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CAVC Bar: Panel on Professionalism

by Morgan MacIsaac-Bykowski

On April 27, 2023, the Court of Appeals for Veterans Claims hosted a CAVC Bar panel presentation where John Juergensen of Bergmann & Moore, Sonia Shah Mezei of the Court's Central Legal Staff ("CLS"), and Thomas Barnes of VA's Office of General Counsel ("OGC") joined together to discuss professionalism.

John began the conversation by noting that the CAVC Bar is a small "close knit" community compared to other bar associations, and it has always been one filled with "mutual respect and congeniality." However, there has been a recent shift. The goal of this panel discussion was to address this shift and highlight the importance of professionalism.

As Sonia stated, every communication between attorneys is an "opportunity . . . to build a relationship with opposing counsel," which can be especially helpful in our niche area of law where there is a relatively small number of practitioners. Thomas shared his personal opinion that "civility should be the cornerstone of how we behave" and that we need to keep in mind that we all have the same end goal: helping veterans in the best way we can.

John asked Sonia if she has been a part of any conferences that have "gotten out of hand." She said that while that "means different things to different people," she has seen attorneys become agitated, particularly when the parties reach a stalemate. Sonia reminded the audience that the purpose of the conferences is not just to rehash the arguments made in the Statement of the Issues ("SOI"), but to

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talk about the issues raised and above all else, *listen*. She said that when the parties are truly listening, the outcomes are often far better. Thomas offered that OGC is always willing to keep the conversation open after conferences and welcomes emails or phone calls with additional arguments or record citations that may better support a remand.

An audience member asked the panelists' opinions on why there has been so much more frustration between OGC and appellants' counsel as of late. Thomas provided that while it is hard to explain "excessively aggressive conduct," he has personally seen a pattern where "it tends to come from smaller firms where there is less oversight on conduct." He said, "a solo practitioner . . . isn't necessarily going to be told that their conduct is unbecoming." "When you are speaking to a member of the Secretary's counsel and you take this zealous, I would say many times aggressive attitude, you are less likely to obtain whatever result you are looking for," he continued. "Unnecessary aggression . . . creates a level of friction and makes it harder for people to trust each other."

Another audience member provided her opinion that "there has been a lot more defending [of Board decisions] from the Secretary and that . . . sometimes it's a bit frivolous." She said she had noticed a rise in aggression on the Secretary's side and asked Sonia if she has noticed it as well. Sonia responded that she thinks there is "loud and aggressive behavior on both sides" and that she thinks "it is very personality driven." Later, Thomas agreed that this behavior comes from both sides.

A question from the audience asked Thomas how much authority the Secretary's counsel has during conferences to change their positions. He responded that he will be granted authority from his deputy to make an offer and that if new arguments are raised, he will always bring that back to his deputy. "We want to make sure we are covering every appropriate legal base."

A private practitioner in the audience noted that his frustration stems from inconsistent treatment of the same issues by the Secretary, where one VA counsel will offer a remand and another will defend "on the exact same issue." Thomas attributed this to attorneys interpreting the law differently, or the fact patterns having some variation.

When asked how to show professionalism in emails without using emojis, the whole room laughed. John thought it was a great question, because tone can be difficult to convey in an email. He thinks it comes with experience and that "when in doubt, it may be best just to be brief and to the point and say a lot of 'please' and 'thank you.'"

Thomas mentioned that because OGC is growing in size, they have a lot of new and inexperienced attorneys. He sees this discussion as a great opportunity "to set the tone for how what we would like to see [regarding] professional conduct." "At the end of the day, we are all intelligent people, we are all professionals, we all care about our clients, we all care about the veterans."

Sonia was asked when CLS is "done" with a case, and if it is appropriate to include them in conversations throughout the Joint Motion for Remand process, especially when there is frustration regarding delay or a lack of communication between parties. She responded that CLS is open to any questions and to assist with any difficulties as long as they are made aware of the situation. "We are there to help out."

An audience member raised his opinion that while the discussion has largely centered around professionalism at the conference stage, it is important to maintain professionalism through the entire process. He has noticed a combativeness in the briefing process, some of which is by nature of the adversarial nature of appellate work, but that this sometimes becomes personal and unprofessional. Judge Michael Allen spoke about how he considers himself a "professional reader" and that "fighting back and forth between counsel literally never serves the purpose of helping me decide the case." He reminded the group that "someone can be mistaken about the law without misrepresenting the law" and explained how personal attacks like this do not help anyone involved and are "a waste of time." Thomas agreed that "there is a significant difference between zealous advocacy and aggressive advocacy," and that

the latter does not serve anyone's interests.

Judge Mary Schoelen built on what Judge Allen offered and said that she has "seen instances where counsel on either side has just been . . . overzealous," and that being reasonable is much more persuasive to the court.

Thomas then shared some "horror stories" about inappropriate things he has heard during conferences, such as, "I'm going to bury you," calling women "honey," "babe," or "sweetie," and "I'm going to have you disbarred." He followed this with a sentiment everyone can agree with – "every single one of us deserves to be treated in a professional manner and a respectful manner."

Morgan MacIsaac-Bykowski is an Adjunct Professor of Law and the Associate Director of the Stetson University College of Law Veterans Law Institute.

Message from the Chief Judge

Greetings Colleagues,

I hope early summer is treating you well.

Big news at the Court—our Executive Officer and Clerk of the Court for the last thirteen years, Greg Block, will be retiring at the end of September. All of us who know and work with Greg will agree that he has been an incomparable Court Executive. The judges and the Court as a whole, and all other groups and individuals who connect with the Court, have been well-served by his hard work and expertise. There is more in this VLJ issue regarding Greg's departure, and I will wait until a further column to celebrate Greg and all that he has done, but I wanted to alert you to his upcoming retirement.

Now, let's take a brief trip back to May 2017, when the Court's Judicial Advisory Committee (JAC) was created. Judge Davis, who was then the Court's Chief Judge, invited a group of experienced practitioners from across the Court's Bar to meet regularly and exchange ideas to improve Court operations and the larger practice of veterans law. To date, the JAC's creativity and industriousness over the past six years has led to innovations such as the Rule 33 Pilot Program for pro se appellants. Another initiative that the JAC has worked through is now on the horizon: bifurcation of panel cases. Let me briefly explain. Cases are frequently sent to a three-judge panel to address a discrete issue that warrants a precedential opinion. These panel cases sometimes include other issues that do not require a panel decision, issues that would ordinarily be resolved by a single judge in a memorandum decision. But because those non-panel-worthy issues are part of the same case as the issue that requires a panel opinion, in the past these non-panel-worthy issues have been decided by the three-judge panel, and are ultimately given precedential weight. This can sometimes have unintended and undesirable consequences.

Bifurcation will allow the panel to issue two separate decisions, a precedential panel decision that addresses the panel-worthy issue and a nonprecedential single-judge memorandum decision that addresses issues that are not panel-worthy. The single-judge memorandum decision will be authored by just one of the panel judges. The decisions will be issued from the same docket and on the same day. More details concerning this process will be provided at the time the Court first implements bifurcation, but I note that post-decisional motions will be permitted as usual, as to either or both decisions, and will be resolved in the normal course of business. The Court hopes that allowing panels to bifurcate appropriate cases in this manner will increase judicial efficiency and clarity in panel decision-making. A thank you to the JAC for their assistance in developing this process.

I have one other note regarding the JAC. Since I last wrote to you, three founding members of the that committee completed their terms and have transitioned off: Glenda Herl, Chief Operating Officer of Carpenter, Chartered; Dan Nagin, Clinical Professor of Law and Faculty Director of the WilmerHale Legal Service Center and Veterans Legal Clinic at Harvard Law School; and Len Selfon, General Counsel for Paralyzed Veterans of America. Glenda, Dan, and Len, you have all made critical contributions to the JAC since its inception, serving

on numerous subcommittees, spearheading special projects, and always sharing thoughts and insights on ways that the Court could better and more efficiently accomplish its mission. On behalf of the BOJ, thank you for your dedication and service to the JAC and the Court these past six years.

And we now have three new JAC members: Virginia (Amy) Girard-Brady, Managing Partner at ABS Legal Advocates, P.C., and President of the National Organization of Veterans' Advocates, Inc.; Stacey-Rae Simcox, Professor of Law and Director of Stetson University College of Law's Veterans Law Institute and Veterans Advocacy Clinic; and Aniela Szymanski, Vice Chair of the Executive Board of The Veterans Consortium and Chief Policy Officer for the Chief Warrant and Warrant Officers Association of the U.S. Coast Guard. Amy, Stacey-Rae, and Aniela recently began their terms on the JAC and we are looking to benefit from their substantial experience and expertise. Welcome aboard!

A final update—as I mentioned in my previous column, last year the Court asked Congress to increase the size of the Court to eleven active judges by permanently authorizing nine judgeships and temporarily authorizing, under existing authority, two additional judgeships. Congress subsequently appropriated the funds for this expansion, and bills have been introduced in the House (H.R. 1329) and Senate (S. 897) to make the necessary authorizing statutory change. The House and Senate have since held hearings on these bills, and the Court has submitted written testimony for the record. This is positive movement, and the Court is hopeful that we will receive the requested authorization soon. I will continue to keep you updated on this as the legislative process moves forward. Until then, I hope you all have a safe and enjoyable summer.

Best regards,
Meg

Message from the President

Dear fellow CAVC Bar Association members,

Somehow it is already nearing the midpoint of the year—time flies! As the year continues to progress, we have been busy with programming and planning.

Thank you to those members who attended and participated in our programs this past quarter, including the panel on professionalism, a "Meet the Court" event, and a military cultural competency panel. We have more programming planned for the next few months, so please keep an eye out for announcements about these events.

Also on the horizon: we will soon be holding elections and our annual meeting! Please save the date for **Wednesday, September 13**, for the annual meeting. This annual meeting is a valuable time to touch base with other bar members and to catch up on Association happenings. In addition to providing a recap of the past year and plans for the year ahead, the annual meeting will include installation of our new Board of Governors members and officers. If you are interested in running for office, a call for nominations will be sent out to membership later this summer. In the meantime, if you have any questions about elections or available positions, please feel free to reach out to me or any officers or Board of Governors members.

We are lucky to have an active and tight-knit membership community; please be sure to check our website (https://www.cavcbarassociation.org/) and (https://www.instagram.com/cavc_bar/?hl=en), our Instagram, for updates.

Please don't hesitate to reach out if you have any questions or concerns, or if you'd like to become more involved in the Bar Association. You can email me personally at berner.jillian@gmail.com. I look forward to hearing from you!
Best,

Jillian Berner

CAVC Bar Association Panel: Meet the Court

by Morgan MacIsaac-Bykowski

On Wednesday, March 29, Jenna Zellmer of the CAVC Bar Association moderated a panel of employees of the Court of Appeals for Veterans Claims to highlight their contributions and provide a better understanding of how the Court operates internally. Michael A. Burnat, Chief Deputy Clerk of Operations; Paquette "Tyrone" DeShazier, Deputy Operations Manager; and John Leon, Court Librarian, served as panelists. Their contact information can be found below.

Michael (Mike) retired in November 2022 as a colonel in the Air Force Judge Advocate General's (JAG) Corps after twenty years of service. He served in assignments as a prosecutor, labor law counsel, trial defense counsel, appellate defense counsel, and executive officer to a one-star general. He deployed to Afghanistan in 2013 as the NATO legal advisor to the commander of Kandahar Airfield. He served in variety of leadership positions, including deputy staff judge advocate for the European Command's largest fighter wing at Royal Air Force Lakenheath, United Kingdom.

Tyrone DeShazier is a veteran of the Marine Corps. After eight years as a Marine, he worked at OSHA for about three years. He has been employed at the Court for over twenty years in various capacities, starting out as a processing clerk and working his way up the ranks to supervisor and eventually deputy operations manager.

John Leon, the third librarian in the history of the Court, has previously worked on Capitol Hill, managing the internal archives of the Congressional Research Service and focusing on digital preservation. He also spent two years working with Congress.gov to manage data on the site and interpret legislative text, and he spent time at the Law Library of Congress.

Tyrone's start at the court was somewhat unplanned. While working for OSHA, he noticed that a woman in his department leveraged an offer for employment at the newly formed CAVC for a raise. When he tried to do the same thing as a "naïve" GS-3 and told his supervisor that he was called back for a second interview with CAVC, his supervisor said, "Congratulations. See you later," instead of giving him a raise. Though it wasn't the result he expected, he said it was one of the best things he has ever done.

John joined the Court staff looking for new experiences and opportunities after working at the Library of Congress. John is responsible for sending out a daily news update to the Court and enjoys researching the current and historical significance of the issues the Court sees.

Mike's role as Chief Deputy Clerk of Operations is his first as a civilian since joining the Air Force. As a veteran with experience in management, supervising, and appellate law, he was excited to join the Court. He explained that his department has a staff of twenty-five employees, including two opening clerks, who process new appeals before turning them over to one of the ten docketing clerks, and two clerks who "float" wherever they are needed. The department also has three lead clerks, two mail staff, three editors, a deputy, and a CM/ECF expert.

Mike polled his team about what common errors they see, and he determined that most errors surround missing information in motions. He is working on creating a template to combat this and reduce the number of nonconforming documents. He also has requested that the clerks list both the rule and the reason for nonconformity in applicable docket entries to make it easier for practitioners to understand what must be fixed and why.

John, Mike, and Jenna share the viewpoint that the Court staff and practitioners are a community with a common mission. Tyrone sees the Court as a family.

Mike Burnat: 202-501-5970 ext. 1030
Tyrone DeShazier: 202-501-5970 ext. 1011
John Leon: 202-501-5861

Morgan MacIsaac-Bykowski is an Adjunct Professor of Law and the Associate Director of the Stetson University College of Law Veterans Law Institute.

The Board's Failure to Decide an Issue Can Be Appealed to the CAVC

by Devin deBruyn

Reporting on *Bean v. McDonough*, No. 2022-1447 (Fed. Cir. April 26, 2023).

In April 2023, a three-judge panel of the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") issued a decision addressing the jurisdiction of the U.S. Court of Appeals for Veterans Claims ("CAVC"). In December 2021, the CAVC ruled that it lacked jurisdiction to review an appeal of an issue that the Board of Veterans' Appeals ("Board") had not adjudicated. Citing precedent on this topic, the Federal Circuit held that the CAVC's jurisdiction covers appeals of issues that were properly before the Board but were not adjudicated by the Board.

This case has a lengthy and complex procedural history dating back to 1997. A condensed summary highlighting the key turning points of this case's 26-year history will be provided. In February 1997, Mr. Wilfred D. Bean, a U.S. Army veteran who served on active duty from November 1966 to November 1969, filed a claim with the Department of Veterans Affairs ("the VA") seeking service connection, in pertinent part, for posttraumatic stress disorder ("PTSD"). In June 1997, Mr. Bean reported to a VA compensation examination and was diagnosed with major depressive disorder ("MDD") and generalized anxiety disorder ("GAD"), but not PTSD. Based on the results of this examination, the Agency of Original Jurisdiction ("AOJ") issued a rating decision denying service connection for PTSD. As a preview of what comes next, the appeals that followed over the next 26-years primarily concerned whether Mr. Bean's 1997 claim for PTSD should have been construed as a claim for an acquired psychiatric disorder, to include PTSD, MDD, and GAD.

