VETERANS LAW JOURNAL

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Message from the Chief Judge

Greetings colleagues,

When I last wrote to you in September, the Court was on the verge of two milestones: we were getting ready to welcome Tiffany Wagner as our new Clerk of Court and Executive Officer, and we were just a few days away from our third Bar and Bench Conference.

Tiffany's first day on the job was at the Bar and Bench Conference, and what better way to introduce her to the Court and veterans law! I won't go into too much detail here about Tiffany's background—you can read her own message in this issue—but she comes to the Court after a decorated career in the U.S. Air Force, where she retired as a colonel and served in various legal positions throughout the world, most recently as Legal Director for the Air Force Review Boards Agency at Joint Base Andrews, Maryland. In her short time at the Court, Tiffany has already proven to be an exemplary leader, manager, and problem solver, and we are so pleased to have her serving in her new role. I hope that over the coming months you will find an occasion to introduce yourself to her. I know she is more than ready to work with you in furthering the Court's judicial review mission.

The Bar and Bench Conference was a wonderful event that brought together the Court's judges and staff and practitioners from across the veterans law community—all in an effort to discuss ways to improve practice before the Court. The Conference kicked off with rollicking table discussions about Court processes and procedures, where we brainstormed and debated ideas for improvement, both big and small. That energy carried through to the next day's program, which included panels on Court remands, recent Court initiatives, and the AMA. I had the privilege of serving on the AMA panel, and it was interesting to hear the different perspectives of those who work at all levels of the claims and appeals process. That panel was followed by another round of robust table discussions, this time about the successes and shortcomings of the modernized system and ways that claims adjudication within that framework may be enhanced.

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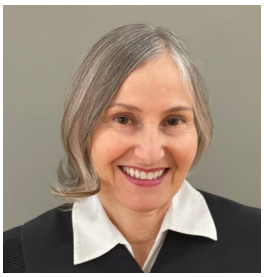
I left the Conference so impressed with the ideas, engagement, and collaborative spirit of all who attended, and the Court has already begun to implement some of your suggestions for improvement. For example, a common refrain we heard from both private and VA counsel was that parties wanted more direction from the Court about the issues to be addressed at oral argument. The Board of Judges has since agreed to issue "be prepared to discuss" orders as a general matter, with very few exceptions, to help focus the issues for argument. The Conference organizers are currently working on an after-action report, which will be a collection of the attendees' most common recommendations and areas of concern. The Court will review that report when received and will consider making further changes based on that information. Kudos and many thanks to Jillian Berner, Glenda Herl, Dave Quinn, Tony Scire, Jenna Zellmer, and their team of dedicated volunteers, as well as conference facilitators Judges Allen and Falvey. The Bar and Bench Conference really was one of the highlights of the year at the Court!

I hope you all enjoy the holidays with family, friends, and loved ones. Be safe and thank you again for your hard work and dedication this past year.

Meg



Message from the Clerk

Dear colleagues,

I am excited to be here! The past few months have been a whirlwind. I retired from active duty after serving as a Judge Advocate General (JAG) in the Air Force for more than 21 years, and then I immediately embarked on this new adventure. A year ago, I was telling my father, a Vietnam veteran, about a new law I had read about, the PACT Act. I encouraged him to reach out to a veterans service organization, but I cannot say I was well versed on the topic. I had no idea that in the near future I would be assessing the impact the PACT Act would have on the operations of the U.S. Court of Appeals for Veterans Claims. From my first day with the Court at the Bar and Bench Conference, I have been impressed by the professionalism, enthusiasm, and dedication of everyone I met.

As an Air Force JAG, I served in a variety of roles, which provided a foundation for my new position. I started as a prosecutor, then became a defense attorney, practicing at both trial and appellate levels. I deployed in support of Operation Enduring Freedom, advising on the law of war. I presided over courts-martial around the world as a Military Trial Judge. As the Executive Director for the three-star general who oversaw the JAG Corps, I ensured timely, enterprise-wide legal advice related to operations, military justice, and national security. In my final assignment, I served as the Senior Legal Advisor for 12 Department of Defense and Department of the Air Force administrative boards, including the Parole and Clemency Board and the Board for Correction of Military Records, where veterans, Airmen, and Guardians request relief from injustices and errors.

Of course, simply being a veteran does not make one an expert in veterans law. Being a veteran does,

however, give me a deeper appreciation for the meaningful work the Court and veterans law practitioners do to ensure that veterans are provided due process and independent judicial review. Since I joined the Court, I have witnessed the Court's and veterans law practitioners' commitment to excellence in judicial review in three oral arguments, including an oral argument the Court held at the University of Notre Dame Law School as part of the Court's outreach to the nation's law schools. I was encouraged by the practitioners' advocacy and civility – two concepts that lawyers sometimes struggle to balance. Additionally, I participated in the National Veterans Law Moot Court Competition, which reinforced my initial positive impressions of the bar's practitioners, who devoted personal time to mentor and inspire law students.

I am honored and humbled to take on this new role, and I know it comes with a steep learning curve. Greg Block has been incredibly generous and patient, passing on his wealth of institutional knowledge to me. I am very grateful for the warm welcome I have received and look forward to getting to know everyone. Please do not hesitate to reach out.

Tiffany Wagner

Message from the President

Season's greetings from the CAVC Bar Association Board of Governors! I hope this edition of the Veterans Law Journal finds you all well and enjoying the holiday season. It was wonderful to see so many of you at our annual meeting in September. Special thanks goes out to Adam Zimmerman, who led a fantastic presentation on class actions at the Court. If you missed it, the presentation is available on the Bar Association's website and is well worth watching. Thank you also to Chief Judge Bartley, who provided a valuable update on the business of the Court. We also celebrated the retirement of Greg Block, who served as the Clerk of the Court for 15 years.

In November, the Bar Association co-sponsored the 2024 National Veterans Law Moot Court Competition with George Washington University Law School and the Court. Twenty-eight teams from across the country competed at GWU Law School, with the semi-final and final rounds being held in the Frank Q. Nebeker Courtroom at the Court. Congratulations to the winners of the team and individual awards and to all the student competitors for your hard work and achievements. Special thanks also to the Court staff and Bar Association members who assisted in preparing, judging, and running the competition.

In December, the Bar Association will be volunteering with Wreaths Across America to place holiday wreaths on the grave markers of our fallen veterans. Members of the Bar Association will be participating at locations across the nation, and we hope you can join on this meaningful tradition.

Next year, we will have additional volunteer opportunities, such as memorial washings and honor flights. The Bar Association's programs committee also has some great panels and networking events planned for 2024, so please stay tuned and keep an eye on your email inbox.

Finally, a reminder that the membership year runs from October to October. If you have not yet renewed your dues for the 2023-2024 year, please do so soon. Your membership helps support our mission to facilitate justice for our nation's veterans and it allows us to continue to provide valuable programming. You can renew your membership at: www.cavcbarassociation.org.

On behalf of the entire Board of Governors, we wish you happy holidays and a happy new year!

Ashley Varga

Federal Circuit Clarifies Scope of Director's Regulatory Authority When Determining Whether an Extra-Schedular Rating is Warranted

By John C. Kendrick

Reporting on *Bell v. McDonough*, 85 F.4th 1383 (Fed. Cir. 2023).

In *Bell v. McDonough*, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") considered whether the regulatory language under 38 C.F.R. § 3.321(b)(1), authorizing the Director of Compensation Services ("Director") to approve extra-schedular ratings in exceptional cases, prohibits the Director from considering agency recommendations prior to issuing a decision. The Federal Circuit, upon consideration of established principles pertaining to the interplay between agency recommendations and the Director's duty to exercise independent discretion, ultimately affirmed the Court of Appeals for Veterans Claims' ("Court") decision denying Mr. Bell's claim for entitlement to an extra-schedular rating.

Mr. Bell served active duty in the Army from 1952 to 1954 and the Air Force from 1955 to 1957, during which time he suffered a lower back injury. Decades later, Mr. Bell initiated a disability claim with the VA claiming service connection of a lumbar spine disability. Following a series of protracted appeals and remands, the VA granted service connection for his lumbar spine disability with an evaluation of 20 percent. Thereafter, Mr. Bell initiated proceedings seeking an extra-schedular rating for his lumbar spine disability. The deciding agency, in response to this claim, requested an administrative review by the Director with regards to entitlement of an extra-schedular rating under 38 C.F.R. § 3.321(b)(1). The agency's request for review also included a recommendation denying entitlement. Upon receiving the agency's request, the Director issued an advisory opinion denying entitlement based on a determination that application of the regular rating criteria was adequate to compensate Mr. Bell for his lumbar spine disability.

Following the subsequent denials of entitlement to an extra-schedular rating from both the Regional Office and the Board, Mr. Bell sought review at the Court. The Court noted that the Board failed to consider certain medical evidence yet determined that Mr. Bell's claim failed to establish any basis on which the Board committed prejudicial error when it denied entitlement to an extra-schedular rating. Accordingly, the Court affirmed the Board's decision. Mr. Bell then sought review of the Court's decision at the Federal Circuit.

