thus, *Snider* like *Ray*, conforms to CAVC precedent, as the holding still maintains the prohibitions which *Floyd* and *Bowling* established.

Now that the Court has clarified the evidentiary threshold for referral, Judge Toth insisted that the problematic hidebound bases (*Floyd* and *Bowling*) which proscribe the Board from deciding extraschedular claims prior to referral back to VBA must be re-evaluated by the full Court.

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## Court Declines to Grant Mandamus Relief on the Basis of Hypothetical Overpayment Rights

by Dale T. Ton

Reporting on *Love v. McDonough*, No. 21-1323, 2022 U.S. App. Vet. Claims LEXIS 950 (Vet. App. June 23, 2022).

In *Love v. McDonough*, the Court considered the propriety of granting a writ of mandamus ordering VA to continue paying out benefits at a pre-reduction rate to a veteran whose payments were instead withheld pending his appeal of the reduction.

By way of background, an overpayment is created when VA pays a veteran more than their entitlement allows. When this occurs, VA can recover the debt by ordering the veteran to pay it back, or, in the case of veterans who remain entitled to benefits, by withholding current or future benefits payments. Veterans who are assessed with VA overpayments have rights to challenge the overpayment. Among other options, a veteran can dispute the existence of and/or amount of the overpayment or can request a waiver of overpayment recovery. A waiver request consists of filing a VA Form 5655 along with a personal statement as to why the waiver should be granted.

Mr. Charles J. Love, Jr., the appellant, is an Army veteran who served in the Republic of Vietnam, during which time he was exposed to herbicide agents. He was diagnosed with prostate adenocarcinoma and was thereafter granted a 100 percent evaluation for prostate cancer, along with special monthly compensation at the housebound rate.

In February 2019, however, the Regional Office (RO) proposed to "reduce" Mr. Love's evaluation by discontinuing the 100 percent evaluation for prostate cancer and instead granting a 20 percent evaluation for prostate cancer residuals. The proposed reduction would disqualify him for special monthly compensation at the housebound rate. He submitted a timely response opposing the reduction, but the RO implemented the reduction in September 2019, replacing his 100 percent evaluation for prostate cancer with a 20 percent evaluation for prostate cancer residuals and establishing a lower level of special monthly compensation based on loss of use of a creative organ. The decision was affirmed by the Board in December 2020, then subsequently appealed to the Court under docket number 21-1265.

While the appeal was pending, VA compensated Mr. Love at the post-reduction amount. Thus, no overpayment would be created if his reduction were to be affirmed on appeal. If the reduction were to be reversed on appeal instead, then Mr. Love would be entitled to a retroactive payment for the difference between the pre- and post-reduction rates for the period that benefits were withheld.

Mr. Love contended that VA was required to continue paying his monthly compensation at the pre-reduction level while his challenge to the rating reduction was pending, even if it meant that he would be subject to a larger overpayment assessment if the reduction were to be ultimately affirmed. Mr. Love petitioned the Court for a writ of mandamus ordering the Secretary to (1) "cease

unlawfully withholding disability compensation" and (2) pay him all amounts due at his pre-reduction rate until the challenge to the reduction concluded. His arguments boiled down to three principal grounds.

First, Mr. Love argued that the Secretary's refusal to continue payment in the pre-reduction amount precluded any possibility of an overpayment being created, thereby "foreclos[ing] [his] ability to appeal any denial of overpayment relief that he seeks." This, he argued, thwarted the Court's prospective jurisdiction under 38 U.S.C. § 7252(a) and warranted issuance of a writ in aid of the Court's jurisdiction under the All Writs Act. As support for his argument, Mr. Love asserted that because Congress created procedures for VA to collect overpayments and for veterans to seek overpayment waivers, its intent was that VA *must* create overpayments so that veterans could seek overpayment waivers. He argued that he would exercise his rights to seek a waiver or deferral of overpayment but for the Secretary taking such options from him, thereby frustrating judicial review.

To this point, the Court held that Mr. Love was not entitled to a writ over a "hypothetical overpayment dispute." The Court determined that a plain reading of the statutes did not establish any right to an overpayment, as nothing requires the Secretary to create overpayments in cases such as Mr. Love's by continuing to pay out benefits as opposed to withholding them. Thus, since Mr. Love was not entitled to an overpayment, he could not show that preclusion of an overpayment would frustrate the future exercise of the Court's jurisdiction. The Court therefore concluded that granting Mr. Love's petition would not be in aid of its jurisdiction and permissible under the All Writs Act.

The Court went on to consider Mr. Love's argument that he could not obtain judicial review of the issue except through a writ petition because the Secretary's payment of compensation at the post-reduction rate was an unappealable "action," rather than an appealable "decision" under 38 U.S.C. § 511(a). The Court determined that although the "action" of paying reduced benefits was indeed not an appealable "decision," the pertinent issue was actually the assignment of an implementation date for that action, which *is* an appealable agency decision. It observed that Mr. Love had not initiated any proceedings before the agency of original jurisdiction (AOJ) related to the proper implementation date of the reduction decision, making mandamus relief improper.

Second, Mr. Love argued that the Court was authorized and required to "compel action of the Secretary unlawfully withheld" under 38 U.S.C. § 7261(a)(2), the nominal "action" here being payment of Mr. Love's disability compensation in the pre-reduction amount. To this, the Court simply observed that since Mr. Love had not demonstrated either a right to an overpayment or an inability to obtain a section 511(a) decision on the matter of implementation, its jurisdiction was not in need of aid and it therefore had no authority to issue a writ under the All Writs Act.

Third and finally, Mr. Love asserted a novel argument that the Court had jurisdiction under 38 U.S.C. § 7252(c) to issue a writ "in aid of Federal Circuit jurisdiction." The Court therefore undertook a comprehensive review of section 7292, finding that only subsection (a) contained a "singular grant of jurisdiction" permitting the Court to "review decisions of the Board of Veterans' Appeals." The Court concluded that 7252(c) is not a source of jurisdiction independent of 7252(a) and that it was moreover not empowered to "create a new kind of jurisdiction not authorized by statute and in aid of a *different* court's jurisdiction . . ." (emphasis in original).

The import of the Court's ruling is that veterans do not have a "right" to have an overpayment created during an appeal of a reduction and that the regular appellate process is still available in cases such as Mr. Love's. If VA undertakes to withhold benefits payments pending appeal of an underlying reduction, the veteran may seek a section 511(a) decision from the AOJ regarding the proper date to implement the reduction, which can then be appealed.

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# Federal Circuit Rules That the Exercise of Judicial Discretion Under the Issue Preclusion Doctrine Extends to Constitutional Questions

by Emily Woodward Deutsch

Reporting on *Morris v. McDonough*, 21-2032 (Fed. Cir. 2022).

On July 18, 2022, the United States Court of Appeals for the Federal Circuit (Federal Circuit) issued *Morris v. McDonough*, holding that the United States Court of Appeals for Veterans Claims (CAVC) properly exercised its discretion by dismissing a constitutional challenge that had not been raised during earlier proceedings before the United States Department of Veterans Affairs (VA). Specifically, the Federal Circuit affirmed the CAVC's dismissal of a Vietnam-era veteran's contention that a September 1970 VA notice letter—issued one month after the denial of his initial claim for disability compensation—had violated the Fifth Amendment's Due Process Clause.

The Federal Circuit's ruling marked the culmination of Louis C. Morris's 17-year pursuit of retroactive compensation for a psychiatric disability, which was initially characterized as a schizophrenic reaction, manifested by paranoid delusion, but was later reclassified as post-traumatic stress disorder. After a series of VA Regional Office (RO) and Board of Veterans' Appeals (Board) decisions led to his receipt of total disability compensation, effective June 2005, he argued that such benefits should have taken effect in May 1970, when he submitted his initial VA claim. However, despite having been represented by the same attorney since July 2007, Mr. Morris presented a theory of entitlement to the RO and the Board that was distinct from the one he later raised before the CAVC.

At the agency level, Mr. Morris alleged that the RO's November 1970 grant of nonservice-connected pension benefits, rather than disability compensation, constituted clear and unmistakable error (CUE) that compelled revision. Yet, after the Board denied Mr. Morris's CUE motion in a January 2019 decision, he appealed it to the CAVC and submitted an opening brief that focused on the September 1970 VA notice letter, stating that his "nervous condition" was a "constitutional or developmental condition and not a disability under the law." Mr. Morris maintained that such notice "was constitutionally inadequate because it failed to clearly and explicitly inform him of [the agency's] decision to deny him service-connected compensation for a compensable nervous condition."

In a responsive brief, the VA Secretary averred that Mr. Morris had abandoned his CUE challenge in favor of a constitutional theory of entitlement, which post-dated the January 2019 Board decision and, therefore, could not serve as the legal basis for his current judicial appeal. In addition, the Secretary maintained that, during the agency proceedings that preceded his appeal, the adequacy of the September 1970 VA notice letter had been litigated. The Secretary further emphasized that if Mr. Morris wished to raise additional notice errors, he should have also pursued such relief administratively.

In a reply brief, Mr. Morris countered that the theory of entitlement underlying his judicial appeal flowed directly from the January 2019 Board decision, which failed to account for the constitutionally-defective notice that prevented him from timely contesting the denial of disability compensation that served as the basis of his later—and unavailing—CUE challenge.

In a February 2021 memorandum decision, the CAVC agreed with the Secretary that Mr. Morris's constitutional theory of entitlement could have been raised below and, thus, was ripe for dismissal. In exercising such discretion, the CAVC relied on the common-law doctrine of issue exhaustion advanced in *Maggitt v. West*, 202 F.3d 1370 (Fed. Cir. 2000). There, the Federal Circuit expressly held that while this doctrine permitted the CAVC to address arguments that were presented in the first instance, it could also remand such issues to the Board—or, alternatively, dismiss them for having not been administratively pursued. *Maggitt*, 202 F.3d at 1377. (Fed. Cir. 2000).