Mr. Bean did not appeal the July 1997 rating decision. In August 2006, he filed a claim with the VA seeking service connection for PTSD, MDD, and GAD. Based on a July 2007 VA compensation examination that resulted in diagnoses of PTSD and MDD, the AOJ issued a rating decision in October 2007 granting service connection for PTSD with an effective date of August 14, 2006, the date of claim. Mr. Bean appealed the effective date assigned in this decision and asserted that his February 1997 claim for PTSD was a claim for an acquired psychiatric disorder, to include MDD and GAD. He further contended that because the AOJ failed to consider his 1997 claim as encompassing an acquired psychiatric disorder, to include additional diagnoses, there was an unadjudicated pending claim that remained on the table. After a Statement of the Case was issued, Mr. Bean appealed to the Board.

In May 2012, the Board increased the rating of Mr. Bean's PTSD all the way back to the assigned effective date of August 14, 2006, but no earlier. Importantly, the Board also acknowledged that the AOJ's July 1997 rating decision should have adjudicated the claim as service connection for an acquired psychiatric disorder, to include MDD and GAD. The Board, however, determined that the only issue before it was entitlement to an increased evaluation for PTSD, and not whether there was an unadjudicated pending claim for an acquired psychiatric disorder from 1997. The Board explained that Mr. Bean could file a claim alleging that the AOJ committed clear and unmistakable error ("CUE") by failing to expand his claim to include additional psychiatric diagnoses in the July 1997 rating decision.

As the Board directed, in July 2012 Mr. Bean requested that the AOJ reconsider the effective date of his PTSD award and, citing the CUE regulation, repeated his contention that there was a pending unadjudicated claim stemming from 1997. The

appeal remained at the AOJ level for the next seven years. In May 2019, the Board issued a decision dismissing the appeal. Mr. Bean appealed to the CAVC.

In April 2021, the CAVC issued a single-judge memorandum decision holding that the Board erred by failing to address Mr. Bean's argument that he had pending unadjudicated claims for service connection for MDD and GAD going back to 1997. However, at the VA's request, the CAVC reconsidered this memorandum decision and withdrew it. In its place, the CAVC issued a new single-judge memorandum decision in December 2021. This new decision concluded that because the Board did not address the issue of pending unadjudicated claims for MDD and GAD stemming from the 1997 claim, then the issue could not be appealed to the CAVC and the CAVC, therefore, lacked jurisdiction to hear it. Mr. Bean appealed to the Federal Circuit.

The Federal Circuit first turned to the statutes governing the Board's and the CAVC's jurisdictions. The Board's decisions "shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation." 38 U.S.C. § 7104(a). As for the CAVC, it has "exclusive jurisdiction to review decisions of the [Board]" and its review is based on "the record of proceedings before the Secretary [of the VA] and the Board." 38 U.S.C. § 7252(a)-(b).

The Federal Circuit emphasized that a "prerequisite to [the CAVC's] jurisdiction is a decision of the Board." Citing *Maggitt v. West*, the Federal Circuit highlighted that a Board decision "for purposes of the [CAVC's] jurisdiction under section 7252, is the decision with respect to the benefit sought by the veteran" and that the Board's failure to rule on a claim properly before it counts as a decision that may be reviewed by the CAVC. 202 F.3d 1370, 1376 (2000). Similarly, relying on *Travelstead v. Derwinski*, the Federal Circuit explained that "[w]hen the [Board] makes a decision (implicitly or explicitly) not to deal with an issue considered at the [AOJ] level, then that decision not to decide an issue is a decision by the [Board] which is properly before" the CAVC. 1 Vet. App. 344, 346 (1991).

Based on this analysis, the Federal Circuit held that "when a claim is adequately presented to the Board but not addressed by the Board, the Board's disposition of the appeal constitutes a decision of the Board on that claim that may be appealed to the [CAVC]." Consequently, the Federal Circuit concluded that the CAVC correctly exercised its jurisdiction the first time when it issued the memorandum decision in April 2021, but that it erred in reversing itself in December 2021. Accordingly, the Federal Circuit reversed the December 2021 CAVC decision and remanded the matter to the CAVC for consideration of whether the Board erred in failing to address Mr. Bean's argument that he had unadjudicated pending claims for an acquired psychiatric disorder, to include MDD and GAD, stemming from his claim filed in February 1997.

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

Federal Circuit Sheds Light on CUE Motions Made After Substitution

By Andrew Penman

Reporting on *Crews v. McDonough*, 63 F.4th 37 (Fed. Cir. 2023).

The Federal Circuit affirmed the Court of Appeals for Veterans Claims (CAVC) in denying a substituted claimant the opportunity to raise an allegation of clear and unmistakable error (CUE) that was never raised by the deceased veteran. Judge Hughes wrote the opinion, with Judges Reyna and Mayer joining. The veteran, Sylvester D. Crews, was originally granted a 100% disability rating for schizophrenia.

In November 1960, that rating was reduced to 70%. Based on a September 2009 claim for an increased rating, the rating was again increased to 100%, effective the date of the September 2009 claim for increase. His surviving spouse, Yvonne Crews, was granted substitution and appealed to the Board, disagreeing with the September 2009 effective date for the increase to 100%, alleging CUE in the November 1960 rating decision that reduced the rating to 70%.

The Board denied an earlier effective date, determining that there was no CUE motion pending at the time of the veteran's death and Mrs. Crews may not file a new CUE motion as a substitute claimant.

Mrs. Crews argued that under 38 U.S.C. § 5121A, there was a claim pending at the time of her spouse's death. She pointed out that § 5121A allows her CUE claim because it is a new *theory* of entitlement in support of an already pending claim.

The Federal Circuit disagreed. It held that for a CUE allegation to be part of a pending claim, both must challenge the same decision. Here, the CAVC found that the Mrs. Crews' CUE claim did not challenge the same decision as did the pending claim for an increased rating.

Andrew Penman is an appellate attorney at NVLSP.

Application of 38 C.F.R. § 4.59 in Cases Where the Diagnostic Code Only Provides Criteria for a Noncompensable Rating

By John Kitlas

Reporting on *Frazier v. McDonough*, No. 2202-1184 (Fed. Cir. May 5, 2023).

When evaluating orthopedic disabilities under the pertinent rating criteria, it is important to adequately address the impact of pain in light of the regulatory provisions of 38 C.F.R. §§ 4.40, 4.45, and 4.59. As such, there has been a great deal of caselaw addressing these regulations. The United States Court of Appeals for the Federal Circuit ("Federal Circuit") recently addressed the applicability of 38 C.F.R. § 4.59, which is titled "Painful motion," in cases where a pertinent Diagnostic Code provides criteria only for a noncompensable (zero percent) rating.

The *Frazier* case was brought by Jeanine Frazier as a substituted appellant for her deceased father, Clarence Frazier. During his lifetime, Mr. Frazier was service connected for disability of the right ring (4th) and little (5th) fingers. Mr. Frazier was assigned a noncompensable rating pursuant to 38 C.F.R. § 4.71a, Diagnostic Code 5230. Under that code, a noncompensable disability rating is assigned for limitation of motion of the ring or little finger. The code does not provide for a compensable rating.

Mr. Frazier contended that he was entitled to a compensable rating pursuant to that portion of 38 C.F.R. § 4.59 which states that "[t]he intent of the schedule is to recognize painful motion with joint or periarticular pathology as productive of disability. It is the intention to recognize actually painful, unstable, or malaligned joints, due to healed injury, as entitled to at least the minimum compensable rating for the joint."

Mr. Frazier had contended that the service-connected disability should be rated under Diagnostic Codes 5219 and 5223, which provide 20 percent and 10 percent ratings, respectively, for unfavorable and favorable ankylosis of the ring and little fingers. When the case was before the Federal Circuit, Ms. Frazier, who was the appellant, did not contend Diagnostic Code 5230 was the wrong Code to use for evaluating the service-connected disability. Rather, she argued that 38 C.F.R. § 4.59 contains a freestanding requirement for VA to grant at least a 10 percent rating for any service-connected joint condition that is associated with pain.

The United States Court of Appeals for Veterans Claims ("Court") previously addressed similar contentions in *Sowers v. McDonald*, 27 Vet. App. 472

(2016). The Court noted that while this regulation may intend to compensate painful motion, it does not guarantee a compensable rating. Instead, 38 C.F.R. § 4.59 employs conditional language that must be read in conjunction with the appropriate diagnostic code to be understood. The text of the regulation does not invite a claimant to shop around. As such, in circumstances as in *Frazier* where the applicable Diagnostic Code(s) does not provide for a compensable rating, none is warranted pursuant to 38 C.F.R. § 4.59. Ms. Frazier urged the Federal Circuit to repudiate the Court's decision in *Sowers*.

In an opinion authored by Judge Bryson joined by Judges Dyk and Prost, the Federal Circuit agreed with the Court's interpretation of 38 C.F.R. § 4.59 in *Sowers*. The Federal Circuit found that this portion of 38 C.F.R. § 4.59 must be read in conjunction with the Diagnostic Code applicable to a particular case, and requiring reference to that Diagnostic Code to determine the minimum compensable rating for the injury in question. The Federal Circuit agreed that 38 C.F.R. § 4.59 does not "create a freestanding painful motion disability" that guarantees a compensable rating for a painful joint. Consequently, a compensable rating is warranted pursuant to § 4.59 only if a compensable rating is available under the applicable Diagnostic Code. A compensable rating for painful motion is not available merely because there are other Diagnostic Codes that provide for a compensable rating for the joint.

Regarding the contention that Mr. Frazier's disability should have been evaluated under Diagnostic Codes 5219 or 5223 as opposed to 5230 , the Federal Circuit noted that it would be an absurd result, as also pointed out in *Sowers*, that someone with only slight pain and occasional stiffness would be rated on par with those whose finger was amputated. The Federal Circuit also noted that the Rating Schedule straightforwardly allows for consideration of other DCs when appropriate. There is no indication that this is the case for Diagnostic Code 5230.

The Federal Circuit rejected Ms. Frazier's argument that the Secretary was barred by the statutory provisions of 38 U.S.C. §§ 1155 and 1114 from adopting disability ratings of zero, and therefore, it was impermissible to rate Mr. Frazier's disability at zero percent. The Federal Circuit found the premise of this argument to be wrong, noting that various veterans' benefits statutes refer to noncompensable disabilities and thus contravene this argument. The Federal Circuit noted relevant portions of 38 U.S.C. § 1710 in support of this finding.

In addition to the findings of the majority opinion, Judge Dyk authored a concurrence in which he noted that he would have gone further and found that § 4.59 should have no role in evaluating veterans' disabilities under the Diagnostic Codes. Judge Dyk would have found that portion of 38 C.F.R. § 4.59 is "entirely precatory." In other words, that this section was simply expressing the general intentions underlying the rating schedule.

John Kitlas is an attorney with the Board of Veterans' Appeals.

Federal Circuit Reiterates Jurisdictional Limits

by Gillian Slovick

Reporting on *May v. McDonough*, 61 F.4th 963 (Fed. Cir. 2023).

In *May*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) affirmed the dismissal from the Court of Appeals for Veterans Claims (CAVC), ruling that CAVC lacked jurisdiction, as there was no decision from the Board of Veterans' Appeals (Board) to appeal.

In so ruling, the Federal Circuit noted that the appellant failed to properly appeal an October 2018 rating decision. That rating decision discontinued dependency and indemnity compensation upon the marriage of the appellant. The appellant, who was deemed a helpless child of a deceased veteran, sought reinstatement of his benefits after his divorce. However, the appellant filed a notice of appeal to CAVC before the Board issued a final

decision, incorrectly citing the Board's notice of certification as a final Board decision.

In February 2022, CAVC held that, absent a Board decision, dismissal was necessary. In his informal request for reconsideration, the appellant noted that he was granted permanent incapacity for self-support by VA. The Federal Circuit noted that he provided no additional basis for why the appeal should not be dismissed.

On review, the Federal Circuit stated: "Everyone agrees that no Board decision exists here. . . . [a]s best we can tell, this entire case arises because Mr. May made a mistake." The Federal Circuit stressed that the veteran's appeal for reinstatement of benefits had not been finally denied, rather the appellant simply needed to assert his claims to the right venue.

In her dissent, Judge Newman pointed out that the appellant only sought CAVC review after two years of inaction at the Board. She argued that the Federal Circuit should have considered the claim based on 38 U.S.C. § 7261(a), which authorized the court to "compel action of the Secretary unlawfully withheld or unreasonably delayed." Further, she argued that the Federal Circuit should have treated the appeal as if it were a petition for a writ of mandamus.

The majority responded that Judge Newman's suggested course would not conform to jurisprudence mandating that CAVC limit review to Board *decisions*. The Federal Circuit reasoned that 38 U.S.C. § 7621(a) did not provide a means of jurisdiction on its own, noting too that the appellant had not petitioned for review on the basis of delay.

The Federal Circuit conceded that when the appellant files a direct appeal and argues unreasonable delay, review might be appropriately considered as a petition for a writ of mandamus. The Federal Circuit explained that in this case, however, the facts did not present that issue.

Gillian Slovick is counsel at the Board of Veterans' Appeals.

Federal Circuit Denies Challenges to VA Rules on Presumptive Agent Orange Exposure Locations

by Melanie Jesteadt

Reporting on *Military-Veterans Advocacy Inc. (MVA) v. Sec'y of Veterans Affs.*, 63 F.4th 935 (Fed. Cir. 2023).

In *MVA v. Secretary of Veterans Affairs*, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") dismissed in part and denied in part MVA's petition for revision of certain parts of the VA's Adjudication Procedures Manual (M21-1).

The Federal Circuit noted that 38 U.S.C. § 502 authorizes direct judicial review by the Federal Circuit of certain VA actions and practices, including the rules and policies set out in the M21-1.

In this case, MVA asked the Federal Circuit to invalidate VA rules that deny presumptive Agent Orange exposure to certain Vietnam-era veterans who served in Thailand (the "Thailand Rules"), offshore of Vietnam (the "Blue Water Navy Rule"), and in the airspace of Vietnam (the "Airspace Rule").

Regarding the Thailand Rules, the relief sought by MVA came by way of the PACT Act, Pub. L. No. 117-168, which was passed in 2022 while this case was pending. Prior to the PACT Act, only veterans who served "at or near the base perimeter" of military bases in Thailand were entitled to a presumption of herbicide exposure. The PACT Act extended a presumption of herbicide exposure to all veterans who served at bases in Thailand during the covered period without regard to where on the base the veteran served. *See* 38 U.S.C. § 1116(d)(2).

Although there was some question as to whether the PACT Act provided the full relief sought by MVA (as the service dates provided for under the PACT Act do not include the full period of service dates under the challenged Thailand Rules), MVA conceded that

it did. Accordingly, the Federal Circuit dismissed the Thailand Rules portion of MVA's petition.

Next, MVA argued that VA's interpretation of the Blue Water Navy Vietnam Veteran's Act of 2019 unduly narrowed the scope of the offshore area for which there is a presumption of herbicide exposure.

The Federal Circuit noted that the Agent Orange Act of 1991, Pub. L. No. 102-4, established a presumption of service connection for veterans who "served in the Republic of Vietnam" and developed certain diseases associated with exposure to Agent Orange. Then in 2019, the Blue Water Navy Vietnam Veterans Act, Pub. L. No. 116-23, extended the presumption of herbicide exposure to veterans who served "offshore of the Republic of Vietnam," specifying that "the Secretary shall treat a location as being offshore of Vietnam if the location is not more than 12 nautical miles seaward of a line commencing on the southwestern demarcation line of the waters of Vietnam and Cambodia and intersecting the following points: [11 sets of latitude and longitude coordinates]." 38 U.S.C. § 1116A.