On appeal to the Federal Circuit, Mr. Bell's primary contention was that the Director erred by considering the agency's recommendation to deny entitlement to an extra-schedular rating. In particular, Mr. Bell argued that the Director is barred from considering *any* recommendations from the agency, prior to deciding whether to approve or deny an extra-schedular rating, under 38 C.F.R. § 3.321(b)(1) and *Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009). The Federal Circuit disagreed with Mr. Bell's contention and ruled that the Director did not err by considering the agency's recommendation to deny entitlement for an extra-schedular rating, ultimately affirming the Court's decision.

The Federal Circuit first explained that the text of Section 3.321(b)(1) does not expressly prohibit the Director from considering an agency recommendation before determining whether an extra-schedular rating is warranted. Instead, the regulatory provision only serves to grant authority to the Director to either approve or deny a request for an extra-schedular rating. The Federal Circuit next addressed Mr. Bell's contention that the principles set forth in *Thun* serve to prohibit the director's consideration of agency recommendations as authorized under Section 3.321(b)(1). In rejecting Mr. Bell's proposition, the Federal Circuit noted that *Thun* "endorses the agency's long-standing interpretation of § 3.321(b)(1), as allowing agency recommendations alongside any requests for an extra-schedular determination." The Federal Circuit further explained that the agency's recommendations do not disrupt the Director's ultimate authority to accept or reject the provided recommendations.

After determining that the authorizing provisions set forth in Section 3.321(b)(1) do not prohibit the Director from considering agency recommendations prior to making an extra-schedular determination, and after setting forth the proper interpretation of *Thun* as permitting agency recommendations with requests for extra-schedular determinations, the Federal Circuit found no error in the Director's consideration of the agency's recommendation. In affirming the Court's decision, however, the Federal Circuit stopped short of drawing a distinction between *Bell* and *Thun*, and carefully noted that the question of whether the Director's decision to deny entitlement to an extra-schedular rating was neither raised nor demonstrated by Mr. Bell's argument. Although the Federal Circuit's decision seemingly left open future consideration for issues centering on agency recommendations and the Director's exercise of independent judgment when making extra-schedular determinations, the *Bell* decision clarifies the provisions of 38 C.F.R. § 3.321(b)(1) as authorizing, rather than prohibiting, the Director's ultimate authority.

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Court Creates Exception to the Cerullo Principle of Appellate Procedure

by Christina Rosa Ralph

Reporting on Kernz v McDonough, No. 20-2365 (Vet. App. Oct 4, 2023).

In Kernz v. McDonough, the U.S. Court of Appeals for Veterans Claims ("Court") held that if the Board of Veterans' Appeals ("Board") "acts on a matter that has already been appealed" to the Court, "such that the claimant obtains all the relief" the Court could have provided, there is no longer a controversy between the parties, and the appeal must be dismissed as moot.

In this rare instance of the Court sitting en banc, the majority created an exception to the principle of appellate procedure established in Cerullo v. Derwinski, 1 Vet.App 195 (1991), that filing an appeal with a court prevents an agency from acting on the case. Judge Allen penned the opinion of the Court, while Judges Toth and Falvey filed concurrences. Chief Judge Bartley filed a dissent joined by Judges Greenberg and Jaquith, who filed a separate dissent.

James M. Kernz served in the U.S. Army from 1968 to 1970. In January 2020 he filed a Notice of Disagreement ("NOD") regarding disability claims that were first denied in 2016. The Board sent Mr. Kernz a letter in March 2020, erroneously informing him that his claims were untimely and that his "appeals were no longer pending" on the Board's docket. In response, Mr. Kernz filed a Notice of Appeal ("NOA") with the Court in April 2020. Subsequent to Mr. Kernz filing the NOA, in May 2020, the Board sent him a letter admitting that, due to an administrative error, it was incorrect when it declared his claim untimely and erred in refusing to docket his claim.

In July 2020, the Secretary of Veterans Affairs (the "Secretary") filed a motion to dismiss Mr. Kernz's appeal arguing the Court did not have subject matter jurisdiction because the Board's March 2020 letter was not a "final decision" appealable to the Court. In February 2021, Mr. Kernz filed a Request for a Class Certification and Class Action ("RCA") seeking to represent a class of similarly situated veterans who were erroneously informed by the Board that their claims were untimely and no longer pending.

On June 15, 2023, an en banc Court heard oral arguments in Kernz v. McDonough. The issues before the Court were: 1) whether the March 2020 Board letter was a decision over which the Court has jurisdiction; 2) whether the Board acted improperly by proceeding on the issue after the NOA; 3) whether the appeal was moot; and 4) whether a class could be certified due to the commonality of claims that were erroneous denied without reason.

The Secretary argued that the Court lacked subject matter jurisdiction because the Board's March 2020 letter was not a "final decision." The Secretary explained that because the letter was part of a "claims processing procedure" about timeliness, not a decision with respect to benefits, the Board did not consider it a final decision, and because the March 2020 letter was not a final decision, it was not appealable to the Court. In the alternative, the Secretary argued that the appeal was moot because the Board cured its error, docketed the case, and amended the language of its claims procedure letters. Lastly, the Secretary argued that a class of veterans who were erroneously informed their claims were untimely should not be certified because it would be "administratively unfeasible" for the Board to determine how many veterans' appeals were dismissed due to the Board's error.

Mr. Kernz countered that the March 2020 letter was a final decision because it "procedurally and substantively extinguished" his appeal. Further, Mr. Kernz stressed that under the Cerullo principle, any attempt by the Board to reconsider its decision after an NOA has been timely filed is null and void unless the Court orders a remand. Thus, Mr. Kernz contended the actions taken by the Board after April 2, 2020 were void because the Board was divested of jurisdiction by the filing of the appeal. Finally, Mr. Kernz argued the erroneous letters, sent between February 2019 and March 2021, reflected a "systematic practice" of denying appellate review for properly filed appeals without adequate reasons or notice.

In addressing the issues presented in this case, the Court first stated mootness is a threshold jurisdictional issue, and that the "preferred course" is to decide the issue of mootness first. The Court explained that without a case or controversy between the parties, addressing subject matter jurisdiction, risks rendering an "advisory opinion" on an "abstract question of law."

The Court found that the controversy between the parties centered on the timeliness of Mr. Kernz's NOD. The Court further reasoned the issue was resolved by the Board's May 2020 letter acknowledging its mistake, declaring the NOD timely, and placing the appeal on its docket. The Court ruled that the Board's actions afforded Mr. Kernz "all the relief" the Court could have ordered in this appeal, thus, the "only substantive issue" on appeal had been "fully resolved". The Court further explained that while Mr. Kernz wanted the Court to issue a "precedential decision" finding the Board's March 2020 letter constituted an appealable final decision, the question could only matter if there was a controversy before the Court.

In its opinion, the Court reaffirmed that under Cerullo, any attempt to "order reconsideration" of a Board decision after the filing of a timely NOA is "null and void." However, the Court found Cerullo was about the inability of a case to be before two courts at once, while this case was about the fundamental need for an actual case of controversy. The Court held the Cerullo Principle did not preclude the Board from issuing additional letters in

this case because doing so did not "modify, vacate, rescind, or alter" its March 2020 letter, rather, the additional letters merely corrected a "distinct clear error."

The Court further held that the Board erred when it failed to seek permission to take corrective action after Mr. Kernz had filed his NOA with the Court. The Court then went on to say that it will not disturb the Board's actions because they were "not prejudicial," as they afforded Mr. Kernz with all the relief possible. While the Court allowed the Board's post NOA actions to stand, the majority insisted it was not overruling Cerullo. Rather, the majority indicated it was merely acknowledging a "very narrow" exception to the Cerullo principle. Thus, the Court held that an agency may not divest the Court of jurisdiction of an appeal, but it may create mootness by resolving the controversy and providing the appellant with all relief available under the appeal.

Finally, the Court considered whether the Inherently Transitory exception to mootness applies in this case. The Court explained that where a claim is "unavoidably time-sensitive" and "acutely susceptible to mootness" a court may reach the merits of the case if it can certify a class. And where a class member's claim is moot, a claim concerning the class may remain live. The Court found that Mr. Kernz's appeal became moot upon the issuance of the Board letter of May 2020, acknowledging its error and ruling the NOD timely. Thus, it reasoned, when Mr. Kernz requested RCA certification in February 2021, his appeal was already moot. The Court explained that the Inherently Transitory exception cannot revive a "dead case," so the mootness of the appeal made the pending class certification also moot. Thus, the Court found it could not certify a class because Mr. Kernz's appeal was moot before the RCA request was filed and no exception applied.

Several judges strongly disagreed with the majority opinion in this case. Judge Bartley wrote in her dissent, which was joined by Judges Greenberg and Jaquith, that this case was about the Board "overstepping its jurisdiction" and "acting with utter disregard" of Mr. Kernz's exercise of his right to judicial review. The minority reasoned that the Board was divested of its jurisdiction when the NOA was filed. Thus, the Board had no authority to continue processing the appealed issue without permission of the Court. The dissent said that "hindsight" and "good intentions" cannot cure the lack of jurisdiction. The minority believed the Board's actions, after the NOA was filed, were a "legal nullity" incapable of mooting Mr. Kernz's appeal. In his dissent, Judge Jaquith warned that the majority gave the Board the "power to defeat meaningful judicial review" by "manufacturing mootness." He also expressed displeasure that it is still unknown how many Veterans were affected by the Board's erroneous calculation of timeliness because of the assertion it would be "too difficult to determine," echoing Judge Bartley's belief that the majority is willing to sacrifice the rights of Veterans to independent judicial review for "administrative efficiency."