Ultimately, after weighing Mr. Morris's own interests against the agency's, the CAVC reasoned that the third option—dismissal—was proper in his case as he had been represented by the same attorney during earlier VA proceedings, but failed to raise the issue of constitutional due process, even when challenging the adequacy of the September 1970 notice letter on separate grounds. The CAVC further reasoned that, while certain constitutional issues could not be viably raised at the agency level, Mr. Morris failed to demonstrate how his own due-process challenge would have rendered the exhaustion of administrative remedies futile, as contemplated by the Federal Circuit. *See Asociacion Colombiana de Exportadores de Flores v. United States*, 916 F.2d 1571, 1575 (Fed. Cir.1990); *Bendure v. United States,* 213 Ct. Cl. 633, 554 F.2d 427, 431 (1977) (recognizing that "[c]ourts will, as a general rule, refuse to require administrative exhaustion when resort to the administrative remedy would be futile, including situations where plaintiffs would be 'required to go through obviously useless motions in order to preserve their rights'") (citations omitted). The CAVC then emphasized that the nature of the relief that Mr. Morris requested, the Board's own ability to provide it, and the need for additional development before the newly raised constitutional issue could be decided were all factors that weighed in favor of dismissal. *See Maggitt,* 202 F.3d at 1378.

Finally, the CAVC declined to reach the merits of the additional argument raised in Mr. Morris's reply brief, citing another line of Federal Circuit cases that held that such post-hoc issues were deemed abandoned. *See Amoco Oil Co. v. United States*, 234 F.3d 1374 (Fed. Cir. 2000) (holding that a party must raise in an opening brief all issues it wishes to challenge); *Henderson v. West,* 12 Vet. App. 11, 18-19 (1998) (stating that where an argument is raised for the first time in the appellant's reply brief, the claim is considered abandoned); *Costantino v. West*, 12 Vet. App. 517, 521 (1999) (declining to address arguments raised for the first time in the reply brief).

On appeal to the Federal Circuit, Mr. Morris argued that the CAVC erred in relying on the issue-preclusion precepts set forth in *Maggitt,* which he claimed did not cover Due Process and other constitutional questions. Rather, he alleged that the CAVC was required to address and decide all those questions under its statutorily prescribed scope of review. *See* 38 U.S.C.S. § 7261.

The Federal Circuit disagreed, ruling that *Maggitt's* issue-preclusion analysis—which required the CAVC to weigh the interests of individual claimants against those of the VA—applied to "constitutional arguments as well as to statutory ones." *See Maggitt*, 202 F.3d at 1378-79 (remanding to the CAVC to make a case-specific determination whether to invoke the issue-exhaustion requirement against constitutional and statutory arguments).

The Federal Circuit next took aim at Mr. Morris's interpretation of 38 U.S.C.S. § 7261, ruling that nothing in the statute supported his view that the CAVC was obligated to decide every constitutional question that came before it. Instead, the Federal Circuit held that while the statute "tells the Veterans Court what judgments to issue . . . if it finds the decisions to be 'contrary to constitutional right,'" it "does not tell the Veterans Court when it is obligated to make such a finding," or specify to the "court that it always must address an argument of constitutional right, even one not presented to the Board or addressed in the Board's decision." *See* 38 U.S.C.S. § 7261. And the Federal Circuit further emphasized that the plain text of 38 U.S.C.S. § 7261(a)(3)—with its parallel treatment of constitutional and non-constitutional errors—further undermined Mr. Morris's argument that the former warranted distinctive treatment under its judicial purview.

Accordingly, the Federal Circuit determined that Mr. Morris's theory—categorically negating the issue-preclusion doctrine's applicability in constitutional contexts—was wholly devoid of merit. It thereby upheld the CAVC's application of the issue exhaustion doctrine, as prescribed in *Maggitt,* in dismissing his judicial appeal.

Ultimately, the Federal Circuit's affirmance in *Morris* demonstrates that the doctrine of issue exhaustion continues to be a viable path for the CAVC to decline to address theories of entitlement—including those rooted in the Fifth Amendment's Due Process Clause and in other

constitutional provisions—which are present in the first instance on judicial appeal. The opinion likewise underscores the ongoing importance of *Maggitt's* case-specific analytical scheme for determining when administrative remedies are capable of exhaustion such that the CAVC may exercise its discretion in dismissing those issues that were previously unraised and undecided.

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## Substance and Form of AMA Notice Requirements under 38 U.S.C. § 5104

by Devin deBruyn

Reporting on *Cowan v. McDonough*, 35 Vet. App. 232 (2022).

The VA is required by statute to notify claimants of how it decided a claim for benefits. As amended by the Veterans Appeals Improvement and Modernization Act (AMA), the notice statute, 38 U.S.C. § 5104, requires that the VA's notice to claimants must contain certain elements. Before the AMA's enactment, caselaw addressing notice focused on whether notice of a decision contained the statutorily required elements, rather than on the form the VA chose to communicate those elements. No case has previously addressed whether 38 U.S.C. § 5104 prescribes a particular form in which the notice elements must be conveyed, such as whether all the elements must be listed in a single document.

When the VA decides a claim for benefits, the agency of original jurisdiction within the VA that decided the claim (typically a VA regional office) mails a package to the claimant containing the decision itself, a notice letter, and enclosures. In *Cowan*, a three-judge panel of the U.S. Court of Appeals for Veterans Claims (Court) issued a precedential decision addressing whether the section 5104 elements must be outlined in the notice letter itself, as veteran Mr. Cowan argued, or whether the section 5104 elements can be contained in the notice letter, decision, and enclosures, as the VA argued. In other words, does section 5104 require all notice elements to be communicated in a single letter? Or does it allow for all notice elements to be communicated by way of a letter, enclosures, and decision, or a combination of the same?

The Court concluded that section 5104 is silent regarding the form in which the statutory notice elements may be conveyed, which left a gap for the VA to fill. The Court further held that the VA's regulation allowing the notice elements to be conveyed in multiple documents was a reasonable use of its discretion to fill the gap left by the statute's silence. Applying its analysis to Mr. Cowan's case, the Court concluded that the Board failed to address his assertion that the VA's notice was insufficient under section 5104. Accordingly, the Court remanded the appeal to the Board to address this argument.

The merits of Mr. Cowan's appeal involved entitlement to increased ratings for right knee disabilities. In September 2018, Mr. Cowan's appeal entered the AMA-governed modernized appeals system by way of a Rapid Appeals Modernization Program (RAMP) higher-level review opt-in. The regional office (RO) issued a decision on the matter in November 2018 and notified Mr. Cowan of the decision in a January 2019 mailing, which contained the decision as well as a letter. The letter repeated the conclusions of the November 2018 decision, explained the steps to take if he disagreed with the decision, explained how to obtain or access evidence used in adjudicating the claim, and provided contact information. In September 2019, Mr. Cowan appealed this decision to the Board by way of a VA Form 10182. The Board issued a decision on the appeal in May 2020.

Mr. Cowan asserted that the January 2019 letter from the RO failed to comply with section 5104 and that this insufficient notice "deprived him of the ability to effectively decide what option to choose under the AMA and that he was thus prejudiced."

Specifically, he stated that if he was informed that the VA made favorable findings of fact regarding all elements of his claim, then "he would have been able to make an informed decision of whether to file a supplemental claim or appeal to the Board." He additionally asserted that section 5104 should apply to the Board and that the Board's notice of its decision was deficient in this regard, particularly for failing to include favorable findings of fact.

The VA argued that Mr. Cowan abandoned any argument relating to the merits of his claim for increased ratings for the knee because he only challenged the sufficiency of notice. The VA also argued that, when read together, the January 2019 notice letter and November 2018 decision provided section 5104-compliant notice and that Mr. Cowan had failed to demonstrate prejudice. Lastly, the VA claimed that the AMA version of section 5104 does not apply to Mr. Cowan's case or to the Board.

The Court began its analysis by interpreting the plain language of section 5104(a)-(b). Subsection (a) provides that decisions affecting benefits must include "an explanation of the procedure for obtaining review of the decision." Subsection (b) provides that notice must include each of the following seven elements: issues adjudicated; evidence considered; applicable laws and regulations; favorable findings of fact; elements not satisfied in case of denial; process for obtaining or accessing evidence; and, if relevant to the claim, the criteria that must be satisfied to grant service connection or the next higher rating.

Next, the Court asked whether the plain language of section 5104 dictates the form in which the notice elements must be conveyed. The Court also questioned whether the statute's plain language requires all elements to be contained in a single letter, or can they be communicated in a letter, enclosures, the decision, or a combination of these documents. To answer these questions, the Court looked to three pre-AMA decisions for guidance, noting the absence of any case on-point. The Court pointed out that in *Cummings v. West*, 136 F.3d 1468 (Fed. Cir. 1998), the U.S. Court of Appeals for the Federal Circuit held that the VA's process of providing an Appeals Notice form containing "a general outline of the steps to appeal a Board decision and which was sent along with each decision" complied with section 5104(a)'s requirement to notify the claimant of how to seek review of a decision.

The Court observed that in *Sutton v. Nicholson*, 20 Vet. App. 419, 423 (2006), it previously held that the "essence of section 5104 is the requirement that a claimant be given notice adequate to allow an appeal of the decision." In that decision, the Court found that the veteran had not demonstrated how his rights were prejudiced by the form of notice and that it was not improper to communicate the notice elements of section 5104 through a Supplemental Statement of the Case. The *Cowan* panel noted that in deciding *Sutton*, the Court implied that it was permissible under section 5104 to communicate the required notice elements "in a document other than a notice letter" and that "the form of the notice was unimportant as long as the relevant information was conveyed to the claimant."

Finally, the Court pointed to *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006), in which the Federal Circuit addressed notice requirements under the Veterans Claims Assistance Act (VCAA). Specifically, the Federal Circuit noted that neither the statute nor regulation required a particular form of notice; they only required that the veteran be informed of "the process, the information that is needed, and who will be responsible for obtaining that information." The Federal Circuit also stated that the VCAA does not require notice to be sent "in a single communication." The *Cowan* Court highlighted that although the VCAA relates to a different part of the adjudication process than that of section 5104, both statutes set forth "similar notice elements, such as identification of evidence, accessing evidence, and what criteria are needed for substantiating a claim."

Based on the statute's plain language and these three decisions, the Court concluded that section 5104 was silent regarding the particular form in which notice must be communicated. Continuing, the Court held that section 5104 "does not dictate a specific form, such as that all eight notice elements be in a single notice letter." In contrast, the Court drew attention to the fact that the statute lists the eight elements of which a claimant must be informed, but "not how they are conveyed." The Court acknowledged that the AMA led to significant changes in the VA's adjudicative system, to include adding six notice elements to section 5104(b). And yet, the statute remained silent regarding the precise form in which those elements were required to be communicated.