MVA argued that the above restrictions are contrary to the Federal Circuit's holding in *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019), that veterans who served in the territorial sea of Vietnam served in the "Republic of Vietnam" under the Agent Orange Act. MVA noted that the offshore area encompassed by § 1116A does not capture the entire territorial sea of the Republic of Vietnam, such as the sea near the island of Phu Quoc.

The Secretary noted that Congress, not the VA, defined the geographic area encompassed by the Blue Water Navy Vietnam Veterans Act and that, therefore, a request for revision must be directed to Congress. The Federal Circuit agreed.

MVA also objected to the 2019 change that shifted Agent Orange claims processing authority from the regional offices to centralized processing teams. The Federal Circuit noted this change to be "a desirable step" given that this is an "area of complex medical science." Accordingly, MVA's petition with respect to the Blue Water Navy Rule was denied.

Lastly, MVA asked the Federal Circuit to invalidate the M21-1's Airspace Rule which provides that flying high-altitude missions in Vietnamese airspace does not constitute "service in Vietnam" for Vietnam-era Veterans who had no other contact with Vietnam. MVA argued that, as per the Federal Circuit's analysis in *Procopio*, the Agent Orange Act should be interpreted consistently with international law, and international law indicates that the "Republic of Vietnam" includes the airspace above its territory.

The Secretary argued that MVA's challenge was time-barred by the six-year limit in 28 U.S.C. § 2401(a), as the Airspace Rule had been in effect since 1993, and the Federal Circuit agreed. The Federal Circuit went on to deny MVA's request on the merits, noting that Congress is presumed to have knowledge of VA's Airspace Rule and has not changed it. The Federal Circuit noted that in the PACT Act, Congress explicitly included the airspace of certain locations in setting out toxic exposure presumptions, yet it did not do so regarding Vietnam.

Melanie Jesteadt is Associate Counsel at the Board of Veterans' Appeals.

38 C.F.R. § 3.156(b) Does Not Require an Explicit Assessment or Inclusion of "Magic Words"

by *Vanessa-Nola Pratt*

Reporting on *Pickett v. McDonough*, 64 F.4th 1342 (Fed. Cir. 2023).

In *Pickett v. McDonough*, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") upheld the Department of Veterans Affairs' ("VA's") interpretation and understanding of 38 C.F.R. § 3.156(b).

David L. Pickett served in the United States Army, from September 1969 to September 1971, to include service in the Republic of Vietnam. He initially filed a service connection claim for a general anxiety disorder, as secondary to his exposure to herbicide

agents. VA, eventually, granted service connection for post-traumatic stress disorder ("PTSD") and coronary artery disease ("CAD"), effective April 2004.

Mr. Pickett appealed the initial rating assigned for CAD. Within the time frame to appeal, Mr. Pickett also filed a 2011 VA Form 21-8940 – Application for a Total Disability Rating Based on Individual Unemployability ("2011 TDIU application"), contending that his CAD and PTSD prevented him from securing or following any substantially gainful occupation.

In a January 2013 rating decision, the VA Regional Office ("Regional Office") listed the 2011 TDIU application as one of the pieces of evidence considered. In an attached sheet, the Regional Office noted that entitlement to a TDIU was denied, and it provided instructions to inform Mr. Pickett that a February 3, 2012 VA examination report stated that "your CAD does not prevent you from performing sedentary employment tasks an light physical employment and your PTSD examiner states that you are in full remission and you appear to have little functional impairment." In a notice letter informing Mr. Pickett that his claim was denied, VA also informed him that he had one year to appeal this decision. Mr. Pickett, however, did not appeal.

A subsequent April 2014 rating decision referenced the January 2013 rating decision, as well as evidence it relied on, which included the 2011 TDIU application. The April 2014 rating decision explained that Mr. Pickett's TDIU claim was denied because the evidence did not show that he was unable to secure or follow substantially gainful occupation as a result of service-connected disabilities. This rating decision also proposed to decrease Mr. Pickett's PTSD rating. Mr. Pickett, however, only challenged the proposed rating reduction for PTSD, but not the denial of his TDIU claim.

In January 2017, Mr. Pickett filed a Supplemental Claim and a new TDIU application, contending that he was unemployed as the result of his CAD and PTSD. This time, the Regional Office granted the TDIU claim, but solely due to PTSD, and increased the ratings for CAD and PTSD, effective the date VA had received Mr. Pickett's most recent claims, in January 2017.

In appealing this decision, Mr. Pickett argued, before the Board of Veterans' Appeals ("Board"), that in assessing his April 2004 claim, VA did not properly apply 38 C.F.R. § 3.156(b) because it failed to consider whether the 2011 TDIU application was new and material evidence that supported his claim. More specifically, Mr. Pickett argued that his April 2004 claim remained pending, which in turn, could allow him to seek entitlement to a TDIU, prior to January 2017. The Board denied Mr. Pickett's claim for an earlier effective date for his service-connected CAD.

Mr. Pickett appealed this Board decision to the United States Court of Appeals for Veterans Claims (Court), and the Court held that the Regional Office implicitly made a Section 3.156(b) determination on the question of new and material evidence, and that it considered the September 2011 TDIU application in connection with the April 2004 CAD claim. In this regard, the Court determined that the Regional Office essentially treated the September 2011 TDIU application form as "new and material evidence", and "considered it in connection with the pending CAD evaluation claim."

In exercising its jurisdiction over this appeal from the Court, the Federal Circuit addressed the issue of whether VA may indicate its compliance with Section 3.156(b) implicitly or explicitly. The Federal Circuit affirmed the Court's decision, holding that although VA must comply with Section 3.156(b), there is nothing in the text of this regulation that requires VA to expressly state its analysis under this regulation.

Mr. Pickett asserted that Section 3.156(b) requires VA to do more than just list evidence that is new and material and filed before the end of the appellate period, and that an assessment, under Section 3.156(b), must be explicitly stated in VA's decisions. In support of his assertions, Mr. Pickett cited *Bond v. Shinseki*, 659 F.3d 1362 (Fed. Cir. 2011) and *Beraud v. McDonald*, 766 F.3d 1402 (Fed. Cir.

2014), and contended that Section 3.156(b) requires VA to provide an explicit analysis of new and material evidence.

Therefore, the Federal Circuit undertook a discussion and analysis of *Bond* and *Beraud* to clarify the holdings in these cases.

The Federal Circuit explained that in *Bond*, it held that under Section 3.156(b), VA must evaluate submissions received during the relevant period and determine whether they contain new evidence relevant to a pending claim. The Federal Circuit clarified that *Bond* explains that determination, under Section 3.156(b), is mandatory, but it left the door open for an implicit determination, so long as there is some indication in the record that the proper analysis occurred.

Further, the Federal Circuit clarified that in *Beraud*, it affirmed *Bond*, and VA's obligation, under Section 3.156(b), to "provide a determination that is directly responsive to the new submission." The Federal Circuit explained, in pertinent part, that it held that VA must make a determination under Section 3.156(b)and that a pending claim is not finalized until VA makes the required Section 3.156(b) determination. The Federal Circuit summarized that in *Beraud*, it held that VA may demonstrate compliance with Section 3.156(b) by implicit determination, only as long as the implicit determination is clear on the evidence of record.

Finally, the Federal Circuit briefly discussed its most recent opinion in *Gudinas v. McDonough*, 54 F.4th 716, 721 (Fed. Cir. 2022), in which it held that VA is not required to explicitly determine whether a submission constitutes "new and material evidence" where the conditions that underly the two claims have no apparent connection. While the Federal Circuit acknowledged that *Gudinas* is factually distinct from the circumstances in Mr. Pickett's case, it emphasized that the holding in *Gudinas* is pertinent to demonstrate its consistent holdings pertaining to VA's requirements for compliance with Section 3.156(b).

In conclusion, by upholding the Court's understanding and interpretation of Section 3.156(b), the Federal Circuit held that VA may fulfill its mandatory obligation under Section 3.156(b) implicitly. Concomitantly, it also clarified that there must be some indication that VA undertook the proper analysis under 3.156(b), but at the same time, also held that Section 3.156(b) does not require VA to invoke certain "magic words" in its decision.

Vanessa-Nola Pratt is Counsel at the Board of Veterans' Appeals.

The Benefit of the Doubt Analysis Does Not Require a Comprehensive Listing of Positive and Negative Evidence

by N'yella Maya Rogers

Reporting on *Roane v. McDonough*, 64 F.4th 1306 (Fed. Cir. 2023).

In *Roane*, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") ruled that while the benefit of the doubt rule in 38 U.S.C. § 5107 and 38 C.F.R. § 3.102 requires the Board of Veterans' Appeals ("Board") to carefully consider all relevant evidence, it is not required to state whether each piece of relevant evidence is negative or positive as part of its benefit of the doubt analysis. The Federal Circuit also ruled that Court of Appeals for Veterans Claims ("CAVC") did not misinterpret the relevant standard of review to the Board under § 7261(b)(1) by only reviewing the Board's weighing of the evidence, because CAVC is excluded from de-novo fact-finding except where the "finding is clearly erroneous."

Ramon Roane served honorably in the United States Navy from August 1981 to March 1991. In August 2017, he filed a claim for a total disability evaluation based on individual unemployability (TDIU). The Agency of Original Jurisdiction ("AOJ") denied the claim in November 2017. In April 2020, the Board in denying the TDIU claim, held that Mr. Roane's service-connected disabilities did not impede all forms of substantially gainful employment consistent with his education, intellectual skills, and

experience. Mr. Roane appealed to CAVC, which affirmed the Board's denial. He subsequently appealed to the Federal Circuit.
In his appeal to the Federal Circuit, Mr. Roane first argued that CAVC misinterpreted 38 USC § 5107 and 38 C.F.R. § 3.102 in addressing the proper application of the benefit of the doubt doctrine. Pursuant to that doctrine, the Department of Veterans Affairs (VA) must give the benefit of the doubt to the claimant, "[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter." Specifically, he argued that § 5107(b) and § 3.102 require the Board to identify which evidence is positive or negative; explain why it made these determinations with adequate reasons and bases; and explain why the benefit of the doubt is not afforded to the claimant.

The Federal Circuit was thus confronted with the issue of the proper interpretation 38 U.S.C. § 5107 and 38 C.F.R. § 3.102, among the most commonly cited and applied law and regulation in veterans' benefits law. This law and regulation codify the evidentiary standard of proof that VA is required to follow in resolving claims for veterans' benefits where, generally speaking, the evidence is nearly equal or in relative equipoise.

The Federal Circuit rejected Mr. Roane's argument, noting that, while 38 U.S.C. § 5107(b) and 38 C.F.R. § 3.102 require careful consideration of all evidence to determine whether there is an approximate balance of positive and negative evidence, they do not specify the manner in which that review must be performed, let alone to the degree of specificity as requested by the appellant.

Citing *Mattox v. McDonough*, 56 F.4th 1369 (Fed. Cir. 2023) in which it addressed a similar argument, the Federal Circuit noted that while the Board was required to identify key evidence and assign probative weight in its benefit of the doubt analysis, the Board was not required to "give a precise and comprehensive listing of positive and negative evidence." The Federal Circuit pointed out that the Board fulfilled its duty by noting the competing reports of the VA medical reports and that of the private examiner's report and assigned probative weight where necessary. The Federal Circuit further explained that CAVC did not legally err by declining to impose "the heightened requirements" proposed by Mr. Roane in its review of the Board's April 2020 decision pursuant to 38 U.S.C. § 5107(b) and 38 C.F.R. § 3.102.

Mr. Roane's second argument was that CAVC incorrectly interpreted the standard of review it should apply to the Board's application of the benefit of the doubt rule under 38 USCS 7261(b)(1). Specifically, he argued that CAVC should have conducted an "'additional and independent non[-]deferential review' of the Board's application of the benefit of the doubt rule, because a deferential review that is constrained by the standard of review in § 7261(a) would be 'meaningless.'"

Citing *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013), the Federal Circuit rejected this argument, and held that CAVC correctly interpreted the standard of review under § 7261 by reviewing the Board's "factual determination for clear error while taking due account of the Board's application of the benefit of the doubt rule" pursuant to 38 U.S.C. § 5107 and 38 C.F.R. § 3.102. Thus, the Federal Circuit refused to adopt Mr. Roane's interpretation of the "take due account" wording in 38 U.S.C. § 7261. The Federal circuit explained that although § 7261(b)(1) is at issue in this appeal, the "take due account" language on which the veteran relies must not be interpreted out of context of subsections (a) and (c) of the statute in order to ascertain the intention of Congress. In this regard, § 7261(a) sets the scope and relevant standard of review that CAVC must apply to cases before it; § 7261(a)(4) provides that CAVC can set aside or reverse a finding of material fact only if the finding is clearly erroneous; and § 7261(c) indicates that the findings of fact made by the Secretary, or the Board will not be subject to "trial de novo" by CAVC.

In reaching its decision, the Federal Circuit explained that § 7261(c) explicitly prohibits CAVC, "an appellate tribunal, from engaging in de novo fact finding." The Federal Circuit further explained that the phrase "take due account" does not give CAVC the authority to deviate from the standards of review outlined in § 7261(a), or to directly contradict what Congress intended- that CAVC refrain from de novo fact finding under § 7261(c). The Federal Circuit

noted, therefore, that CAVC can only review the Board's weighing of the evidence in the application of the benefit of the doubt rule under § 7261(b)(1); it may not weigh any evidence itself and expanding the scope of CAVC's "review beyond what is specified in § 7261(a) would directly violate § 7261(c)."

The Federal Circuit's affirmance of the Board's ruling demonstrates that the Board's exercise in assigning probative weight to the evidence of record is not a quantitative exercise. As in *Mattox*, *Roane* reinforces that the benefit of the doubt doctrine does not guarantee that VA will grant benefits simply based on the number of pieces of favorable evidence submitted, but rather the Board must consider the totality of the evidence.

Moreover, *Roane* clarifies the limits of CAVC's review of de novo fact finding. In affirming CAVC's affirmance of the Board's decision not to apply the benefit of the doubt doctrine, the Federal Circuit notably took issue with Mr. Roane's broad interpretation of the "take due account" language of 38 U.S.C. § 7261. Thus, *Roane* affirms that "take due account" must be interpreted in the context of the rest of the statute. Otherwise, CAVC may be granting itself the authority of de novo fact finding which would be contrary to Congress' language and intent in 38 U.S.C. § 7261.

N'yella Maya Rogers is Associate Counsel at the Board of Veterans' Appeals.

The Wider Breadth of "But For" Causation for Service Connection After *Spicer*

By Mariah N. Sim

Reporting on *Spicer v. McDonough*, 61 F.4th 1360 (Fed. Cir. 2023).

In *Spicer*, the Federal Circuit overturned a decision from the CAVC that affirmed the Board's decision denying secondary service connection. The Federal Circuit held that the causation standard under 38 U.S.C. § 1110 is a simple and broad "but for" standard.

Mr. Spicer is service connected for chronic myeloid leukemia (CML). Due to his leukemia, Mr. Spicer took medication that lowered his hematocrit, or red blood cell level. He will take this medication indefinitely, and thus, will always have lowered hematocrit.