In the end, the Court did not reach the merits of this case. In fact, the Court made a point of explicitly stating it was not giving any opinion on the issue of whether the Board's letter was a "final decision" over which it would have jurisdiction. Perhaps this indicates that this issue, which could significantly impact the influence and power of the Court, is likely to come up again in the future.

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Interpreting VA's Intent to File Rule: A Claimant Must Submit an Intent to File in One of the Three Enumerated Methods Under 38 C.F.R. § 3.155(b)(1)

by Amanda Purcell

Reporting on *Kriner v. McDonough*, No. 20-0774 (Vet. App. Oct. 25, 2023).

In *Kriner v. McDonough*, a panel of the United States Court of Appeals for Veterans Claims ("Court") comprised of Judges Toth, Laurer, and Jaquith affirmed a Board of Veterans' Appeals ("Board") decision that denied accrued benefits because Mr. Kriner did not submit an intent to file and did not have a claim pending at his death. In reaching this conclusion, the Court considered whether 38 C.F.R. § 3.155(b)(1) obligates a claimant to submit an intent to file in one of the three enumerated methods under that subsection or, whether a claimant could submit an intent to file outside of the enumerated methods under the subsection of the regulation. Judge Laurer authored the opinion of the Court, and Judge Jaquith issued a concurring opinion.

In July 2010, the Agency of Original Jurisdiction ("AOJ") terminated Mr. Kriner's nonservice connected ("NSC") pension and, as a result, determined VA had overpaid Mr. Kriner for benefits, which created a debt of $80,895. Mr. Kriner subsequently submitted correspondence challenging this debt but later paid it off in full. On March 26, 2015, and two days after VA adopted a standardized claims system, VA received a letter from Mr. Kriner. *See* 38 C.F.R. § 3.155 (2015) (replacing the informal claims process with a process requiring standardized claims forms effective March 24, 2015). Mr. Kriner's letter included the following statement: "You need to pay back my $80,895.00 plus my service connected pension and aid and attendance plus aggravation." Thereafter, in May 2015 and June 2015, Mr. Kriner and his representative submitted requests to VA for medical equipment.

In July 2015, VA sent Mr. Kriner a letter acknowledging receipt of his application for benefits. The July 2015 VA letter also informed Mr. Kriner that VA would contact him if it needed more information. A few months later, in October 2015, VA notified Mr. Kriner that it had received his correspondence but that "VA regulations now require[d] all forms to be submitted on a standardized form." The October 2015 letter stated that to begin processing his claim, Mr. Kriner must apply for benefits on a standardized form but that, if he was not ready to submit his claim, he could submit an intent to file.

In January 2016, Mr. Kriner passed away. The following month, his surviving spouse, Mrs. Kriner, applied for benefits claiming that Mr. Kriner had several disabilities. In April 2016, Mrs. Kriner applied for burial benefits and then applied for dependency and indemnity compensation, death pension, and accrued benefits. She clarified that she wanted the disability pension that she alleged VA owed to her husband.

In December 2016, VA denied her claim for accrued benefits and Mrs. Kriner perfected an appeal to the Board. In April 2019, the Board issued a decision that denied Mrs. Kriner's claim for accrued benefits. The Board determined that there was not a pending claim at the time of Mr. Kriner's death because he did not submit a claim on a proper VA form during his lifetime. Mrs. Kriner appealed the April 2019 Board decision to the Court. The Court affirmed the Board's decision involving entitlement to accrued benefits in a February 2021 memorandum decision, which was subsequently vacated and remanded by the Federal Circuit.

In this case, the questions before the Court were whether the Board correctly found that the March 2015 letter was not an intent to file and whether Mr. Kriner had a claim pending at the time of his death.

As relevant to these questions, 38 C.F.R. § 3.155(b), which was implemented by VA in March 2015, provides the requirements for how claimants may

submit an intent to file a claim. This regulation explains that an intent to file a claim must provide sufficient identifiable or biographical information to identify the claimant, that VA will furnish the claimant with the appropriate application form prescribed by the Secretary upon receipt of the intent to file a claim, and that if VA receives a complete application form prescribed by the Secretary within one year of receipt of the intent to file a claim, VA will consider the complete claim filed as of the date the intent to file was received.

This regulation also includes several subsections further specifying the process and requirements of an intent to file a claim. Crucially, the regulation includes a subsection stating that, "[a]n intent to file a claim *can* be submitted in one of the following three ways" and enumerates three methods:

> (1) "Saved electronic application."
>
> (2) "Written intent on a prescribed intent to file a claim form."
>
> (3) "Oral intent communicated to designated VA personnel and recorded in writing."

38 C.F.R. § 3.155(b)(1) (emphasis added).

Mrs. Kriner argued that Mr. Kriner submitted an intent to file in March 2015 because his March 2015 letter contained the necessary information under the regulation (i.e., sufficiently identified the claimant and identified the general benefit sought). She also argued that although Mr. Kriner did not submit an intent to file in one of the three methods listed under section 3.155(b)(1), the regulation does not mandate that a claimant must submit an intent to file with VA under one of the listed methods. Instead, she asserted that because section 3.155(b)(1) uses the term "can," the regulation should be read permissively and sympathetically to also permit a claimant to submit an intent to file in a method beyond the three listed by VA.

The Court found this argument unpersuasive and held that based upon the text and structure of section 3.155(b) as well as the history and purpose behind the intent-to file rule, a claimant must submit an intent to file in one of the three enumerated methods under section 3.155(b)(1).

The Court explained that although the regulation uses the word "can," there is no ambiguity in VA's intent-to-file rule and this word should be read restrictively. The Court first noted that "can" could refer to whether a claimant may submit an intent to file at all (instead of a standardized claim), and not to the enumerated methods available to submit an intent to file. Moreover, upon reviewing the structure of the regulation, the Court found that "[b]y indenting and elaborating on the 'one of . . . three ways,' VA's use of 'can' in its rule restricts what could constitute an intent to file exactly as if the regulation used the phrase 'can only.'" Through this interpretation, the Court held that the three enumerated methods for submitting an intent to file were the exclusive means of submitting an intent to file.

The Court further found that the other subsections under the regulation also supported this interpretation of section 3.155(b)(1). In this regard, the Court considered subsection (4), which states that "[i]f an intent to file a claim is not submitted in the form required by paragraph (b)(1) of this section . . . VA will not take further action unless a new claim or a new intent to file a claim is received." The Court noted that the reference to paragraph (b)(1) in subsection (4) reinforces that if a submission is not received in one of the three ways listed in subsection (1), VA will not act on the submission and will not take any further action until it receives a new claim or a new intent to file.

The Court also referenced subsection (3), which states "[u]pon receipt of an intent to file a claim, the Secretary shall notify the claimant and the claimant's representative, if any, of the information necessary to complete the appropriate application form prescribed by the Secretary." The Court underscored that because this subsection indicates that VA must notify the claimant of the information necessary to complete the application in instances when a claimant submits information on the correct paper form as prescribed by the Secretary but does not submit enough information, it reflects that VA

will help develop a claimant's intent to file but only when the intent to file was first submitted in one of the three methods that VA allows.

Additionally, the Court found that the history and purpose of the intent-to-file rule weighs against Mrs. Kriner's interpretation of section 3.155(b)(1). The Court emphasized that the Federal Register conclusively establishes that an intent to file must be filed in one of the three ways listed in section 3.155(b)(1). The Court further detailed that VA has historically pushed for standardization in the claims and appeals process. Thus, the Court determined that Mrs. Kriner's interpretation of section 3.155(b)(1) does not support the purpose behind the intent-to-file rule, which is standardizing the claims process through the use of specific forms.

Accordingly, by interpreting section 3.155(b)(1) as requiring that an intent to file can only be filed through one of the three authorized methods, the Court found that Mr. Kriner's March 2015 letter was a non-standard submission and, therefore, did not constitute an intent to file.

Nonetheless, Mrs. Kriner argued that VA's October 2015 letter to Mr. Kriner (notifying him that VA regulations required claims to be submitted on a standardized form and referencing the standardized forms) shows that VA accepted his March 2015 letter as an intent to file. In response, the Secretary argued that the October 2015 letter shows that VA did not accept Mr. Kriner's March 2015 letter as an intent to file because the October 2015 letter encouraged Mr. Kriner to submit an intent to file and because section 3.155(b)(6) prohibits multiple intent to files. The Court found no error with the Board's interpretation that the October 2015 VA letter instructed Mr. Kriner that the regulations now required all claims to be submitted on a standard form and, therefore, informed him that the March 2015 letter was not an intent to file.

The Court further addressed VA's July 2015 letter (stating that VA had received an application for benefits) but found that the letter did not prove Board error as the letter did not acknowledge Mr. Kriner's March 2015 letter and did not intimate that VA received an intent to file. The Court also noted that the Board does not need to comment on every piece of evidence and that Mrs. Kriner had not explained how the July 2015 letter was relevant to the issue on appeal given that Mr. Kriner submitted letters in May 2015 and June 2015 requesting medical equipment.

In sum, the Court found that since Mr. Kriner failed to submit an intent to file and did not submit a claim before his death, the Court could not disturb the Board's conclusion that there was no pending claim at the time of Mr. Kriner's death.