This silence means that the statute creates a gap, which, under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837 (1984), the VA is authorized to fill. That gap concerns the form in which the section 5104 notice elements must be communicated. The Court noted that the VA filled this gap in promulgating 38 C.F.R. § 3.103(f). The Court evaluated this regulation using *Chevron*'s two-step inquiry, which involves determining whether Congress has directly addressed the matter at issue, and if not, whether the agency's action to fill the gap is in line with the statute. Because Congress was silent regarding the form in which the notice elements must be communicated, the Court proceeded to the second prong of the *Chevron* test.

Under 38 C.F.R. § 3.103(f), written notification must include the same seven elements contained in section 5104, plus information regarding a claimant's options for seeking review of an adverse decision. But more importantly, the regulation states that written notification must be provided to the claimant "in the notice letter or enclosures or *a combination thereof*." 38 C.F.R. § 3.103(f) (emphasis added). In promulgating this gap-filling regulation, the VA established that "the section 5104 notice elements need not all be in a single notice letter," but may also be communicated in enclosures or a combination of a letter and enclosures. Critically, the Court reasoned that the enclosures referred to in the regulation "would presumably include the decision itself and standard VA forms explaining how to obtain review of a decision, given that VA generally encloses those documents with its notice letters."

The Court held that 38 C.F.R. § 3.103(f) was a permissible construction of section 5104 because it contained the same notice elements. The Court further held that the regulation's clarification that notice could take the form of a letter, enclosures, or combination of both, constituted a "reasonable gap-filling of the statute about the form of that notice." Because the VA is charged with adjudicating claims for benefits and notifying claimants of the results of those adjudications, the Court reasoned that the VA occupies the best position with respect to determining the most effective and efficient method of communicating those notices to claimants. As a result, the Court held that even if it believed that a single letter was the optimal form of notice, "it is not the Court's place to prescribe such a practice."

The Court also discussed a particular House Report which stated that the AMA provides "a statutory requirement that VA issue detailed decision notification letters." The Court stressed that the phrase "detailed decision notification letters" was not included in the statutory language, nor any other phrase suggesting that notice must be contained in a single document. The Court also explained that the House Report "appears" to be more focused on substance of notice, rather than the form the notice takes. Critically, the Court emphasized that although a House Report can be useful for gleaning evidence of Congressional intent, the "authoritative statement" of Congress's intent is the statutory text itself, which, here, lacks any indication that the notice elements must all be contained in a single letter.

Significantly, the Court stated that it was permissible to communicate section 5104's elements to a claimant in the decision itself, "so long as those notice elements are highlighted or flagged." The

Court emphasized that if the decision itself and enclosures are used to communicate the statutory notice elements, those elements must be "easily identifiable" and presented in such a way that "help[s] claimants understand the decision."

Moving to the specifics of Mr. Cowan's case, the Court next addressed whether the November 2018 RO decision and January 2019 letter satisfied the notice requirements of section 5104. The Court could not answer this question, however, as it found that the Board did not sufficiently address Mr. Cowan's arguments. Specifically, the Court noted that the Board's discussion was "general and conclusory," and did not discuss the specifics of how the notice elements were conveyed in the RO decision and enclosure letter. Given this lack of discussion in the Board decision, the Court stated that it was "unclear" how the RO decision and letter satisfied the requirement to identify favorable findings and to explain to the veteran "how to obtain or access evidence used in making the decision."

Regarding the requirement to notify claimants of favorable findings, the Court highlighted that at least two favorable findings were not included in the "Favorable findings" section of the November 2018 decision. The Court stated that it was able to determine the favorable findings used by the VA *only after* "a careful comparison" between the information provided in the sections labeled "DECISION" and "Favorable findings." The Court reasoned that requiring claimants, who often lack representation, to do the same level of "legal gymnastics"—which the Court said was necessary here to discern the favorable findings—ran counter to the AMA's goal of improving how claimants are informed of decisions on their claims.

Regarding the requirement to notify claimants of how to obtain or access evidence used in making the decision, the Court compared the January 2019 letter to a pre-AMA letter sent to Mr. Cowan in September 2012. In 2012, section 5104 did not require the VA to notify claimants of how to access or obtain evidence. And yet, the Court highlighted that the 2012 and 2019 letters contained a virtually identical set of instructions regarding how to contact the VA. The Court noted that due to the Board's lack of discussion on this issue, it was not clear how the 2019 letter's contact information complied with section 5104, especially because it appeared to be almost a mirror copy of the information provided in another letter sent seven years before the AMA's passage.

The Court held that because judicial review was frustrated by the Board's insufficient discussion of Mr. Cowan's notice arguments, the proper remedy was to remand the matter for the Board to determine whether the RO provided sufficient notice under section 5104. Consistent with its analysis and holding, the Court noted that the Board may read the November 2018 decision and January 2019 letter together, as well as other enclosures, when determining whether all the required notice elements were sufficiently communicated.

Because remand was the proper remedy, the Court did not reach several issues. The Court did not reach the question of "whether there was a notice error" and, if so, whether "that error was prejudicial." The Court also did not reach the question of "whether Mr. Cowan would be prejudiced by any notice error if he may still file a supplemental claim and preserve his effective date." Lastly, the Court did not reach the question of whether section 5104 applies to the Board under the AMA.

*Devin deBruyn is Associate Counsel at the Board of Veterans' Appeals.*

## Court Addresses Board Decision Finality

by Sarah "Sally" Battaile

Reporting on *Clark v. McDonough*, No. 21-1124 (June 15, 2022).

In *Clark*, a panel of the U.S. Court of Appeals for Veterans Claims (Court) comprised of Judges Greenberg, Falvey, and Jaquith addressed whether the Board's denial of Mrs. Clark's motion to waive her duty-to-assist (DTA) rights was a final adverse Board decision over which the Court's jurisdiction is proper. The Court dismissed the appeal for lack of jurisdiction, finding that the appealed Board order was not a final decision for jurisdictional purposes.

Mrs. Clark is the surviving spouse of veteran Roosevelt Clark, who passed away in August 2013 and had a combined disability evaluation of 90 percent at the time of his death. Mrs. Clark sought dependency and indemnity compensation (DIC) benefits, contending that her husband's service-connected disabilities caused or contributed to his death. Her claim was initially denied by the regional office (RO) in October 2013, and later remanded by the Board in January 2019 and again in July 2019. A December 2019 Supplemental Statement of the Case (SSOC) continued to deny DIC. Mrs. Clark filed a Notice of Disagreement (NOD) in January 2020 under the Veterans Appeals Improvement and Modernization Act (AMA), which was accepted by the Board into the Direct Review docket of the AMA.

In an April 2020 correspondence, Mrs. Clark stated that she "unequivocally" waived her DTA rights to any additional assistance by the Secretary to obtain medical evidence or a medical opinion. She stated that she reached an informed decision that such development would be harmful to her claim.

In a January 2021 remand, the Board acknowledged the arguments set forth in the April 2020 correspondence, but did not address Mrs. Clark's waiver of her rights under DTA for further development. The Board found a pre-decisional error by VA with respect to a VA-contracted medical opinion that ignored relevant evidence and failed to provide an adequate rationale. Consequently, the Board remanded the appeal.

The RO continued to develop the claim on remand, and Mrs. Clark filed a Notice of Appeal to the Court in February 2021. She also requested a pause in adjudication in an April 2021 letter to VA.

The Secretary moved to dismiss the appeal for lack of jurisdiction. Mrs. Clark argued that the Court had jurisdiction, contending that her April 2020 letter was a motion for waiver which the Board effectively denied when it remanded the appeal, and was thus a final adverse decision under the Court's jurisdiction.

The Court noted that it has jurisdiction to review final Board decisions under 38 U.S.C. § 7252, and its holding in *Skaar v. Wilkie*, 32 Vet. App. 156, 180 (2019) (en banc order holding a "final Board decision operates as a jurisdictional 'trigger' that gives [the Court] the authority to hear a particular appeal").

The Court relied on caselaw stemming from *Maggitt v. West*, 202 F.3d 1370, 1376 (Fed. Cir. 2000), which clarifies that a final Board decision is one in which the Board grants or denies benefits. The Court also discussed caselaw finding that Board remands were not within the Court's prospective jurisdiction, and that it cannot hear interlocutory appeals. *See Gardner-Dickson v. Wilkie*, 33 Vet. App. 50, 54-55 (2020), *aff'd sub nom. Gardner-Dickson v. McDonough*, No. 2021-1462, 2021 WL 5144367 (Fed. Cir. Nov. 5, 2021) (per curiam).

The Court noted that Mrs. Clark did not argue that there was a final decision on her DIC claim, and that the parties agreed her DIC claim was the only claim for benefits before the Board. Because the Board did not grant or deny her claim, the Court found no final decision over which to take jurisdiction. The Court additionally found the cases cited by Mrs. Clark in support of her claim all involved a final Board decision, thereby involving the "jurisdictional hook" missing in the instant case.

The Court emphasized it offered no opinion on whether Mrs. Clark's April 2020 request for waiver of her DTA rights was a motion that the Board denied. However, the Court held that such a motion is not a claim for benefits and that the Board's adverse ruling on a nondispositive motion does not itself satisfy the requirements of finality in order for the Court to take jurisdiction over the appeal.

In a footnote, the Court noted that a right held by a claimant and a duty placed on VA are two separate

things, stating it does not follow that a claimant's voluntary relinquishment of a right categorically forbids VA's performance of a related but separately imposed duty. Because of the Court's lack of jurisdiction, it did not reach the question of whether a claimant's waiver of her right to the correction of a pre-decisional error would compel the Board to immediately issue a decision regardless of all other considerations, including VA's own obligations under statutes, regulations, and caselaw.

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

## Rating Individual Symptoms Versus Manifestations of the Same Injury

by Pamela Watt

Reporting on *Walleman v. McDonough*, No. 20-7299 (June 9, 2022).

In *Walleman*, the United States Court of Appeals for Veterans Claims (Court) issued a precedential decision written by Judge Bartley and reversed a decision of the Board of Veterans' Appeals (Board) that if a disability rating assigned under DC 5259 already exists pyramiding categorically precludes a separate disability rating under DC 5257.