Separately, Mr. Spicer developed arthritis in both of his knees, and he used a wheelchair to cope with the resulting pain and instability. Although he could benefit from knee surgery, his leukemia medication made his hematocrit levels so low that his doctors would not operate on him. He filed a claim for service connection for his knee arthritis, secondary to service-connected CML, pursuant to 38 C.F.R. § 3.310.

The Board denied his claim for secondary service connection. The Board focused on the secondary aspect of the claim, finding that Mr. Spicer's inability to undergo knee replacement surgery due to the effects of his service-connected leukemia medication was not contemplated by the applicable laws or regulations to fall within the meaning of secondary service connection. The Board also found that any knee disability was not "related to service in any other way." Mr. Spicer appealed.

Before CAVC, Mr. Spicer contended that service connection was warranted under the statute providing for basic entitlement to compensation for disability resulting from injury or disease in service. 38 U.S.C. § 1110.

In its decision, the majority of the CAVC panel held that the language "disability resulting from" in 38 U.S.C. § 1110 *did not* apply to disabilities that included the natural progression of the condition not actually caused or aggravated by a service-connected disability that might have been less severe were it not for such disability. Instead, the phrase "resulting from" required "*actual* but-for causation," and § 1110 included an etiological component that required a veteran's service to be the cause or origin of the disease.

However, the majority also acknowledged that causation permitted a multi-link causal chain. As a result, the CAVC majority concluded that Mr. Spicer's knee condition did not "result from" his service-connected cancer because it *could not* be said that his knee arthritis *would not* exist in the absence of his cancer or chemotherapy; therefore, there was no "actual but-for" causation. In other words, the CAVC majority reasoned that Mr. Spicer's interpretation of § 1110 would impermissibly compensate him for the natural progression of disabilities that would arise independently of a veteran's service. The CAVC majority thus affirmed the Board's denial of entitlement to service connection for a bilateral leg disability, to include as secondary to CML.

Judge Allen dissented. He interpreted the language "disability resulting from" to warrant a broader causation standard. Judge Allen explained that "as a result of" would only require a showing of a "consequence or effect," i.e., "that one thing flow from another." He relied on Congress's use of the broad "resulting from" language without any limitations. Importantly, with regard to § 1110, Judge Allen opined that there were no other requirements to establish service connection, to include an etiological cause.

Mr. Spicer appealed the CAVC decision to the Federal Circuit. The Federal Circuit first discussed *Saunders v. Wilkie*, 886 F.3d 1356 (Fed. Cir. 2018), reiterating that the definition of "disability" is "functional impairment." In doing so, the Federal Circuit noted that Mr. Spicer claimed service connection for the current functional impairment of his knees, which had been negatively impacted by his service-connected CML due to his inability to undergo surgery.

Next, the Federal Circuit acknowledged that "resulting from" in § 1110 required "but for" causation, which the parties agreed was a broad standard of causation. The "but for" causation was, at a minimum, broader than proximate causation, and it would encompass multilink causal chains.

Thereafter, the Federal Circuit attempted to narrow the dispute in *Spicer* and identified the issue as whether the "but-for causation requirement in § 1110 is limited . . . to bringing something about or the onset or etiological link, or whether . . . that language may encompass situations where the service-connected disease or injury impedes treatment of a disability." The Federal Circuit adopted the much broader interpretation of "but for" causation presented by Mr. Spicer.

The Federal Circuit focused its analysis on the "resulting from" language and emphasized that there are no qualifiers or exceptions to this language. Thus, according to the Federal Circuit, the "but for" causation standard reflected by this language is broader than proximate cause and contemplates multicausal links, including action and inaction.

The Federal Circuit elaborated that the broad interpretation would apply to the natural progression of a condition *not caused* by a service-connected disability but that would have been less severe if not for the service-connected disability.

In sum, the Federal Circuit found that Mr. Spicer's bilateral knee disability could have been corrected or improved by corrective knee surgery, which was prevented as a result of his treatment for a service-connected disability. But for such medication lowering Mr. Spicer's hematocrit, the degree of functional impairment from his knees could be reduced. The Federal Circuit placed the burden on VA to determine, even if speculatively, the degree of functional impairment or functional loss caused by an inability to treat a disorder because of a service-connected disability. Such speculative assessment seemed to be within VA's capabilities given VA's everyday use of medical opinions to guide factfinding.

The Federal Circuit thus vacated the CAVC decision and remanded the case for VA to apply 38 U.S.C. § 1110 consistent with the Federal Circuit's interpretation of this statute.

A surprising aspect of the Federal Circuit's decision in *Spicer* is the very brief conclusory statement included as a seeming afterthought: "To the extent that the VA also applied 38 C.F.R. § 3.310(b) to reject

Mr. Spicer's theory of compensation, that regulation is unlawful as inconsistent with 38 U.S.C. § 1110," without any further elaboration. However, some insight can be attained when looking at Judge Allen's dissent in the 2021 CAVC decision.

Section 3.310(b) provides for compensation for "any increase in severity of a nonservice-connected disease or injury that is proximately due to or the result of a service-connected disease or injury." Neither Judge Allen nor by implication the Federal Circuit found fault with this part of the regulation. Rather, as Judge Allen explained, the added requirement following this language in the regulation, "and not due to the natural progress of the disease," is inconsistent with 38 U.S.C. § 1110 because it is an inappropriate extra limitation to the broad causation requirement in the statute. A regulation that so restricts or conflicts with a statute is invalid.

Judge Allen noted that the language VA used in 38 C.F.R. § 3.310(b) was taken from a different statute, 38 U.S.C. § 1153, in which Congress explicitly chose a narrower causation principle. Given the Federal Circuit's lack of discussion around why it invalidated 38 C.F.R. § 3.310(b), one can presume that it adopted Judge Allen's reasoning as to the impropriety of the "natural progress" language in the regulation.

Going forward, it remains to be seen what the ripple effects of *Spicer* will be and whether *Spicer* will be applied to grant service connection based on an extremely tenuous or remote connection between a disability and service. Such a butterfly effect may raise concerns about a slippery slope of indirect causation.

Mariah N. Sim is counsel at the Board of Veterans' Appeals.

VA May Review Attorney-Fee Agreements to Determine Whether the Claim is Covered and the Fee Payable Directly from Past-Due Benefits

by Max C. Davis

Reporting on *Viterna v. McDonough*, 65 F.4th 1378 (Fed. Cir. 2023).

In *Viterna v. McDonough*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) affirmed that the VA has authority to review an attorney-fee agreement to determine whether a fee is payable from past-due benefits awarded to a claimant.

In 1988, the Veterans' Judicial Review Act created judicial review of VA decisions. Given the importance of retaining legal counsel in the new review proceedings, Congress removed the former $10 limit on attorney-fee agreements. But it gave the VA authority to review attorney fee agreements to ensure their reasonableness. 38 U.S.C. §§ 5904(c)(2). Although a reasonable fee agreement may exceed 20%, Congress set a maximum of 20% of proceeds from past-due benefits awarded on a claim that the VA may withhold from the claimant to pay the attorney directly under an approved fee agreement. 38 U.S.C. § 5904(d)(1) &(d)(3). ,

In *Viterna*, a veteran's surviving spouse filed a notice of disagreement (NOD) in 2005 to appeal a denial of a claim for dependency and indemnity compensation. While her appeal was pending, in 2012 she signed a fee agreement with Viterna, an attorney, that provided Viterna would be owed 20% of any past-due benefits the claimant recovered. The agreement specified, however, that it was "only effective as to those claims for which a notice of disagreement has been filed after June 20th, 2007." This was explained as standard language designed to avoid improperly charging attorney fees for work performed before June 20, 2007, the date an

amendment to the attorney fee statute took effect and expanded the types of services for which an attorney may charge. Viterna said that the inclusion of this provision in the fee agreement was an "unintentional drafting error."

The claimant's appeal was ultimately successful and yielded an award of past-due benefits arising from a NOD filed in 2005. The VA, complying with its regulatory obligation to "determine whether an . . . attorney is eligible for fees" withheld from past-due benefits, 38 C.F.R. § 14.636(c)(4), reviewed Viterna's fee agreement and informed Viterna that it would not pay him 20% of the claimant's past-due benefits because the NOD underlying her appeal was filed in 2005, while their agreement was specifically for claims filed after June 20, 2007. Viterna appealed to the Board, which reached the same conclusion as the original VA decision. On appeal to the United States Court of Appeals for Veterans Claims, that Court affirmed.

Before the Federal Circuit, Viterna admitted that the claimant's claim was not covered by their fee agreement, but argued that because their agreement was otherwise valid under 38 U.S.C. § 5904—in that it was contingent on securing benefits, charged a reasonable and permissible fee, and covered work in a period permitted by Congress—the VA had no authority to refuse to pay him out of the award for the claim. The Federal Circuit disagreed.

The Federal Circuit explained that, under 38 U.S.C. § 5904, the VA can only withhold and pay fees directly to the attorney "from any past-due benefits awarded ***on the basis of the claim***," 38 U.S.C. § 5904(d)(2)(A) (emphasis added), and the total fee payable may not exceed 20% of the total amount "of any past-due benefits awarded ***on the basis of the claim***." 38 U.S.C. § 5904(d)(1) (emphasis added). In order for the VA to draw on past-due benefits to pay attorneys under fee agreements covering "the claim" that resulted in the award of "past-due benefits," the VA necessarily must determine whether a given fee agreement covers the claim that resulted in the past-due benefits. Thus, the VA is empowered to determine whether a fee is payable under an otherwise qualifying attorney-fee agreement.

Where, as here, the VA determines that the fee agreement did not cover the claim resulting in past-due benefits, the VA may not draw from those past-due benefits even if the fee agreement may otherwise be a valid, qualifying agreement under the statute. The Federal Circuit likened the instant situation to one where, "if a lawyer had a fee agreement with a veteran concerning a toe arthritis disability and succeeded in getting compensation for post-traumatic stress disorder, the fee agreement would not call for compensation out of the PTSD award."

In the concluding paragraph of the decision, the Federal Circuit remarked that it did not address whether the VA has the authority to reform a fee agreement on the theory of mutual mistake because Viterna did not seek that relief.

Max Davis is Counsel at the Board of Veterans' Appeals.

38 C.F.R. § 20.1305(a) Does Not Facially Deprive Appellants of Procedural Due Process

By Christopher Casey

Reporting on *Costello v. McDonough*, 36 Vet. App. 43 (2023).

In *Costello*, the U.S. Court of Appeals for Veterans Claims (Court) held that 38 C.F.R. § 20.1305(a) does not facially deprive a claimant of the right to notice and the opportunity to respond if the appeal is decided less than 90 days after notice of certification to the Board.

Section 20.1305(a) provides that a legacy claimant and his or her representative will be granted 90 days following the mailing of notice that an appeal has been certified to the Board of Veterans' Appeals (Board) "or up to and including the date the appellate decision is promulgated by the Board, whichever comes first, during which they may submit a request for a personal hearing, additional

evidence, or a request for a change in representation."

Mr. Costello was awarded service-connection for coronary artery disease in a February 2019 rating decision, which assigned a 10 percent rating and an effective date of October 2, 2018. Mr. Costello filed a timely appeal to the Board, seeking an increased rating and earlier effective date. On December 30, 2019, Mr. Costello and his representative received notice from the Board that his appeal had been certified, and that he had 90 days or until the Board issued a decision, whichever came first, to request a hearing, submit additional argument or evidence, or to request a change in representation. On January 28, 2020, just 29 days after the Board's notice letter and before Mr. Costello responded to it, the Board issued a decision denying the claims for an increased rating and earlier effective date.

Mr. Costello argued on appeal that 38 C.F.R. § 20.1305(a) is facially invalid because it deprives a claimant of due process of law. Specifically, Mr. Costello argued that § 20.1305(a) provides illusory notice and necessarily denies claimants their constitutional right to due process, as the Board may issue a decision less than 90 days after the certification notice.

The Secretary argued in response that, rather than providing a "date certain" to submit evidence, the regulation's purpose is to provide a "cut-off date" to assist in orderly, prompt appeal processing, and to clarify the evidence considered by the Board. The Secretary further argued that the entire review period should be considered, and that the Veteran was given adequate notice and opportunity to be heard over the course of the entire appeal.

The Court asked the parties to submit supplemental briefing to address, *inter alia*, that the section was amended by the Veterans Appeals Improvement and Modernization Act of 2017 (AMA) to include a guaranteed 90-day period. Mr. Costello argued that VA's adoption of a definite period under the AMA demonstrates that the language in the regulation at issue is unfair, while the Secretary argued that the appeal mechanisms of the open-record legacy appeals system, and that of the closed-record AMA system, are unrelated to each other.

Ultimately, the Court ruled that Mr. Costello failed to meet his burden of showing that § 20.1305(a) facially violates procedural due process rights under the Fifth Amendment. The Court was careful to note the important distinction between a facial due-process challenge made by Mr. Costello, and a due process challenge to the regulation as applied to facts of his case. The Court observed that Mr. Costello did not argue that the appeals process deprived him, or any other claimant, of notice and opportunity to respond.

The Court considered a hypothetical situation offered by Mr. Costello, that a veteran could receive the decision on the same day as the certification notice. However, the Court found such a situation was only hypothetical. The Court held that, while Mr. Costello's arguments may warrant closer scrutiny in an as-applied due process challenge, his argument is out of place in a facial due process challenge, which requires a showing that the regulation is invalid in all circumstances.

The Court distinguished this case from *Bryant v. Wilkie*, 33 Vet. App. 43, 46 (2020), in which the Court set aside a Board decision issued within the 90-day period. In *Bryant*, the Board was notified that the appellant intended to submit additional evidence or argument, but still issued a decision within the 90-day period. In this case, there was no communication to the Board of an intent by Mr. Costello or his representative to submit evidence or argument, or request a hearing, within the 90-day period.

Christopher Casey is Counsel with the Board of Veterans' Appeals, and Secretary of the CAVC Bar Association Board of Governors.

Blue Water Act Retroactive Effective Date Exception Not Limited to Prior Claims Denied for Lack of Vietnam Service

by R. Brouck Kuczynski

Reporting on *Crews (Robert) v. McDonough*, No. 21-0226 (Vet. App. Apr. 17, 2023).

In *Crews*, the U.S. Court of Appeals for Veterans Claims (Court) vacated and remanded a November 2020 Board of Veterans' Appeals (Board) decision that denied an earlier effective date for an April 2020 grant of service connection of a heart disease based on presumed exposure to an herbicide agent due to offshore Vietnam service. Ultimately, the Court held that the Blue Water Navy Vietnam Veterans Act of 2019 (Blue Water Act) did not preclude application of an exception to the generally applicable effective date rules where a prior claim was denied based on evidence of a current disability.

Judge Meredith's opinion detailed the requirements of the Blue Water Act, which provides an exception to the rules for assigning effective dates and extends a presumption of Vietnam herbicide agent exposure to include offshore military service. *See* 38 U.S.C. § 1116A (Blue Water Act); *see also* 38 U.S.C. § 5110 ("the effective date of an award…shall not be earlier than the date of receipt of application therefor").