In a concurring opinion, Judge Jaquith agreed with the ultimate result of denying Mrs. Kriner's claim for accrued benefits. However, Judge Jaquith disagreed with the holding that section 3.155(b)(1) restricts a claimant to submit an intent to file in one of the three enumerated methods. He emphasized a pro-veteran reading of section 3.155(b)(1), determined that "can" is a permissive term rather than a mandatory term, and cited language in adjacent sections of the regulation where VA used mandatory terms such as "must."

Judge Jaquith found that Mr. Kriner's March 2015 letter identified the claimant and the general benefit sought (noting claims for disability pension and aid and attendance) as required under the regulation; however, he found that Mrs. Kriner's claim in early 2016 seeking disability compensation for specific disabilities was a new claim that did not pursue the relief that Mr. Kriner sought in his March 2015 letter. Further, as Mrs. Kriner applied for accrued benefits based upon disability pension and aid and attendance in August 2016, which was more than a year after Mr. Kriner's March 2015 letter, Judge Jaquith found that to the extent that Mr. Kriner's March 2015 letter expressed a qualifying intent to file, no timely action was taken by him or Mrs. Kriner to complete the claim.

Amanda Purcell is an Attorney-Advisor at the Board of Veterans' Appeals.

Looking Beyond a Written Withdrawal of an Appeal

by Diego M. Pestana

Reporting on *Martinez v. McDonough*, 36 Vet. App. 320 (2023).

In *Martinez*, the Court answers a question previously left unanswered by its previous decision in *Hembree v. Wilson*, 33 Vet. App. 1 (2020). Namely, when, if ever, can post-withdrawal information raise questions about the validity of a veteran's written withdrawal of an appeal? *Martinez* holds that questions about a written withdrawal's validity can arise when evidence exists that "strikes at the very validity of the withdrawal." When the claimant or record reasonably raises a question about a withdrawal's validity, then the Board must address the issue by focusing on evidence that might cast doubt on the initial withdrawal's validity.

Army veteran Pablo Martinez, who had a 50% rating for post-traumatic stress disorder ("PTSD"), applied for total disability based on individual employability ("TDIU") in December 2007. After the Regional Office denied TDIU, Martinez filed a Notice of Disagreement with that denial and requested a hearing before a decision review officer.

On the day of his hearing, Martinez submitted a letter withdrawing his appeal and hearing for TDIU. The next day, VA sent Martinez a letter stating that it received his request to withdraw his appeal for TDIU. The VA letter also informed Martinez that if he did not intend to withdraw his TDIU claim, he should contact the VA immediately.

Martinez eventually obtained TDIU effective February 2010—the date on which the VA received Martinez's claim for increased PTSD rating. Martinez filed an NOD with the TDIU effective date and continued his appeals on that issue through the Board. He argued that the effective date of his TDIU should have been December 2007—the date of his initial TDIU application. His basis for that argument was that his letter withdrawing his TDIU appeal was invalid because he filed a new TDIU application just one month after his withdrawal letter. Martinez argued that his subsequent TDIU application showed that he had no intent to withdraw his TDIU appeal. Martinez maintained his position to the Court, where a panel consisting of Judges Allen, Meredith, and Falvey issued an opinion.

The Court began its analysis by reiterating the holdings from *Hembree* and its predecessor, *DeLisio v. Shinseki*, 25 Vet. App. 45 (2011). *DeLisio* holds that an oral withdrawal of an appeal must be "explicit, unambiguous, and done with full understanding of the consequences of such action on the part of the claimant." 25 Vet. App. at 57. *Hembree* holds that that standard does not apply to a written withdrawal but left open the question about whether any post-withdrawal information can call into question the validity of a withdrawal. The Court called *Martinez* to panel to answer that question.

In a decision authored by Judge Falvey, the Court held that post-withdrawal information can raise issues about the validity of a written withdrawal. The Court clarified that the focus should be on "whether the record reasonably suggests any issues that could have prevented the withdrawal from being valid in the first place." The Court reiterated that the VA must address the issue if it is raised by the claimant or if the evidence reasonably calls into question the validity of the withdrawal. But the Court also clarified that the Board need not "ferret out" the claimant's subjective understanding after the withdrawal—an argument the Court previously rejected in *Hembree*.

In Martinez's case, the Court affirmed the Board's determination that his subsequent TDIU application did not show that he intended to continue his

original TDIU application and appeal. The Court discussed how Martinez never responded to the VA letter informing him to immediately contact VA if he did not intend to withdraw his appeal. And, when Martinez did submit a new TDIU application in March 2010, he did not say anything about his previous withdrawal being invalid or unintentional.

Although the record contained evidence about Martinez's cognitive impairment, the Court pointed out that he never expressly raised the question of whether that impairment affected his TDIU withdrawal. Similarly, the Court discussed how the record did not suggest that Martinez failed to understand the consequences of his withdrawal because of his cognitive impairment; thus, the Court concluded that the record itself did not reasonably raise that issue. Finally, the Court rejected Martinez's argument based on fair process because he pointed to no authority supporting his contention that evidence of his cognitive impairment violated fair process.

Judge Allen dissented from the Court's decision. Although Judge Allen recognized much agreement between his opinion and the Court's decision, Judge Allen saw the Court's decision as too narrow. For Judge Allen, there is room for considering a claimant's subjective understanding when it comes to written withdrawals. Judge Allen opines that, under 38 U.S.C. § 7104(a), the Board must consider the full record, including when a claimant expressly argues that he or she did not understand the consequences of the withdrawal or when the record reasonably raises a question about the claimant's understanding. In addition, Judge Allen opined that the Board based its decision on a misapplication of *Hembree* because the Board refused to look beyond the four corners of Martinez's withdrawal letter. Thus, Judge Allen would have remanded the decision for the Board to correctly apply *Hembree*.

Ultimately, *Martinez* answers a question left open in *Hembree*: post-withdrawal information can raise questions about the validity of a written withdrawal of an appeal. If the claimant or the circumstances of the withdrawal reasonably raise a question about the withdrawal's validity, then the Board must address the issue. Exactly where the line is for determining when a claimant's understanding is relevant for the Board's consideration is possibly a question for the Court to clarify in a later decision.

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Court Finds it has the Authority Under All Writs Act to Stay an Appeal if the Stay Will Protect the Court's Prospective Jurisdiction

by Jessica Nestander

Reporting on *Purpose Built Families Foundation, Inc. v. McDonough,* 36 Vet. App. 345 (2023).

In *Purpose Built Families Foundation, Inc.* ("PBFF"), a panel of the U.S. Court of Appeals for Veterans Claims ("Court") comprised of Judges Greenberg, Allen, and Laurer determined that the Court has the authority to stay an administrative action under the All Writs Act ("AWA") when the stay protects the Court's prospective jurisdiction. While the Court determined it has the authority to issue a stay in this case, the Court ultimately denied PBFF's request for a stay because PBFF failed to demonstrate any likelihood of success on the merits of the case.

The Petitioner, PBFF, is a non-profit organization located in Broward County, Florida. It is the recipient of three grants from VA's Support Services for Veteran Families ("SSVF") program. SSVF grants are awarded to nonprofit organizations and consumer cooperatives to assist low-income veterans' families that are residing in or transitioning to permanent housing.

In November 2021, the VA Office of Business Oversight ("OBO") completed an audit of PBFF's grants and identified 276 questionable expenditures totaling $955,710.40. Based on the audit findings, the VA SSVF Program Office sent a letter to PBFF notifying PBFF that VA would terminate its SSVF grants in 7 days. PBFF filed suit in the U.S. District Court for the Southern District of Florida ("district court") requesting to enjoin VA from terminating the SSVF grants. The district court granted this relief and issued a temporary restraining order preventing VA from terminating the SSVF grants.

In May 2022, VA withdrew its termination letter and provided PBFF an opportunity to submit a written response to the November 2021 audit findings. VA informed PBFF that after review of the written responses, it would issue a final decision. VA then moved the district court to dismiss PBFF's cause of action. The district court granted VA's motion on the basis that PBFF's action was moot given the withdrawal of the termination notice. PBFF appealed this dismissal to the U.S. Court of Appeals for the Eleventh Circuit. At the time of this publication, this appeal is still pending.

In February 2023, OBO issued a revised audit in which it cleared 31 questionable costs, totaling $80,348.48. However, the bulk of the expenditures remained questionable. In March 2023, VA sent a second termination letter informing PBFF that the SSVF Program Office determined that PBFF had 1) violated the terms and conditions of the SSVF grants, 2) the noncompliance could not be remedied, and 3) termination would be effective 7 days after the date of the letter. The SSVF Program Office also informed PBFF that if it disagreed with the termination decision, it could appeal to the Board of Veterans' Appeals ("Board").

Prior to the termination of the grants, VA and PBFF entered into a voluntary agreement wherein VA agreed to temporarily stay the termination of the grants if PBFF appealed to the Board and sought an involuntary stay with the Board or the Court. In April 2023, PBFF filed an appeal with Board challenging the termination of the SSVF grants and a motion requesting stay of the termination. PBFF also filed a motion with the Court seeking a stay during the pendency of the litigation. Specifically, PBFF petitioned the Court to issue a Writ of Mandamus. Thus, PBFF had to demonstrate entitlement to the writ.