The VA Regional Office (RO) assigned the veteran Kevin Walleman, Appellant, a 10% disability rating under DC 5259-5260 based on his left knee torn meniscus status post meniscectomy. Mr. Walleman disagreed with the assigned rating and appealed. The Board remanded the claim and directed the RO to obtain a new medical examination that tested Mr. Walleman's active motion, passive motion, and pain with weight-being and without weight-bearing. The Board then assigned a 10% disability rating under DC 5260 for limited, but otherwise noncompensable, flexion of the left knee due to pain and a separate 10% disability rating under DC5259 based on his symptomatic residuals from his left knee meniscectomy manifested by swelling, popping, locking, stiffness, grating, and clicking. Although the Board acknowledged the veteran's slight instability of the left knee, it declined to award another separate 10% disability rating because knee instability is contemplated under both DC5257 and DC 5259 and the Board believed it would violate the rule against pyramiding. Mr. Walleman appealed this decision, arguing that assigning disability ratings under both DC 5257 and DC 5259 does not violate the rule against pyramiding because DC 5259 does not list any specific symptoms.

On appeal, the Court focused on whether a claimant can have a separate rating under DC 5257 for lateral instability when the claimant is already rated under DC 5259, a rating that may contemplate instability and other residuals that could independently warrant a compensable rating under DC 5259.

The Court, citing *Lyles v. Shulkin*, 29 Vet. App at 118 (2017), noted two critical points to consider in determining whether a separate evaluation is warranted. First, none of the symptoms should be duplicative of or overlapping with the symptoms of the other conditions—i.e., none of the disabilities share a common manifestation. And second, the common manifestation should not be improperly compensated more than once. Additionally, the Court highlights the express language of DC 5259, which provides a 10% disability rating for the removal of semilunar cartilage, symptomatic—residuals of a veteran's meniscectomy. Yet, as noted by the Court, the regulation fails to limit the symptoms of a meniscectomy and fails to enumerate any specific symptoms that are necessary to support a rating under DC 5259.

The Court then looked to the specificity of the language of DC 5257, which provides disability compensation for lateral instability of the knee. It concluded that it is most appropriate to rate a condition using a DC in which the condition is specifically listed, rather than rate the condition under a general, non-specific provision. It further noted that the lateral instability should only be rated under DC 5257 because that DC specifically provides for lateral instability, potentially entitling a claimant to more compensation that would be available under DC 5259.

Finally, the Court stressed that two separate ratings

under DC 5257 and DC 5259 are not rating individual symptoms; rather, they are evaluating distinct manifestations from the same injury.

Ultimately, the Court held that the Board erred when it determined that Mr. Walleman was categorically precluded from obtaining a separate disability rating under DC 5257. The Court reversed the Board's decision and remanded the issue for proper consideration of the evaluation criteria of DC 5257.

*Pamela Watt is a student at the Stetson University College of Law.*

## Board Hearings Under the AMA

by La'Tonya Lynn

Reporting on *Frantzis v. McDonough*, No. 20-5236 (June 21, 2022).

In *Frantzis v. McDonough*, the United States Court of Appeals for Veterans Claims (Court) issued a precedential opinion, written by Judge Allen, holding that nothing in the statutory provisions Congress enacted under the Veterans Appeals Improvement and Modernization Act of 2017 (AMA) requires that the Board of Veterans' Appeals (Board) member who conducts a hearing must also decide the appeal.

In 2009, Mr. Frantzis filed a claim for tension headaches, which was denied in November 2009. Mr. Frantzis filed a timely appeal to the Board and requested a hearing. During the July 2013 hearing, Mr. Frantzis testified that his headaches were caused by a kick to the chest by another servicemember during service. He testified that the kick caused him to be lifted into the air and hit his head on a concrete slab. Mr. Frantzis stated that following this incident, he developed headaches that affected his vision. In 2014, the Regional Office (RO) granted non-compensable service connection for headaches. Mr. Frantzis appealed and opting into the Rapid Appeals Modernization Program (RAMP), thereby converting to AMA. He then appealed a Higher-Level Review Rating Decision to the Board, requesting a hearing.

One of the most notable differences between the Legacy Appeals System and the AMA guidelines is Congress' removal of the statutory language that required the same Board member who conducted a hearing to also participate in the appeal's final decision. During his May 2019 hearing, Mr. Frantzis and his wife provided direct evidence to a Board member presiding over his case. In September 2019, a Board member absent during the hearing rendered a decision.

Mr. Frantzis appealed to the Court, arguing that the phrase "a member or panel assigned a proceeding shall make a determination" in 38 U.S.C. § 7102 required the same Board member who conducted the hearing to issue the decision. Although the Court had not addressed these statutory provisions under the AMA, it did consider the provisions as relating to the context of the Legacy Appeals System in *Arneson v. Shinseki*.

The Court in *Frantzis* determined that section 7102 governs the assignment of cases to Board members, not the governance of Board hearings, based on *Arneson v. Shinseki*, 24 Vet.App. 379 (2011). The Court explained that the AMA did not change the statutory scheme the Board recognized in *Arneson* - section 7102 continues to concern the assignment of appeals and section 7107 continues to address hearings.

The Court further held that in enacting the AMA, Congress used plain, nontechnical language when revising section 7107; the section no longer requires that the Board member conducting a hearing must participate in the final determination of the claim. The Court found no regulations under the AMA that currently provide appellants with the right to have the same Board member who presides at a hearing render a decision.

Mr. Frantzis' briefly raised a fair process argument for the first time during oral argument. The Court, based on *Smith v. Wilkie*, 32 Vet.App. 332 (2020), described the "fair process doctrine" as an obligation placed on VA to provide claimants with a fair process in adjudicating their claims. However, the Court declined to consider how the fair process

doctrine may apply, as it was not properly raised by Mr. Frantzis and determined that it must refrain from acting as an advocate by advancing an argument a represented party failed to raise himself.

Judge Jaquith, dissenting, wrote that the Board failed to provide Mr. Frantzis with an opportunity to meaningfully participate in the appellate process. "Mr. Frantzis was never notified that a substitute 'factfinder had been assigned to adjudicate his appeal and never given the opportunity provided by statute and regulation to have a hearing before that decisionmaker.'" The "switcheroo" of Board members, to Jaquith, "gives an appearance of forum shopping and unfairness, regardless of any good faith basis for changing the assignments."

Judge Jaquith also disagreed with the majority's opinion regarding the applicability of the statutes. He noted that while section 7102 does not prescribe the docketing, location, or manner of hearings, it does govern the assignment of the Board member who conducts the hearing and that Board member's responsibility. Accordingly, it cannot be read separately from section 7107, and both are relevant regarding Board hearings.

Mr. Frantzis moved for en banc consideration, arguing that the majority overlooked or misunderstood the application of the law and focused on an incorrect issue of the law. The Court denied en banc review, stating that the Appellant had not shown that exceptional circumstances existed to warrant full Court review. Mr. Frantzis then filed an appeal to the Court of Appeals for the Federal Circuit.

*La'Tonya Lynn is a student at Stetson University College of Law.*

## Attorney Fees: The 60-Day Waiting Period Is Valid, Consistent with the Time Frame to File a NOD in Simultaneously Contested Claims

by Natasha N. Pendleton

Reporting on *Wells v. McDonough*, 35 Vet. App. 325 (2022) (per curiam Order).

In *Wells v. McDonough*, a three-judge panel of the U.S. Court of Appeals for Veterans Claims (Court), which comprised Chief Judge Bartley and Judges Greenburg and Jaquith, denied a petition for a writ of mandamus. The petition challenged VA's process for issuing fee awards to individuals who successfully represent VA claimants pursuant to direct-pay fee agreements under 38 U.S.C. § 5904(d)(2) and 38 C.F.R. § 14.636. The Court held that a dispute over fees that VA withholds directly from a claimant's retroactive benefits award is a simultaneously contested claim. Therefore, it is subject to the contested claims rules of 38 U.S.C. § 7105A, which allows claimants 60 days to contest a fee award. The Court ruled that the 60-day period aligns with the statutory time frame to file a Notice of Disagreement (NOD) with an adverse action in a simultaneously contested claim, and the 60-day period is not arbitrary, capricious, or contrary to the law.

Historically, the petitioner, Mr. Wells, is an attorney who represents clients before VA. His petition sought to compel VA to expeditiously pay outstanding fees and expenses subject to direct-pay fee agreements in compliance with 38 U.S.C. § 5904(d)(2) and 38 C.F.R. § 14.636.

Per 38 U.S.C. § 5904(d) and 38 C.F.R. § 14.636, direct-pay fee agreements allow an attorney or agent to be awarded fees up to 20% of the total amount of past-due benefits awarded to claimants for appeals with a favorable resolution. VA disburses the fees directly to the attorney or agent. Under the current process, however, VA does not immediately disburse fees to the attorney or agent when it pays past-due benefits to the claimant. Instead, VA holds the fee award for a period of 60 days to inform the claimant of his or her appellate rights to contest the amount of fees withheld.

Mr. Wells specifically challenged the legality of the 60-day waiting period as arbitrary, capricious, and contrary to the law. He argued that neither 38 U.S.C. § 5904, which governs attorney fees, nor 38 U.S.C. § 7105A, which governs simultaneously contested claims, specifically permits a 60-day

waiting period. He further contended that 38 U.S.C. § 7105A did not apply to fee awards because the presumption must be that fees are not contested when there is a properly executed direct-pay fee agreement signed by both the attorney and the claimant. He argued that without the extraordinary remedy of mandamus, he had no other relief because there was not an appellate process to force the Secretary to pay fees.

Mr. Wells alternatively asked the Court to order the Secretary to create a method that allowed claimants to waive the 60-day waiting period. Mr. Wells cautioned that delays in fee awards deter sole practitioners and small firms from practicing veterans benefits law. He stated that he had 10 outstanding attorney fee awards pending disbursement, and he asserted that the Secretary was not complying with his own policy of processing fee awards as the 60-day period for each case had expired.

The Secretary, in contrast, argued that the law addressing simultaneously contested claims applies to fee awards, which includes the 60-day period waiting period. The Secretary noted that VA must first decide whether the attorney is eligible for fees, and that decision is an important procedural safeguard for claimants. It notifies claimants that VA intends to reduce their past-due benefits to pay a portion to their representative for fees, and it notifies claimants of their appellate rights to contest that decision.

Lastly, the Secretary asserted that the creation of a waiver process would present a conflict of interest. The waiver would only serve the representative and encourage claimants to relinquish their right to challenge the reasonableness of the fee or the representative's eligibility to receive it. Moreover, a waiver of the 60-day period would be less efficient because it would still require VA to ensure that any waiver of appellate rights was knowing and voluntary.

The Secretary noted that Mr. Wells's petition had since become moot because VA had already paid Mr. Wells's attorney fees in 9 of the 10 cases identified and that VA had instructed its finance department to release the fees in the final case.