More specifically, the Blue Water Act exception applies to claimants who had previously filed for compensation on or after September 25, 1985, and before January 2020, for a covered disease, and the prior claim "was denied by reason of the claim not establishing that the disease was incurred or aggravated by the service of the veteran." *See* 38 U.S.C. § 1116A(c)(2)(B)(i). The veteran's claim must also have been submitted for disability compensation on or after January 1, 2020, for the same condition covered by the prior claim, and that claim is approved pursuant to the Blue Water Act. *See* 38 U.S.C. § 1116A(c)(2)(B)(ii).

In this case, by way of background, Mr. Crews filed for service connection for a heart disease (ischemic heart disease) in September 2013. The Agency of Original Jurisdiction (AOJ) denied the claim in July 2014. Prior to the denial, the AOJ requested private treatment records, but a response was not received. While the requisite Vietnam service was met for presumptive service connection at that time, the record lacked sufficient evidence for a finding of a current disability. In the July 2014 rating decision, the AOJ stated that the evidence did "not show an event, disease[,] or injury in service" and the condition "did not happen in military service, nor was it aggravated or caused by service." Mr. Crews did not appeal.

Following Mr. Crews' supplemental claim filed in September 2019, in April 2020, the AOJ granted service connection for a heart disease (coronary artery disease); the record at this time showed he had been diagnosed and treated for a heart disease from at least 1991. While an effective date for the award of service connection was first assigned from the date of his September 2019 supplemental claim, in a May 2020 decision, the AOJ assigned an earlier effective date to September 5, 2018, one year prior to the date of the supplemental claim. (In this regard, because coronary artery disease had been added to the list of presumed herbicide-related conditions on August 31, 2010, the AOJ determined an effective date should have been awarded one year prior to the receipt of claim). Seeking an award of an earlier effective date, Mr. Crews appealed to the Board.

Upon review, the Board considered the Blue Water Act and determined that an exception under the law was inapplicable to Mr. Crews' case as the prior claim had been denied on a lack of current disability, and not based on lack of Vietnam service. In the November 2020 decision, noting that the AOJ had denied the claim in July 2014 for multiple bases including that "the evidence did not show a currently diagnosed disability," the Board denied the appeal for an earlier effective date. Significant to the decision was the Board's determination that the evidence at the time of the denial of Mr. Crews' prior 2013 claim did not show a current disability and records showing a current disability were not available for review until after his subsequent 2019

claim. In disagreement, Mr. Crews appealed to the Court.

In a majority opinion by Judge Meredith, the Court held that there is no prohibition in the Blue Water Act from granting entitlement to an earlier effective date when a prior claim was denied due to lack of evidence of a current disability. Rather, the requirements include that the claim was previously denied because it had not been shown that the disease was incurred or aggravated by service. *See* 38 U.S.C. § 1116A(c)(2)(B)(i).

The Court discussed the specific requirements for a retroactive effective date under the Blue Water Act (that the prior application for benefits was denied "by reason of the claim not establishing that the disease was incurred or aggravated by the service of the veteran") and determined that there is nothing in the Blue Water Act to mandate that a prior claim must have been based upon a particular theory or to require that a veteran had alleged exposure to an herbicide agent in the prior claim.

Dissecting the language codified in the Blue Water Act, the Court interpreted the phrase of "the claim not establishing" as reasonably describing "a situation in which the claimant failed to support his or her claim with sufficient evidence to permit VA to grant the specific benefit sought," and also concluded that the best reading of "by reason of" was "that it does not signal the *only* cause for the prior denial."

Regarding the phrase that "the disease was incurred or aggravated by the service," the Court held this cannot be read as specifying that an element for service connection must have been affirmatively established at the time of the prior denial, or, in other words, that a lack of evidence of a current disability could not have been the basis for a prior denial.

The Court also analyzed usage of "the disease" due to the inclusion of "the" within the phrase. However, the Court explained that it was not persuaded that, by using "the," Congress meant to convey that the claimant must have previously established the existence of a current disability. Instead, the Court noted that "grammar and usage establish that 'the' is a function word" and thus, "the disease" is reasonably understood to refer to the "disease" mentioned earlier in the same sentence, simply referring to the conditions identified as presumptive.

Therefore, the Court held that "the specific criteria that Congress enumerated for a retroactive effective date" in the Blue Water Act "do not include a prohibition" on the prior claim denied for lack of evidence of a current disability.

Mr. Crews' case was remanded for the Board to reexamine whether the Blue Water Act exception applies under the Court's interpretation, with consideration of the precise reasons and bases provided in the July 2014 denial by the AOJ.

Concurring, Judge Jaquith emphasized that the Blue Water statute does not specify that a prior claim must have been denied "only by reason of" or "solely by reason of" and thus, Congress did not explicitly intend to limit the applicability of this provision. Regarding the facts of this particular case, he wrote that the July 2014 rating decision included that the claimed condition "did not happen in military service" which amounted to a favorable finding, and that the Board mischaracterized the July 2014 rating decision by ignoring that favorable finding. Judge Jaquith stated that the November 2020 Board decision rested on a "misleading half-truth" in the AOJ's April 2020 *characterization* of the July 2014 rating decision (that the "original claim…was denied because there was no evidence of a diagnosis") "rather than the July 2014 decision itself."

In contrast, Judge Falvey dissented, resolving that the denial of Mr. Crews' previous September 2013 claim was *not* because "the disease was [not] incurred or aggravated by service" as required by the Blue Water Act Judge Falvey added that if congressional intent had been to provide earlier effective dates for all veterans who had merely previously filed an application for a covered disability and were denied, Congress would have only broadly included in the statutory language that those claimants had been "denied."

Furthermore, the question of whether a disability was incurred in or aggravated by service is relevant *only when* the current disability prong has already been met, and in any case if the disability prong could not be met, a veteran would not benefit from the presumptions.

Brouck Kuczynski is counsel at the Board of Veterans' Appeals.

CAVC Requires Board to Seek Clarification Where Appellant Attached Evidence to VA Form 10182 Electing Direct Review

by Donald M. Badaczewski

Reporting on *Edwards v. McDonough*, No. 20-7244 (Vet. App. March 20, 2023).

In *Edwards v. McDonough*, Mr. Edwards claimed service connection for a neck disability. After an examiner provided a negative nexus opinion, Mr. Edwards's claim was denied in a November 2019 rating decision. Mr. Edwards initiated an appeal by filing a timely Notice of Disagreement ("NOD") using VA Form 10182.

In Part II of his NOD, Mr. Edwards marked Box 10A, indicating that he desired direct review by the Board of Veteran's Appeals (Board). In Part III of his NOD, he marked the box indicating that he was attaching additional sheets.

In a statement submitted along with his NOD, Mr. Edwards described the details of an in-service car accident at Fort Knox in which he sustained a neck injury. Additionally, he reported treatment for neck and back pain over the years and asserted that a physician had advised him that his neck injury appears to be very old due to the amount of arthritis formed around the injured area. He also requested reconsideration of the November 2019 decision and asked for the Fort Knox accident file to be located.

In the August 2020 decision on appeal, the Board indicated that it limited its review to the evidence considered in the November 2019 decision. However, the Board also included the statement Mr. Edwards attached to his NOD in its recitation of evidence. The Board denied service connection, explaining that the evidence weighed against "continuity between events in service and the current" disability.

On appeal to the United States Court of Appeals for Veterans Claims ("CAVC"), Mr. Edwards argued that 38 C.F.R. § 20.202(f) required the Board to contact him to clarify his NOD. Section 20.202(f) is titled "Unclear Notice of Disagreement" and states that if the Board receives a timely NOD but cannot identify the issues appealed or the review option selected, then the Board will contact the appellant to request clarification of intent.

The Secretary argued that the Board was not required to seek clarification here, as Mr. Edwards's NOD was clear on its face. Furthermore, the Secretary argued that Mr. Edwards had affirmed that he was seeking direct review, as after the Board notified him that his appeal had been placed on the direct review docket, he submitted a brief stating that "[t]his is an AMA appeal for direct review by the [Board]." Additionally, the Secretary argued that any error in construing the NOD was harmless, sincethe Board had considered the additional evidence submitted by Mr. Edwards.

The CAVC agreed with Mr. Edwards. It explained that when read together, Mr. Edwards's docket election on his NOD and the attached statement were unclear, if not wholly contradictory. The CAVC stated, "Despite the Secretary's protestations to the contrary, it is simply not possible to reconcile Mr. Edwards's submission of new evidence with his chosen election. Indeed, it is perfectly clear to the Court that Mr. Edwards's scenario gave rise to the exact type of confusion or uncertainty suggested in the regulation's title."

The CAVC explained that the Board is obligated to consider the full context within which appellants' submissions are made, including liberally construing the filings of pro se claimants. *See Rivera v. Shinseki*,

654 F.3d 1377, 1380, 1382 (Fed. Cir. 2011). The CAVC noted that when 38 C.F.R. § 20.202 was proposed, the Secretary characterized the new regulation as "closely aligned with the process of clarifying [NODs] in the legacy system" and explained that Veterans Law Judges "will retain their discretion to interpret some unclear statements on [NODs] in the light most favorable to the veteran." *See VA Claims and Appeals Modernization*, 83 Fed. Reg. 3918, 39,832 (Aug. 10, 2018) (proposed rule). Moreover, the CAVC noted a prior decision where it viewed the legacy appeals process as requiring the Board "to seek clarification and communication with the appellant as to any perceived concern about how the appellant had filled out" an NOD. *See Evans v. Shinseki*, 25 Vet. App. 7, 16 (2011).

However, the CAVC emphasized that it was not speculating as to other scenarios that might implicate 38 C.F.R. § 20.202(f), such as where an appellant submits additional statements or evidence after submitting a VA Form 10182.

The CAVC went on to conclude that the Board's error here was not harmless, as the Board adjudicated Mr. Edwards's appeal on the Direct Review docket and did not fully account for his new evidence in its analysis.

Thus, the CAVC set aside the August 2020 Board decision and remanded the matter to the Board for further development and readjudication.

The CAVC provided additional guidance to the Board regarding the adequacy of the negative nexus opinion. That opinion was based in part on a "lack of continuum" and absence of evidence that Mr. Edwards actively sought medical treatment for his chronic neck condition over 40 years. However, Mr. Edwards had indicated in written statements and to the examiner that he sought and received chiropractic neck treatment for many years. The CAVC found that the opinion was therefore inadequate because it "failed to consider whether the lay statements presented sufficient evidence of the etiology of [the veteran's] disability such that his claim of service connection could be proven," pursuant to *Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006). Moreover, as the examiner's premise that there was no evidence that Mr. Edwards sought treatment ignored his statements that he had received chiropractic treatment for many years, the examiner's conclusions were flawed. *See Reonal v. Brown*, 5 Vet. App. 458, 460-1 (1993) ("An opinion based upon an inaccurate factual premise has no probative value").

Donald M. Badaczewski is Counsel at the Board of Veterans' Appeals.

The Board May Not Consider the Same Issue Once the Court Takes Jurisdiction of That Issue

by Sarah "Sally" Battaile

Reporting on *Encarnacion v. McDonough* (*Encarnacion I*), 36 Vet. App. 31, *superseded on recons. by Encarnacion II*, No. 21-1411 (Vet. App. May 18, 2023).

In the *Encarnacion* decisions, a panel of the U.S. Court of Appeals for Veterans Claims (Court), composed of Judges Toth, Falvey, and Jaquith, addressed whether the Board properly dismissed the veteran's appeal for lack of jurisdiction. The Board of Veterans' Appeals (Board) failed to consider whether a notice of disagreement (NOD), which challenged a rating decision that implemented a Board decision, could be construed as a timely motion to reconsider the Board decision.

In *Encarnacion I*, the Court vacated two Board decisions—the May 2018 decision and a June 2020 decision—and remanded the matter to the Board. In *Encarnacion II*, the Court granted the Secretary's February 2023 motion for reconsideration, withdrew *Encarnacion I*, and issued *Encarnacion II* in its stead, modifying *Encarnacion I* to address matters raised in the Secretary's motion.

The agency of original jurisdiction (AOJ) awarded service connection for the right knee disability in August 2010 and assigned an initial 10% rating, effective October 14, 2009. The veteran, Mr. Aparicio, appealed to the Board, seeking a higher

rating and an earlier effective date, but he passed away while his claim was pending. His surviving spouse, Ms. Encarnacion, filed claims for dependency and indemnity compensation and for accrued benefits in 2011.

After a long procedural history, the Board adjudicated the merits of the claim in the May 2018 decision, granting an initial rating of 10% and attaching a notice of appellate rights. The notice informed Ms. Encarnacion that she did not need to do anything if she was satisfied with the outcome and that the AOJ would implement the decision. She was also informed that if she was dissatisfied, she could appeal to the Court, file a motion for the Board to reconsider or vacate its decision, or to file a motion to revise the decision based on clear and unmistakable error.

A June 2018 rating decision implemented the Board's decision, and in July 2018, Ms. Encarnacion filed an NOD as to the right knee increased rating issue.

The AOJ issued a statement of the case (SOC) but the next day also sent Ms. Encarnacion a letter rejecting the appeal of the June 2018 rating decision because it simply implemented the Board's May 2018 decision. Ms. Encarnacion filed a substantive appeal but did not respond to VA's letter rejecting the appeal. VA certified her case to the Board. The Board issued a decision on the merits, and Ms. Encarnacion appealed to the Court. In a joint motion for partial remand, Ms. Encarnacion and the Secretary agreed that the Board erred by adjudicating the claim on the merits before it addressed whether the AOJ properly rejected her July 2018 NOD.

On remand, in the June 2020 decision, the Board concluded that it lacked jurisdiction to address the claim without a valid NOD, finding that the AOJ erroneously issued the September 2018 SOC because the law prohibited her from filing an NOD to an AOJ implementation. The Board did not address whether it should have sympathetically construed the NOD as a motion to reconsider its May 2018 decision.

Ms. Encarnacion argued that the Board erred in not accepting her NOD as a motion to reconsider the Board's May 2018 decision. The Secretary defended the Board's June 2020 decision, arguing that the Board lacked jurisdiction because a pure implementation cannot be appealed.

The Court held that under 38 U.S.C. §§ 511 (the Secretary "shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits") and 7104(a) ("questions in a matter [under § 511] . . . shall be subject to one review on appeal" and "[f]inal decisions on such appeals shall be made by the Board"), the pure implementation of a Board adjudication cannot be appealed to the Board. The Court reasoned that "pure" implementations are ministerial acts giving effect to the Secretary's final determination on the matter. In these implementations, the AOJ need not make any further determinations for an award of benefits to take effect, and the AOJ could not render new findings on factual or legal issues already determined by the Board because the AOJ cannot review the decision of a superior tribunal. Thus, although Ms. Encarnacion argued that VA waived any objections to jurisdictional defects by issuing the September 2018 SOC, there was no "decision" under 38 U.S.C. § 511, and therefore nothing to review or to confer jurisdiction. The Court therefore agreed that the Board had no authority to review the implementing action because it did not constitute a "decision" of the Secretary.

The Court discussed important exceptions to the finality of a Board decision. A claimant may appeal the matter to the Court within 120 days of the Board decision or file a motion with the Board to revise its decision based on clear and unmistakable error. 38 U.S.C. §§ 7111, 7252(a). Additionally, under 38 U.S.C. § 7103(a), a claimant can at any time ask the Board to reconsider its decision. The Court noted that the important qualification of motions to both reconsider and revise is that the underlying Board decision being challenged has not been reviewed and affirmed in relevant part by the Court.