In June 2023, the Board submitted a declaration to the Court stating that the Board notified PBFF that the Board could not address the merits of the motion to stay the termination of the SSVF grants while the appeal of the SSVP Program Office's decision to terminate the grants was pending before the Board.

In its petition to the Court, PBFF argued that the Court has the authority to impose a stay of VA's termination of SSVF grants pending the completion of PBFF's appeal of the termination. The Court agreed.

Under 38 U.S.C. § 7252(a), the Court has exclusive jurisdiction to review decisions of the Board. In this case, the Court was unable to act pursuant to the authority outlined in section 7252(a) because PBFF's appeal of the termination decision was still pending before the Board. However, the Court found that under the AWA, courts may issue all writs necessary in aid of their respective jurisdiction, to include in the aid of a court's prospective jurisdiction. Ultimately, the Court was persuaded by PBFF's argument that if the Court did not issue a stay, PBFF would lose its funding and cease to exist as an organization. The Court determined that the likely dissolution of PBFF absent a stay would undermine the Court's prospective jurisdiction over the appeal of the termination of PBBF's grants.

The Court was unpersuaded by VA's argument that the Court's authority to consider a stay under the AWA goes against Congress's intent for judicial review of VA action. The Court determined that the AWA is not expanding the Court's jurisdiction. PBFF did not ask the Court to review the merits of the appeal. Instead, a stay would allow PBFF to continue to operate throughout the course of the litigation, to include any future appeal before the Court.

Although the Court determined that it had the authority to issue a stay in this case, the Court

determined PBFF was not entitled to the relief requested. In making this determination, the Court adopted a five-part test to evaluate whether it should grant PBFF's requested relief. The five-part test includes: (1) lack of an adequate alternative to obtain desired relief; (2) likelihood of success on the merits; (3) irreparable harm in the absence of such relief; (4) effect on VA in granting the stay; and (5) public interest in granting the relief.

The Court determined that four out of the five criteria favored PBFF. First, PBFF did not have an adequate alternative to obtain the desired relief, as the Board declined to address PBFF's petition to issue a stay. Second, VA would experience limited harm if the Court decided to grant the stay, whereas PBFF would likely cease operations and PBFF employees would lose their jobs.

However, the Court concluded that PBFF "utterly failed" to provide evidence that it would prevail in the administrative appeal challenging the termination of the SSVF grants. First, PBFF argued that the termination was improper, stating that the director of the SSVP Program Office did not have the authority to terminate the grant, VA pre-approved PBFF's expenses, and VA inappropriately accepted the audit of PBFF's expenses without responding to PBFF's response to the audit. In responding to this argument, the Court noted that the PBFF failed to cite to legal authority to support its contentions. Additionally, PBFF did not provide evidence of pre-approval. The Court highlighted the fact that PBFF failed to supply the Court with its "voluminous response" to the audit of its expenses, thus failing to provide evidence of the likelihood of success on appeal.

Second, PBFF argued that the termination violated several Federal regulations and VA policy. Essentially, PBFF argued that termination could not be the first course of corrective action and cited to several Federal regulations in support of this argument. The Court analyzed each regulation and determined that termination can be a first course of corrective action when it is determined that additional actions will not remedy the noncompliance.

The Court acknowledged the low threshold for showing a likelihood of success on the merits. However, in this case PBFF failed to identify evidence to support its conclusions or demonstrate to the Court that it was likely to succeed on the merits of its appeal before the Board. Despite the Court's authority to provide PBFF the requested relief, the Court denied PBFF's petition for extraordinary relief and its motion for a stay pending appeal.

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The Intersection of the VA Fiduciary Program and Writs of Mandamus

by David R. Seaton

Reporting on *Shorette v. McDonough*, 36 Vet. App. 297 (2023).

In *Shorette v. McDonough*, the U.S. Court of Appeals for Veterans Claims ("Court") considered the standing of a veteran's state-appointed guardian to seek a writ of mandamus on the veteran's behalf against the Secretary of the Department of Veterans Affairs ("VA") in order to replace a VA-appointed fiduciary of VA benefits with the state-appointed guardian. The Court ruled that the state-appointed guardian had standing to seek a writ of mandamus solely for the purpose of enforcing a timely notice of disagreement ("NOD"), but the Court otherwise declined to grant the state-appointed guardian any further relief. *Shorette* demonstrates a continued willingness of the Court to exercise its jurisdiction to provide extraordinary relief (including issuing writs of mandamus), but it also reveals a strong preference in favor of restraint when determining the actual relief to provide petitioners.

After 26 years of service in the United States Air Force, Charles Shorette retired in 2001 as a Chief Master Sergeant. After separating from service, Mr. Shorette was awarded VA monthly compensation (approximately $3,500.00), which included an

allowance for his spouse Karen Shorette. Unfortunately, Mr. Shorette developed dementia and was no longer able to care for himself. Ms. Shorette was appointed as fiduciary of Mr. Shorette's VA funds. Additionally, the State of Indiana appointed Ms. Shorette guardian over Mr. Shorette and his estate. After receiving a complaint that Ms. Shorette was allegedly misusing Mr. Shorette's VA funds, VA removed Ms. Shorette as VA fiduciary and appointed a new one. VA memorialized this determination in two letters, one mailed to Mr. Shorette, the other to Ms. Shorette, dated November 1, 2018. On November 29, 2018, an attorney acting on behalf of the guardianship demanded an explanation for the removal of Ms. Shorette as Mr. Shorette's VA fiduciary as well as the restoration of Ms. Shorette as Mr. Shorette's VA fiduciary. Several years later, VA determined that Ms. Shorette had not misused Mr. Shorette's funds, but VA refused to reinstate Ms. Shorette as Mr. Shorette's fiduciary. On February 28, 2022, Ms. Shorette was informed that she would not be reinstated as Mr. Shorette's fiduciary regardless of the finding that she had not misused Mr. Shorette's funds. Ms. Shorette submitted a document which characterized itself as an appeal. The Court interpreted Ms. Shorette's "appeal" as a petition for extraordinary relief and exercised jurisdiction accordingly.

Ms. Shorette argued that VA should be compelled to issue a written decision offering a rationale for refusing to reinstate Ms. Shorette as Mr. Shorette's VA fiduciary. Additionally, Ms. Shorette argued that VA should be enjoined from altering Mr. Shorette's award pending the outcome of the requested litigation.

VA argued that Ms. Shorette did not, as a former fiduciary, have standing to challenge VA's determination. VA further argued that – even to the extent that Ms. Shorette was acting on Mr. Shorette's behalf – Mr. Shorette did not have a right to a specific VA fiduciary. Finally, VA argued that such a determination would not lead to a decision by the Board of Veterans' Appeals ("Board"), thus depriving the Court of jurisdiction.
Before analyzing the parties' arguments, the Court reviewed its jurisdiction and the pertinent provisions of the VA fiduciary program.

The Court has the authority to issue extraordinary relief pursuant to the All Writs Act. 28 U.S.C. § 1651. Nevertheless, the All Writs Act does not provide an independent basis of jurisdiction for the Court; rather the Court can issue extraordinary relief for the purposes of correcting an action that is within the scope of the Court's jurisdiction. The Court has the authority to review decisions of the Board. 38 U.S.C. § 7252. The Board has the authority, on behalf of the Secretary of VA, to determine all questions of fact and law regarding VA benefits. 38 U.S.C. §§ 511, 7104. Thus, the Court concluded that its jurisdiction to issue extraordinary relief in this case depended on: (a) whether such relief could lead to a Board decision; and (b) whether the case involved VA benefits. The Court also noted that jurisdiction also requires the petitioner to prove an injury in fact in order to demonstrate standing before the Court. Finally, the Court noted that extraordinary relief is, well, extraordinary and requires the following elements to be met: "(1) [t]he petitioner must lack adequate alternative means to attain the desired relief, thus ensuring that the writ is not used as a substitute for an appeal; (2) the petitioner must demonstrate a clear and indisputable right to the writ; and (3) the Court must be convinced, given the circumstances, that issuance of the writ is warranted."

The Secretary of VA has the authority to appoint a fiduciary to manage VA benefits whenever the Secretary finds that it would be in the best interests of the beneficiary. 38 U.S.C. § 5502. The selection of a fiduciary affects VA benefits and, to the extent that a veteran is unhappy with the selection process, a veteran may appeal the selection of a fiduciary. *Freeman v. Shinseki*, 24 Vet. App. 404 (2011).