Mr. Wells subsequently filed an amended petition where he identified a total of 22 cases where fees were paid after excessive delays. The Secretary responded by providing updates on all the cases identified by Mr. Wells.

During August 2021 oral arguments, Mr. Wells argued that his petition fell within the established mootness exception for disputes that are capable of repetition but evading review. He also contended that the Court should look at the plain meaning of 38 U.S.C. § 7105A and find that attorney fees resulting from direct-pay fee agreements under 38 U.S.C. § 5904(d)(2) are not "contested" claims and are not subject to the claims processing rules for simultaneously contested claims.

The Court held that it had jurisdiction to review the petition because it fell squarely within the exception to mootness as a dispute capable of repetition but evading review; however, the Court denied the petition on the merits. The Court found that Mr. Wells had not established that the delay in processing attorney fee awards was so extraordinary as to amount to an arbitrary refusal to act.

Indeed, it was not accurate to call the challenged 60-day period a "delay" in the traditional sense because the statute explicitly contemplated the 60-day period to permit a claimant to appeal a fee decision. Therefore, the Court held that the Secretary's policy of withholding direct payment of fees for 60 days was not arbitrary, capricious, or not in accordance with law.

The Court also noted that both the Federal Circuit and the Court have concluded that disputes involving direct payment of fees are contested claims governed by 38 U.S.C. § 7105A and 38 C.F.R. § 14.636.

A simultaneously contested claim requires no initial indicia of disagreement or conflict. Rather, the fact that both parties seek to benefit from the same award, such that compensation of one party would necessarily limit the other party's compensation, is sufficient to establish the "contest."

Regarding Mr. Wells's argument for VA to institute a

process that would permit claimants to waive the 60-day period, the Court found that 38 U.S.C. § 7105Aexplicitly contemplates the 60-day period to benefit claimants and that there are persuasive legal and ethical challenges to the creation of a potential waiver process. The Court instructed Mr. Wells that he was free to petition VA for rulemaking on the subject.

The Court also acknowledged Mr. Wells's argument that unpredictability posed a barrier to the practice of veterans benefits law. However, the Court found that the delay of fee awards was not so egregious to be unreasonable, and the Court noted that the delays apparently resulted from VA's efforts to balance its obligations to preserve veterans' appellate rights and to ensure timely payment to representatives.

The Court, therefore, concluded that Mr. Wells had not demonstrated a clear and indisputable right to the writ of mandamus. Accordingly, the Court denied the petition.

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## Federal Circuit Holds CAVC Review is Limited to Record Before Board Even in Cases Raising Constitutional Issues Board Cannot Address; Appellants Did Not Show 38 C.F.R. § 3.354(a) is Unconstitutionally Vague on its Face

by Alex Hampton

Reporting on *Bowling v. McDonough*, 2021-1945 (June 28, 2022), and *Appling v. McDonough*, 2021-1970 (June 28, 2022) (consolidated and referred to hereinafter as *Bowling/Appling*).

As an initial matter, veterans' benefits are payable to veterans, and Congress defines a "veteran" for benefits purposes as a person discharged under conditions "other than dishonorable." 38 U.S.C. U.S.C. § 101(2). Thus, individuals with dishonorable discharges are barred from receipt of benefits. There is a statutory exception, however, when at the time of the conduct leading to an individual's dishonorable discharge, they were "insane." 38 U.S.C. § 5303(a). Congress did not define "insane" in the statute.

The regulation promulgated by the Department of Veterans Affairs (VA) provides that "an insane person is one who, while not mentally defective or constitutionally psychopathic, except when a psychosis has been engrafted upon such basic condition, exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior; or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack the adaptability to make further adjustment to the social customs of the community in which he resides." 38 C.F.R. § 3.354(a). This definition of insanity is further elucidated in a 1997 VA General Counsel opinion (1997 GC opinion). *See* Veterans Affairs Opinion of General Counsel Prec. 20-97, 1997 WL 34674474 (May 22, 1997). VA General Counsel opinions are binding on the Board under 38 U.S.C. § 7104(c).

Also relevant to the discussion of *Bowling/Appling*, the U.S. Court of Appeals for Veterans Claims (CAVC) is generally limited to reviewing the record that was before the Board of Veterans' Appeals (Board) at the time of the time of the Board decision being appealed. 38 U.S.C. § 7252(b).

It should also be noted initially that the Board does not have jurisdiction to rule on constitutional issues, such as whether a particular VA regulation is constitutional. *Johnson v. Robison*, 415 U.S. 361, 368 (1974).

In *Bowling/Appling*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) held that the regulations limiting CAVC's review to the record

that was before the Board are not abrogated in cases where constitutional claims are at issue, even though the Board does not have jurisdiction to decide such issues. The Federal Circuit also held that the appellants had not demonstrated that 38 C.F.R. § 3.354(a) was vague on its face in violation of the Due Process Clause of the Fifth Amendment of the U.S. Constitution.

Veterans Charles Bowling and Kevin Appling received "other than honorable" discharges upon separation from military service. Each later applied for VA benefits. Mr. Bowling died during the pendency of his claim, and his wife, Charlotte Bowling, was substituted as the appellant for the purpose of continuing the appeal. The appellants did not dispute that their discharges were a bar to the benefits sought. Instead, they contended that both cases fell under the insanity exception in 38 C.F.R. § 3.354(a). Mr. Bowling alleged that he had post-traumatic stress disorder at the time of the conduct leading to his discharge, while Mr. Appling alleged that he had depression due to racial harassment, as well as alcoholism, which led to the misconduct resulting in his discharge.

In July 2018 and October 2019 decisions, the Board denied the appellants' claims, finding that neither veteran met the regulatory definition of "insane" at the time of the in-service offenses in question. The Board's analysis was based, at least in part, on the 1997 GC opinion.

On appeal to CAVC, each appellant argued that 38 C.F.R. § 3.354(a) was unconstitutionally vague on its face, and thus unconstitutional under the Due Process Clause. As later noted by the Federal Circuit, neither appellant put forth arguments challenging the application of § 3.354(a) to the facts of their particular cases, or challenging the constitutionality of the regulation as applied to them specifically. The appellants requested that in addressing the vagueness issue, CAVC take judicial notice of certain materials published by veterans' advocates purporting to demonstrate disparate, "arbitrary and capricious" application of the insanity exception amongst different VA regional offices and different Veterans Law Judges at the Board. This evidence was not submitted or otherwise part of the record before the Board at the time of its decisions. Given the similar arguments in *Bowling* and *Appling*, CAVC consolidated the appeals and issued a single decision addressing both.

CAVC first disagreed with the appellants' request to consider what it called "extra-record" evidence on two bases. First, CAVC noted such evidence was not part of the record before the Board, and thus could not be considered. Second, CAVC determined that the requirements for judicial notice of extra-record material pursuant to the Federal Rules of Evidence had not been met. *See* Fed. R. Evid. 201 (judicial notice may be taken of a fact that is not subject to reasonable dispute).

Next, CAVC rejected the appellants' constitutional argument, finding that they had not demonstrated that VA was "incapable of applying § 3.354(a) or that the regulation fail[ed] to provide fair notice of the factors by which insanity may be established, except by way of speculation based on the extra-record opinion evidence that [CAVC] may not consider." *Bowling v. McDonough*, 33 Vet. App. 385, 398–400 (2021).

On appeal to the Federal Circuit, the appellants argued that CAVC erred in not considering the extra-record material, and in deciding against the facial vagueness challenge.

Regarding the extra-record evidence issue, the Federal Circuit first noted that the appellants had not challenged CAVC's finding that the request for review of the material in question did not meet the criteria for judicial notice under the Federal Rules of Evidence. Instead, the appellants argued that CAVC should have considered the extra-record evidence because it would have been futile to submit it to the Board, as the Board had no jurisdiction to decide the constitutionality of the VA regulation at issue. The Federal Circuit agreed to address this argument,

even though it had only been raised to CAVC during oral argument.

The Federal Circuit framed the appellants' argument in terms of the well-established doctrine requiring exhaustion of administrative remedies as a prerequisite for judicial review. Essentially, the appellants' argument was that they had exhausted all avenues to address their constitutional claim at the agency level, because the Board could not address the issue at all.

Ultimately, the Federal Circuit rejected this argument, relying on its own precedent in *Ledford v. West*, 136 F.3d 776 (Fed. Cir. 1998) for the proposition that an inability by an agency to remedy issues beyond its charter does not necessarily excuse a claimant from presenting those issues to the agency. In *Ledford*, the Federal Circuit discussed Supreme Court caselaw to the effect that the purpose of the exhaustion doctrine was for "an administrative agency to perform functions within its special competence – to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi v. Davidson*, 405 U.S. 34, 37 (1972).

Based on its analysis of the caselaw, the Federal Circuit held that "even if the Board could not grant appellants their requested relief of declaring § 3.354(a) unconstitutionally vague, presenting such evidence to the Board would not be futile." In particular, the Federal Circuit noted that submitting the evidence in question to the Board would not have been "pointless" because the Board could have provided analysis of the evidence, or developed the record for additional information that may have supplemented or contradicted the evidence, and thus aided in the later judicial review of the constitutional issue. For these reasons, the Federal Circuit affirmed CAVC's decision not to consider the "extra-record" evidence.

Next, the Federal Circuit agreed with CAVC's determination that the appellants had not established the facial vagueness of 38 C.F.R. § 3.354(a). First, the Federal Circuit noted that without consideration of the extra-record evidence submitted to CAVC in the first instance, the appellants had not provided any substantive analysis in support of their argument that § 3.354(a) was insufficiently clear. In contrast, the Federal Circuit noted that § 3.354(a) and the 1997 GC Opinion provided references to conduct that was objectively describable, made clear the importance of prevailing medical standards and common meanings of insanity such as in criminal law, and discussed specific rules for situations that frequently arose under the regulation.

The appellants, the Federal Circuit noted, had not substantively addressed these governing principles employed by VA, such as by discussing the nature of the subject matter (human behavior), or applicable authorities on the subject. Nor had the appellants shown that there was "pervasive disagreement" among VA adjudicators about the nature of the inquiry one was supposed to conduct under § 3.354(a). This last point was particularly important in the analysis undertaken in a previous Supreme Court case addressing this issue. *See Johnson v. United States*, 576 U.S. 591, 601 (2015). Based on this analysis, the Federal Circuit affirmed CAVC's determination that the appellants had not demonstrated facial vagueness with respect to § 3.354(a).