Under *Ratliff v. Shinseki*, the filing of a written expression of disagreement within the 120-day period to submit a notice of appeal (NOA) to the

Court "abates the finality of the Board decision for purposes of appealing to the Court." *Ratliff v. Shinseki*, 26 Vet. App. 356, 360 (2013) (per curiam order). The AOJ must "forward written expressions of disagreement [filed within the 120-day appeal period] to the Board chairman, who is 'to determine[] . . . whether it is considered a motion for Board reconsideration or not, and notif[y] the claimant of its determination.'" *Gomez v. McDonald*, 28 Vet. App. 39, 44-45 (2015) (per curiam order) (quoting *Ratliff*, 26 Vet. App. at 360). The Court concluded that the receipt of Ms. Encarnacion's NOD in July 2018 abated the finality of the Board's May 2018 decision until the appropriate steps under *Ratliff* were taken.

As a final matter, the Court noted a substitution issue regarding notice and Ms. Encarnacion's rights to pursue the claims pending at the time of her husband's death that was seemingly resolved, but Ms. Encarnacion's new counsel attempted to raise a new argument about whether she received proper notice regarding her eligibility to substitute for Mr. Aparicio in the claims that were pending when he died. The Court declined to address the argument because the Board found that the AOJ had granted the request to substitute, thereby rendering moot any argument about notice. Additionally, the argument was not presented in an initial brief and was raised too late. The Court deemed the issue waived and of no jurisdictional import.

Encarnacion I vacated the Board's May 2018 and June 2020 decisions and remanded the matter for the Board to assess whether Ms. Encarnacion's July 2018 NOD qualifies as a motion to reconsider the Board's May 2018 decision.

In *Encarnacion II*, the Court modified its prior decision to address the Secretary's contentions in his motion to reconsider. The Court restated its holding from *Encarnacion I*: a purely ministerial implementation of a Board decision does not constitute a decision of the Secretary and, therefore, cannot be reviewed by the Board. The Court further rescinded the vacatur of the May 2018 Board decision but kept its vacatur of the June 2020 Board decision in place. The Court also modified its holding to address the Secretary's contention that a remand was unnecessary because the Board had already construed Ms. Encarnacion's July 2018 NOD as a motion for reconsideration.

The Court clarified that once the Court takes jurisdiction over a claim, the Board may not take unilateral action on that issue, and the Court noted that it had specifically ordered the Board to take no action unless it was first granted leave to do so per procedures set out in *Cerullo v. Derwinski*, 1 Vet. App. 195, 200 (1991). Thus, the Court concluded that any action taken by the Board while the matter was pending before the Court was void. The Court noted that since it determined that *Ratliff* applied in these circumstances and that the June 2020 decision must be vacated, the Board is only *now* permitted to address whether the July 2018 NOD qualifies as a motion for Board reconsideration.

Judge Jaquith wrote a concurring opinion because he agreed with the entire Court opinion except as to the substitution issue. Judge Jaquith reported in detail the "tortured history of this case," highlighting the "spotty record before the Court imped[ing] review of the effect of that mishandling [of the substitution issue]" since Mr. Aparicio's death in October 2011.

Judge Jaquith highlighted the Board's several acknowledgments that the AOJ had not determined the substitution issue, and the Board's eventual abandonment of its own insistence on regulatory compliance when it found that the AOJ had implicitly approved Ms. Encarnacion's request to substitute and afforded her appropriate notice rights. Judge Jaquith also noted that although the Board had dismissed the appeal in September 2017 for lack of jurisdiction, the Board then concluded that it did have jurisdiction in May 2018, finding that Ms. Encarnacion's request to substitute was implicitly granted by the AOJ.

Judge Jaquith opined that the muddled record left open to debate whether the error in addressing substitution was harmless or prejudicial to Ms. Encarnacion, but he noted that the remand afforded the Board the opportunity to ensure Ms. Encarnacion's substitution rights, e.g., to waive substitution and to a hearing, were or are protected.

The balance of Judge Jaquith's opinion addressed Judge Falvey's dissenting opinion and concurred with the majority's reliance on both *Cerullo* and *Ratliff*.

Judge Falvey agreed with the majority that Ms. Encarnacion could not appeal a ministerial rating decision. But he disagreed with the majority's decision to remand the matter and the majority's conclusion that the Board should have determined whether the July 2018 NOD was a motion for reconsideration. A remand, Judge Falvey wrote, adds steps to the process and orders the Board to make a determination that the Chairman has already made, but the right thing to do would be to resolve Ms. Encarnacion's case as quickly as possible by affirming the Board decision on appeal and letting the Chairman act on the motion.

Judge Falvey considered the majority's reliance on *Ratliff* misplaced. In that case, the Court did not address whether the Board erred by not sua sponte deciding if a filing is a motion for reconsideration. Rather, in *Ratliff* the Court addressed whether to dismiss an appeal of a Board decision when an NOA with the Court was filed well outside the 120-day appeal deadline.

Judge Falvey also disagreed with how the majority applied *Cerullo*, which dealt with whether the Chairman may order reconsideration of a Board decision after an NOA is filed with the Court. But here, Judge Falvey noted that Ms. Encarnacion did not try to appeal the May 2018 Board decision to the Court or argue that the Board erred by not considering whether her July 2018 NOD was a motion for reconsideration, even after the issue was "injected" by the Court.

Further, Judge Falvey remarked, *Cerullo* does not prohibit the Chairman from reconsidering a decision that is not on appeal and over which the Court has no jurisdiction, i.e., the May 2018 Board decision, or prohibit VA from acting on any issue that may relate to any issue before the Court. He noted that the latter would be inapposite because claims can be in multiple places at once in the modernized appeal system and even in the legacy appeal system in certain situations involving bifurcated claims.

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

Petition Asserting Legacy Appeals Decided Out-of-Docket-Order Dismissed as Moot

by C. Jeffrey Price

Reporting on *Gray v. McDonough*, No. 22-3933 (Vet. App. Mar. 24, 2023).

In *Gray v. McDonough*, the Court of Appeals for Veterans Claims (Court) dismissed as moot a petition seeking an order compelling the Board of Veterans' Appeals (Board) to issue a decision on petitioner Justin Gray's legacy appeal, which had been filed in December 2018. It did so because Mr. Gray's Board appeal was assigned to a and a decision was issued while his petition to the Court was pending.

Before the Board decision was issued, however, the Court referred Mr. Grays' petition to a panel and held oral argument on November 9, 2022. In its briefings and at oral argument, the Secretary informed the panel the Board had indeed adjudicated some legacy appeals out of docket order, which was in violation of 38 U.S.C. § 7107(a)(1). The Secretary acknowledged to the panel that the Board had been distributing a limited number cases in certain classes out of docket order.

As part of its response to Mr. Gray's petition, the Secretary submitted to the Court a declaration from Deputy Vice Chairman of the Board, Christopher A. Santoro, stating that the Board has implemented changes to simplify how it distributes cases to Board members and to prevent the improper out-of-docket-order distribution from happening again.

The Secretary opposed the relief sought by Mr. Gray because it argued it would result in improper "line jumping" and would be unfair to other claimants who are in the same situation as Mr. Gray. The

Court ordered supplemental post-argument briefing from the Secretary to clarify its position and the factual bases for supporting it.

As noted above, in March 2023, before the Court could enter a decision on the merits of Mr. Gray's petition, the Secretary informed the Court that the Board had assigned Mr. Gray's December 2018 appeal to a Veterans Law Judge and a decision had been issued. The Court noted there was no longer a "case or controversy" between the parties and thus the Court no longer had jurisdiction. Therefore, the Court dismissed the matter as moot.

Jeff Price is an Appellate Attorney at the National Veterans Legal Services Project.

In Pension Claims, a Veteran's Annual Income Includes Spousal Income

by Monica Ball Jackson

Reporting on *Hairston v. McDonough*, No. 20-4692 (Vet. App. April 20, 2023).

In *Hairston*, the U.S. Court of Appeals for Veterans Claims (Court) affirmed the Board of Veterans' Appeals (Board) denial of pension benefits based on a finding of fact that the veteran's countable annual income exceeded the maximum annual pension rate (MAPR), given his spouse's annual income.

Generally, veterans must meet three requirements to qualify for non-service-connected pension benefits under 38 C.F.R. § 3.3(a)(3). The veteran must have 90 days or more of active service during a period or periods of war; must meet the net worth requirements of 38 C.F.R. § 3.274 and not have an annual income in excess of the MAPR; and must be age 65 or older or totally and permanently disabled due to a non-service-connected disability. At issue here is the part of the regulation that governs the veteran's net worth under 38 C.F.R. § 3.274 and annual income as specified in 38 C.F.R. § 3.23 to qualify for pension benefits.

On appeal, Mr. Hairston advanced three arguments in support of his position that the Board erred when it included his wife's income as part of his countable annual income. He first argued that the Board improperly applied § 3.23(b) by including his spouse's income in calculating his countable annual income. Next, Mr. Hairston argued that § 3.23(d)(4), the implementation regulation for the Department of Veterans Affairs (VA), is invalid because including a spouse's income in calculating a veteran's countable annual income does not comport with 38 U.S.C. § 1521(c), the authorizing statute. Finally, Mr. Hairston asserted that 2018 regulations setting a net worth limit superseded § 3.23.

The Court began its analysis by addressing Mr. Hairston's validity argument. Mr. Hairston argued that § 1521(c) makes clear that Congress intended to only contribute a child's income to the veteran's annual income. He relied on the final sentence of § 1521(c), which states that "[t]he rate payable shall be reduced by the veteran's annual income and, subject to subsection (h)(1) of this section, the amount of annual income of such family members." Because subsection (h)(1) relates to a reduction to the rate payable based on a child's income and not a spouse's income, Mr. Hairston contended that Congress did not intend to include a spouse's income in the veteran's annual income.

The Court discussed the statutory interpretation principles of plain meaning and consistent meaning in explaining that the last sentence of subsection (h)(1) could not be interpreted in isolation because the phrase "such family members" was used in different parts of the same statutory section. Following that reasoning, the Court determined that the phrase "such family members" included a spouse's income and a child's income. The Court pointed out that the "obvious antecedents" for the references to "such" in the statute are clearly

referenced in the first line of subsection (c): "a spouse with whom the veteran lives or to whose support the veteran reasonably contributes and any children in the veteran's custody or to whose support the veteran reasonably contributes." 38 U.S.C. § 1521(c).

The Court concluded that "§ 1521(c) clearly requires that the rate payable be reduced by a spouse's income because it is countable as part of a veteran's annual income." The Court held that § 3.23(d)(4), defining a veteran's annual income, is valid and applicable to Mr. Hairston's claim.

The Court next addressed Mr. Hairston's assertion that the 2018 amendments to 38 C.F.R. § 3.274 and 3.275 set a bright-line net worth limit, thereby superseding § 3.23's mandatory MAPR reduction scheme. The Court found no evidence that VA intended to supersede § 3.23. Rather, the Court determined that the VA simply defined the term net worth limit. The Court also held that the supersession Mr. Hairston suggested was invalid because it was inconsistent with the terms of the pertinent statutes.

Finally, the Court turned to Mr. Hairston's argument that the Board misunderstood § 3.23(b) because nothing in that section defines countable annual income of the veteran to include a spouse's income. The Court noted that § 3.23(d) provides definitions of terms used in the section and explicit definition trumps ordinary meaning. The Court concluded that § 3.23(d)(4) defines annual income of the veteran to include income of the veteran's dependent spouse; therefore, the Board correctly included the income of Mr. Hairston's wife' in its calculation of his annual income.

In sum, the Court held that 38 C.F.R. § 3.23 is valid and consistent with its authorizing statute, was not superseded by 2018 amendments setting a bright-line net worth limit and was properly interpreted by the Board to include a spouse's income as part of a veteran's countable annual income.

Monica Ball Jackson is an attorney advisor at the Board of Veterans' Appeals.

A Failure to Obtain Informed Consent was not Undebatably a Basis Upon Which to Award Compensation Under 38 U.S.C. § 351 in 1980

by S. Michael Stedman

Reporting on *Hatfield v. McDonough*, No. 21-5125 (Vet. App. March 28, 2023). (*Hatfield II*)

In *Hatfield II*, a panel of the U.S. Court of Appeals for Veterans Claims (Court) comprised of Judges Allen, Meredith, and Falvey, addressed a June 2021 Board of Veterans' Appeals (Board) decision which denied a motion to revise an October 1980 Board decision on the basis of clear and unmistakable error (CUE). The Court affirmed the June 2021 Board decision, holding that the failure by the Department of Veterans Affairs (VA) to obtain a patient's informed consent was not undebatably a basis upon which to award compensation under 38 U.S.C. § 351 in 1980. Judge Allen authored the opinion of the Court.

Mrs. Pat A. Hatfield, the appellant and surviving spouse of veteran Mr. Archie A. Hatfield, sought compensation for Mr. Hatfield's death pursuant to 38 U.S.C. § 351 (1976), now codified as 38 U.S.C. § 1151, following his death in 1979 due to complications from radiation therapy used by VA to treat his Hodgkin's disease. In March 2021, Mrs. Hatfield was awarded dependency and indemnity compensation (DIC) benefits after the Court's decision in *Hatfield I*, which held that the reasonable person exception to informed consent does not apply when no consent is obtained.

In *Hatfield II*, Mrs. Hatfield challenged a June 2021 Board decision which denied a motion to revise on the basis of CUE an October 1980 Board decision that denied entitlement to compensation under 38 U.S.C. § 351. Mrs. Hatfield argued that the 1980 Board decision contained CUE, as it did not address whether VA's failure to obtain Mr. Hatfield's informed consent for his radiation treatment

constituted deficient medical care under 38 U.S.C. § 351. Mrs. Hatfield argued that the 1980 Board decision was based on an incorrect application of 38 U.S.C. §§ 351, 4131 (1976) and 38 C.F.R. § 17.34 (1980), as the Board did not address whether VA medical professionals had sought or obtained Mr. Hatfield's consent for radiation therapy.

Mrs. Hatfield also raised arguments regarding 38 C.F.R. § 3.358, which was section 351's implementing regulation in 1980, as well as the common law. The Court noted these arguments were not included in her September 2020 CUE motion, and the Court therefore lacked jurisdiction to address such theories. However, the Court noted that it did have jurisdiction to consider 38 C.F.R. § 3.358 in assessing whether the Board's 2021 conclusion that the 1980 Board decision did not contain CUE was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Concerning Mrs. Hatfield's argument regarding the common law, the Court found it was able to consider this argument in the limited context of the how the common law in 1980 influenced the understanding of 38 U.S.C. § 351 at that time.

Mrs. Hatfield asserted, when read together, 38 U.S.C. §§ 351, 4131 and 38 C.F.R. § 17.34 would have provided a basis to award DIC benefits at the time of the 1980 Board decision.

In 1980, 38 U.S.C. § 351 provided compensation for an additional disability or death that was not the result of willful misconduct and was caused by VA hospitalization, medical or surgical treatment, or rehabilitation services as if that disability were service connected. Moreover, 38 U.S.C. § 4131 and 38 C.F.R. § 17.34 required VA medical professionals to obtain a patient's informed consent prior to receiving medical care. Essentially, Mrs. Hatfield argued that, at the time of the 1980 Board decision, a lack of informed consent was tantamount to negligence and deficient medical care, and the Board's failure to consider lack of informed consent for radiation treatment was CUE.