Before turning to the Court's analysis, let us briefly review VA's appellate frameworks. There are two VA appellate frameworks: (1) the legacy appellate framework, which applies to all appeals filed before February 19, 2019 subject to the caveat that appellants may opt into the modernized review system created by the Appeals Modernization Act; and (2) the modernized review system, which applies to appeals filed on or after February 19, 2019. 38 C.F.R. § 19.2. If an appellant is unhappy with a determination of an agency of original jurisdiction

("AOJ") (such as a Regional Office ("RO"), VA Medical Center ("VAMC"), or in this case the VA Fiduciary Hub under the legacy system), then the appellant must file a timely NOD. 38 C.F.R. § 19.20. If the AOJ has issued a standard form for the matter being appealed, then the standard form must be used. 38 C.F.R. § 19.21(a). Otherwise, the NOD need only be a clear statement identifying the matter being appealed. 38 C.F.R. § 19.21(b). The AOJ will respond by reexamining the issue being appealed, and, to the extent that the requested relief is not granted, the AOJ will, thereafter, issue a statement of the case (SOC). 38 C.F.R. § 19.26. Then, the appellant must file a timely substantive appeal to the Board to perfect the appeal. 38 C.F.R. § 19.22. This latter requirement, however, may be waived by VA. *Percy v. Shinseki*, 23 Vet. App. 37 (2009). Under the modern appellate framework, the appellant simply files a timely NOD. 38 C.F.R. §§ 20.201-20.204. To the extent that the appellant is unhappy with the Board's decision in either appellate framework, then the appellant may appeal the matter to the Court. 38 U.S.C. § 7252.

Turning back to *Shorette*, the Court, citing to *Freeman*, found that Mr. Shorette had standing to challenge the appointment of a fiduciary in his own right. Both Ms. Shorette and VA agreed that Ms. Shorette, as the legally appointed guardian of Mr. Shorette, had the authority to enforce Mr. Shorette's rights on his behalf. The Court concluded that Ms. Shorette had standing to seek extraordinary relief on Mr. Shorette's behalf.

The Court then turned to whether or not it should grant the requested extraordinary relief. The Court ultimately determined that the November 29, 2018, letter – in which an attorney acting on behalf of the guardianship of Mr. Shorette demanded an explanation for the removal of Ms. Shorette as VA fiduciary as well as the restoration of Ms. Shorette as VA fiduciary – constituted a timely NOD. Consequently, the Court ordered that VA issue an SOC responsive to the November 29, 2018 NOD so that Ms. Shorette could perfect a substantive appeal to the Board. It should be noted that the Court's reasoning was based on the fact that the determination being appealed was issued prior to February 19, 2019 and thus was subject to the legacy appellate framework. 38 C.F.R. § 19.2. If a case involving a similar fact pattern to this one were to arise today, it would fall under the modernized review system and we would expect the finding that a timely NOD was filed to result in the Court directing the Board to place the matter on its docket. 38 C.F.R. §§ 19.2, 20.201-20.204. Despite ordering VA to issue an SOC, the Court declined to grant Ms. Shorette her requested injunction, finding that she had failed to demonstrate she was entitled to injunctive relief. Ms. Shorette filed a motion for reconsideration regarding the specific relief the Court denied her, and the Court denied the motion. *Shorette v. McDonough*, No. 22-4698 (Vet. App. Oct. 2, 2023) (nonprecedential Order). On November 21, 2023, she filed a Notice to Appeal to the Federal Circuit.

In *Shorette*, the Court clearly demonstrated that it is willing to continue to exercise jurisdiction over writs of mandamus and other forms of extraordinary relief, but the actual relief provided when the Court exercises such jurisdiction will be narrowly tailored. The Veterans Court determined that state-appointed guardians can seek extraordinary relief on a veteran's behalf in order to challenge the appointment of a fiduciary controlling the veteran's VA benefits, but, so far, only for the purposes of enforcing an NOD. It is unclear at this time how much further, if at all, the Court will continue in this direction.

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What Does "Any" Administrative Review Option Mean Under the AMA?

by Devin deBruyn

Reporting on Terry v. McDonough, No. 20-7251 (Vet. App. Oct. 19, 2023).

The main issue before the U.S. Court of Appeals for Veterans Claims ("Court") in Terry v. McDonough

was whether the Appeals Modernization Act's ("AMA") provision of "any" review option means a claimant is limited to choosing only a single option or whether the claimant can make multiple, successive selections of different options in response to the same rating decision. The Court also addressed whether the issue of service connection for basal cell carcinoma ("BCC") was reasonably raised by the record and, if so, whether the Board of Veterans' Appeals ("Board") erred in failing to address this issue.

In August 2016, U.S. Air Force veteran, Mr. William Terry, filed a claim seeking entitlement to service connection for obstructive sleep apnea ("OSA") and BCC. In June 2017, the agency of original jurisdiction ("AOJ"), issued a rating decision denying the claim. Mr. Terry appealed this decision by way of a Notice of Disagreement ("NOD") filed timely in June 2018.

In February 2019, Mr. Terry opted into the AMA review system by way of the Rapid Appeals Modernization Program ("RAMP") higher-level review lane ("HLR"). In April 2019, the AOJ issued a HLR rating decision denying entitlement to service connection for OSA and BCC. In June 2019, Mr. Terry filed a Supplemental Claim seeking review of the issue of service connection for OSA from the June 2017 rating decision.

In September 2019, the AOJ issued a rating decision that continued to deny service connection for OSA because new and relevant evidence had not been submitted to warrant readjudication of the issue.

In April 2020, Mr. Terry filed an appeal to the Board by way of an AMA NOD and selected a Direct review. Importantly, on the NOD form he identified the issues on appeal as BCC and OSA and the April 2019 HLR rating decision as the decision he intended to appeal.

In June 2020, the Board issued its decision on the matter. The Board did not accept Mr. Terry's AMA NOD as an appeal of the April 2019 HLR decision, because, as it explained, the AOJ had issued a more recent rating decision in September 2019. As a result, the Board construed Mr. Terry's AMA NOD as an appeal of the September 2019 rating decision. Because the Board found that the September 2019 decision was the one on appeal, the Board addressed the issue from that decision, which concerned the receipt of new and relevant evidence, not the underlying merits of the service connection claim. This appeal to the Court followed.

The relevant statute is 38 U.S.C. § 5104C, which provides a claimant with several administrative review options in the AMA system after the AOJ issues a decision. Those options include HLR, Supplemental Claim, or NOD.

Here, Mr. Terry selected three different review options in succession: HLR in February 2019, then Supplemental Claim in June 2019, and then AMA NOD in April 2020. The Board took the view that his April 2020 AMA NOD was only effective as to the September 2019 decision issued in response to the most recent review option, rather than the April 2019 decision.

The Court began its analysis by focusing on the statute's language allowing a claimant to take "any" of the available review options. 38 U.S.C. § 5104C(a)(1). The Court highlighted that the word "any" carries an "expansive meaning," that when viewed in context, evinces Congress's intent that a claimant may take "any or all" of the listed review options. The Court noted that the statute lists the review options without a disjunctive "or," which if included would suggest only one option could be taken.

The Court also emphasized that the statute provides only one limitation: the review option must be used within 1 year of the rating decision. The fact that the statute included such restriction indicates that Congress could have added more restrictions if it wanted to, such as limiting a claimant to only a single

review option. Congress, however, did not include such a restriction, which the Court inferred was an intentional omission.

Continuing, the Court pointed to subsection (a)(2)(A) which, in essence, places a prohibition on using more than one review option at the same time. The Court reasoned that if a claimant was limited to choosing only one review option on a claim, as the VA argued, then there would be no need for the language barring use of multiple options at the same time. In addition, the Court looked to subsection (a)(2)(B), which says there is no restriction on taking "any" of the review options "in succession." If the statute barred a claimant from choosing multiple options on a claim, there would be no need for the statute to specify that review options may be used "in succession."

When read in its entirety, the Court found that the plain and unambiguous language of 38 U.S.C. § 5104C(a) allowed a claimant to choose a second review option so long as it was made within one year of the rating decision and the second review option was not taken at the same time as another option. Summed up, the Court held that "subsection 5104C(a) provides that a claimant may file more than one administrative review request within 1 year of an initial AOJ decision on a claim, so long as those administrative reviews do not run concurrently." Because of this holding, the Court declared invalid that part of the VA's corresponding regulation found at 38 C.F.R. § 3.2500(a)(1), which used the word "one" instead of "any," and as a result, conflicted with the Court's interpretation of 5104C.

Applied to Mr. Terry's case, the Court explained that his April 2020 AMA NOD constituted a timely appeal of the April 2019 HLR rating decision, which adjudicated the issues of entitlement to service connection for OSA and BCC. On this point, the Court observed that the AMA NOD specifically identified the April 2019 rating decision as the one to appeal; it was filed within one year of the April 2019 decision; and the AMA NOD was not taken concurrently with any other review option. As a result, the Board erred by construing the AMA NOD as an appeal of the September 2019 decision. Accordingly, the Court found that the proper issues before the Board were the merits of the service connection claims stemming from the April 2019 HLR decision, and not the issue regarding new and relevant evidence that had been adjudicated in the September 2019 decision on the supplemental claim.

The Court also remanded the issue of entitlement to service connection for BCC due to radiation exposure. Concerning this, the Court found that the record reasonably raised a theory of entitlement based on radiation exposure pursuant to 38 C.F.R. § 3.311 and, as a result, the Board erred by failing to address this theory of entitlement even though Mr. Terry did not argue this theory to the VA.

The Court pointed to evidence of record establishing that BCC is a type of skin cancer, skin cancer is a radiogenic disease under 38 C.F.R. § 3.311, Mr. Terry did not develop BCC until many years after service, 38 C.F.R. § 3.311 applies where skin cancer manifests five years or more after exposure, and Mr. Terry's military records included documentation showing that he was exposed to ionizing radiation during active service. Because the Board did not discuss this evidence and did not discuss entitlement to service connection for BCC under 38 C.F.R. § 3.311, remand was necessary to consider this theory, which was reasonably raised by the record. Because this theory was reasonably raised by the record, the Board was required to address it even though Mr. Terry did not specifically raise this theory to the VA.