The Federal Circuit proceeded to discuss an additional basis on which the appellants' claim was destined to fail, independent of the foregoing discussion. Specifically, the Federal Circuit referred to settled law providing that where there is no assertion of vagueness of a regulation as applied to a particular claimant, there is no valid facial vagueness claim. *See United States v. Hasson* ("[A] plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim"); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010) ("[A] plaintiff who engages in some conduct that is clearly proscribed [by the regulation in question] cannot complain of the vagueness of the law as applied to the conduct of others").

In the case before it, the Federal Circuit noted, the appellants presented only an argument that 38 C.F.R. § 3.354(a) was vague on its face and had not provided argument or analysis to the effect that the regulation was vague as applied in their particular cases. For this reason, the Federal Circuit found, the appellants' facial vagueness challenge was invalid.

Upon consideration of the Federal Circuit's analysis in *Bowling/Appling*, it can be said that the decision includes a clear holding that the Board's lack of jurisdiction to address constitutional issues does not excuse claimants from presenting such issues and accompanying evidence to the Board as a prerequisite for CAVC review. The decision made clear the importance of the Board's record-development function in such cases, even when it cannot ultimately adjudicate the issue at hand.

It cannot be said, however, that the Federal Circuit reached a decision as to whether 38 C.F.R. § 3.354(a) is facially vague. That is, in its lengthy analysis, the decision alluded to numerous deficiencies in the presentation of the appellants' case, which obviated the need to squarely address the issue. Most importantly, the Federal Circuit noted that without being able to rely on their extra-record evidence, the appellants' claim lacked any substantive discussion or bases with respect to the purported vagueness of § 3.354(a). In addition, the decision determined that the claim of facial vagueness was invalid notwithstanding any of the other reasons for its affirmance of CAVC's decision, because the appellants had not argued or shown that § 3.354(a) was vague as applied to the facts of their own cases. Overall, CAVC and the Federal Circuit were left to consider the appellants' case without the benefit of any supporting evidence, and the appellants failed to satisfy the basic criteria for consideration of a valid facial vagueness claim. These aspects of the case prevented the Federal Circuit from reaching the ultimate issue of whether § 3.354(a) is compatible with the Constitution's Due Process Clause. Resolution of this issue must await the federal courts' analysis in a case in which supporting evidence is submitted to the Board in the first instance, and in which an appellant argues that § 3.354(a) is vague both on its face and in its application to the facts of in the appellant's particular case.

The decision was authored by Judge Taranto and was joined by Judge Clevenger and Judge Chen.

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## Correction of DD-214 Is Not Required to Grant Retirement Benefits

*by Yesenia DeJesús Torres*

Reporting on *LaBonte v. United States*, 2021-1432 (Fed. Cir. Aug. 12, 2022)

In *LaBonte v. United States*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) held that the Army Board for Correction of Military Records (ABCMR) is not required to correct the DD Form 214 (DD-214) in order to grant retroactive disability retirement.

In 2004, Mr. Robert LaBonte was court-martialed for desertion. He pleaded guilty and was given a bad conduct discharge. In 2014, the Department of Veterans Affairs (VA) granted him benefits, assigning him a 100% compensatory disability rating for multiple service-connected medical conditions. The Army Discharge Review Board (ADRB) soon upgraded his discharge and changed the character of service on his DD-214 from "bad conduct" to "general." The ADRB did not, however, change the reason for separation listed on his DD-214, which was a court-martial.

In 2015, he applied for retroactive medical retirement through the Army Board for Correction of Military Records (ABCMR), claiming that his disabilities caused him to be unfit for service prior to going absent without leave (AWOL). The ABCMR denied his claims on three occasions.

Mr. LaBonte appealed to the U.S. Court of Federal Claims (court). The court dismissed his case because it determined that the ABCMR did not have the authority to grant the relief he sought. Because his DD-214 listed "court-martial" as the reason for separation, the court interpreted the DD-214 as an administrative record "related" to his court-martial. The court concluded that since 10 U.S.C. § 1552(f) prohibits the ABCMR from amending the reason for separation on his DD-214, the ABCMR would be precluded from granting retroactive retirement.

On appeal, the Federal Circuit held that the court erred in dismissing Mr. LaBonte's claim because the ABCMR is not required to change his DD-214 in order to grant retroactive disability retirement.

First, the Federal Circuit took issue with the court's decision to treat the DD-214 as "related" to the proceedings of a court-martial. Under Department of Defense Instruction (DoDI) 1336.01, the DD-214 must accurately and completely provide a concise summary of active service at the time of transfer, discharge, or change of component. Furthermore, Army Regulation 635-8, paragraph 5-1 (2019), which implements DoDI 1336.01, stated that the "DD Form 214 is not intended to have any legal effect on termination of a Soldier's service." The Federal Circuit, therefore, interpreted the DD-214 as a record document with the limited purpose of describing past events.

The Federal Circuit analyzed the statutory construction of 10 U.S.C. § 1552(f). Whereas the court focused upon the phrase "related administrative records," the Federal Circuit considered the statute's operative phrase to be "related administrative records *pertaining to court-martial cases*." The panel thus concluded that although the DD-214 can reflect the finding of a court-martial resulting in separation, it is not a part or product of a court-martial, nor does it have legal consequences on a court-martial finding or sentence.

Secondly, the Federal Circuit found that the court misread a previous ABCMR decision upon which the court relied to conclude that the DD-214 must be corrected before relief can be granted. The 2017 decision stated that although Mr. LaBonte may have met the criteria for referral to disability evaluation prior to going AWOL, "the ABCMR is not empowered to set aside a conviction." The following paragraph stated that "there is no basis to amend the applicant's DD Form 214 by changing the reason and authority for separation." Although the court read this to mean that the DD-214 must be amended before the ABCMR can grant relief to Mr. LaBonte, the Federal Circuit interpreted it as a simple statement of reasoning to not correct the DD-214.

Furthermore, the Federal Circuit noted that the Government failed to cite any authority specifically requiring that the DD-214 must be amended before granting retroactive disability retirement. Mr. LaBonte presented multiple correction board decisions where veterans' underlying records were amended in order to grant requested relief. In response, the Government argued that those decisions were distinguished because they did not involve a court-martialed service member who was requesting disability retirement. However, the Federal Circuit found the Government's rebuttal unpersuasive because it was inconsistent with the military's practice to correct service records independently of the DD-214.

In sum, the Federal Circuit held that it is not necessary to amend Mr. LaBonte's DD-214 in order

for the ABCMR to grant him retroactive disability retirement. The Federal Circuit also held that if such relief is granted on remand, the Government is not precluded from amending his DD-214 because it is a record document with no legal effect and not part or product of a court-martial proceeding.

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## VA Stops Telling Veterans That Giving Them Their Own C-Files Would Violate the Veteran's Privacy

By Gordon Siu

This April, I was able to attend the U.S. Court of Appeals for Veterans Claims (CAVC) Fifteenth Judicial Conference as a scholarship recipient. My journey there was a long one. As a Marine Corps veteran, I understand the delays and red tape veterans face trying to get the benefits they've earned.

While VA allows accredited attorneys and claims agents remote access to the Veterans Benefits Management System, allowing them to view veterans' claims files (C-files) in real-time, veterans handling their own claims do not have such access. 38 C.F.R. § 1.601(a)(1). Instead, those veterans generally need to file a Freedom of Information Act (FOIA) request, which appears to be the only method for obtaining a veteran's C-file that has any time limit for VA to respond. *See* 5 U.S.C. § 552(a)(6)(A)(i) (generally requiring an agency to make a "determination" on a FOIA request within 20 working days); 5 U.S.C. § 552(a)(6)(C)(i) (requiring records to be "made promptly available" to the requester upon the agency's determination that it will comply with the request). *But see Lawrence v. Wilkie*, 33 Vet. App. 158, 166-67 (2020) (Toth, J., dissenting) (objecting to the federal district courts' jurisdiction over a veteran's discovery dispute with VA), *vacated sub nom. Lawrence v. McDonough*, No. 2021-2118, 2021 U.S. App. LEXIS 38850 (Fed. Cir. Oct. 5, 2021) (nonprecedential per curiam Order).

In 2019 and 2020, I made FOIA requests to VA for updated copies of my own C-file. Each time, VA sent me a form letter denying my request under FOIA (but stated that it would process it under the Privacy Act, which VA purports doesn't have a time limit to respond). VA's denial cited FOIA Exemption 6, 5 U.S.C. § 552(b)(6), and claimed that giving me my *own* C-file would constitute a "clearly unwarranted invasion of personal privacy." In other words, VA denied my requests under FOIA for my own records because it would somehow invade my own privacy.

But "Exemption 6 cannot be invoked to withhold from a requester information pertaining only to him or herself." U.S. DEP'T OF JUST., GUIDE TO THE FREEDOM OF INFORMATION ACT, Exemption 6 at 7 (2022). So I sued in federal district court—as *Lawrence v. Wilkie* suggested—to enjoin VA's pattern or practice of violating FOIA by sending veterans form letters automatically denying their FOIA requests for their own C-files. *Siu v. U.S. Dep't of Veterans Affs.*, No. 3:21-cv-01110 (S.D. Cal. May 10, 2022).

Under a typical FOIA suit seeking production of records, the claim becomes moot once the agency produces the records. But pattern or practice claims, which have been explicitly recognized in several circuits, seek to enjoin an agency's future violations of FOIA and don't get mooted by the production of specific records (as long as the requester can show that he or she has a need to make future FOIA requests that would be subject to the agency's challenged conduct, such as a lawyer who routinely requests his clients' records). Consequently, pattern or practice claims are potent tools for challenging an agency's systematic FOIA violations. For example, one federal court recently enjoined the Department of Homeland Security's pattern or practice of failing to make timely determinations on noncitizens' FOIA requests for their own alien files, which they needed for their immigration cases. *Nightingale v. U.S. Citizenship & Immigr. Servs.*, 507 F. Supp. 3d 1193, 1196 (N.D. Cal. 2020).

As a result of my lawsuit, VA changed its form letter in April 2022 to stop making automatic denials under FOIA Exemption 6. Instead, VA's new letter tells veterans that responsive records *will* be provided to them as soon as VA works through the volume of requests.

I did eventually get my updated C-file—nearly a year after my last FOIA request, and only after filing two administrative appeals and a federal lawsuit, and with the help of an assistant U.S. attorney.

At the Judicial Conference, I had the opportunity to ask the Secretary of Veterans Affairs, Denis McDonough, if there should be a better way for veterans to get their own claims file. He agreed that there should be. So do I.