The Court noted that the concept of informed consent, in relation to VA medical care, did not appear until 1976, at which time it was a part of a patient's bill of rights pursuant to 38 U.S.C. § 4131 and 38 C.F.R. § 17.34. However, at that time there was no connection between the informed consent requirement for VA medical professionals and the provisions of disability compensation under 38 U.S.C. § 351.

Rather, section 351, and its later iterations, did not contain language that a lack of informed consent was a basis for compensation. The Court found there was no evidence in either the statutory language or legislative history to indicate a congressional intent to provide disability compensation on the basis of a lack of informed consent.

In regard to Mrs. Hatfield's argument that a lack of informed consent was part of the common law for negligence, the Court noted there was no evidence that Congress intended to adopt common law principles as a basis for 38 U.S.C. § 351.

The Board's June 2021 decision denying Mrs. Hatfield's CUE motion primarily relied on the changes in the implementing regulations for 38 U.S.C. § 351, and section 1151 after 1980. The Court specifically rejected Mrs. Hatfield's argument that it was error to consider any regulatory changes which occurred after the October 1980 Board decision. In doing so, the Court recognized how post-1980 changes gave context to how 38 U.S.C. § 351 was interpreted in 1980.

In 1980, the regulatory history of section 351's implementing regulation, 38 C.F.R. § 3.358, did not mention informed consent, as compared to the implementing regulation for section 1151, 38 C.F.R. § 3.361, which explicitly included informed consent as a basis for compensation. The Court found that the current regulation provides the missing connection between the informed-consent requirement for medical professionals with disability compensation, which was missing in 1980.

Importantly, it was not until 1995 that consent was first mentioned in the regulatory history of section 1151, in which VA amended 38 C.F.R. § 3.358 to include that compensation was not payable for the necessary consequences of treatment to which the veteran consented. The Court emphasized that this change reflected a revision of how compensation had been considered under section 1151, and section 351 by extension, prior to 1995.

The Court found that the failure to obtain informed consent was not a basis upon which compensation was warranted until the mid-1990s. At the time of the 1980 Board decision, 38 U.S.C. § 351 did not explicitly or implicitly reference informed consent in 1980, nor did it incorporate the consent provisions of 38 U.S.C. § 4131 and 38 C.F.R. § 17.34. As such, the Court affirmed the June 2021 Board decision, which found no CUE in the October 1980 decision as it was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

S. Michael Stedman is an Associate Counsel with the Board of Veterans' Appeals.

Errors in Notice Letters May Render Them Inadequate

By Mary E. Rude

Reporting on *Wiker v. McDonough*, No. 21-5454 (Vet. App. May 12, 2023).

In *Wiker*, a panel of the U.S. Court of Appeals for Veterans Claims (Court), comprised of Judges Falvey, Allen, and Jaquith, vacated a Board of Veterans' Appeals (Board) decision that denied an earlier effective date for service connection on the basis that the veteran had been sent incorrect notice about the initial denial of his claim.

Navy veteran Roger W. Wiker was discharged in 1964 because he had been found unfit for duties due to two eye disorders, bilateral cataracts and amblyopia. He submitted a claim for cataracts that same year, but the regional office denied the claim on the basis that the condition was congenital and there was no further in-service injury. Unfortunately, the veteran was never sent this rating decision, and instead was sent a letter in January 1965 which incorrectly indicated that service connection for cataracts was granted, but was assigned a noncompensable (0 percent) rating. The letter also informed Wiker of his right to appeal to the Board by submitting a Notice of Disagreement within one year of the date of the letter.

An attorney submitted a Notice of Disagreement on the veteran's behalf in September 1965, but the Department of Veterans Affairs (VA) informed him that he had not been recognized as an attorney, and the Notice of Disagreement was not valid. Mr. Wiker then was sent a letter in October 1965 informing him that the earlier letter had been in error, and that service connection was in fact denied. This letter did not include any information about appellate rights or the time limit for submitting an appeal.

After submitting a new claim for blindness in 2007, service connection for left eye blindness due to cataracts was granted, and Mr. Wiker appealed the effective date assigned, arguing, essentially, that because he had not received proper notice of the denial in 1965, that claim remained pending, and an effective date of the day after he left service should be assigned. The Board denied an effective date earlier than 2007, and the Court vacated this decision, instructing the Board to address whether the VA had provided the veteran with adequate notice of the January 1965 decision.

The Board again denied the claim for an earlier effective date, finding that the January 1965 notice was adequate. It wrote that although the regional office had mistakenly inserted the word "cataracts" into the wrong portion of the form, making it appear that the claim had been granted, it otherwise complied with 38 C.F.R. § 3.103, by explaining that an eye disability was not incurred in or aggravated by service and was not considered a disability under the law, and that the claimant could initiate an appeal to the Board by filing a Notice of Disagreement within one year.

The Court strongly disagreed with the Board's conclusion. It pointed out that the regulations in effect in 1965, laid out in 38 C.F.R. §§ 3.103 and 19.109, required that whenever the VA granted or denied a claim, it must have provided notice to the claimant of 1) the reason for the decision, 2) the right to appeal with a Notice of Disagreement, and 3) the time limit for filing. The Court found that the 1965 notice failed to inform Mr. Wiker of "two vital things—that he was denied service connection for cataracts and why." The Court found that the

mistake made by the regional office when it incorrectly listed service connection for cataracts as granted rendered the notice unacceptably inadequate, and that while the standards for meeting the due process clause of the Constitution with regard to giving notice may be flexible, it could not tolerate such patently incorrect notice.

The Court also discussed the Board's finding that even if the notice *had* been inadequate, Mr. Wiker had "actual knowledge" of the decision, and a "reasonable person" would have understood the decision made, thus rendering any error nonprejudicial. The Court cited *Sanders v. Nicholson*, 487 F.3d 881, 889 (Fed. Cir. 2007), where the Federal Circuit had held that notice errors are presumptively prejudicial, but the VA can rebut that presumption by showing that the claimant 1) had actual knowledge of the requisite information, 2) that a reasonable person would have known the information, or 3) that the benefit could not have been awarded as a matter of law, as these were situations where the error would not have affected the essential fairness of the adjudication. *Sanders*, 487 F.3d at 889.

The Court then discussed how the Supreme Court reversed that decision on the basis that the Federal Circuit had overstepped by creating a default rule of prejudice and placed the burden of disproving that prejudice on the VA. *See Shinseki v. Sanders*, 556 U.S. 396, 408-410 (2009). The Court then stated that based on the Supreme Court's decision and its discussion of harmless error, it appeared that the "actual knowledge" exception remained good law, although some language in the decision brought the validity of the "reasonable person" exception into question. The Court then found that even assuming that both exceptions were still good law, neither one applied in this case. The evidence did not show that the veteran had actual knowledge of the decision back in 1965, and even the "reasonable person" standard failed, because the January 1965 and October 1965 letters would not have been clear to a reasonable person regarding what exactly had been denied and what the time limit for filing had been.

The Court concluded that the January 1965 decision was still pending, but an additional fact-finding task was still needed. The claim was remanded to the Board to determine when the disability first arose, so that an appropriate effective date could be assigned, pursuant to 38 C.F.R. § 3.400, which provides that, generally, the effective date of an award of compensation is the date of receipt of the claim or the date entitlement arose, whichever is later.

Mary E. Rude is Counsel at the Board of Veterans' Appeals.

Book Review: *Veterans Benefits: Law, Theory, and Practice,* by Stacey-Rae Simcox and David E. Boelzner

by Mary Tang

Some authors, regardless of the genre, have a natural knack of drawing a reader into their story, such as in *Veterans Benefits: Law, Theory, and Practice*, by Professors Stacey-Rae Simcox and David E. Boelzner. This textbook's tone invokes a friendly and personal feel, with sparks of humor and levity popping out as a reader learns the intricacies of VA and veterans law. Humor and levity are often welcomed when learning about the twists and turns of veterans law.

It is clear the authors intended for this textbook to be full of creases and wear-and-tear and not gathering dust on a bookshelf – although, much in line with their senses of humor, a reader has been granted permission to "plop the kid on it at the dinner table." *See Preface*, page xxx. Even in the Preface, Professors Simcox and Boelzner outright state this textbook is intended to "provide a useful and complete resource…particularly in the practical context of preparing student advocates in law clinics to assist veterans with their claims for benefits." There is indeed value gained in having a personal guide to tour veterans law.

Professors Simcox and Boelzner cover as much ground as possible in veterans law for practical clinical use in a law school setting. The casebook breaks down into ten chapters: Introduction to

Veterans Benefits in the United States; The Department of Veterans Affairs; VA Benefits Available to Veterans and Family Members; Eligibility for Veterans Benefits: Who is a Veteran?; VA's Procedural and Substantive Obligations in the Processing and Adjudication of Claims; Pursuing a Claim for Disability Benefits; Rating a Service-Connected Disability; Appeal of VA Decisions; Writing for Advocacy: The Challenge of Constructing Arguments; and Representing Veterans. The textbook also contains practical use appendices: Glossary of Terms Used in Cases and Client Interview Vignettes; both important in learning how use the knowledge imparted by these chapters.

Each chapter is then broken down into digestible information: I. Putting It in Context; II. Thinking It Through; III. Information within that chapter as it applies to VA; and IV. Conclusion. Each chapter also contains helpful notes and footnotes that provide educational tidbits, clarity, or addendum to the main, substantive message. Caselaw within these chapters is annotated to focus a reader on the crux and takeaway to each case. The "Some Finer Points" and "Application" portions of each chapter are where this textbook shines, as they are extremely helpful to direct the students where to focus in a clinical setting. A student should understand how to practically use the knowledge learned in aiding a veteran after each chapter.

At times, Professors Simcox and Boelzner share stories of their frustrations navigating claims through the VA process or become a bit critical of either VA or the Board of Veterans' Appeals. However, these criticisms are useful in clinical teaching to show students that no system is without its faults.

A key chapter in a clinical practicum setting is learning how to advocate successfully in legal writing, as presented in Chapter 9: Writing for Advocacy: The Challenge of Constructing Arguments. This chapter emphasizes the strength and components of advocacy writing, which is rarely seen in any textbook. Most legal advocates are often left to blindly learn this on their own, and thus, having this useful tool builds the road to successful advocacy.

While its target audience is law students, the textbook may be embraced by any practitioner starting out or perhaps a beginning veterans law instructor seeking a guide to shape his or her course syllabus.

In sum, this textbook should be a well-worn resource, given its practicality, personal wit, and hand-holding guidance to veterans law. The veterans law community is lucky to have options in sound and knowledgeable textbooks to choose from, including this one.

Mary Tang is currently on detail as a Special Counsel to the Office of Assessment and Improvement at VA's Board of Veterans' Appeals and thanks Jon Hager for his invaluable time and guidance with this book review.

Dollars to Donuts: Whose Money Is It Anyway? Critical Differences Between an Apportionment and an Attorney's Fee in Veterans Law

by Anna Kapellan

Pennies do not come from heaven. They have to be earned here on earth. – Margaret Thatcher

"We are all here on earth to help others; what on earth the others are here for I don't know," teased W.H. Auden, referring to grandiose proclamations of serving public good that ring hollow. Indeed, the real dedication to public good often goes unnoticed and is rarely rewarded in dollars and cents. But it is undoubtedly a reward of its own to those who keep the noble goal of the common good in their hearts. And while almost every profession offers a chance to create good in this world, few offer it as amply as the legal work on the collateral consequences of criminal convictions. While the bulk of such claims fall within the area of law referred to as the

law of prisoners' litigation, a subset of constitutional law, many constellations within this vast universe of law have their own slivers where prisoners' civil claims are frequent. Veterans' benefits law, as it relates to veterans who are or were incarcerated, is one of them.

Representing prisoners and persons formerly incarcerated often carries a peculiar stigma, since it is common for onlookers to unduly conflate the crime underlying the incarceration with the prisoner's civil claims and wonder why, on earth, an attorney might want to offer his/her services to such a client. Mirroring this onlookers' prejudice, is attorneys' bias that commonly manifests by their uneasy, apologetic assertion that, in general, their clients are all law abiding, and only this one incarcerated client is an exception to the attorney's general rule of avoiding the representation of "this type" of persons: since such attorneys are tone deaf and cannot hear, moreover admit, their obvious-to-others social bias.

Perhaps mindful of this social bias towards veterans who are or have been incarcerated, the Federal Circuit issued its opinion in *Snyder v. Nicholson*, 489 F.3d 1213 (Fed. Cir. 2007), vacating the Court's decision in *Snyder v. Nicholson*, No. 04-0381, 2007 U.S. App. Vet. Claims LEXIS 1437 (Sept. 25, 2007). In so doing, the Federal Circuit held that an attorney who successfully obtains a grant of past-due benefits for such a veteran is entitled to a payment of attorney's fees based on the amount awarded, and not the amount actually received by the veteran after the statutorily mandated reduction for time spent incarcerated.

If perceived as one, the Court's and Federal Circuit's *Snyder* opinions qualify as the first in the tetralogy of cases that shaped the law of calculating an attorney's fee directly payable by VA to private counsel who obtained an award of, *inter alia*, past-due benefits on behalf of a VA claimant whose right to receive VA benefits, including past-due benefits, was limited, amount-wise, under a provision that is silent as to attorneys' fees. In *Snyder*, such a limiting provision was that capping the amount of an incarcerated veteran's VA benefits to the amount payable for a 10 percent rating (or a half of that amount, depending on whether the veteran's combined rating was 10 percent or higher). This type of limitation affects the period running from the 61st day of confinement arising from the type of conviction warranting such a limitation to the date of release on parole or into a halfway house or civil commitment, or simply due "maxing out," *i.e.*, the expiration of a prison term.

The Federal Circuit reversed the Court in *Snyder* because the Court was mindful of the correlation between the amount of past-due benefits and that of an attorney's fee directly payable by VA to a private counsel who assisted in securing the award of past-due benefits. This is why the Court held that the limitation affecting the amount of past-due benefits should be carried into and proportionately limit the amount of a private counsel's attorney's fee in order to prevent a scenario where an attorney's fee would exceed the amount of the client's past-due benefits limited due to incarceration. However, concerned that such a limitation of attorney's fee might disincentivize private counsel from representing incarcerated claimants, the Federal Circuit concluded – not unreasonably – that cold cash is likely to persuade those lawyers whose hearts do not inflame with the desire to help prisoners rebuild their lives if such prisoners are reluctant to proceed *pro se* or are being represented by veterans services organizations (VSOs). Therefore, the Federal Circuit held that a direct attorney's fee paid to private counsel should be calculated based not on the limited amount of past-due benefits (actually paid to a claimant as to the portion of the period on appeal coinciding with the incarceration) but, instead, based on the hypothetical amount that the prisoner would have been entitled to, had no incarceration taken place.

Since the Federal Circuit's holding did not void the Court's mathematical concerns, an occasional presently or formerly incarcerated claimant ends up

with the actual, *i.e.*, limited amount of past-due benefits accrued during incarceration smaller than the directly payable attorney's fee owed to private counsel for the same period under the attorney-client fee agreement. And while the Federal Circuit's *Snyder* ruling left no question as to what this amount of such an attorney's fee should be, the question who should pay what portion of this fee has not been spelled out by courts and, therefore, requires both legal and public policy analyses.