In November 2023, VA filed a Motion for Full Court Review regarding the Court's decision on the issue of administrative review options under 38 U.S.C. § 5104C. VA asked the Court to revisit the question en banc and argued that the correct interpretation of this statute is "a question of exceptional importance." On December 5, 2023, the Court issued an en banc nonprecedential Order denying the VA's motion, finding that VA had not shown that the question was

of exceptional importance or that en banc review was necessary to ensure uniformity in the Court's decisions.

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Till Death Does Us Part: Overcharges and Underpayments Resulting from VA's Use of Calculative Spreadsheets

by Anna Kapellan

We need to defend the interests of those whom we've never met and never will.
– Jeffrey D. Sachs

The verb "excel" means "to be exceptionally good at or proficient in an activity or subject." Therefore, it is hardly surprising that Microsoft named its famous spreadsheet program released in 1985 "Excel," making its name sound as reliable as the program proved to be popular. However, while Excel surely enables users to swiftly calculate inputted data by using spreadsheet formulas, any AI program – be it modern or half-a-century old, like Excel – requires, mathematically speaking, calibration or, speaking in terms of an Excel user, the selection of proper formulas to ensure that the information factored into and processed by a spreadsheet would actually excel at what it does, rather than foul things up.

If these threshold calibration steps are not taken, the laws of arithmetic parts ways with Excel because Excel skips critical steps by ignoring a portion of the fed data. Once that happens, the strength of Excel quickly transforms into its liability because the people who use Excel spreadsheets are often not those who calibrate these spreadsheets. Indeed, the users tend to blindly rely on results obtained from Excel instead of relying on their own common sense. This concept is known in law of negligence as that of "human error" and most frequently used in aviation cases when pilots continue to rely on odd information they receive from airplane computers even if they understand, based on their common sense, that this information could not be correct, *i.e.*, they elect to trust AI more than themselves, which is always a dangerous proposition, as it was illustrated in the air crash near Cali, Colombia, when the pilots undoubtedly knew that "something" was off but still elected to trust the inexplicable results produced by the plane's autopilot (which was producing solutions based on incorrectly entered data).

If such a transformation from an AI-based advantage to liability takes place in a financial setting, e.g., in disbursements of VA monetary benefits, this liability becomes a loss to taxpayers or to VA beneficiaries. Worse over, since VA has used Excel as broadly and, unfortunately, as blindly, without making even a quick check of what the Excel-produced results suggest, the errors have stopped being once-in-a-blue-moon exceptions years ago and, therefore, warrant a closer look.

VA's reliance on Excel is understandable, plus easily justified, because each VA regional office has to conduct hundreds – if not thousands – of financial calculations per day, and checking the outcome of each Excel calculation would be as pointless as it would be unrealistic. That said, VA's blind reliance on Excel, coupled with unfortunately the not infrequent failure to calibrate its Excel spreadsheets carefully (or to create different spreadsheets to be used for different scenarios) has resulted in a stream of errors that flows unnoticed or noticed but ignored, being an odd manifestation of Plato's "greater good for a greater amount of people" principle. In fact, VA admits that it has become so comfortable with its odd-version-of-Plato approach that VA unabashedly states in both its Appeal Notification Letters and its Statements of Case that its Excel spreadsheets are: (a) used to calculate payments to beneficiaries (and overpayments charged); but (b) still calibrated based on

a presumption that each month of a calendar year contains only 30 days.

However, since a calendar year has 12 months, seven of which have 31 days and one has either 28 or 29 days, it is self-evident that the RO's method results in a loss of four days per annum during a leap year and five days during a non-leap year. Further, while it might indeed be tempting to presume that a few days difference is a too minor a matter to cause concern, the reality of finance and mathematics is such that minor discrepancies have a predictable tendency to add up once they enter an economy of scale. To provide a couple of easy illustrations in dollars and cents, the reader is invited to keep in mind that, as of now, VA pays to a veteran having a 100 percent rating, but no dependents and no special monthly compensation (SMC), $3,621.95 per month, while a VA compensation for a 10 percent rating is $165.92 per month. Thus, as to just one overpaid incarcerated veteran having a 100 percent rating and serving a felony-conviction-based term, the 60th day of which falls in the beginning of a 31-day month, e.g., on October 3, of a non-leap year, VA's election to ignore the simple and proper annualization step results in an overcharge of $71.09 (($3,621.95 – $165.92) / 30 x (30 – 3) – ($3,621.95 – $165.92) x 12 / 365 x (31 – 3)), *i.e.*, a small fortune to an incarcerated person who typically earns from $1 to $3 per diem working at his/her prison. And if the same approach is used to a VA beneficiary who has a 100 percent combined rating and executes three unit training assembly (UTAs, often referred to as drill weekends) during, e.g., every 31-day month of a year (January, March, May, July, August, October, and December), this overcharge becomes $520.97 (7 x ($3,621.95 / 30 x (30 – 3) – ($3,621.95 x 12 / 365 x (31 – 3))), *i.e.*, it is anything but a "small-potato" amount, especially for someone who covers all his/her expenses out of VA's $3,621.95 per month payment.

However, unfortunately, VA still recoups the debts arising from such overcharges without a qualm, and many veterans simply do not contest the amounts of these charges because they either cannot imagine that VA was *de facto* increasing their per-diem debts by ignoring the fact that VA's Excel spreadsheets are poorly calibrated or because many persons, veterans included, are not particularly great at mathematics.

Moreover, while the discrepancies in VA charges to incarcerated, UTA-executing, and other veterans whose overcharges are as unfortunate as they are unnecessary (since these errors could be cured by two simple steps of, first, annualization of monthly amounts and then division by 365 or 366 days per year), VA's calculations of overpayments charged to widowed/widowered VA pensioners by utilizing generic Excel spreadsheets comes close to being indefensible: because such veterans often represent the most helpless segment of VA beneficiaries and, more often than not, their circumstances require either customized Excel spreadsheets or old-fashion calculation by hand.

And yet, this segment ends up being harmed by VA the most, although it appears substantially certain VA causes harm without any malicious intent. That said, the lack of VA's malice or VA's failure to realize the magnitude of the damage it causes by utilizing improperly calibrated Excel spreadsheets does not make the financial injury of these most defenseless among the veterans any less severe.

Admittedly, VA's failure to realize the magnitude of the injury it inflicts is understandable since VA's pension system is uniquely positioned to trip Excel calibrators because it has two variables that, like the two fish in the zodiac symbol Pisces, constantly move in two diametrically opposite directions, *i.e.*, one variable *reduces* the amount of a VA pensioner's pay, while the other one *increases* that amount. At the core of both these processes lies each veteran's applicable maximum annual pension rate (MAPR), that is, the MAPR applicable to the veteran's and his/her spouse's financial and health circumstances.

The process, often mis-defined as consisting of two steps, actually consists of three steps. At its outset, the process requires tallying up the amounts of all

sources of the veteran's non-VA family income, *i.e.*, his/her and the veteran's spouse's wages, their Social Security Administration (SSA) benefits, withdrawals from their 401K plans, monthly retirement pays, plus disbursements of annuities, the income made from sales of investments or assets, etc. Once the annual amount of such income is determined, the next step is to have their combined countable income downwardly adjusted based on the veteran's and his/her spouse's unreimbursed medical expenses (such as out-of-pocket payments of health insurance and Medicare premiums, copayments for doctor visits and lab work, copayments or fully-out-of-pocket payments for prescription and over-the-counter medications, etc.). However, the downward adjustment of the veteran's family countable income by the amount of his/her unreimbursed family's medical expenses is not done on a dollar-for-dollar basis; rather, such expenses are first reduced by five percent of the MAPR applicable to the veteran's circumstances and, only after such a reduction takes place, the amount of so-reduced unreimbursed medical expenses is deducted from the tallied-up family income.

Once the income is so reduced, the third step is taken: the veteran's reduced amount of family income is deducted from his/her MAPR to produce the amount of the veteran's annual pension and then the difference is divided by 12 to be disbursed in 12 equal monthly installments (often confused as a "monthly" VA pension, even though such an incremental disbursement is done merely for VA's and the veterans' convenience since there is no such a concept in VA law as a "monthly" pension).

To illustrate, if the yearly MAPR for a veteran and his/her dependent is $10,000, and he/she and his/her dependent made only $4,000 in "countable income," that is, their tallied-up income of all sorts, then the veteran's pension would be $6,000 ($10,000 – $4,000) per year or $500 ($6,000 / 12) per month. However, if the veteran reports that he and his/her spouse spend $2,000 out of pocket on medical expenses, then the veteran would be entitled to have his/her $6,000 pension upwardly adjusted (or, alternatively, his/her MAPR downwardly adjusted, since these are different definitions of the same mathematical function) for the difference between $2,000 and five percent of his/her MAPR. Given that five percent of the hypothetically selected $10,000 MAPR is $500 ($10,000 / 100 x 5), the upward adjustment of the unreimbursed medical expenses would be $1,500 ($2,000 – $500). Accordingly, the veteran's pension would increase from $6,000 to $7,500 ($6.000 + $1,500) per annum because (s)he would be expected to not only support his/her spouse but also to cover their joint unreimbursed medical expenses. Hence, VA's Excel spreadsheets are calibrated for pension calculations and perform these multi-step tasks with a near-exemplary precision but, unfortunately, only until such a veteran-pensioner becomes a widow/widower.