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## Happy (Belated) Birthday to America's Oldest, Current Longest Serving (and Most Life-Experienced) Active Federal Judge

By Ben Small

You wouldn't know it by looking at her, but Circuit Judge Pauline "Polly" Newman from the United States Court of Appeals for the Federal Circuit turned 95 years old on June 20th, making her the nation's oldest active sitting judge (not to be confused with judges who elect "senior (semi-retired)" status).

On July 1, 2022, Judge Newman also became the oldest active sitting judge in American history, 95 years and 11 days, surpassing a record held by Circuit Judge Giles Rich, another Federal Circuit alum. While there are judges who ultimately served more years on the federal bench, Judge Newman is currently the longest-serving federal appeals judge on active status.

Every day, Judge Newman continues to break her own records while she impresses with her legal acumen on topics that include patent and trademark law, international trade, government contracts, federal labor law, and veterans' law.

An expert on most any topic, she holds a B.A. from Vassar College, an M.A. from Columbia University, a Ph.D. from Yale University, and an LL.B. from the New York University School of Law.

A chemist by training, Judge Newman lived in France while doing work for the United Nations from 1961 to 1962 and moonlighted as a bartender, mixing spirits instead of compounds. She assures anyone who asks that she can still serve up any drink order provided in French.

From 1954 to 1984, Her Honor was counsel for the FMC Corporation, what she described as "lawyers with technical backgrounds," and was responsible for anything that involved technology, including patents, trademarks, copyright, trade secrets, government contracts, and employment law. In the 1970s and 1980s, she also performed work for the State Department.

In the early 1980s, Judge Newman testified before Congress on the need to create a single forum for patent appeals. As if it was foreshadowed, she was the first appointee to the newly created U.S. Court of Appeals for the Federal Circuit in 1984, the result of a merger between the U.S. Court of Customs and Patent Appeals and the U.S. Court of Claims. At the

time she was appointed, less than 4 percent of the federal bench was occupied by women.

Judge Newman has been serving on the Federal Circuit Court since the creation of the U.S. Court of Appeals for Veterans Claims. Not surprisingly, she has heard hundreds of cases appealed from the Court and has authored numerous lucid and well-reasoned opinions that have helped further develop the contours of veterans' law.

Her Honor finds all cases interesting because, "[W]hen you get to a dispute, two aspects that people are fighting about that they haven't been able to resolve, where big bucks are involved, that really characterizes the work of the judge." Judge Newman didn't hesitate when she said that being a judge is "never" boring.

Between 1984 and 2016, she issued 202 dissenting opinions, the most of any Federal Circuit judge in history, a record she still holds and a record that is not likely to be broken by anyone but her. During that time frame, the U.S. Supreme Court reviewed nine of the cases in which she dissented. In eight of those nine cases, the Supreme Court reversed or vacated the Federal Circuit's majority and sided with Judge Newman. Judge Newman cites "wisdom, persistence," and "thoroughness" as a judge's best qualities. She credits "life experience," including 30 years of working in the private sector, as the source of wisdom and cautions against the "tunnel vision of limited life experience."

You may be surprised to learn that Judge Newman is a pilot, flew her own plane to graduate school, is a self-proclaimed "biker," knows an MG engine "inside and out," likes cheesesteaks, prefers Lamborghinis and Maseratis to Ferraris, and was once complimented by Queen Elizabeth on her curtsy.

Her former law clerks describe her as a bit of a prankster, a boss who frowns upon weekend work, is "impervious to grandstanding and rhetoric," and has "integrity [] beyond question." She once encouraged a law clerk to choose an umbrella without a logo, explaining that the entity represented by the logo might someday be a party to litigation at the Court. Her colleagues at the Federal Circuit use words like: "articulate, beautiful writer, great sense of humor, pioneer, marvelous colleague," and "icon" when they describe her.

Happy Birthday Judge Newman. Thank you for all that you do to assist veterans. We look forward to hearing more of your wisdom in the years to come at the Federal Circuit.

Author's Note: the sources for this article include the 2009 IPO Education Foundation Awards Dinner, "An Interview with 2018 Judiciary Recipient Pauline Newman," California Lawyers Association, the United States Court of Appeals for the Federal Circuit website, and the 2018 NYU Annual Survey of American Law.

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## A Twenty-Million-Dollar Question About Sixty Days in VA Overpayment to Reincarcerated Beneficiaries

by Anna Kapellan

*No question is so difficult to answer as that to which the answer is obvious.* – George Bernard Shaw

"Justice is the insurance we have on our lives and property; obedience is the premium we pay for it," observed William Penn, the founder of the Province – and now, the Commonwealth – of Pennsylvania. Regretfully, Penn's wisdom does not always sink in with those convicted prisoners who get released on parole, usually after serving portions of their penal sentences in correctional facilities.[i] Even more unfortunately, the relationship between a prisoner's original conviction and their reincarceration based on a violation of the terms and conditions of their release on parole almost invariably escapes the understanding of VA, since VA remains unaware of its immediate need to immerse itself in the intricacies of the process and nature of a release on

parole and reincarcerations resulting from violations of the terms and conditions of such a release.

The ensuing misconception leads VA to erroneously perceive a VA beneficiary's reincarceration based on revocation of parole as different and distinct and from the initial incarceration that ended with release from confinement upon the grant of parole. This misconception, in turn, triggers VA's invariable 60-day overpayment to VA beneficiaries who are reincarcerated parolees, since these parolees are treated as if they are incarcerated and not re-incarcerated. To grasp this phenomenon in terms of its legal premise, two brief discussions appear necessary. The nature and process of parole should be read in light of VA laws that trigger such 60-day overpayments that go unnoticed.

In terms of VA law, 38 U.S.C. §§ 1505, 5313 and 38 C.F.R. §§ 3.665, 3.666, either limit or outright bar disbursements of VA monetary benefits to those VA beneficiaries who become incarcerated under a certain set of circumstances. Specifically, 38 U.S.C. § 5313 and 38 C.F.R. § 3.666 dramatically reduce the amount of VA compensation benefits that could be disbursed to a VA beneficiary incarcerated after the initial 60 days of penal confinement that ensues from the beneficiary's felony conviction, and the same rule also applies to those beneficiaries who are in receipt of a VA Dependency and Indemnity Compensations (DIC). In a very similar fashion, 38 U.S.C. § 1505 and 38 C.F.R. § 3.665 fully bar any disbursements of VA monetary benefits to VA pensioners held in penal confinement following the initial 60 days of incarceration ensuing from their criminal convictions, regardless of whether these convictions are based on misdemeanors or on felony offenses. Notably, the 60-day grace period allowed by these statutes and their implementing regulations is always a "one-time-deal" in the sense that a VA beneficiary convicted of and incarcerated based on a penal offense that has triggered either set of these statutes and regulations cannot get multiple 60-day grace periods if they, e.g., are transferred from one prison facility to another, placed in a civilian hospital for a period of time in connection with medical treatment, briefly released into a court environment on a writ habeas corpus *ad prosequendum*, or if they are granted a very rare habeas remedy of an unsupervised furlough.

In other words, the legal mathematics of the 60-day grace period is simple: one 60-day grace period per each qualifying conviction, no less, no more. Thus, to become entitled to another 60-day grace period, an incarcerated VA beneficiary must be convicted of and start serving *another* sentence that is different from the original sentence and is imposed consecutively to the original sentence, served without any overlap. For example, if a prisoner is convicted of an offense while serving the original sentence with the 60-day grace period, the prisoner would not become entitled to another 60-day grace period from VA for the second offense if the sentences are served concurrently, in full or in part, with the original sentence. Had it been otherwise, a prisoner who continues committing crimes while in confinement would be rewarded by VA with an infinite number of 60-day grace periods, thus allowing such a career offender to be placed in a position more financially advantageous that of a prisoner who is also a VA beneficiary but does not engage in illegal activities.

However, this simple logic is lost once the event of a revocation of parole comes into the picture. The parole system in the United States was created in the 19th century in New York. At the time, the penal system in the United States utilized only so-called "determinate" sentences, meaning that every person convicted of a criminal offense had to be sentenced to a "fixed" period of incarceration stated by the sentencing tribunal in terms of the exact number of days or months, e.g., a 10-year sentence was referred to as a "120-month" sentence and it literally meant that the prisoner would spend every day of those 10 years in prison. However, by the end of the 19th century, the ill of prison overcrowding had become so pronounced in the State of New York that it could no longer be ignored. Thus, in 1876, in the hope to combat prison overcrowding, the New York state legislature pioneered a system of "indeterminate,"

*i.e.*, range-based sentences, and coined the concept of "conditional release," which eventually developed into what we currently refer to as a release on parole.

Notably, the United States' federal criminal system is still based on determinate sentencing, but the majority of the U.S. states utilize various versions of indeterminate sentences that envision a possibility of release on parole.[ii] An indeterminate sentence provides both the minimum term that a convicted prisoner must serve and a maximum term that (s)he may be required to serve while confined at a correctional facility. Accordingly, more often than not, a prisoner is deemed eligible for parole after serving the minimum term (which is often, but not always, one-third of the maximum term) and is entitled to be considered for – but by no means automatically granted [iii] – release on parole by the state's parole board.

If a prisoner is denied parole upon a parole proceeding that does not violate the prisoner's due process requirements, the prisoner must wait two years before appearing before the parole board again. However, if the prisoner is granted parole, they are released from confinement and serve the remainder of the sentence subject to the terms and conditions stated in the parole board's decision authorizing the release, and the parolee's strict compliance with these terms and conditions is monitored by a parole supervision officer. A release on parole does not nullify the remainder of the convicted prisoner's criminal sentence post-parole. Simply put, a grant of release on parole merely alters where and how the remaining portion of the sentence would be served. In that respect, a release on parole is substantively identical to a prisoner being placed in a civilian hospital for medical treatment. The convicted person continues serving the original sentence while being in a civilian hospital or sleeping at home and moving amongst society while still complying either with the hospital rules or with the terms and conditions of parole. Indeed, a reincarceration upon a violation of the terms and conditions of parole is substantively analogous to return to a correctional facility upon completion of a medical treatment in a civilian hospital, and the only distinction is that – in the hospital scenario – the prisoner is found fit to return to the correctional facility by medical personnel and brought back by correctional facility officers, while in a parole revocation scenario, the prisoner is being returned to the correctional system upon a parole revocation hearing.