That said, in *Snyder*, the Federal Circuit seemingly implied that any shortcoming (*i.e.*, the amount that a presently or formerly incarcerated claimant whose past-due benefits are insufficient to cover this obligation in terms of the attorney's fee payable to counsel for the portion of the period on appeal coinciding with incarceration) should be paid from VA funds. Well, to be precise, the Federal Circuit's *Snyder* opinion strongly suggests that the Federal Circuit failed to envision any shortcoming scenario, naively believing that even limited past-due benefits would always be sufficient to cover an attorney's fee.

The language that VA pays the shortcoming came from *Rosinski v. Wilkie*, 32 Vet. App. 264 (2020), the fourth case in the tetralogy. Indeed, the Federal Circuit dubbed the possibility of a conflict resulting in a shortcoming as a collision that would not occur since the "two ships" would safely pass each other in the night. But, with a healthy dollop of imagination, the Federal Circuit's reference to such ships could also be interpreted as hinting that a collision is avertable simply because VA would dip into its own funds in the *Rosinski* style, *i.e.*, that a shortcoming could be paid from taxpayers' funds VA is allocated each year.

Thus, the calculative process resulting from *Snyder* is as follows: the amount of attorney's fee accrued during the period coinciding with incarceration-based limitation is calculated as if no incarceration took place; then, the amount of actual, *i.e.*, limited past-due benefits accrued during the same period is calculated and compared to the attorney's fee. If the latter is smaller than the former, the claimant keeps the difference. If they are equal, the claimant fully covers the attorney's fee from past-due benefits but is left with nothing. And if these past-due benefits are insufficient, then the claimant pays each penny of the past-due benefits, and then VA covers the shortcoming from its allocated taxpayers' funds.

To illustrate, if a privately represented claimant is awarded, *e.g.*, $40,000 in past-due benefits accrued as to the period coinciding with incarceration (but entitled to receive, *e.g.*, only $4,000, with $36,000 ($40,000 – $4,000) withheld due to the limitation), plus $80,000 in past-due benefits accrued after incarceration, then – pursuant to a valid 20 percent directly payable attorney's fee agreement – his or her private counsel is entitled to $24,000 ($40,000 / 5 + $80,000 / 5) in attorney's fee. However, the $24,000 fee is not paid only from the claimant's combined past-due benefits or only from VA funds. Instead, as to the period coinciding with incarceration, the fee due to the attorney is $8,000 ($40,000 / 5), meaning that the entire $4,000 of the claimant's limited past-due benefits are used to pay the attorney's fee, and then the balance of $4,000 ($8,000 – $4,000) is paid by VA from taxpayers' funds. And, as to the post-incarceration period, the fee is $16,000 ($80,000 / 5), *i.e.*, the claimant gets $64,000 ($80,000 – $16,000).

Thus, the claimant's total obligation paid to the attorney ends up being $20,000 ($16,000 + $4,000), while VA's obligation is $4,000. Notably, VA cannot withhold this $4,000 balance from the net of $64,000 paid to the claimant in past-due benefits accrued post incarceration. By the same token, the claimant cannot hold on to even a cent of his or her $4,000 past-due benefits accrued during incarceration. Simply put, VA and the claimant cannot mix-and-match the funds associated with the period of incarceration and the funds accrued post incarceration because these periods are subject to different legal provisions and public policies. Regretfully, this rule is often misunderstood or plainly ignored. Thus, a confused claimant or counsel may allege that the claimant is entitled to

"fixed" past-due benefits accrued during incarceration, even if the attorney's fee is equal to or exceeds the claimaint's actual, limited past-due benefits.

These allegations tend to fall into two categories. One reflects a *bona fide* misunderstanding since it posits that incarcerated claimants should get "at least some" chunk of their past-due benefits accrued during incarceration. Typically, this "chunk" is defined as 80 percent of the limited past-due benefits. To illustrate, in the above example, the argument would be that the claimant should get $3,200 ($4,000 / 5 x 4) of his or her $4,000 past-due benefits and pay only $800 ($4,000 – $3,200) as the attorney's fee accrued during the period coinciding with incarceration, while VA should be required to pay $7,200 ($8,000 – $800), rather than $4,000, *i.e.*, $3,200 ($7,200 – $4,000) more from its taxpayers' funds as to this incarceration period.

The error of such a position is self-evident. Once the Federal Circuit in *Snyder* rejected the Court's solution and refused to correlate the amount of attorney's fee to the amount of an incarcerated claimant's actual past-due benefits (that would have availed clients to the lion share of their actually pay, limited benefits pursuant to the attorney-client fee agreement) and, instead, chose to increase the attorney's fee to the amount calculated based on a hypothetical past-due benefits, claimants' ability to keep 80 percent of their actual past-due benefits was bartered by the Federal Circuit for the clients' ability to incentivize private counsel with cold cash. Indeed, nothing in the Federal Circuit's decision even hinted at claimants' right to have their choice-of-legal-representation cake and eat it too, so to speak, by keeping past-due benefits.

The other type of allegation is designed to cause an adjudicator a brief shock akin to that experienced by a law student who sees a red-herring fact in a final exam. Thus, such an allegation is usually structured as a one-two punch in the sense that it first asserts that a client should be entitled to keep *all* his or her actual, *i.e.*, limited past-due benefits that have accrued during the portion of the period on appeal coinciding with incarceration, meaning that *all* directly payable attorney's fee for such a period should be paid by VA from taxpayers' funds. Stripped of all niceties, this position means that incarcerated claimants should be supplied with their choice of private counsel free of charge simply because they do not like to proceed *pro se* or with the assistance of a VSO.

Not surprisingly, on a closer look, such a position falls for many reasons, three of which are obvious. To start, unless a VA claimant is litigating before the Court or on appeal from the Court, the Equal Access to Justice Act (EAJA), *i.e.*, the only vehicle that could convert services of private counsel into free to the claimant and paid by taxpayers via VA, does not apply to any litigation before VA or the Board (plus, the EAJA imposes many limitations markedly more stringent than those arising from an attorney-client agreement). Next, it would indeed be anomalous to allow shrewd incarcerated clients to have free services of private counsel after these clients undertook contractual obligations to pay these private counsel attorney's fee: such a regime would make a mockery of not just contract law but also of those incarcerated claimants who, being money-conscious, elect to proceed *pro se* or with a VSO assistance. Finally, the scheme where an incarcerated claimant is *de facto* rewarded with free private counsel, while a law-abiding claimant must pay from past-due benefits for those contractual obligations undertaken voluntarily would put all public policies of VA law on their head: nothing in VA law aims to reward a claimant for committing a crime. Simply put, while society has vested interest in helping prisoners to mend their ways, and the Federal Circuit in *Snyder* made sure that private counsel would not shun such clients, neither society nor the Federal Circuit expressed any desire to *de facto* reward criminal conduct and automatically render all attorney-client contracts executed by inmates enforceable against taxpayers to the full amounts of these private counsels' fees.

However, since the shock caused by the aforesaid first punch of this argument typically dissipates faster than one reads a single paragraph in a law journal, the allegation (asserting that incarcerated claimants should be entitled to keep the entire past-due benefits accrued during incarcerations, while their private counsel should receive full attorney's fee from taxpayers) proceeds to the second punch. This second punch seeks to analogize VA's payment of directly payable attorneys' fees to the funds VA could pay to persons associated with an incarcerated VA beneficiary in one way or another. A common version of such an analogy tries to inject an equal sign between an attorney's fee directly payable to private counsel and an apportionment. However, dollars to donuts, this analogy is wholly meritless.

It is undisputed that the limitation of the amount of VA benefits paid to incarcerated beneficiaries effective the 61st day of their confinement ensues from the constitutional entitlements enforced by inmates through 42 U.S.C. § 1983 and *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), actions if the inmates are denied shelter, nutritious food, clothes, medical care, etc., *i.e.*, life necessities guarded predominantly by the Eighth Amendment. In other words, the limitation stems from the fact that these inmates would have to purchase such life necessities had they not been held in government custody. Accordingly, legislators acknowledge that it would be anomalous to disburse such inmates their entire VA benefits and, on top of it, provide them with life necessities covered by taxpayers. Thus, if one were to look at the larger picture of governmental economics, it is clear that the portions of VA benefits withheld due to incarceration remain taxpayers' funds and within the overall public fisc. (In fact, even though the relation between VA funds and expenses of state and municipal correctional facilities is less direct than those of the Federal Bureau of Prisons, the point is that an average annual expense of keeping an inmate incarcerated is about equal to the difference between the amounts payable for a 100 percent rating and a 10 percent rating, since correctional services are expensive.)

However, as many public-policy-driven statutes and regulations, the provisions limiting the amounts actually paid to incarcerated VA beneficiaries are narrowed by statutory and regulatory provisions reflective of public policies having an even greater social value. A good example of such narrowing provisions reflective of a greater social importance are the statutes and regulations revealing a societal belief that members of the family of an incarcerated veteran should not be penalized for the acts leading to incarceration, and that society has a vested interest in ensuring that dependents of incarcerated veterans are neither homeless nor hungry, exposed to the elements, denied medical care, etc. This is why taxpayers' funds allocated to VA but not disbursed due to limitations based on veterans' incarcerations may – but certainly not must – be vested in dependents of incarcerated beneficiaries.

To warrant such an investiture, the dependents must demonstrate a sufficient current financial need, *i.e.*, a concept having nothing in common with the prisoner's or the dependents' desire to grab taxpayers' money. Notably, the need determination associated with apportionment is fact-specific, *i.e.*, it turns on the dependents' current income, assets, and expenses. Therefore, if dependents have not established being needy, no apportionment right arises, regardless of their greed or the veteran's desire to have his dependents, rather than taxpayers, access the withheld limitation-caused difference.

Moreover, it is not unfathomable that desperately needy dependents of an incarcerated VA beneficiary might be awarded an apportionment consisting of the entire amount withheld due to the incarceration and, in addition, a portion of the actual, *i.e.*, limited disbursement. This is so because the dire poverty of dependents of a confined VA beneficiary might present a consideration more weighty than the beneficiary's ability to have spare funds that that might be used to, *e.g.*, buy goods in the prison's

commissary (that sells items not qualifying as life necessities) or pay for such services as, *e.g.*, medical care, or such goods as, *e.g.*, postal stamps for legal mail: because neither medical care nor stamps for legal mail could be denied to an indigent inmate, even though inmates who are not indigent are required to pay a fee for such goods and services.

Further, unlike an attorney's fee (that can simply be contracted for by a claimant and legal counsel), neither the fact nor the amount of apportionment could be contracted for or otherwise agreed upon by an incarcerated veteran and his or her dependents. In that sense, apportionments are indistinguishable from all other claims litigated under VA law, *i.e.*, the funds payable as an apportionment could stop being vested in VA acting on behalf of taxpayers and become vested in dependents of incarcerated VA beneficiaries only if an adjudicator grants the claim. In other words, the difference (between the limited amount paid due to incarceration and the one that could have been paid had no incarceration had taken place) does not consist of magic coins that hover in heaven, unreachable to VA and taxpayers and awaiting an incarcerated veteran's master's order.

And yet, as part of the second punch of the aforesaid claim asserting that an incarcerated VA beneficiary should be entitled to keep the entirety of past-due benefits accrued during incarceration, counsel may assert that – the moment an incarcerated VA beneficiary is granted entitlement to a claim producing past-due benefits – the beneficiary becomes the sole vested owner and master of all past-due benefits that could have been received if not incarcerated, even though he or she certainly cannot take actual possession of the withheld funds. Such a position treats these withheld funds as invisibly earmarked and different from all other dollars and cents. However, it is axiomatic that monies are fungible, and funds that are not disbursed to a beneficiary due to incarceration are indistinguishable from taxpayers' dollars and cents held by VA for all its other tasks.

Finally, there are critical distinctions in terms of what type of "pot" of money can be reached for the purposes of a directly paid attorney's fee and an apportionment. Since, as Justice Stevens noted, VA must protect veterans even "from the consequences of [their] own [naïve] improvidence," *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 359 (1985) (Stevens, J. dissenting), including ensnaring champerty, the law and policies unambiguously prohibit any payments of attorney's fee from funds disbursed as recurrent payments. Simply put, the "pot" of a claimant's VA-paid money an attorney can dip his or her hand into for the purposes of receiving attorney's fee is the client's past-due benefits. If the attorney were to seek a direct payment from the client's VA-paid recurrent benefits, a contract for such an attorney's fee would necessarily be null and void *ab initio* as against public policy.

In contrast, the only "pot" of an incarcerated VA beneficiary's money that dependents may reach for the purposes of an apportionment is the beneficiary's VA-paid recurrent benefits. If an incarcerated VA beneficiary not entitled to any VA funds were to inform his or her dependents that the beneficiary has filed a claim for VA benefits and, sooner or later, hopes to receive a large chunk of money in past-due benefits, these dependents would not be able to file a valid claim for a "prospective" apportionment of these future past-due benefits: such a claim would necessarily be dismissed as unripe in light of its speculative nature because neither VA not the Board has the authority to divvy the monies the claimant has not been awarded and might never be. This is why an apportionment pays past-due benefits only with regard to the period when: (a) recurrent benefits were available; (b) dependents' financial need was established; and (c) an apportionment claim was pending. If any of these elements is not met, no past-due apportionment benefits could be granted. In sum, the law of apportionment is not a get-rich-later scheme or a method to claw taxpayers' funds from VA based on greed, rather than a valid need. In

other words, an apportionment and an attorney's fee exist in different temporal planes of the "pots" of money for which such claims could be associated.

A fortiori, while society has a collective interest in ensuring that dependents of incarcerated veterans are not homeless, hungry, exposed to the elements, denied medical care, etc., society has no vested interest in ensuring that private counsel would get richer on the taxpayers' dime. Where the attorney and the client have a meeting of minds and are aware of the *Snyder* effect on the attorney's fee and past-due benefits, the client contractually owes counsel such a fee to the last cent of past-due benefits received as to the period coinciding with incarceration. If there is no meeting of minds, their contract is not enforceable. And if an attorney wishes to make sure that not a cent of the client's past-due benefits accrued during incarceration is taken away, the attorney has an easy method to ensure such an outcome: in the world of law, it is known as *pro bono* representation.

More than two millennia ago, paraphrasing the words of wisdom of the great scholars of antiquity, Publilius Syrus observed that "[a] good reputation is more valuable than money." A millennium and half later, the same sentiment was repeated by the great Bard whose writing beautifully standardized the English language. And – half a millennium later – this wise sentiment remains as poignant as when Publilius earned his freedom with his brilliance of mind and pure nobility of soul, setting an eternal example for those professing their dedication to the common good, including attorneys representing veterans who are current or former prisoners.

Anna Kapellan is a Counsel at the Board of Veterans' Appeals. She would like to thank Veterans Law Judge Alexandra P. Simpson for the mentorship inspiring to fight with equal zeal for every cent that is wrongly taken both from a legally entitled claimant and from the taxpayers.

Vacancy Announcement: Clerk of the Court/Executive Officer

Mr. Gregory O. Block, who was sworn in as Clerk of Court of the U.S. Court of Appeals for Veterans Claims on September 1, 2010, is retiring this coming September. Accordingly, the CAVC has posted a vacancy announcement for the Clerk of the Court/Executive Officer position in search of candidates. For information regarding this position and how to apply, please see the posting here: USAJOBS - Job Announcement.

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

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** The views and opinions expressed are those of the authors and do not necessarily reflect the position of the CAVC Bar Association or the Editor in Chief. **