Once a tragic development like this takes place, the clear Excel picture becomes very murky very fast because VA's Excel spreadsheets calibrated for calculations of overpayments are so structured that – upon a passing of the spouse of a veteran-pensioner – VA ends up being very well equipped to determine an overpayment arising only from two scenarios: (a) the lack of any change in the family income or the family's unreimbursed medical expenses (*i.e.*, the veteran was and remained the sole person in the family with a non-VA income and unreimbursed medical expenses); (b) the veteran's family income decreases slightly due to the veteran being the main bread-winner in the family in terms of the non-VA income, while the veteran's unreimbursed family medical expenses substantially reduce because the now-deceased spouse's health was far more poor than that of the veteran. Having read this mouthful of a precursor though the Piscean prism of variables affecting the VA pension scheme, the reader should have no problem guessing the scenario where things go awry: this scenario occurs if the unreimbursed medical expenses of the now-deceased spouse were markedly lower than those of the veteran while the deceased

spouse's non-VA income was markedly higher than that of the veteran.

Since, at this point, definitions become a mouthful, any reference to sample numbers becomes easier. Thus, the reader is invited to consider the following hypothetical amounts. In the example provided *supra*, the hypothetical yearly MAPR for a veteran and his/her dependent spouse was $10,000, and this veteran and his/her spouse were making $4,000 in countable annual family income. Let's now presume that the veteran made only $1,000 of that income, but his/her spouse made the $3,000 portion. In addition, let's also presume that the veteran and his/her spouse had $2,000 in unreimbursed medical expenses, but only $1,450 of these expenses were due to the veteran's poor health and $550 were due to his/her spouse's unreimbursed medical expenses. Thus, while both the veteran and his/her spouse were alive, these niceties about who earned what and whose health was poorer did not matter since the veteran was entitled to, as also calculated *supra*, a $7,500 VA pension per year.

But what happens if – in the hypothesis refined as detailed above – this veteran's spouse passes away, and both the spouse's $3,000 monthly income and his/her $550 in unreimbursed medical expenses disappear, plus the veteran's MAPR changes to that applicable to a pensioner with no dependents which, for the purposes of this supplemental example, is presumed to be $9,000 per annum. Upon such developments, the veteran's $1,000 income would be reduced by his/her unreimbursed medical expenses of $1,450 (that, prior to the aforesaid reduction, should be downwardly adjusted by five percent of his/her new $9,000 MAPR). Because five percent of $9,000 is $450 ($9,000 / 100 x 5), the veteran's unreimbursed medical expenses factored into VA's calculation are to transform into $1,000 ($1,450 – $450). Therefore, his/her income would become $0 ($1,000 - $1,000), meaning that the veteran's VA pension necessarily becomes $9,000 ($9,000 – $0), *i.e.*, $1,500 ($9,000- $7,500) *higher* than what his/her VA pension was before the death of his/her spouse. In other words, such a veteran can only be *under*paid in the event VA continues paying him/her the same amount of VA pension that VA had been paying to the veteran before the veteran's spouse passed away.

Simply put, such a veteran cannot be overpaid by VA based on his/her failure to timely report the death of his/her spouse. In other words, if this veteran fails to timely report the death of his/her spouse to VA, (s)he begins to receive less – rather than more – in comparison to what he/she is eligible and entitled to receive by law. Or, to put it in mathematical terms, such a veteran's "overpayment" is "minus $1,500" since an *over*payment of "minus $1500" is the same as an *under*payment of $1,500. However, VA's calibration of Excel spreadsheets that are used for calculation of overpayments of widowed/widowered veterans who are VA pensioners is such that the spreadsheets – deriving from the unfortunate mindsets of those persons who calibrated these Excels spreadsheets – cannot "imagine" that a veteran might be better off upon the passing of the veteran's spouse, financially speaking. And, since Excel is a primitive version of AI and is a *calculative* program using formulas and having neither human common sense nor any legal analytical reasoning, VA's Excel "mindset" is such that it *necessarily* has to charge a VA pensioner with an overpayment unless he/she informs VA of his/her spouse's death during the month of the death, plus VA actually adjusts the amount of his/her pension paid by VA during this month of the spouse's death, *i.e.*, in time to notify the Department of Treasury of the change in the amount of the veteran's monthly installment. And, because the "mindset" of VA's Excel spreadsheets is such that it can "think" only in terms of an overpayment, the spreadsheet simply drops the minus sign (associated with a result that reveals an underpayment), and transforms this underpayment into an *over*payment. In other words, in the above-provided example, a VA spreadsheet – instead of stating that the veteran who failed to report his/her spouse's death for a year was underpaid $1,500 would state that he/she was

overpaid by $1,500 without providing even a tiny clue to VA officers utilizing VA's Excel spreadsheets that a mistake was made.

Correspondingly, VA officers reading hundreds – if not thousands – of Excel results daily, simply do not wonder if Excel is wrong, and they should perform a recalculation by hand to ensure that this $1,500 is a true overpayment reflective of the veterans' debts to VA, rather than misstated underpayments reflecting VA's debt to veterans. Thus, VA officers, overwhelmed and not analytical in terms of knowing when a recalculation by hand should be conducted (or just lacking mathematical savvy), mechanically enter the *under*payment numbers generated by VA Excel spreadsheets into regional offices' reports to the Debt Management Center (DMC).

With that, the DMC issues such veterans demand letters quoting these "overpaid" amounts as debts and, if the Committee on Waivers and Compromises (COWC) denies such veterans' claims for waivers of the recoupments of these meritless "debts," then the DMC begins withholding these veterans' paltry monthly VA pensions toward recoupment of these "debts."

A reader should really pause for a moment to fully appreciate the blood-curling cruelty of this situation. Indeed, the reader should imagine, just for a moment, that VA removed the deceased spouse from the VA account of such a hypothetical veteran about two years after his/her spouse's death, and – instead of paying the veteran $3,000 ($1,500 x 2) that VA actually owed to him/her during these two years – VA charged that veteran with a $3,000 debt. That means the DMC starts withholding from his/her VA pension this $3,000 "indebtedness," *i.e.*, the amount equal to one-third of the Veteran's $9,000 MAPR. Such a veteran then ends up short-changed by VA *twice*: first he/she was wrongly underpaid $3,000 and then $3,000 were wrongly withheld from him/her, meaning that VA's failure to properly calibrate its Excel spreadsheets caused the veteran $6,000 loss.

Therefore, after two years of being underpaid, this veteran would have his/her VA benefits withheld for one-third of a year, that is, four months. The reader, therefore, is invited to imagine his/her own reaction in a scenario where, being entitled to, e.g., a salary raise during a period of two years, the reader would end up having his/her salary withheld for four months instead of being paid the raise he/she should have received during those two years. And, if such veterans appeal (usually unable to even articulate their vague understanding of what went wrong with any degree of clarity because they rarely have the mathematical savvy to understand how to calculate the amounts of their VA pensions), the Board – regretfully – often f to conduct its own calculations and merely remands these claims to VA for an "audit" without explaining what this audit should be about and how it should be performed. Hence, it is not surprising that, upon the Board's remand, VA uses the same Excel spreadsheets to conduct the same calculations yielding the same mistakes. And, if these veterans re-appeal, then – having faith in two rounds of VA's calculations, the Board dismisses these challenges as wholly meritless. *A fortiori*, if these claims somehow reach the Court, the Court does not conduct any calculations on its own based on the Court's duty to remand all fact-finding matters to the Board. And while it is debatable whether the Court's election to determine that two plus two is four (or to conduct any other calculation based on numbers that cannot be disputed) qualifies as an impermissible fact-finding, the Court, thus far, has not indicated any appetite for putting an accountant's hat on as part of wearing its adjudicator's hat. Therefore, for all practical purposes, the veterans placed in such unfortunate circumstances remain defenseless.

VA's failure to address this oversight both adds insult to injury and literally adds injury to injury because the widowed/widowered veterans who lost their life-long partners end up going through both the emotional grief of their loss and, to top it off, become saddled with meritless debts while being underpaid, battling old age, and dire diseases, plus

being terrified of being "too vocal" and offending the system they perceive as their financial lifeline.

Thus, short of VA, the Board, or the Court, there is no other candidate for being a savior or knight in shining armor who might save these beneficiaries from very real financial woes. Two and a half millennia ago, after being born into slavery and then owned, in sequence, by two "masters" before he was granted freedom for his remarkable intelligence, Aesop observed, "the injury we do and the one we suffer are not weighted on the same scale." Perhaps it is time for VA, the Board, and the Court to put the injuries of widowed/widowered VA pensioners -- that is, the most defenseless VA beneficiaries of them all -- on at least an equal, if not on a preferential scale, to finally recalibrate (or directly recalibrate) VA's Excel spreadsheets because spreadsheets do indeed save time, and time is money. But, here, the money is *other* people's money, and this money should be protected by VA through measures tailored based on Kantian, rather than Plato's, philosophy, *i.e.*, on the premise that each human being's welfare should be treated as both the means and ends in themselves.

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