Moreover, the similarity between these processes is particularly clear in light of the fact that a prisoner who had spent a portion of the penal sentence at a civilian hospital is indeed entitled to apply for and might be granted release on parole after a return to prison. Neither the process of returning to a correctional facility following a medical treatment at a civilian hospital nor a return to a correctional facility upon revocation of parole triggers a new penal sentence.

While the former is self-evident, the latter is often confusing because the conviction or sentence underlying the initial incarceration that resulted in a release on parole is habitually confused with the conduct that triggers the revocation of parole. This is so because any parolee is necessarily obligated to remain crime-free in order to remain on parole. Other requirements set forth in the order generated by the parole board upon the grant of a prisoner's application for parole typically include the parolee's duty to diligently attend all scheduled meetings with the supervising parole officer, avoid any interactions with persons who are known to have criminal convictions, refrain from possession of any legal firearm, timely pay parole supervision fees and installments on all court-ordered restitutions, etc. In addition to such generic terms and conditions of supervised release, a parolee might also be required to adhere to special conditions of release on parole, like avoiding alcohol consumption, refraining from the use of any controlled substances (even if these substances are legalized by the state), obey a curfew, or submit to drug testing on demand.

The requirements other than to remain "crime-free" are referred to as "technical" terms and conditions, and a violation of any of these is analogously qualified as a "technical violation," but a commission of any crime, especially if it leads to its own, separate conviction, qualifies as a "criminal" violation. Notably, even a technical violation still can and often does result in a parole revocation. To illustrate, a parolee who has engaged in a brawl might be arrested based on charges associated with the injuries that were inflicted during the brawl, but these charges would be dismissed if the parolee proves that they acted in self-defense proportionate to the danger faced. However, such a dismissal would by no means guarantee that the defendant's parole rendered in regard to the prior conviction would not be revoked.

Once parole is revoked, the parolee is automatically reincarcerated to serve the remainder of the original sentence. Moreover, a parole violation that triggers revocation of parole might not entail any criminal prosecution at all. A parolee may have their parole revoked due to repeated failures to attend scheduled meetings with a supervising parole officer without promptly informing the officer of reasons that could be both verified and deemed proper justifications for each such failure to attend. Indeed, because a revocation of parole is an administrative process (same as that of granting a release on parole), and the revocation process utilizes the evidentiary standard of "good cause shown" (*i.e.*, a very low burden that has to be met in order to get a release on parole revoked), such revocations of parole are exceedingly common.

Notably, if a parolee commits a criminal violation of parole and is convicted of a penal offense that qualified as such a violation, that violation gives rise to revocation of parole and an independent prosecution based on the criminally-prohibited conduct. In such a scenario, the criminally-prohibited conduct that qualified as a violation of parole results in an additional and independent conviction, plus a new penal sentence that might be imposed to run concurrently with or consecutively to the original prison term that had resulted in the release on parole, of which the terms and conditions were violated. However, while the distinction between the original term of incarceration and the new sentence should be self-evident, it is habitually overlooked by VA and – quite understandably – ignored by reincarcerated parolees who are VA beneficiaries.

Hence, while a reincarcerated parolee who is a VA beneficiary cannot become entitled to a second 60-day grace period following revocation of parole, VA invariably grants a second 60-day grace period that necessarily results in a 60-day overpayment. Further, since VA invariably overpays those VA beneficiaries who are such reincarcerated parolees, no such beneficiary has a reason to seek a review from the Board or from the federal appellate courts. Consequently, neither the Board not the appellate courts are availed of an opportunity to opine on VA's misconceptions and correct VA's practice that puts VA law on its head.

Indeed, a VA beneficiary who has not been released on parole and served the entire penal sentence in a correctional facility (or a VA beneficiary who is a Federal prisoner and, since Federal penal law does not have the concept of an indeterminate sentence, simply cannot be released on parole), gets only one 60-day grace period, while a VA beneficiary who is a state prisoner and – in addition to committing the original offense that triggered 38 U.S.C. §§ 1505 or 5313 and 38 C.F.R. §§ 3.665 or 3.666 – was given a second chance by the parole board when released on parole, and yet once again committed a violation, gets *rewarded* by VA for committing this violation with the second 60-day grace period, with 60 days of VA's payment of taxpayers' funds that could have been spent by VA on causes fostering – rather than defying the very logic of – VA's noble mission.

Notably, in addition to being legally incorrect, the financial effect of VA's unfortunate misconception is anything but unsubstantial. During the last decade, the overall rate of parole violations resulting in parole revocation has been

fluctuating, but it has been about 52 percent in 2022,[iv] with veterans in state prisons accounting for 7.9 percent of all state prisoners,[v] regardless of the fact that many states in the U.S. took measures to reduce their prison populations in light of the COVID-19 pandemic.

At this juncture, there are about 195,000 new convictions in the U.S. every year, with convictions in state courts outnumbering federal convictions at about a two-to-one rate.[vi] Since an average veteran was in receipt of $18,320 in yearly VA benefits in 2020[vii] (and this amount is likely to be higher at this juncture in light of cost-of-living adjustments that were implemented on December 1, 2020, and then on December 1, 2021[viii]), at maximum, a convicted VA beneficiary serving a criminal sentence falling outside the 60-day grace period is entitled to receive only a compensation in the amount of $152.64 per month,[ix] it follows that the minimum amount of VA's annual overpayment to reincarcerated parolees is about $22,013,128.80.[x] Thus, assuming, *arguendo*, that VA's yearly cost of requesting and processing information about parole revocations of inmates who are VA beneficiaries would be $2,013,128.80, the saving to taxpayers would be at least $20 million a year. Self-evidently, if at least a portion of such reincarcerated parolees who are VA beneficiaries are pensioners who are not entitled to receipt of any VA benefits at all while held in confinement post the 60-day grace period, the aforesaid taxpayers' savings would be even higher,[xi] same as it would be even higher if there are DIC beneficiaries among the reincarnated parolees.[xii] Hence, VA's thoughtful review of the governing legal authority through the prism of the nature of reincarceration based on parole revocation is necessary and long overdue.

In other words, while VA's confusion as to the relation between the pre-grant-of-parole and post-parole-revocation portions of the same state penal sentence is understandable, since such a relation could be obvious only to legal professionals specializing in the matters of criminal law and prisoners' litigation implicating revocation of parole, VA has a duty to taxpayers to educate itself about the legal intricacies inextricably intertwined with VA's mandate to properly distribute taxpayers' hard-earned dollars. After all, as Michelangelo famously observed, "trifles make perfection, and perfection is no trifle."

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[i] While a release of a convicted criminal defendant on parole immediately upon penal sentencing is not entirely unfathomable, such releases are extraordinarily rare since a sentence served outside a correctional facility right upon the defendant's conviction and sentence is typically qualified as a probationary sentence, and the concepts of parole and probation, while somewhat similar in many respects, still have very different meanings and entail different consequences for violations of their respective terms and conditions, even though the events that qualify as a violation of parole and a violation of probation might be the same.

[ii] "Sixteen states have abolished or severely curtailed discretionary parole. For example, Wisconsin changed its sentencing structure in 2000 to eliminate the option of discretionary parole for all offenses committed after that date[, while,] in California and [in] Washington, discretionary parole was eliminated for most offenses, although it is still available for life[-term sentences] and [a handful of] other offense[s]." Jorge Renaud, *Grading the parole release systems of all 50 States*, PRISON POLICY INITIATIVE (Feb. 26, 2019), *available at* https://www.prisonpolicy.org/reports/grading_parole.html.

[iii] It is well-settled that there is no federal constitutional right to parole; however, a U.S. state may create a parole entitlement by creating an expectation that a parole proceeding would be held, and such an expectation is protected by the Due Process Clause of the Fourteenth Amendment. *See Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7 (1979); *see also Board of Pardons v. Allen*, 482 U.S. 369 (1987) (clarifying *Greenholtz*). Therefore, a state that establishes a parole system becomes obligated to avail a prisoner to a parole proceeding unless the system is altered or nullified in an

unambiguous way, akin to the parole changes adopted in Wisconsin, California, and Washington. However, a right to a parole hearing by no means guarantees a grant of a prisoner's parole application which might still be – and often is – denied on the merits.

[iv] Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, *available at* www.prisonpolicy.org.

[v] https://www.ussc.gov/research/research-reports/federal-offenders-who-served-armed-forces.

[vi] *See supra* n. iv.

[vii] https://www.veteransaidbenefit.org/how-much-does-va-pay-for-veterans-disability-compensation.htm.

[viii] https://www.va.gov/disability/compensation-rates/veteran-rates/; https://www.va.gov/pension/veterans-pension-rates/.

[ix] https://www.va.gov/disability/compensation-rates/veteran-rates/ (the amount payable to a compensation beneficiary corresponding to a monthly rating of 10 percent, *i.e.*, the highest amount that VA can disburse to a VA beneficiary confined for a period in excess of 60 days based on his/her felony conviction).

[x] ($18,320 / 12 x 2 – $152.64 x 2) x 195,000 x 0.079 x 0.52

[xi] Regretfully, there is no individualized statistic of VA pensioners held in penal confinement. A veteran may qualify as a VA pensioner either based on being 65 years old or older or based on being younger that 65 but totally disabled by disabilities that are nonservice-connected or a mix of service-connected and nonservice-connected disabilities. That said, the percentage of persons held in penal confinement that could qualify as VA pensioners based on their age or total disability does not appear substantial, even though they cannot be fully ignored. *See* https://bjs.ojp.gov/content/pub/pdf/drpspi16st.pdf (prisoners with disabilities that might qualify for a VA pension compose 6.1 percent of prisoners who identify as males and 8 percent of prisoners who identify as females, but the ratio of prisoners who identify as male to those who identify as female is 12-to-1); https://www.prisonpolicy.org/blog/2020/05/11/55plus/ (the percentage of incarcerated persons over 55 years old varies from state to state, with North Dakota having the lowest 7.33 percent and Montana having the highest 17.34 percent).

[xii] Unfortunately, there is no existing statistic related to DIC beneficiaries held in penal confinement. However, DIC beneficiaries are, more often than not, elderly, and – also more often than not – identify as females. Therefore, the number of DIC beneficiaries in penal confinement is unlikely to be substantial, but they cannot be ignored. *See supra* n. vii.

If you are interested in contributing to the Veterans Law Journal, please reach out to Morgan MacIsaac-Bykowski, Editor-in-Chief, at memacisaacbykowski@law.stetson.edu